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WCB# G250 7149

STATE OF NEW YORK

WORKERS' COMPENSATION BOARD

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CLAIMANT: THOMAS JIRGAL

WCB#: G2507149

EMPLOYER: SAFEWAY CONSTRUCTION ENTERPRISE

DATE OF ACCIDENT: 4/17/2019

CARRIER: GALLAGHER BASSETT SVCS, INC.

CARRIER'S CASE#: 009087000987WC01

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August 18, 2022
8:33 a.m.

Telephonic deposition of Dr. Angel Macagno, a nonparty witness, taken by all parties, held at the above-mentioned time, pursuant to Workers' Compensation Law and Rules of Testimony, before Amanda DePalma, a Shorthand Reporter in the State of New York.

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A P P E A R A N C E S:

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(Via Telephone)

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BY: NICK SWITACH, ESQ.

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ALSO PRESENT:

Dr. Angel Macagno

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S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that all rights to object to any questions, except as to the form, or to move to strike any testimony at this deposition, are reserved, and, in addition, the failure to object to any question or to move to strike any testimony at this deposition shall not be a bar or waiver and said objections or motion is reserved for the hearing before Workers' Compensation Law Judge.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto, that this deposition transcript may be utilized for all purposes as provided by C.P.L.R.

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto, that the filing and certification of the original of the deposition transcript be the same hereby are waived.

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A N G E L M A C A G N O, MD, duly sworn, testified as follows via telephone:

VOIR DIRE EXAMINATION BY

MR. ARMSTRONG:

Q Good morning, doctor. Again, my name is Brandon Armstrong with Bangel, Cohen and Falconetti here on behalf of the claimant. I have a few brief questions first regarding your qualifications, then I'll get into your testimony.

Doctor, can you tell us your medical school you attended and year of graduation, please?

A I graduated in 1988. Medical school is in Argentina. The National University of Cordoba School of Medicine.

Q What year did you become licensed to practice medicine in the State of New York?

A 2012.

Q Since that time, has your license to practice remained in good standing?

A Yes.

Q Do you have a field of specialty, doctor?

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A I'm Board certified in orthopedic surgery, subspecialize in spine surgery.

Q Are you coded by the New York State Workers' Compensation Board?

A Yes. COS letters.

Q Do you have any current hospital affiliations?

A Yes. NYU Langone Hospital, with Hospital for Joint Disease, Bellevue Hospital, and New Jersey with Hudson Regional Hospital, Long Island with Mercy Hospital and Winthrop Hospital.

Q Doctor, do you have a license to practice medicine in any other state?

A New Jersey, since 2015.

Q Has your license to practice medicine in any jurisdiction ever been subject to any disciplinary proceedings?

A No.

MR. ARMSTRONG: Counsel, do you have any questions regarding the doctor's qualifications?

MR. SWITACH: No questions regarding the doctor's qualifications. I will stipulate as coded by the Workers' Compensation

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Board. Thank you.

DIRECT EXAMINATION BY

MR. ARMSTRONG:

Q Doctor, we're here today on a couple of issues. Before I begin with that, were you able to -- did you have occasion to review surveillance footage provided by the carrier in connection with this matter?

A No. I read something written by the IME doctor, but I don't have anything with me. I don't have any surveillance records.

Q It's your testimony that leading up to today you have not yet had occasion to review any surveillance video footage?

A No.

Q I'm going to ask you a few questions, just very briefly, about when you started treating this claimant and your opinions as of late, and then I'm going to turn it over for cross-examination.

Doctor, can you please tell us the first time that you evaluated Mr. Thomas Jirgal in connection with this April 2019 accident?

A I saw him first time on October 12,

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2020.

Q What were his complaints at that point in time?

A He was complaining of worsening neck pain, midback pain and lower back pain.

Q Doctor, are you only evaluating the claimant's neck and back?

A Just the back, yes. Back, neck and midback. Just the spine.

Q Okay, and did you recommend a treatment plan following your initial consultation on October 12, 2020?

A Let me see. I did surgery on his back, but I don't remember if I recommended the first time. Yes. I recommended surgery the first time I saw him, and we put a request for surgery.

Q Did this gentleman have the surgery?

A Yes. He had the surgery performed on February 17, 2021.

Q Doctor, what type of surgery was performed?

A It was a fusion L-4/5 of the lumbar spine.

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Q Did you perform the procedure?

A Yes, I did.

Q When was the last time that you evaluated Mr. Jirgal?

A I saw him last time on April 19, 2022.

Q What were his complaints at that point in time, doctor?

A At that point the patient was complaining of new onset of worsening lower back symptoms. He was coming for follow-up. I think we discussed maximum medical improvement, because on CT scan and MRI of the lumbar spine nothing was changed.

Q You just indicated that you did find maximum medical improvement, is that accurate?

A Yes. From the lumbar surgery he's at maximum medical improvement.

Q Okay, and is that opinion regarding maximum medical improvement pertaining to both the neck and the back, or just the back?

A Just regarding the lumbar spine that is where I performed the surgery.

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Q Okay. Do you have an opinion as to whether or not he has reached maximum medical improvement referable the cervical spine?

A Let me see. I think so, because he doesn't want surgery. Let me review. One second. Yes, because he has nothing surgical basically in the cervical spine. I think he's got maximum medical improvement for all the spine issues, yes.

Q Okay, and, doctor, can you tell us any positive or significant findings that were revealed on April 19, 2022?

A The physical exam we reviewed a CT scan of the lumbar spine and MRI. Didn't show anything significant at that time. The fusion was okay and complete. Let me see.

Regarding the lower extremities exam was improved. He was still complaining of some lower back pain, some decreased range of motion, but, you know, it's related to the muscle spasm of the surgery. He also when I did exam he was having some problem with the cervical spine. The range of motion was decreased. He had some pain and tenderness to palpation in the cervical spine. This is

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basically what I got for him.

Q Okay, and given that you have opined maximum medical improvement, doctor, have you arrived at an opinion yet as to his level of permanent impairment?

A Yes. We did permanence at this time. I think I wrote here the patient is permanently totally disabled from his current job, that was I think a construction worker. He cannot lift, pull or push more than 15 pounds. He cannot perform activities that require bending forward as part of the job. In case that he performs any activities sitting down he should be allowed to change position from sitting to standing every 30 minutes. He will also need a specific ergonomic chair. In case of driving he should be allowed to take breaks every 20 to 30 minutes.

Q Doctor, have the claimant's complaints been consistent with your findings on physical exam?

A Yes.

Q Okay, and have the complaints also been consistent with the diagnostic studies over the course of your treating this individual?

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A Yes.

MR. ARMSTRONG: Okay. I have nothing further at this time, subject to re-direct.

CROSS-EXAMINATION BY

MR. SWITACH:

Q Good morning, doctor. My name is Nick Switach. I'm here on behalf of the insurance company. I'll be asking you a couple of questions.

I believe you stated your first examination was October 12, 2020?

A Let me see. I saw him on October 12, 2020, my first time.

Q Okay. In viewing that report, I'm looking on the examination for the neck/cervical spine. You indicate the claimant is in excessive discomfort. Can you explain to me what excessive discomfort means in this context?

A Yes. In the context it's for the neck and lower back. The patient is moving around, he's in pain in the neck and lower back. He's moving around. He cannot be sitting down, standing up for long periods of time. That is why

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we refer to excessive discomfort. It's what the patient was showing us.

Q At that time in October he was in that type of pain?

A Say again. I'm sorry.

Q You're saying at that time in October of 2020 he was in that kind of pain?

A Yes, he was, because it's written in my chart. He was in excessive discomfort, bilateral muscle spasm, the range of motion was painful is written there.

Q Okay. That's the meaning of excessive? Okay. At that time he was working full duty, you are aware of that, correct?

A Let me see. I don't recall right now, but --

Q You have it listed under discussion.

A Yes. He's currently working full-time, yes.

Q Doctor, how much of your report is copy and pasted between, I guess, October and February?

A It's not copy and paste. There are

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two different things here. This is the old system that we had. Now we move to a new system. You have the last notes from the new system. It's not copy and paste. This kind of old system is repeated. It keeps repeating the same. It's not copy and paste, but some of the parts, mostly the history of present illness, is going to be the same going from one report to the other.

Q Okay. So, the February 16th report that says working full duty, excessive pain, reporting worsening symptoms, it's not necessarily new findings, it's just the same as the one before it?

A I don't have any before with the October 12th visit, first time I saw him.

Q Yes, and then the next one is February 16th. That's the next one I have.

A Okay. I'm sorry. Yes. Some of the part of this old system are going to show the same, yes.

Q Okay, and this is the day before the surgery you still note he's working. On the 17th you performed the surgery, yes?

A We did surgery I think 2/17, correct.

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Q Then your 3/16 visit he's no longer working, correct?

A Say again. I'm sorry.

Q On the 3/16/21 visit the claimant is no longer working, correct?

A He should not be working. I did surgery of the lower back. Absolutely not. I don't have anything of him working at that time.

Q Okay, and am I correct in my understanding that, to your knowledge, the claimant did not return to work since that surgery?

A Right. I'm sorry. I'm talking about 3/16. I have occupation is patient is not working since surgery. I do not believe he returned to work until today, until my last, yes, correct.

Q Okay. If I understand your opinion on permanency, he's not going to be able to return to work in that same capacity, is that accurate?

A Yes. He shouldn't be performing any construction kind of work.

Q But he was doing it before the surgery, correct?

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A Correct, but he didn't have a fusion of the lumbar spine.

Q Right. Let me see if I can get my question right then. He was performing carpentry immediately before the surgery, and then the surgery is now preventing him from doing that; is that accurate?

A Correct, because one of the things you cannot do after this kind of surgery, and we discuss with the patients all the time before performing this kind of surgery, the work he was performing, this patient shouldn't be performing any kind of bending. That is going to wear off the disc from the surgical site. He cannot lift, pull, push because it's going to bring consequences of the surgery. That is the reason. He shouldn't perform that kind of activity after this kind of surgery.

Q Right. So, doctor, if it was something he was able to perform after his accident, but before the surgery, and no longer can perform after the surgery, how is the surgery a benefit to him?

A Well, this is a reason why you

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perform the surgery. The patient is having increasing problem, not only because of pain. He was having significant changes related to compression of the nerves at the level of the injury. With one of the things with the surgery performed is not only improving the pain, but also to avoid this patient having significant consequences from chronic nerve damage. That is the most important indication for this kind of surgery.

Q You requested a fusion surgery for degenerative disc disease, is that accurate?

A No. The surgery is requested for two reasons. He got significant wear off of the disc. I don't have the MRI right now, but it's what I'm reading here, and the other because of the increasing problems with one of the legs. I don't remember at this time, but it should be written there. He was having increasing weakness, pain, shooting pain to the left lower extremity, and he has some injury, some pain, in the right lower extremity too. These are related to nerve injuries at the level we did the surgery.

Q So, doctor, I'm looking at -- it's

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on the bottom it says page six of seven of your October 12, 2020 report.

A Okay.

Q It says the Guideline you used for lumbar fusion is degenerative disc disease, is that not accurate?

A Not completely accurate. The Guidelines we use are the Guidelines for Workers' Comp is degenerative disc disease, black disc disease, discogenic back pain. That is the Guideline. That is why you request, or Workers' Comp request, for us to do, but the surgery is not only for that. It's for improving the nerve function and improve -- avoid lower extremities to get chronic injuries or chronic disability.

Q So, which one of these degenerative disc disease, discogenic back pain or black disc disease does the claimant have as the basis for the request for surgery?

MR. ARMSTRONG: I'm just noting an objection for the record. I just would like to note an objection as asked and answered. He did indicate that the claimant had black disc when asked the basis for the request initially.

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I would also just like to note my objection that the lumbar fusion was approved by the Court on January 20, 2021. Doctor, you may proceed in answering Mr. Switach's question.

A Correct. Basically, this patient -- I am reading my report of the MRI. There is black disc disease, there is disc herniation that is compressing the nerves. That is the reason for surgery in this case.

Q Okay. Black disc disease is a degenerative condition, is it not?

A Not necessarily, no. Black disc disease could be a traumatic condition. I do believe this is the case, because if it's degenerative by history, it's going to be multiple levels, because you're getting older. When it's traumatic is mostly one level. That's what happened in this gentleman. It's when the gel inside the disc came out in a way that is in the form of a disc herniation, and then in the MRI, that's why it's called black disc disease, that disc is dehydrated, it lost water, and that means you're going to see black instead of seeing like white or clear. That is a normal hydrated

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cushioning disc. In this case, it's going to be black. That is why it's called black disc disease. That's the only reason, but in this case it's not degenerative, it's traumatic.

Q Well, doctor, the MRI you're referring to for the lumbar spine, I assume it's the 11/27/2019 MRI of the lumbar spine?

A I am looking. September 30, 2020 I have this. That is the last one that I'm reading here. Before the surgery this is the last one that I have. It's September 30, 2020.

Q Okay. Well, the MRI of the lumbar spine mentioned the prior of 2013. So, the claimant has had apparently back pain since 2013, and it mentions interval development of disc herniation L-4/5 and L-5/S-1. So, it sounds like there's more things going on at that level since at least 2013, and not just the accident of record, isn't that accurate?

A Can you repeat the question? I didn't quite get it.

Q Sure. The MRI, the 11/27/19 MRI of the lumbar spine, notes that there were priors in August of 2013. So, the claimant underwent

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MRI's of the lumbar spine back in 2013, yes?

A I don't have the report here, but if you have it I'm okay with that.

Q I have the report.

A Okay.

Q The report indicates there were interval developments of central disc herniation, which means it happened over time between 2013 and the 2019 MRI, is that not accurate?

A Could be.

Q Okay. Well, I have the 2013, and that one also has L-4/5, L-5/S-1 positive findings.

A I have the report here, yes. I'm reading what you see. The report in 2019, disc herniation developed since prior examination. That means it's new. L-4/L-5 central disc herniation has developed since the prior examination. That means it's worsening, or it's new. I don't have the previous one, but it's saying it's getting worse, or it's a new MRI. I don't know what developed means.

Q Okay, but we got some questions as

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to whether or not this condition would be then related to the accident of record, wouldn't we?

MR. ARMSTRONG: I would just note an objection. Calls for speculation. I don't see the 2013 MRI in the file for the doctor to refer to in answering the question, and as I noted earlier, the Court has already ruled on the authorization of the back fusion, but, doctor, again you may answer Mr. Switach's question.

A It's clear here. The patient has an accident on April 17, 2019. Without the report of the first MRI from after that accident states that he had disc herniation, but I didn't see the previous. I cannot comment. I don't base my decisions on reports, but the report here is pretty clear. He has a new disc herniation since prior examination.

Q Doctor, my question is, the claimant has been complaining of pain and has positive findings at the same levels since at least 2013.

A I don't know about that. I can't answer.

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Q I'm telling you that.

A Okay.

Q So, doctor, wouldn't that have some bearing on whether or not the claimant would have needed this surgery related to this case specifically as the conditions pre-date this case?

A Well, I didn't review that, but you can always have pre-existing condition in patients that the patient is having overtime, and then due to a specific trauma it started getting worse and start having worsening symptoms, worsening weakness and worsening the compression of the nerve, and you have the surgery related to the last accident. Not necessarily this patient -- what I read in the MRI of this guy, the MRI after the accident, has developed or has worsened since the previous MRI.

Q Okay. I'm going to move on now. Doctor, looking at your reports, a lot of them since between March and August, they seem to be largely the same findings. So, I'm going to jump ahead to December 21, 2021. Can you pull that one up for me?

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A December 21, 2021.

Q At that time the claimant reported worsening symptoms a few weeks prior, yes?

A Yes.

Q Claimant reports six weeks of worsening symptoms. So, you requested a CT and MRI, is that accurate?

A Correct. This is months after the surgery. When this happens around one year we request MRI to be sure everything was okay with the surgery.

Q Okay. What type of activities, if you're aware, was the claimant performing around December of 2021?

A I am not sure what he was doing. I am sure what I told him not to do, but I am not sure what activities he was performing.

Q Well, let's go with that. What did you tell him not to do?

A This patient at this time shouldn't be, as I said before, we tell him to not bend forward. That is important. Try to use the knees. It doesn't have to be 100 percent of the time, but it's important for this kind of surgery

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try to be consistent with that. Do not lift weights more than 10 to 15 pounds. Twisting is another issue. This is basically what the patient shouldn't be performing. He can walk, he can drive, he can ride a bicycle, but basically lifting, pulling, pushing, and bending is what we recommend not to do.

Q Is it that he should not be doing it, or he's not physically capable of doing it at that point?

A He shouldn't be doing it.

Q Okay. How much would he physically be capable of doing at that point?

A This patient, as I said, he can ride a bicycle, he can drive short period of time. He shouldn't be driving long period of time. He can walk. He can lift, pull and push weights that are reasonable around what I tell before, no more than 10 to 15 pounds, around that.

Q Doctor, your January 27th report appears to be largely the same. So, now I'm going to jump ahead to the February 15th report.

A Okay.

Q Do you have that available?

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A Yes. I have it in front of me.

Q Okay. February 15th the claimant reports his pain effects his daily activities of living. What were the activities the claimant reports were being effected?

A I'm trying to get it, because I do not recall, of course, but I'm trying to get -- what did you say? Activities of daily living?

Q Yes. In the February 15th report you note it effects his activities of daily living.

A But in what part? I'm trying to get it. I say -- okay. This is part of the history. When you write the chart, any chart in medicine, the history is what has happened before. That is what I put in this part of the recollection. Whatever is new is on the top of that. Activities of daily living, that is what we're talking about, is coming since the beginning. That is always copied there, because you have an immediate recollection of what is going on.

Q So, that was old information? That wasn't something new for February?

A Correct.

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Q Okay. Understood. Under discussion, however, that seems to be mostly new information there. At this point you indicated the claimant cannot lift, pull or push more than 15 pounds, cannot perform activities that require bending as part of the job, sitting and standing every 30 minutes, special ergonomic chair, and driving he should take breaks every 20 to 30 minutes.

A Correct. This is what I repeat a couple of times before.

Q Doctor, the reason I ask you about the December and February reports is this, December 21, 2021 when you found the claimant was totally disabled, he was on video, which is why you were asked if you had watched the video.

A No, I don't have it.

Q We understand you didn't watch the video. On that video the claimant is carrying five gallon water jugs with one arm. Those are 40 pounds each. He was on a cell phone in the other hand. Now, doctor, is that activity within the restrictions that you put on the claimant?

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A Well, I would not recommend for him to do it, because he's going to get lower back pain, but I didn't think he was doing it. I don't have the video, as I said before. I would recommend not to. I put my recommendations in the permanency there.

Q Okay. He did it twice on that video. So, doctor, is it fair to say that's not acting within the restrictions you placed on him?

A Well, this is the deal with restrictions. It's impossible to follow the exactly the restrictions. I will not recommend the patient do that as part of the job as a repetitive thing, but evidently if you are in a situation where you have to do it one time or two times, it's not going to be effecting the patient's life. Now, the patient's job as a construction worker where he has to lift, pull and push constantly as part of the job, I will definitely be against that.

Q Doctor, I'm not quite sure that you understood my question. So, throughout the testimony today you said the claimant should not

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be lifting, pulling or pushing more than 15 pounds, yes?

A This is part of the job description, because we're doing permanency for his job. This is commonsense. It's like you're doing -- if I recommend not to do it, but you have to do something and you are going to lift eventually 40 pounds, it's not a crazy thing to do. You cannot do it as part of the job description, because I would not recommend it, but you have a situation where you have to lift 40 pounds one or two times, I don't think it's a crazy situation. I think it's commonsense.

Q Doctor, I'm not exactly sure we're still on the same page, because like I said, you were asked repeatedly about his restrictions. We didn't say specific to his job, and you never testified specific to his job until after I advised you that he was caught on video. So, again, doctor, at no point prior to me advising you what was on the video did you testify that 40 pounds was within his limit, is that accurate?

MR. ARMSTRONG: I'm just noting an

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exception as the question has been asked and answered. The doctor has clearly said that while he has not recommended that he lift more than 10 to 15 pounds, there are obviously situations in life where you have to do it here or there. Doctor, you may continue to answer Mr. Switach's question.

A Absolutely. What I'm trying to explain is I would not recommend to do it as a routine exercise, but eventually anyone is going to be in a situation that perhaps lifting, it is what it is. I will not recommend to do it as a routine or something that you have to perform every day, but eventually you will be in a situation that you have to do something. So, you do it. It's not like so terrible. We're not talking about 200, 300 pounds. It's one time lifting 40 pounds, I think, or something like that, I don't think it's a terrible situation.

Q So, doctor, you also noted a whole bunch of changes in your February 15th report as to activities that the claimant should be performing as compared to the January 27th report, is that accurate?

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A Repeat the question, please.

Q You also noted a number of changes in your February 15, 2022 report about activities the claimant should perform as compared to January 27, 2022 report, is that accurate?

A Yes, absolutely. The patient is complaining of more pain I would say don't do anything. I would tell him not to do anything until I have a CT scan and MRI just to confirm you're not having any surgical complication, like screws loose or broke or anything like that. That is why it's a medical situation. Then, the next I request a CT scan and MRI. They come back normal. Surgery was a success, that we have a fusion and there is no new injuries, and I say, okay, there's nothing to do. Now, this is going to be your permanency. This is what I think that you should do from now on. That is why the reports are totally different, of course.

Q All right. Well, doctor, in the January 27th you already listed totally disabled from current job. So, that part didn't change?

A Absolutely it didn't change. I would

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say at that time you're totally disabled to do anything until I see the CT scan and MRI. If the patient gets worse, don't do anything. Stop until we have the MRI and CT scan just to be sure nothing is wrong. Then we say, okay, this is what is going on. From now on these are your restrictions, this is your permanency, this is your maximum medical improvement.

Q Correct. So, nothing changed regarding the permanent totally disabled, but between January 27th when you first noted that, and February 15th where you gave a whole bunch of activities the claimant could perform, we were also disclosed that we had the video. That occurred on February 7th. So, in that timeframe of a little more than two weeks the claimant was aware that we had video of him performing activities beyond 10 to 15 pounds. Could that effect your opinion on February 15, 2022 at all?

A No. It's not. I recommend him not to do it. He shouldn't be doing it because he will have a problem, he's going to make it worse, but if he did it, he did it. I cannot say anything about that. It's not that he cannot do

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it. I recommend highly not to do anything until we have the result of the study because he reports worsening symptoms, but if it's what he did or not did, it's not on me to decide it.

Q Okay. So, you made a recommendation 10 to 15 pounds. He lifted 40. Is that not outside of your recommendation? The claimant is not acting within the recommendation, is that accurate?

MR. ARMSTRONG: I'm just going to again note an objection as to asked and answered. It's been asked a few times. There's no dispute. The doctor each and every time has agreed that 40 pounds is in excess of the restrictions he placed on him, but also indicated that obviously there are situations in life where he has to lift 40 pounds once or twice. Doctor, I believe you already answered Mr. Switach, but I'll let you proceed. Thank you.

A Correct. It's not my recommendation. Patient did it. He has his reason.

MR. SWITACH: All right. That was the last of my questions. Thank you very much

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for your time this morning, doctor.

MR. ARMSTRONG: I have nothing further. Thank you.

(Time noted: 9:12 a.m.)

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C E R T I F I C A T I O N

STATE OF NEW YORK.)

SS:

COUNTY OF NASSAU.)

I, Amanda E. DePalma, a Shorthand Reporter and Notary Public in and for the State of New York, do hereby certify:

That the testimony of Dr. Angel Macagno, was held before me at the aforesaid time and place. That said witness was duly sworn before the commencement of the testimony and that the testimony was taken stenographical by me and is a true and accurate transcription of my stenographic notes.

I further certify that I am not related to any of the parties to the action by blood or marriage and that I am in no way interested in the outcome of this matter. IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of August, 2022.

_____

AMANDA E. DEPALMA

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From: Amanda DePalma
Sent: Thursday, August 25, 2022
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