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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS CIVIL TERM: PART 91  
-----x  
KAMIL SZWED,

INDEX NO.  
521048/2019

Plaintiff,

-against-

50 HYMC OWNER, LLC, GILBANE BUILDING  
COMPANY, and HUDSON YARDS CONSTRUCTION  
II, LLC,

Defendants.

-----x  
360 Adams Street  
Brooklyn, New York 11201  
December 6, 2024

Trial (Damages)

B E F O R E: HONORABLE DEVIN COHEN,

SUPREME COURT JUSTICE

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

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CHLOE HASSENFRATZ, ESQ.  
NICOLE P. ALDRIGE-HENRY, ESQ.

Harold Ortiz  
Senior Court Reporter

## P R O C E E D I N G S

1 (Whereupon, the following takes place on the  
2 record, in open court, in the presence of the Court, and the  
3 respective attorneys.)

4 THE COURT: Counsel, I understand you want to  
5 offer a record in evidence.

6 MR. LIAKAS: Yes.

7 At this time plaintiff offers Plaintiff's 44  
8 marked for identification into evidence.

9 (Whereupon, Plaintiff's Exhibit No. 44 was marked  
10 into evidence.)

11 THE COURT: Great. What is 44 again?

12 MR. LIAKAS: It is the MRI film of September -- I  
13 am sorry. August 2024. Physician: Radiologist.

14 THE COURT: It was marked for ID on what date do  
15 you know?

16 MR. LIAKAS: I have to look at the marking when.  
17 We marked all of the exhibits weeks ago.

18 THE COURT: And it was present in the courthouse  
19 on the date Mr. Provost staff was given an opportunity to  
20 copy the records?

21 MR. LIAKAS: Correct.

22 THE COURT: Okay. Ms. Provost, I understand you  
23 have an objection. What's your objection in detail?

24 MS. PROVOST: Yes, your Honor.

25 By the way, what's the date?

## P R O C E E D I N G S

1 THE COURT: I am sorry.

2 MS. PROVOST: What's the date it was taken?

3 THE COURT: August something.

4 MR. LIAKAS: August 19, 2024.

5 MS. PROVOST: So, first, it's been in plaintiff's  
6 possession since August at least.

7 THE COURT: I just said -- I apologize.

8 Other than your objection that you haven't gotten  
9 to see it because its been in the courthouse for several  
10 weeks and based on counsel's representation it was marked  
11 before the day that your staff came to copy all the records  
12 that they didn't have copies of.

13 MS. PROVOST: I am sorry. That wasn't my  
14 objection, Judge.

15 What I am saying is, there wasn't enough time  
16 before. There was enough time before we even got to court  
17 for us to get the MRI and it was not subpoenaed. I don't  
18 know how it gets to court but it was not subpoenaed.

19 THE COURT: That's overruled. They were present  
20 when all the exhibits were marked for identification. They  
21 were here when all the other exhibits were marked for  
22 identification. Your staff was offered an opportunity to  
23 copy it.

24 I assume the doctor who is here is going to  
25 authenticate it in someway having read it and it has some

## P R O C E E D I N G S

1            markings about being Mr. Szwed's records.

2                    It does say on the printed label for the CD that  
3            it is Kamil Szwed, 8-9-1991, which I assume is his birthday,  
4            and 8-19-24 lumbar spine and then it says Dr. Joe Roblet (ph)  
5            from Precision AcceleRad. It's a preprinted label from that  
6            facility.

7                    I am going to take it subject to authentication by  
8            somebody who has read the film, okay.

9                    Good. Let's get the jurors and get going.

10            COURT OFFICER: Your Honor, ready for the jury?

11            THE COURT: Ready for the jury.

12            COURT OFFICER: All rise.

13                    (Whereupon, the jury entered the courtroom.)

14            THE COURT: All right. You can all be seated.

15            Thank you very much.

16                    Plaintiff, call your next witness.

17            MR. LIAKAS: The plaintiff calls Dr. Vadim Lerman.

18                    (Whereupon, the witness entered the courtroom.)

19            THE COURT: Good morning, Doctor.

20                    Raise your right hand.

21                    THE CLERK: You swear or affirm that the testimony  
22            you are about to give would be the truth, the whole truth and  
23            nothing but the truth?

24                    THE WITNESS: I do.

25            D R.        V A D I M        L E R M A N, having been first duly sworn,

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 was examined and testified as follows:

2 THE CLERK: In a loud clear voice please state  
3 your name and address.

4 THE WITNESS: Vadim, V-a-d-i-m. Lerman,  
5 L-e-r-m-a-n and address is 1789 Sheepshead Bay Road,  
6 Brooklyn, New York 11335.

7 THE COURT: Thank you, sir. You can be seated.  
8 Your witness.

9 MR. LIAKAS: Thank you.

10 DIRECT EXAMINATION

11 BY MR. LIAKAS:

12 Q. Good morning, Dr. Lerman.

13 A. Good morning.

14 Q. Dr. Lerman, I understand you were here last week; is  
15 that correct?

16 A. Yes.

17 Q. Unfortunately, we couldn't get to your testimony so I  
18 apologize for that.

19 Doctor, did you see patients this morning?

20 A. I didn't get to see patients but I rounded on my  
21 patients that we operated on yesterday.

22 Q. So we taking -- withdrawn.

23 We asked you to change your schedule twice in the last  
24 two weeks. I apologize for that. You intend on seeing patients  
25 later today?

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 A. Yes.

2 Q. Dr. Lerman, can you tell us a little bit about your  
3 education and background?

4 A. I graduated from Binghamton University with a chemistry  
5 degree in 2001. From there I went on to New York College of  
6 Prosthetic Medicine. I graduated in osteopathy in 2006. From  
7 there I went on to orthopedic residency. At that time it was  
8 North Shore LIG but now it's Northwell Hospital. Residency in  
9 2011 and then graduated from my fellowship at Beth Israel Spine  
10 Institute in 2012.

11 Q. Are you board certified?

12 A. I am board certified.

13 Q. In what discipline?

14 A. Orthopedic surgery.

15 Q. Have you conducted major spine surgeries in your  
16 career?

17 A. Only spine surgeries pretty much.

18 Q. Dr. Lerman, how many patients do you treat on a given  
19 week?

20 A. Again with time suggestion because of teaching position  
21 but everything about four to six surgeries a week and about 30  
22 to 40 patients a week.

23 Q. That's all related to the spine?

24 A. Only spine.

25 Q. Is that for patients with traumatic as well as genetic

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 injury?

2 A. Traumatic actually because we take coded level one and  
3 we get as I always mentioned from slip and falls to weight  
4 crashes.

5 Q. Now, when you take code level one trauma, Doctor, what  
6 does that mean?

7 A. Level one trauma center is the highest level of trauma  
8 that gets delivered to the hospital and the hospital can provide  
9 from the most advance life support treatment. So anywhere from  
10 major highway, on water or anywhere the patient can be  
11 transported for treatment.

12 Q. Where do you teach?

13 A. I am the associate director of spine surgery at Nassau  
14 Spine Surgical and assistant clinical professor at Mount Sinai.

15 Q. As part of your teaching do you teach spine surgeons as  
16 how to diagnose spine injuries?

17 A. We were fortunate about six years ago to open up our  
18 own residency program to get approved. It's the first in 40  
19 years in New York City and Icahn University Medical Center every  
20 Thursday we do rounds with our residents. We teach them spine  
21 rotation because these are guys that go to general orthopedic  
22 residency. At which point before they choose their specialty.

23 We go through MRI of patients that we would be  
24 operating that day. The reason we do searches based on the  
25 surgery to see why we do the surgery and they follow the post up

## DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS

1 care.

2 Q. Are you being compensated for your time away from your  
3 practice?

4 A. I am.

5 Q. What is the rate of compensation?

6 A. \$550 an hour.

7 Q. You mentioned some hospitals you affiliated with. You  
8 have privileges at those hospitals I assume?

9 A. Of course.

10 Q. Did there come a time when you had an opportunity to  
11 examine Mr. Szwed?

12 A. Yes.

13 Q. Did you bring your chart with you of your examinations?

14 A. It's electronic medical records so everything is in  
15 computer. Whatever we able to printout is here.

16 Q. Are those records your's?

17 A. Yes.

18 Q. And are they kept in the normal course of your  
19 business?

20 A. Yes.

21 Q. Were those records made contemporaneously with your  
22 examination or examinations of other physicians in your office  
23 of Mr. Szwed?

24 A. Yes.

25 MR. LIAKAS: Your Honor, I like to offer what's



**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1           been premarked as Exhibit 57 for ID into evidence.

2                   MS. PROVOST: May I?

3                   THE COURT: You just want to see them?

4                   MS. PROVOST: Yes.

5                   THE COURT: She can see it.

6                   Subject to redactions it's admitted into evidence.

7                   (Whereupon, People's Exhibit No. 57 was marked  
8           into evidence subject to redactions.)

9                   THE COURT: Let's keep moving.

10           Q.     By the way, Doctor, have you ever testified in court  
11   before?

12           A.     Yes, I did.

13           Q.     Have you testified -- withdrawn.

14                   In what context?

15           A.     On behalf of my patients.

16           Q.     Have you ever testified on behalf of a patient that I  
17   represented before in court?

18           A.     No.

19           Q.     Now, let's turn to your notes, Doctor. You can refer  
20   to them throughout your testimony if you wish to refresh your  
21   recollection and you can actually read.

22                   THE COURT: From his own records?

23                   MR. LIAKAS: From his own records.

24           Q.     Can you tell us, Doctor, when did Mr. Szwed first come  
25   to you for treatment?

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 A. His first initial visit was on September 30, 2019.

2 Q. And what was the history that Mr. Szwed gave you at the  
3 time you first saw him?

4 A. If you don't mind me reading.

5 Q. You can read from the notes.

6 A. Kamil Szwed, 28 years old, male who presents today with  
7 complaints of lower back pain. Dominantly on the right side  
8 that radiates into the right leg with numbness and tingling.

9 This problem originated on 6/13/2019 as a result of a  
10 work related accident. Patient fell 15 feet from ladder. Prior  
11 to accident patient was in a normal state of health and denies  
12 any spine trauma. Patient describes pain as severe and  
13 stiffness.

14 Q. Okay. Did he give -- before we go any further. You  
15 mentioned that he complaint to you. The history he gave you was  
16 that he had right sided back pain and right leg pain?

17 A. Correct.

18 Q. Are you aware that Mr. Szwed had any other additional  
19 injury other than his lumbar spine?

20 A. He had a CAM boot on his leg which I couldn't examine  
21 on the right side. He had calcaneous fracture. Foot fracture.

22 Q. This was approximately how many months after his  
23 accident?

24 A. The accident was on the sixth. About three months.

25 Q. Now, you can continue. Did Mr. Szwed rate the type of

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 pain he was having? Did he describe it in any way other than  
2 back pain and radiation?

3 A. At that time the lower back was 5 from 10. 0 being no  
4 pain, 10 being the worse pain of your life.

5 Q. Did he make any commentaries with regard to the status  
6 of his back compared to previous dates?

7 A. I mean, compared to previous date?

8 Q. Yes.

9 A. I mean --

10 Q. Compared to post accident but before he saw you?

11 A. It's getting worse but not -- again, it's somewhere  
12 medium to moderate pain. Not severe at this point.

13 Q. Did he have any complaints with regard to what  
14 aggravated his symptoms?

15 A. Yes. Symptoms are aggravated by laying down, prolong  
16 sitting and walking, bending and twisting.

17 Q. Now, after Mr. Szwed came to your office and gave you  
18 the history of falling 15 feet from a ladder did you do a  
19 physical examination?

20 A. Absolutely.

21 Q. And can you take us through the context of your  
22 physical examination, please?

23 A. Sure. Can I read from the notes again?

24 Q. Sure. Of course.

25 A. So when patient first walked in the first thing you

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1 notice is the way they walk in. That's No. 1 thing. And the  
2 first thing that was noticed patient wearing a CAM walker. So  
3 obviously there is some sort of injury in his foot.

4 You ask the patient what happened. He tells you it was  
5 after the fall, surgical intervention was done on his foot.  
6 Calcaneous fracture. So this is the foot that you can examine  
7 up to the knee but you can't really examine past the knee.

8 Then you have to lay your hand on the patient. Make  
9 sure that you feel every aspect of the patient. Patient notes  
10 to have tenderness on his whole entire lower back. He has  
11 bilateral muscle spasms moderately, not severe. Muscle spasms  
12 bilaterally in the centromeric distribution.

13 Q. What is the significance, if any, on the muscle spasm  
14 you found when you touched Mr. Szwed's spine on that day?

15 A. That he has some sort of injury around that area that's  
16 not acute but it's something that's been lingering there for the  
17 last couple of months.

18 Q. Okay. Now, you noted in your report that he had  
19 kyphotic lumbar spine. What does that mean in the  
20 musculoskeletal section?

21 A. That shows that he had more of a cavity than normal.

22 Q. What is the significance?

23 A. The significance of this is loss of lordosis a/k/a  
24 muscle spasm.

25 Q. Now, you actually touched the back and felt those

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1 muscle spasms?

2 A. Yes.

3 Q. Is that something that can be created by the patient?

4 A. No. This is something that's another reason why you  
5 examine the patient because you cannot gauge this.

6 Q. Now, did you do a range of motion test on Mr. Szwed?

7 A. Yes. Correct.

8 Q. And what did you find generally with regard to his  
9 range of motion, was it full, limited, something else?

10 A. No. His range motion was decreased by about 45 percent  
11 compared to normal range of motion.

12 Q. That's for his lumbar spine?

13 A. For his lower back in every direction. Whether it's  
14 forward flexion, side bending, rotation or extension.

15 Q. What is the significance of that?

16 A. That he's limited by some sort of injury not being able  
17 to move.

18 So the whole point of the physical exam is to conclude  
19 your diagnosis before you even move on to the individual studies  
20 like x-rays or MRI, because a long time ago people would  
21 diagnose treating people without fancy machinery like MRI and  
22 CAT scan.

23 In my school residency and fellowship I was taught to  
24 diagnose even the patient before you can start looking at the  
25 MRIs. So that's why physical exam is such crucial part of your

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1 diagnosis.

2 Q. Now, Dr. Lerman, there is a portion where you mentioned  
3 the left anterior fibulas has a four out of five strength. Can  
4 you explain to us what is the left fibulas?

5 A. So in our body it's like electrical chart where every  
6 part where the nerve exits intervenes with certain parts of your  
7 body musculature that provides you with the movement. If  
8 patient cannot do certain movement or cannot raise their foot or  
9 does not have enough strength in your head you start having a  
10 working diagnosis. When we deal with anterior fibulas it's  
11 originated with the L5 nerve root. Can I use this?

12 Q. Not that one yet. We have another model that's coming  
13 later.

14 MR. LIAKAS: If the officer will please provide  
15 the long spine which is Exhibit 49 for ID, I am sorry, for  
16 demonstrative purpose.

17 THE COURT: As a reminder this is demonstrative  
18 exhibit. It's also not an exact copy. It's just a  
19 representative color coded spine.

20 (Whereupon, Plaintiff's Exhibit No. 49 previously  
21 marked into evidence was shown to the witness.)

22 A. As we looking at the spine we have our levels. Right  
23 side and we have little window from where the nerves are  
24 exiting. These are called foramen. So from each area that the  
25 nerve exits it runs down and gives innervation to specific muscle

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1 groups. When we talking about in this particular case fibulas  
2 or which is the muscle that let's your foot be elevated. Brings  
3 your foot up and if there is a weakness we note the nerve exit  
4 between L4 and L5 region there is some sort of disconnect. The  
5 wiring from the pain electrical wire down to the leg is  
6 somewhere being affected.

7 So now you think whether it's something in the spine or  
8 something local. So you move on with the next part of your  
9 physical examination. Then there is subsequent studies that you  
10 can request to figure out whether it's something local around  
11 the muscle or something more of a central within your canal.

12 Q. Now, Doctor, it says here that you performed a test  
13 with regard to his perception of touch, light touch?

14 A. Correct.

15 Q. Why is that test administered?

16 A. To see, again, because there is hematoma which gives  
17 you the mechanical part of the nerve and there is sensory part  
18 of the nerve. So each part of our leg is distributed and  
19 innovated by specific nerves. So if you touch in front of the  
20 thigh patient comes in and says, doc, I have this pain in front  
21 of my thigh and it's numb and tingling and you look at the MRI.  
22 There is multiple distributions, but, you know, it's really only  
23 one affecting L3 L4.

24 In that specific case you want to figure out which part  
25 of your body we have fibulas or that affecting the mechanical

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1 part. We have degree of sensation in that same area. By the  
2 time I am even done with diagnosis I am working with somewhere  
3 L4 L5 area. That's without looking at the MRI or x-rays.

4 Q. And what was your finding when you tested his  
5 perception to touch?

6 A. It was decreased on the left side.

7 Q. And did you designate a percentage of what normal was  
8 and what Mr. Szwed exhibited?

9 A. Correct. It was decreased by 50 percent.

10 Q. In what nerve distribution specifically was it  
11 decreased?

12 A. L5 which exits between L4 and L5.

13 Q. On what side specifically?

14 A. On the left side.

15 Q. Now, he had come in complaining of pain to his right  
16 side but on your examination you found the left side. Is that  
17 concerning to you in any way?

18 A. No. Correct. That's the reason why you do a physical  
19 exam, because, again, patients have distracting injury.

20 On his right foot he's wearing a CAM walker on his  
21 right foot which is digging into his skin. It's uncomfortable.  
22 It's three months after the surgery so without you doing the  
23 appropriate testing you can get mislead. You can do physical  
24 exam. You listen to the patient. You can look at MRI and have  
25 a completely different diagnosis.



**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 Q. Did you continue with any additional physical  
2 examination with Mr. Szwed in the form of a straight leg raise  
3 test?

4 A. Correct, I did.

5 Q. What is that test?

6 A. So the straight leg raise test is another test to  
7 identify whether patient is telling you the truth or not because  
8 they can tell you all this numbness and pain down the leg day  
9 one, but you do this provocative test by sitting there  
10 nonchalantly raising the leg. Saying, relax, let me raise  
11 again. If there is any expression in this little window exit by  
12 stretching your leg you putting more stretch on the nerve and  
13 creating even less room.

14 The whole thing moves forward. It creates more tension  
15 here and if there is anything like in this situation, disc  
16 pushing on the nerve, it will jam right into the nerve and the  
17 patient will jump up and say I have this pain and it was on the  
18 left side as well.

19 So patient came in saying I have all these right sided  
20 symptoms but in reality the pain or the issue that were coming  
21 from the lower back are all in the left side and that's the  
22 beauty of physical exam. It's the beauty of actually seeing  
23 patient, examining patient and seeing what is going on.

24 Q. Now, prior to Mr. Szwed suffering this fall did you  
25 take any history with regards to whether or not he was

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 exhibiting any of these symptoms of an L4-5 disc injury before?

2 A. Based on my notes it says patient was an absolutely  
3 healthy 28 year old man.

4 Q. Now, did you have occasion to view the MRIs that were  
5 completed of Mr. Szwed's spine in 2019?

6 A. Correct.

7 MR. LIAKAS: Your Honor, I like to publish Exhibit  
8 40 for the jury. It's already admitted into evidence.

9 THE COURT: That's fine.

10 Q. Dr. Lerman, I am going to ask if you would please step  
11 down and if you can take us through your interpretation of the  
12 MRI that Mr. Szwed had in 2019.

13 THE COURT: Just to remind the, Doctor. Even when  
14 you standing off the stand you still under oath.

15 THE WITNESS: Okay.

16 (Whereupon, Plaintiff's Exhibit No. 40 previously  
17 marked into evidence was published in open court.)

18 A. So we looking at the picture of the MRI. The fancy  
19 word is sagittal view or side view of your back and axial view.  
20 Us looking inside the canal and this is going to be the right  
21 side, this is going to be the left side and the slices are done  
22 as you slicing the area inside.

23 Here is where you see the little dots. It's a whole  
24 bunch of nerves exiting from your brain down to your legs. Your  
25 spinal cord ends about L1 L2. At this point you have bone

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1     ligamentous or a horse tail because it does look like a tail of  
2     a horse running down. It's a whole bunch of nerves. You really  
3     have quite enough room for the nerve to be pushed. Enough not  
4     to be completely debilitated. That's very important because  
5     when we look at the patients we look how they present. What's  
6     going on. Whether you have central, right in the middle  
7     compression or the little windows that I just showed you guys  
8     where the little nerves exit.

9             Now, when we looking at the quality of the disc we  
10    looking at a 28 year old male who has almost a pristine spine  
11    with the exception of one particular disc L4 L5. If we look at  
12    the picture we have disc here. Everything that is filled up  
13    with water brightens up with the MRI. We consist of 70 percent  
14    of water in our entire body. That's how we are made up 70 or  
15    more percent of water. Soft tissue has lit up disc. In this  
16    situation this is more grayish. You can see how nice and flat  
17    these disc are.

18            What are disc? Disc are our bubbles that gives us  
19    support. If we have bone sitting on top of bone we be very  
20    stiff individuals. We wouldn't have much stability. Given this  
21    and the little joints that are called facet per each level gives  
22    us this amazing mobility we have. So square vertebrae. Between  
23    each vertebrae we have collagen disc that looks more like crab  
24    meat. Then we have our nerves running down and then we have our  
25    spinal apparatus. If we describe it, it's basically having

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1 almost like a house.

2 Can I get the model?

3 Q. Sure.

4 A. So we have this amazing armor that gives us the support  
5 for our entire body. That's why you see the vertebral body.  
6 It's almost like an Eiffel Tower in Paris. It starts small and  
7 bigger in the bottom to give us more support. These are the  
8 levels that take our pressure from down all our body. All the  
9 pressure is exerted here. So now 28 year old isolate one level.

10 Q. What you said?

11 A. Isolate meaning one level issue. It cannot come --  
12 first of all, he's 28. We are not talking about a greater  
13 change. It's not possible. It's possible if he had some sort  
14 of trauma and developed into arthritic changes. In this case  
15 pristine, pristine and then look at this darker disc with a  
16 bulge that's popping back out. Not only that we have a little  
17 bit of instability pieces here. Because if you look at here,  
18 draw a straight line it's in the vertebrae. It's actually from  
19 one quarter to another to another to another and when we draw  
20 straight from here it hits a couple of millimeters back. It  
21 opens up more like a fish mouth. Here it slips a little bit.

22 Q. Is that what you talking about?

23 A. Yes. Correct. So from here if we draw a straight line  
24 it's going to hit two millimeters. Find from here. It's going  
25 to be again perfect.

**DR. LERMAN - DIRECT - PLAINTIFF - MR. LIAKAS**

1 Q. Let's just talk about this for a second. This you  
2 describe it as a hitch?

3 A. No, almost like a slip.

4 Q. So this slip here what is the significance of that,  
5 what is it first of all?

6 A. So, again, we looking at this is perfect. When we look  
7 at this particular picture this vertebrae is millimeters shining  
8 backwards. So in my mind is patient laying down in the MRI. So  
9 he doesn't have enough support. Out of all the vertebrae this  
10 is the only vertebrae that falls back. Again, brings us back to  
11 my physical exam working around four, five area. Some issues  
12 going on there. The only disc on the MRI that has an issue is  
13 L4 L5.

14 Now, after we examine fully, digest it and dissect the  
15 side view now we start paying our attention to the inner view  
16 because things that you see on the side view you would not be  
17 able to appreciate on the inner view which is our little windows  
18 or the little foramens.

19 Now we looking inside here. See how much room we have  
20 for these little windows because we cannot approach it here.  
21 When we look at here we can see on the right side you still have  
22 some grey area and there is the disc. That nerve can exit  
23 through here. It's tight but not as tight. On the left side  
24 though there is significantly larger fragment that is sitting  
25 inside this window and creating almost no room for the nerve to

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1 exit and it gives that innovation that doesn't provide enough  
2 sensation or mechanical supply to get your muscle up.

3 Q. Dr. Lerman, did you see any signs of trauma on this  
4 MRI?

5 A. I mean, I don't see at this point. I see the traumatic  
6 disc here which at this point I am correlating to the story the  
7 patient tells me. Fall off significant height, calcaneous  
8 fracture highly associated with a spine trauma and isolated  
9 issue.

10 Q. Now, you actually mentioned the word edema. Do you  
11 know when this MRI was taken? I know it was not right away. If  
12 I was to tell you about five weeks after?

13 A. It makes sense.

14 Q. Would you expect to see edema on the MRI?

15 A. No. I mean, A, there is no fracture and, B, five weeks  
16 you would not see.

17 Q. Despite that you still determined this is a  
18 traumatically injured disc?

19 A. Yes.

20 Q. Doctor, I am going to ask you a few more questions  
21 about your note and I might have you come back down. Thank you.

22 Dr. Lerman, you weren't the only physician at your  
23 practice to examine Mr. Szwed; is that correct?

24 A. Correct.

25 Q. There are other physicians that --

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1           A.       Yes. We had Dr. Drazic also was the one I see  
2 following.

3           Q.       Mr. Szwed was periodically following up with you and  
4 Dr. Drazic throughout the injury up until this point?

5           A.       Correct. Absolutely.

6           Q.       Now, your physical examination and Dr. Drazic's  
7 physical examination at times don't exactly match, right. There  
8 are times where Dr. Drazic may not have found a certain straight  
9 leg raise positive. You may have found it months either earlier  
10 or later. How could you explain that?

11          A.       A, you can put ten spine surgeons in a room everyone  
12 would have different physical exams plus or minus. We not  
13 talking about different examination.

14                 B, also depends on the weather. The way patient feels  
15 with the colder weather. Patients always tend to have more  
16 muscle spasm, more symptomatology that comes out and they always  
17 say that doctors in Arizona are happier doctors because the  
18 weather is nice and dry. A lot of people leave to Florida after  
19 having surgery because the climate. Living in New York you are  
20 very susceptible to the weather changes especially with  
21 injuries.

22          Q.       Dr. Lerman, when was the next time that you personally  
23 saw Mr. Szwed after the initial visit in September of 2019?

24          A.       I saw him on November 13, 2019.

25          Q.       Just generally speaking any significant changes that

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1 you recall. Whether it's in your history or examination of  
2 Mr. Szwed?

3 A. Let me just glance. No.

4 Q. And your recommendation for Mr. Szwed throughout that  
5 time was to do what in terms of treatment for his spine, if  
6 anything?

7 A. Just continue physical therapy, aquatic exercises and  
8 follow up if needed.

9 Q. Now, I want to skip over Dr. Drazic's notes and we  
10 mentioned some things about Dr. Drazic, but generally speaking  
11 who is Dr. Drazic?

12 A. Dr. Drazic is an orthopedic surgeon. He was actually  
13 training when I was a resident.

14 Q. So Dr. Drazic does he work in your office?

15 A. No, he's actually semi retired.

16 Q. Now, I want to skip over to a note that you authored in  
17 August of this year. August 14, 2024. Now, at this point based  
18 on your reading of the MRI, based on several examinations of  
19 Mr. Szwed you found that he had an injury at the L4-5 disc,  
20 fair?

21 A. Correct.

22 Q. And it was related to what? Withdrawn.

23 What was the cause of that injury?

24 A. A height fall injury.

25 Q. Did you recommend that he undergo any type of surgery



1 when you first saw him?

2 A. No, absolutely not.

3 Q. When you first saw him about five and a half years ago  
4 to this date and now after years of reexamining has your opinion  
5 changed to that point?

6 A. Absolutely. I mean, to begin with Kamil is a guy who  
7 always does not even want to hear surgeon. Spine surgeon. I  
8 know I am in pain but I am going to try to do everything  
9 possible not to have surgery. That's the attitude that he had  
10 in every exam he was in the office.

11 Q. Aside from surgery, right, there are other types of  
12 modalities also in addition to physical therapy that one can  
13 undergo to help alleviate the spine, fair?

14 A. Sure.

15 Q. Like what?

16 A. Pain management with facet blocks, epidural injections,  
17 microdiscectomy. I mean, everything it's still interventional  
18 but not required a fully open procedure.

19 Q. So let's go to your note of August 2024 that I  
20 mentioned and you can just take us through the history now that  
21 you seen Mr. Szwed for at that point approximately five years of  
22 examinations periodically. What was the history he gave you?

23 A. Mr. Szwed follows up with continued lower back pain.  
24 Patient complaining of lower back pain with worsening pain in  
25 his left leg and bilateral buttock associated with pins and

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1 needles, numbness and tingling. He rates his pain as 7 on a  
2 scale of 1 to 10. Patient was attending PT for about six weeks.  
3 He would like a new referral.

4 Patient had three lumbar epidural injections with  
5 Dr. Moise. One, a lumbar medial nerve branch block with  
6 Dr. Mohamed and L4 L5 percutaneous discectomy with Dr. Salah.  
7 Patient reported some relief following treatments but radicular  
8 symptoms including buttock and left leg were worsening.

9 Q. And now you reviewed records from Dr. Coba, Dr. Salah  
10 and Dr. Moise on that day, correct?

11 A. Correct.

12 Q. Now, you aware that he's had this alternative type of  
13 treatment pain management procedures all of which Dr. Salah and  
14 Dr. Moise testified to before this jury a few weeks ago. Did  
15 you have any additional diagnostic tests that you were able to  
16 look at when you examined him in August?

17 A. Yes. There was subsequent EMG studies.

18 Q. The EMG study what was the result of that?

19 MS. PROVOST: Objection.

20 THE COURT: It's in.

21 MR. LIAKAS: It's in evidence.

22 THE COURT: It's in evidence, yeah. It's in  
23 subject -- I mean, subject -- he has to authenticate it  
24 obviously.

25 Q. What were the findings on that EMG?

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1 A. EMG for L4 L5 lumbar radiculopathy.

2 Q. And is that consistent with your examinations and the  
3 history?

4 A. Yes. Absolutely.

5 Q. And is that consistent with the treatment that  
6 Dr. Moise and Dr. Mohamed administered to Mr. Szwed throughout  
7 that time?

8 A. Absolutely.

9 Q. Now, did you have occasion to view any additional  
10 diagnostic studies performed on Mr. Szwed in the interim  
11 referred by either Dr. Mohamed or Dr. Moise?

12 A. We had MRIs of his lumbar spine.

13 Q. And the MRIs of the lumbar spine showed what?

14 A. Patient -- can I read from here?

15 Q. You can read.

16 A. Left paracentral broad base disc herniation and disc  
17 bulge at L4 L5 indenting the thecal sac, lateral recesses, and  
18 foramina, abutting the bilateral exiting nerve root.

19 In normal words it's basically a disc that is more to  
20 the left side causing compression of the little window where the  
21 nerve exits.

22 Q. So, Doctor, I am going to pull it up and you can remain  
23 seated for the time being. I am going to pull this up.

24 MR. LIAKAS: This is in evidence as Exhibit 41,  
25 your Honor.

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1 (Whereupon, Plaintiff's Exhibit No. 41 previously  
2 marked into evidence was published in open court.)

3 Q. Doctor, how would you characterize, if at all, any  
4 progression of the injury that Mr. Szwed suffered to the L4-5  
5 disc as you compared -- I am sorry. To the 19 and the 2020 MRI?

6 A. The disc is much darker and it's much smaller. So it  
7 keeps disintegrating. There is more compression from bulge now  
8 converted to actual herniation.

9 Q. So I am going to put on the left side of screen here  
10 the MRI from 2019 and the right side the MRI from 2020. If you  
11 can kind of using this describe to us what you mean by the  
12 progression?

13 A. Can I come up?

14 Q. You can. Sure. I was trying to save you a trip.

15 A. So, again, this is the view looking inside the canal.  
16 We can see the darker inside of the disc and now if we see at  
17 least a small little grey exit of the nerve. In the left side  
18 we don't see anything at all. We see a dark mass effect on the  
19 exiting nerve and there is much more now compression  
20 essentially.

21 So if we see at least a little bit of rounding part  
22 here, we see only a tight angle because of this extra couple of  
23 millimeters of the disc which is enough for a small space to  
24 begin with to create less room for the nerve. It explains why  
25 patient's left lower extremity symptoms are not getting better.

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1 No matter how many injections you put in there, no matter how  
2 much micro disc you can do unless you come in here, take out  
3 this piece of bone and create all this room for the nerve you  
4 are not going to be able to do anything.

5 Q. Now, Dr. Lerman, at some point when you examined  
6 Mr. Szwed you referred him for a new MRI, correct?

7 A. Yes.

8 Q. I am going to turn to that date in August and since you  
9 don't have the notes in front of you I am going to ask if you do  
10 need to refresh?

11 MR. LIAKAS: Your Honor, can he grab the notes?

12 THE COURT: Sure.

13 Q. You want to just get the notes. Thank you.

14 So in August 2024 you did a reexamination, another  
15 physical exam of Mr. Szwed. Can you take us through that. Is  
16 there anything significant about the physical exam that is  
17 notable?

18 A. His muscle strength throughout the lower extremity is  
19 significantly reduced. It got weaker. It means there is more  
20 constant compression of the nerves. Nerves are the only cells  
21 in our body that do not regenerate. The more nerve cells the  
22 more compression you have. The more nerve cells die out the  
23 more chance you have permanent issue and not being able to bring  
24 it back.

25 So if you -- then you find out when is the chronic

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1 issue. In my eyes and literature six months is a chronic issue.  
2 We dealing here with five years worth of post injury patient  
3 that we keep doing everything possible at his young age to avoid  
4 the surgery but there comes a point where if the weakness  
5 progresses and less the pain it's great we can treat for pain  
6 but the most important thing is functionality. Once the patient  
7 loses functional a/k/a strength or sensation you have to act  
8 more aggressive. You have to start talking to the patient about  
9 possibly decompressing the nerve and getting the patient right.

10 Q. You ordered an MRI on that, correct?

11 A. Yes.

12 Q. Mr. Szwed returned to you in September to review that  
13 MRI. Fair enough?

14 A. Correct.

15 Q. I am going to pull up the MRI from Precision Imaging of  
16 September of 2024 and, Dr. Lerman, if you would just take us  
17 through what we seeing on this MRI?

18 A. We see a significant progression of the worsening of  
19 the disc. This is even more perfect picture of isolated disc  
20 injury where again we dealing with the arthritic changes in the  
21 body. We should see somewhere else in the body changes.  
22 Arthritic changes.

23 In this particular case we have significant increase in  
24 that disc herniation. Decreased of height because the water  
25 leaks out of there and now we start draining out. We walking on

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1 the air max bubble that has puncture in it. We are going to  
2 walk one, two, three, four. By the end of the year we walking  
3 on no air bubble at all. With luck of our muscles keep being  
4 supportive. It doesn't disappear as quickly as luckily it would  
5 have happened if it would have had the support or muscle force  
6 around it.

7 Here the significance of that side view is just  
8 tremendous. It's the progression that I saw from day one on  
9 2019 to 2024, five years later, and here I mean not only that we  
10 don't have any room here. Now this disc is going outside of the  
11 window becoming even more extra foraminal or extra window and  
12 it's sitting just like this inside the window and outside the  
13 window compressing the nerve. So now it makes sense why the  
14 injections don't work, because the injection can only come  
15 epidural or through the foraminal. Through the foraminal we are  
16 not getting any because there is not enough room. Where are you  
17 going to deliver the steroid.

18 It's not going to hold anything. It's not going to do  
19 anything because we have all the compression that is causing all  
20 of these symptoms the patient describes and the only way to get  
21 rid of it is literally with all the knowledge come in here  
22 remove part of this bone, move the nerve to the side, remove  
23 most of this disc and put an implant here that is going to open  
24 up for the nerve. Create a space so the bone don't grind on the  
25 bone and two screws in the back to prevent the motion.

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1           Q.     I want you to assume, Doctor, that Dr. Mohamed  
2 testified earlier in this trial that between the MRI we see on  
3 the left and the MRI we see on the right he performed a  
4 enteroscope extracutaneous discectomy on the left side of this  
5 disc. How would that affect, if at all, any of the more --  
6 withdrawn.

7                     How would that affect any of the progression of that  
8 disc?

9           A.     I mean, you would assume you would see less of the disc  
10 herniation after that discectomy not more that we see here.

11          Q.     Can you tell me what a reherniation is?

12          A.     Reherniation. So the disc consist of nucleus fibrosis  
13 which is the inside and the annulus fibrosis the way I describe  
14 to patient or my residents crab meat with saran wrap around.  
15 When the saran wrap ruptures that starts leaking out.

16                     When we do discectomy we remove the section sticking  
17 out, the saran wrap, but there is no technology to date. Any  
18 glue or suture that you can hold the fibrous together. You  
19 depend on the scar tissue and, again, if there is more pressure  
20 inside or less water inside that scar tissue formation would be  
21 increased because we have constant pressure within the disc  
22 that's not healthy and keeps pushing out more of the disc  
23 herniation. That's why they say second time you don't really go  
24 for discectomy. You go for the fusion.

25          Q.     I want to talk to you about that. On this visit in



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1 September did you recommend that Mr. Szwed undergo fusion?

2 A. This is the first time in five years that we were  
3 confident to describe or talk about his MRI findings and really  
4 talk about surgical intervention.

5 Q. Do you find that based on his injury this is the  
6 natural progression?

7 A. This is the book example of natural progression.

8 Q. Doctor, with the Court's permission I like --

9 MR. LIAKAS: We have a demonstrative with regard  
10 to the fusion.

11 MS. PROVOST: Objection.

12 THE COURT: Actually, let him finish his sentence.

13 MS. PROVOST: I am sorry.

14 MR. LIAKAS: I like to lay the foundation but I  
15 know we have to lay it before we can publish it.

16 THE COURT: Why don't you lay the foundation of  
17 what you describing then we can talk about it.

18 MR. LIAKAS: Okay.

19 Q. Dr. Lerman, you have seen what has been left up there  
20 as demonstrative.

21 A. Yes.

22 Q. Do you know what that represents?

23 A. Interbody fusion.

24 Q. Is that a fair and accurate demonstrative of what a  
25 inner bed fusion would look like?

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1 A. Yes.

2 Q. Is that something that would assist you to explain to  
3 the ladies and gentlemen of the jury what a fusion is as you  
4 recommended for Mr. Szwed?

5 A. Yes.

6 MR. LIAKAS: Your Honor, I would ask that we be  
7 allowed to publish for the jury.

8 MS. PROVOST: Objection.

9 THE COURT: Sustained to the following extent.  
10 Sustained to the full extent.

11 Is there any indication, Doctor, that Mr. Szwed  
12 has admitted that he wants to have a physician -- not wants  
13 but prepare to have a fusion?

14 THE WITNESS: Yes. At this point he's talking to  
15 us about surgical intervention and that's the reason why he  
16 came back after so many years.

17 MR. LIAKAS: It's in the note.

18 THE COURT: I am sorry. I am trying to address  
19 counsel's objection.

20 He's talking to you about it but do you have an  
21 indication he's actually going to go through this?

22 THE WITNESS: We haven't selected a date yet but,  
23 yes, he wants to do the surgery.

24 THE COURT: And the demonstrative is indicative of  
25 the surgery you intend to do. That's in your treatment plan

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1 for this patient?

2 THE WITNESS: Correct.

3 THE COURT: At that point then the objection is  
4 overruled and subject to obviously, you know, the jury's  
5 decision whether they believe the patient will have the  
6 surgery or not. This exhibit would be permitted.

7 MR. LIAKAS: Thank you. Can we publish to the  
8 jury, please.

9 MS. PROVOST: Publishing to the jury. Is it  
10 evidence or demonstrative?

11 THE COURT: We been through this several times.  
12 Demonstrative doesn't mean it's not evidence. It is in  
13 evidence. It's for demonstration purposes. It's not proof  
14 of something, but it has to be allowed to be shown to jury or  
15 it's not a demonstrative exhibit. You not hiding something  
16 if I don't show to the jury. It doesn't mean that's what the  
17 surgery would look like in the event. It's intended as an  
18 illustration to explain what he intends to do.

19 That spine model is not proof of what Mr. Szwed's  
20 spine looks like and we can stipulate that his spine is not  
21 color coded by spinal segments in the way that that model is.  
22 It is published to the jury only for the purposes of your  
23 education and the doctor being able to describe and with that  
24 the object is accepted as demonstrative exhibit.

25 THE CLERK: That's No. 58.

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1 MR. LIAKAS: Yes.

2 (Whereupon, Plaintiff's Exhibit No. 58 was marked  
3 into evidence.)

4 THE COURT: 58 in evidence for demonstrative  
5 purposes only.

6 MS. PROVOST: I am sorry, Judge. The jury gets to  
7 hold it?

8 THE COURT: My gosh. It can be published to the  
9 jury. They can hold it. They can touch it. They can look  
10 at it. It is in evidence for demonstrative purposes. We are  
11 not going to keep going in circles on this. Your objection  
12 is noted, it's overruled and based on the foundation rule.

13 MS. PROVOST: May I look at it?

14 THE COURT: It was shown to you earlier.

15 MS. PROVOST: No, it was not.

16 THE COURT: It was marked for ID before. I  
17 thought it was shown to counsel.

18 MR. LIAKAS: We just marked it.

19 THE COURT: Go ahead and give it to counsel,  
20 please. From now on I am surprise if you mark something for  
21 identification, either side, it has to be shown to everybody  
22 as soon as it's marked for ID. I would expect to have an  
23 objection to it being marked for ID if it hasn't been shown  
24 to everybody. You have to show it to counsel at the time,  
25 right, and once it's been shown to counsel it can be

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1 published to the jury and, yes, they can hold it and touch  
2 it.

3 Just so we clear, we are not -- it's a color  
4 sufficient spine. We are not saying it's the same weight as  
5 the patient's spine?

6 THE WITNESS: Correct.

7 THE COURT: It's an acrylic model.

8 THE WITNESS: Correct.

9 THE COURT: Okay. It's been shown to the jurors.

10 Q. Dr. Lerman, what is the purpose of that hardware?

11 A. The purpose of the hardware is to stabilize the spine  
12 for better decompression. In order for us to be able to get  
13 into -- so this is us looking inside like we see inserted. We  
14 have the nerves that come out through each side. The surgery is  
15 done this way, but I just want to show for better understanding  
16 as we looked at the MRI. So the nerve is exiting here and it's  
17 being compressed by the disc from the top and bone from the  
18 bottom.

19 In order for us to be able to get to this nerve without  
20 damaging it we have to take down this bone which is our facet  
21 which gives us stability, then come in by removing -- keeping  
22 the nerve to the side. We move most of this disc so it doesn't  
23 herniate. Again, we put this implant and it's going to support  
24 us and prevent any kind of subsidence which you expect as you  
25 see here.

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1           As the disc is degenerating at that particular area  
2   after the trauma it's going to be pretty much within the next  
3   two or three years bone grinding on bone. You put that implant  
4   and it's going to fill up with bone and create a nice solid  
5   segment. Before it happens you rely on these four screws. So  
6   technically a year and a half down the line you really don't  
7   need these screws, but no one goes does this surgery because  
8   later you rely on the solid bone the patient produces with the  
9   help of the instrumentation that's inside that's bone connected  
10   and it let's the bone grow in one area to the other.

11           The bone that you take away from the patient you give  
12   him back because that also creates a -- promotes the growth of  
13   the bone and the data have a bone being supplied by a special  
14   company. So you rely on the fusion and the screws are there  
15   really for the fusion to take place, but no one ever goes back  
16   to do another surgery to remove anything unless God forbid  
17   something is happening.

18           Q.     Doctor, whether or not Mr. Szwed does have the fusion I  
19   just want to talk about his injury for a second. Someone with  
20   this type of injury can they work in construction?

21           A.     No.

22           Q.     And is the injury that we see on the MRI, is that  
23   something that is permanent?

24           A.     Absolutely.

25           Q.     And is the injury that we see on the MRI consistent

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1 with his complaints?

2 A. Yes.

3 Q. And are those complaints something that you find to be  
4 significant?

5 A. Yes.

6 Q. Are his limitations significant?

7 A. I think a grade and a half of strength in someone in  
8 his position is pretty significant.

9 Q. Now, just so we have it and I want to ask you this  
10 question within a reasonable degree of medical certainty what  
11 was the competent cause of this disc injury that has become that  
12 we see in this MRI?

13 A. Force from the fall.

14 Q. I want to talk to you about direct axial loading from  
15 the fall. I want to talk to you about something that I think  
16 it's worth mentioning. You mentioned that Mr. Szwed had a  
17 calcaneous fracture to his heel?

18 A. Correct.

19 Q. You aware of that?

20 A. Yes.

21 Q. I want you to assume that on the date of the incident  
22 he went to the medical facility nearby Hudson Yards and only  
23 complaint of his foot. He did not complaint about his back.  
24 Does that change your opinion?

25 A. No. It's understandable. He has a severe, severe

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1 fracture in his calcaneous.

2 Q. I want you to further assume that Mr. Szwed then went  
3 to an emergency room and there again denied any back pain and  
4 only complaint of pain to his foot and heel.

5 A. Again, we have this distracting injury and not only  
6 that we are not even full weight bearing for you to be able to  
7 appreciate any back issue at that particular time so you  
8 concentrating on your foot and you don't have full weight  
9 bearing that provides all the force on your L4 L5.

10 Q. I want you to also assume that prior to going to the  
11 emergency room Mr. Szwed took two percocet tablets. In your  
12 opinion would that affect his perception of his pain at other  
13 parts or his entire body?

14 A. Of course. It's a generalized painkiller.

15 Q. That didn't just work on the foot or just the back or  
16 vice versa, correct?

17 A. Unless they directly injected something into his foot  
18 like a numbing that would be directed but if you take something  
19 by mouth it's generalized painkiller. It takes away all pain in  
20 your body.

21 Q. Doctor, I also want to ask you about his complaints and  
22 the findings or lack therefore of the findings of the physicians  
23 that he saw up until a week after the accident. So whether it's  
24 the urgent care, the emergency room or one of Dr. Gross  
25 physician assistants Mr. Szwed complaint of no back pain at any



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1 of those appointments does that change your opinion?

2 A. No.

3 MS. PROVOST: Objection.

4 THE COURT: Can I have the last question read  
5 back.

6 (Whereupon, the Court Reporter read the requested  
7 portion of the record.)

8 THE COURT: Just one week after the accident?

9 MR. LIAKAS: Yes. Up to June 20th.

10 THE COURT: Okay. So as to form I would agree  
11 it's the same question that we had with the witness  
12 yesterday. Same issue I mean with the question we had with  
13 the witness yesterday.

14 Can I ask you, Doctor, did you review those  
15 records he's asking you about in your treatment of this  
16 patient?

17 THE WITNESS: I am not sure which records.

18 THE COURT: The ER records.

19 THE WITNESS: I don't have them.

20 THE COURT: So then I am agreeing with the  
21 objection that certainly as to form and as to foundation and  
22 I would ask the same thing we asked with the emergency  
23 department expert yesterday which was to ask in the context  
24 of things you asked the witness to assume which you are  
25 allowed to do if he hasn't seen the records.

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1 MR. LIAKAS: I thought I asked if he would assume.

2 THE COURT: I don't think so. I think you said  
3 based on your review of the record.

4 MR. LIAKAS: Then I will withdraw.

5 Q. Dr. Lerman, I like you to assume that Mr. Szwed made no  
6 complaints of back pain to the urgent care doctor, the hospital  
7 or Dr. Gross physician assistant and only made complaints of  
8 back pain for the first time on June 20th which was seven days  
9 after the accident. Would that change your opinion of the cause  
10 of the disc injury in any way?

11 A. No. Absolutely not.

12 Q. Why not?

13 A. Because initially first week after the fall would, A,  
14 distract the severe injury in the foot. B, you are not full  
15 weight bearing. C, you have significant amount of musculature  
16 swelling and spasm to kind of give you enough protection for  
17 that area for you not to complain of the back pain. You feel  
18 back tightness you can feel something but when you have this  
19 severe distracting injury you really not paying attention and,  
20 again, not being fully weight bearing I mean that's a big one as  
21 well.

22 Q. Why?

23 A. Because you don't have full support so you really kind  
24 of getting around either on crutches or with a cane and you  
25 don't have that full thrust on that L4-5 area or whatever area

## P R O C E E D I N G S

1 we looking at in the lumbar spine.

2 Q. Thank you, Doctor. No further questions.

3 THE COURT: You want to cross or you need a  
4 second?

5 MS. PROVOST: Actual, I can take a second.

6 THE COURT: Sure. Let's take five.

7 MS. PROVOST: Unless the jurors need a brake we  
8 will keep going.

9 THE COURT: Just give me a second.

10 Does anybody need a brake? Yes.

11 We are going to take five.

12 Doctor, you remain under oath. Please don't  
13 discuss your testimony or talk to anybody.

14 COURT OFFICER: All rise. Jury exiting.

15 (Whereupon, the jury exited the courtroom.)

16 (Whereupon, a brief recess was taken.)

17 COURT OFFICER: You ready, your Honor?

18 THE COURT: Yes.

19 COURT OFFICER: All rise.

20 (Whereupon, the jury entered the courtroom.)

21 THE COURT: You can all be seated. Thanks very  
22 much.

23 Ms. Provost, your witness.

24 MS. PROVOST: Thank you.

25 CROSS-EXAMINATION

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 BY MS. PROVOST:

2 Q. Good morning, Dr. Lerman.

3 A. Good morning.

4 Q. I understood from your direct that you are a doctor of  
5 osteopathy?

6 A. Correct.

7 Q. That's a doctor that you go to school just like an  
8 M.D.?

9 A. Correct.

10 Q. To study the area -- well, to do a general study and to  
11 focus on the area that you are going to be practicing on, right?

12 A. You study same M.D. plus additional course of  
13 musculoskeletal structure with a view of being an orthopedic  
14 surgeon. I thought that would be the best route for me.

15 Q. A doctor of osteopathy you look at the body as a whole,  
16 right?

17 A. Surgical intervention, correct.

18 Q. You look at the body as a whole and you do try to avoid  
19 surgery if you can, correct?

20 A. If you specifically as osteopathy or doing just a  
21 anesthesiology. I went to subspecialty orthopedic spine surgery  
22 so my treatment is focussed on surgical intervention of the  
23 spine.

24 Q. And you've testified more than one time?

25 A. That's correct.

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 Q. And you have also testified at depositions?

2 A. Yes. Of course.

3 Q. And you haven't testified for the Liakas firm until now  
4 but you testified for other plaintiff firms?

5 A. I testify for my patients. I don't testify for firms.

6 Q. Every time you come into court is for plaintiffs in a  
7 case?

8 A. For my patients.

9 Q. Your patients who happen to be plaintiffs, yes?

10 A. I get whatever it is but my patients.

11 Q. And I just want to take you first to your note -- by  
12 the way the fusion that you talked about. That was something  
13 that you only discussed this year. Just a month before trial,  
14 correct?

15 A. I don't know if there would be a trial or anything. It  
16 was just this year with discussion.

17 Q. You weren't aware that Mr. Szwed's case was going to be  
18 tried this year?

19 A. Unless they call me and they really have to beg me to  
20 come here. I really don't know about trials. I try not to find  
21 out and deal with this.

22 Q. By the way, you have testified in the past. Your  
23 testimony is usually about \$15,000, correct?

24 A. No. It's about \$550 an hour. So whatever the billing  
25 comes up to I don't know. It's the billing department that

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 deals with it.

2 Q. And you never charge \$15,000?

3 A. A flat fee. No, there is no flat fee.

4 Q. Okay. You were here a couple of weeks ago?

5 A. No.

6 Q. To testify in this case?

7 A. To testify in this case?

8 Q. Yes.

9 A. No. I was here last week before I left for the brake.

10 Q. It was last week?

11 A. Correct. Wednesday.

12 Q. And when were you contacted that you needed to come  
13 into court to testify?

14 THE COURT: Wednesday before Thanksgiving. We  
15 weren't up. Maybe Tuesday.

16 THE WITNESS: We were here.

17 THE COURT: The Wednesday before Thanksgiving we  
18 weren't up.

19 THE WITNESS: Tuesday afternoon. When I was  
20 sitting outside for four and a half hours.

21 MR. LIAKAS: We had several witnesses.

22 THE COURT: It wasn't Wednesday. It was Tuesday I  
23 assume.

24 THE WITNESS: Probably.

25 THE COURT: We weren't up on the Wednesday before

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 Thanksgiving.

2 THE WITNESS: I know I was sitting four and a half  
3 hours in the area outside.

4 Q. If I told you it was on a Friday would that refresh  
5 your recollection?

6 A. No, it was not on a Friday.

7 Q. It was not on a Friday?

8 A. I don't think so. No, it was not on a Friday. Let me  
9 look at my schedule.

10 Q. Okay.

11 A. It was definitely not on a Friday.

12 THE COURT: Can I suggest whatever it is it  
13 doesn't matter that much because we got 50 minutes and we can  
14 all stipulate that Dr. Lerman was here once before and sat  
15 for the afternoon waiting.

16 Q. And you don't know -- you can't recall when the firm  
17 contacted you that you would have to be in court to testify?

18 A. I don't deal with this at all. My right hand manager  
19 takes care of these scheduling cause if I am going to be taking  
20 care of this on top of taking care of my patients.

21 Q. Okay. Doctor, let's just move on to your examination  
22 of Mr. Szwed. Just so I'm clear prior to Mr. Szwed seeing you  
23 for the first time on September 30, 2019 you didn't look at any  
24 of his other records for treatment before that, correct?

25 A. Besides the physical therapy I didn't see anything

1 else, no.

2 Q. You have physical therapy notes?

3 A. It's scanned in the system probably, yeah.

4 Q. And in your system are physical therapy notes for  
5 Mr. Szwed's back before 9/30/2019?

6 A. It should have been. I am not sure. I have to look at  
7 my notes.

8 Q. Well, Doctor, do you know that Mr. Szwed had gone to  
9 Dr. Gross and told him that his back pain resolved in September  
10 2019?

11 A. I saw him on September 2019. He still had back pain.

12 Q. And do you know that he also went to Dr. Yamagami, the  
13 doctor that he was treating with for the PT. For the physical  
14 therapy and also told him my back pain was resolved. Do you  
15 know that?

16 A. No, I don't. But, again, first visit he was not a  
17 surgical or anything candidate and referred back to PT.

18 Q. He was not a surgical candidate?

19 A. At that particular time, no, absolutely not.

20 Q. And, Doctor, you do -- other than fusions you do  
21 epidural?

22 A. No.

23 Q. You don't do epidural?

24 A. No.

25 Q. And you don't do medial branch blocks?



## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. No.

2 Q. And you don't do discectomies?

3 A. I do open discectomies not micro. Not pain management  
4 discectomies.

5 Q. And you didn't refer him for any epidurals, correct?

6 A. Not at this particular time, no.

7 Q. At any time prior to 2024 when you saw him you never  
8 referred him for an epidural, correct?

9 A. No.

10 Q. And you did not refer him for medial branch block?

11 A. No.

12 Q. You did refer him for a discectomy, right?

13 A. No, not at that time.

14 Q. In fact, Doctor, from the first time you saw him on  
15 September 30, 2019 up until was it August of 2024?

16 A. Let me go through my notes. Yes, he was seen by  
17 Dr. Drazic in the interim in February of 2020, June 2020 and  
18 then he was seen by me on August 14th, 2024, correct.

19 Q. So between the first time you saw him and August 2024  
20 you had only seen him one other time and that was  
21 November 13, 2019, correct?

22 A. Correct.

23 Q. And then when you saw him that first time, Doctor, you  
24 did testify on direct that his pain was getting worse, but I am  
25 going to ask you to take a look at your note under history of

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 present illness and right where you stop with the pain being 5  
2 on a 0 out of 10 scale can you read us that next line?

3 A. Pain is getting better. I read that.

4 Q. Patient states pain is getting better?

5 A. I read this.

6 Q. You actually said pain was getting worse?

7 A. No.

8 Q. We will let the record speak for itself. And at that  
9 time he was taking ibuprofen; is that correct?

10 A. Yes.

11 Q. And it's noted that patient is not currently in  
12 physical therapy; is that right?

13 A. Correct.

14 Q. So when you first saw him and you talked about physical  
15 therapy notes what physical therapy notes you talking about if  
16 he wasn't in physical therapy?

17 A. Not at the time he saw me but he had physical therapy  
18 prior to that. So whatever you see in the notes is patient in  
19 physical therapy right now. No, he's not right now.

20 Q. Can you tell where he was getting physical therapy from  
21 when he saw you on September?

22 A. I don't recall off the top of my head. It was five  
23 years ago.

24 Q. Well, five years ago but you refreshed your  
25 recollection with your notes, correct?

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. Correct.

2 Q. And you did a review of the musculoskeletal system  
3 among other things and you noted the musculoskeletal was  
4 negative; is that right?

5 A. No, it's not.

6 Q. Well, take a look at review of systems, Doctor.

7 A. Review of system advices any particular issues that he  
8 had in the past. That's review of systems in the past and then  
9 you move on to the physical exam.

10 Q. Okay. So up until -- so when you talk about  
11 constitution, cardiovascular, endocrine, eyes, gastrointestinal,  
12 hematological/Lymphatic, immunologic, musculoskeletal, nervous,  
13 and respiratory you talking about the past?

14 A. Yes, review of systems. Anything that ever happened to  
15 the patient in review of systems.

16 Q. Well, didn't he tell you that he fell and so he had  
17 injured himself back in June of 2013?

18 A. Correct.

19 Q. I mean, June 13th of 2019?

20 A. Correct.

21 Q. So isn't that a part of review of systems?

22 A. It's in the notes describing fall 15 foot, patient  
23 can't walk. On my physical exam all of this is noted. It's not  
24 part of review of systems. We talking about any general -- when  
25 we talk about review of systems it's general diseases. Whether

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 we talking about OCC or myelomalacia or any kind of hereditary  
2 problems. Cardiovascular problem. Anything you were born with.  
3 I am talking to the patient. Patient told me prior to this  
4 accident of fall I did not have any other issue. Review of  
5 systems. So it's blank because there was nothing else to  
6 review.

7 Q. So, Doctor, he didn't tell you about his accident in  
8 2018 is that what you telling me?

9 A. Yeah. I do not know about that.

10 Q. And, Doctor, so when you write previous surgeries none  
11 that's because he didn't tell you about anything else?

12 A. There was no other surgery besides the foot.

13 Q. Besides the open reduction and internal?

14 A. Correct.

15 Q. Which you didn't include in the history?

16 A. Again, if I am going to be including every aspect in my  
17 notes I don't have time to spend with my patient. It was  
18 included in the physical exam where it was noted patient in CAM  
19 boot.

20 Q. CAM walker?

21 A. Correct.

22 Q. Is that a boot on his foot?

23 A. Post operative boot they put on the foot.

24 Q. And he had a cane?

25 A. I don't recall. Hold on. Let me look what did he walk

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 with. I think he had a cane at that time, yes.

2 Q. So does your notes refresh your recollection, Doctor,  
3 that patient walks with a cane as well as -- I am assuming you  
4 meant CAM boot not CAN boot, right?

5 A. Yes, correct.

6 Q. Before we get to the next thing he had a CAM boot  
7 September 30, 2019 and, Doctor, that would mean that he wouldn't  
8 be able to drive, correct?

9 MR. LIAKAS: Objection.

10 A. I don't know. I would assume unless you driving with  
11 your left foot which some people do.

12 Q. Thank you, Doctor. So current and most recent  
13 occupation did he tell you what he did?

14 A. Construction.

15 Q. You wrote unspecified?

16 A. Again, because he was not working already at that time  
17 and it's work related injury due to construction so it's  
18 mentioned already in one part of my notes.

19 Q. I am looking at your notes, Doctor. Could you direct  
20 me to where you have he was working in construction?

21 A. Problem originated 6/13 as a result of work related  
22 accident. Patient's fall 15 foot from the ladder.

23 Q. So that automatically tells you he was a construction  
24 worker?

25 A. Yeah.

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 Q. He could have been any other things other than a  
2 construction worker?

3 A. He had to do something with labor.

4 Q. Right. It could have been a super in a building  
5 putting in a light bulb, right?

6 A. It's still part of the construction or labor quality.

7 Q. Putting a light bulb is construction?

8 A. It's part of construction.

9 Q. Okay. So you asked him about his physical requirements  
10 of his most recent occupation and that also says un-specified,  
11 correct?

12 A. Yeah.

13 Q. So you asked him and he didn't answer or you didn't  
14 bother to write it down?

15 A. Probably didn't really concern me at that time.

16 Q. Okay. You asked him about his hand dominance and he  
17 didn't tell you whether he was a righty or lefty, right?

18 A. When we dealing with the cervical spine we always want  
19 to specify that. When we dealing with the lower back we not  
20 really asking.

21 Q. You indicated, Doctor, provider has reviewed current  
22 medication, medication allergy and PFSH slash ROS information.  
23 Can you tell me what PFSH slash ROS is?

24 A. Past family social information here.

25 Q. That's what we just talked about, right?

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. No. This is the family history. Whether his family  
2 had cancer. Whether his grandparents died of cancer or anything  
3 of significance.

4 Q. Right. And you noted nothing regarding that, correct?

5 A. No. Nothing relevant to my treatment of his lower  
6 back.

7 Q. And in terms of his current medication you do note at  
8 the top that he's on ibuprofen 800 milligrams?

9 A. Correct.

10 Q. Do you know how often he was taking it?

11 A. I don't know.

12 Q. And you did the range of motion testing, correct?

13 A. Correct.

14 Q. And his lumbar spine you noted it to be flexion  
15 restricted to 40 degrees in the lower back, yes?

16 A. Correct.

17 Q. What is full range of motion with flexion?

18 A. 75 to 80.

19 Q. 75 to 80?

20 A. Uh-huh.

21 Q. Do doctors have different numbers to that. Some say 75  
22 to 80 and others say different things?

23 A. Yes.

24 Q. For you if somebody was doing 75 to 80 that would be  
25 normal, yes?

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. Yes.

2 Q. Let's go down a little bit further and when you note  
3 medication take as directed that was with respect to the  
4 ibuprofen, correct?

5 A. Correct. It's not a prescription medication.

6 Q. Right and then the physical therapy with emphasis on  
7 therapeutic exercises and modalities for improving functional  
8 independence and restoration of motion and aquatic therapy is  
9 that something that you recommended to do or he tells you that  
10 he was doing?

11 A. I am recommending.

12 Q. That's again you trying to avoid surgery, right?

13 A. Absolutely.

14 Q. And for your second -- the second time you saw him.  
15 The second and only other time you saw him up until 2024 you  
16 note there that he is still 5 out of 10. Same thing, right?

17 A. Yeah.

18 Q. Still not in physical therapy, correct?

19 A. Uh-huh.

20 Q. And still not currently working, right?

21 A. Correct.

22 Q. But we don't know from your notes what it was that he  
23 did other than your testimony here today that you know now he  
24 was construction?

25 A. Correct.



## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 Q. And, again, November 13, 2019 he still in a CAM boot;  
2 is that right?

3 A. Yes.

4 Q. And in your notes also kyphotic at lumbar spine. Is  
5 that a curvature of some sort?

6 A. Kyphotic is what you have in your thoracic spine.  
7 Something you don't want to have in your lumbar spine. Any time  
8 you have a loss of lordosis which is this type of thing it's  
9 fibrosis which is forward which suggests muscle spasm in your  
10 lower back.

11 Q. If you have folic at the lumbar spine it doesn't  
12 necessarily mean it's from trauma, right?

13 A. It has to be something going on in your back, yeah.

14 Q. Sometimes it can be congenital?

15 A. He doesn't have any congenital issues.

16 Q. Well, prior to September 30th of 2019 you don't know  
17 what was going on with Mr. Szwed, correct?

18 A. I have x-rays, MRIs. I have all the possible studies  
19 to review to be able to tell whether patient had congenital  
20 issues or not. Review of systems, past family and social  
21 history, et cetera.

22 Q. And by the way, Doctor, when you looked at the  
23 diagnostic films that were on the screen I noted that you said  
24 it's a picture of the diagnostic film. It's not the actual  
25 diagnostic film?

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 MR. LIAKAS: Objection.

2 THE COURT: Sustained. We have gone through this.

3 MS. PROVOST: Withdrawn.

4 THE COURT: I am going to correct the record  
5 because you keep saying it.

6 The digital images are the same in the 21st  
7 century anyway. Are the same as the film images we  
8 stipulated to that we accepted them in evidence. They are  
9 treated for all purposes as the same as if you put them on  
10 data tape film and brought them in and put them in a light  
11 box as we did when I was a kid lawyer.

12 Q. Doctor, I don't know if you can testify from memory or  
13 for the sake of time do you recall when you looked at the  
14 picture of the film that later on the discs from L1 L2, L3 L4  
15 that white crabby matter that you talking about that it's like  
16 crab meat it was lighter than it was in a prior MRI?

17 A. Correct.

18 Q. Okay. Now, after you see him in November Dr. Drazic,  
19 and correct me if I am wrong, you said that -- did he teach you?

20 A. He was one of the attending in one of the hospitals  
21 that we worked at.

22 Q. So you worked with him?

23 A. Yes. Of course. Great guy.

24 Q. And, Dr. Drazic saw Mr. Szwed February 6th of 2020,  
25 right?

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. Correct.

2 Q. And you have that note in your file?

3 A. Yes.

4 Q. Cause you all work at the same facility which is Total  
5 Orthopedics?

6 A. Total Orthopedics and Sports, correct.

7 Q. You have a bunch of locations throughout?

8 A. At this point, yes.

9 Q. Now, Dr. Drazic notes last seen by Dr. Lerman November  
10 2019. Physical therapy was recommended, right?

11 A. Correct.

12 Q. Patient notes physical therapy did help alleviate his  
13 symptoms and would like to continue with PT. You see that?

14 A. Yes.

15 Q. And when Dr. Drazic notes that do you know if the PT  
16 he's talking about is the foot or the back?

17 A. It's for the back.

18 Q. Okay. Now, if you go down to history of present  
19 illness. We go down he presents with complaints of pain  
20 dominantly on the right side and radiating into the right leg.  
21 Do you see that?

22 A. Yes.

23 Q. By the way when something radiates from the spine down  
24 the leg that's radiculopathy, correct?

25 A. Not necessarily. I mean, it can also radiate up from

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 the foot up as well on the right side.

2 Q. That wouldn't be radiculopathy, correct?

3 A. On the right side, no, correct.

4 Q. Okay. And now it indicates the problem originated  
5 several months ago. You see that?

6 A. I am not sure which line.

7 Q. So we are at the history of present illness of  
8 Dr. Drazic.

9 A. No.

10 Q. And it says patient was in a normal state of health and  
11 denies any spine trauma. You see that?

12 A. Correct.

13 Q. Let's just keep going. He rates his lower back pain as  
14 three to four on a 0 to 10 pain scale. You see that?

15 A. Yes.

16 Q. I read that correctly, correct?

17 A. Correct.

18 Q. The pain is getting better, yes?

19 A. Yes.

20 Q. And it notes patient is not currently in physical  
21 therapy. You see that?

22 A. Yeah. That's why patient came back and asking for more  
23 physical therapy because he ran out.

24 Q. The patient came back and asked for it?

25 A. Yeah.

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 Q. Does it say that anywhere?

2 A. Yes, it does. Alleviates symptoms and would like to  
3 continue with PT. The second line of complaint.

4 Q. Okay. So that's what that indicates he would like to  
5 continue?

6 A. Yes, cause he runs out. You can only give for six  
7 weeks at a time.

8 Q. So by February 6, 2020 he was doing physical therapy  
9 for his back?

10 A. He was doing at some point. We don't have exact  
11 indication of time but patient comes back stating that physical  
12 therapy does help. It helps improve his symptoms. He would  
13 like to continue with physical therapy but currently not in  
14 physical therapy.

15 Q. The fact that you didn't note that in either of your  
16 notes does that indicate to you that he wasn't in physical  
17 therapy at the time he saw you?

18 A. At the point that he would be seeing me he was not in  
19 physical therapy at that point because, again, physical therapy  
20 are usually given in six week blocks.

21 Q. And I don't have -- again, it's not in the file you  
22 have today but it's in the computer?

23 A. Yes.

24 Q. So interestingly Dr. Drazic notes in addition to not  
25 being in physical therapy patient is not taking any medications.

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 You see that?

2 A. Yeah.

3 Q. That means he's doing better?

4 A. Yeah.

5 Q. Now, there is review of system. Dr. Drazic writes  
6 limitation of the joint. Muscle pain and back pain. You see  
7 that?

8 A. Yes.

9 Q. Okay. That's not something that you wrote, correct?

10 A. Again, this is another surgeon that he is seeing after  
11 me and seeing him already as a follow up to an injury that  
12 happened for sure, yes.

13 Q. So Dr. Drazic he's not included in your's?

14 A. Because he didn't have anything prior.

15 Q. Cause what?

16 A. He didn't have anything prior to seeing me. Dr. Drazic  
17 seen him after the injury after me so he has to include it.

18 Q. So as far as you know he didn't have anything prior to  
19 seeing you so there were no complaints prior to seeing you?

20 A. No issues prior to the accident the patient reports to  
21 me.

22 Q. And you referred to that as a story when you were on  
23 direct?

24 A. I would not call it a story.

25 Q. It was his history, right, his medical history?

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 A. It's patient's history. It's not a story. We not  
2 talking about a fairy tale.

3 Q. I didn't say fairy tale. Okay. And Dr. Drazic notes  
4 he has 60 percent range of motion in flexion?

5 A. Great.

6 Q. Right?

7 A. Yeah.

8 Q. And do some spine surgeons and other doctors note 60  
9 percent flexion is normal?

10 A. I don't think I seen a single book that refers to 60  
11 percent as normal.

12 Q. So if a doctor came in to testify and says 60 degrees  
13 is normal it would be wrong?

14 A. No. I think 60 degrees is very limited. I don't wish  
15 it on anyone in this room to have 60 degrees of normal.

16 Q. So you indicate that Dr. Drazic was trying to get him  
17 more physical therapy, but then in the plan it says continue  
18 physical therapy with an emphasis therapeutic exercise  
19 modalities or regaining function independent restoration of  
20 motion. You see that?

21 A. Yeah.

22 Q. So would that tell you that he was in physical therapy  
23 or not in physical therapy?

24 A. He was in physical therapy. The scrip runs out patient  
25 come back. We say please continue physical therapy. Here is

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 more scrip for physical therapy.

2 Q. Doctor, my question to you somebody that is reviewing  
3 these records I wouldn't know that the physical therapy  
4 prescription ran out just looking at this, correct?

5 A. But if we indicate the patient is currently not in  
6 physical theory and asking for more physical therapy and we been  
7 referring for the past three other notes for physical therapy I  
8 think it's more or less self explanatory the patient has been  
9 going to physical therapy. Physical therapy has been doing  
10 great. We are at where year five and only at this point we  
11 starting to discuss any potential interaction.

12 Q. And usually when you send somebody to do something  
13 whether its an MRI, an x-ray or physical therapy you write a  
14 prescription, yes?

15 A. Correct.

16 Q. And there was nothing like that in your notes, correct?

17 A. Yes. Correct.

18 Q. You have a prescription?

19 A. We live in a different world of electronic medical  
20 records where you see communication, PT, lumbar, it gets sent  
21 automatically. It's sent out to the patient or gets sent  
22 automatically to the place of choice.

23 Q. So you referred him in your world for PT. That's your  
24 prescription. Twice Dr. Drazic refers him but patient still not  
25 currently in physical therapy. Did I say that right?



## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. You seeing the gap between patient. It's way over six  
2 weeks.

3 Q. In fact, Doctor, it's way over four years, right?

4 A. It's a year then -- three and a half years, yeah.

5 Q. The last time he saw you, right, other than right  
6 before this trial was in 2019, correct?

7 A. Absolutely.

8 Q. And, again, Dr. Drazic June 15, 2020 not taking any  
9 medication?

10 A. Correct.

11 Q. Agree?

12 A. Yes.

13 Q. Now, just to be clear your straight leg raising test  
14 was positive?

15 A. Yes.

16 Q. For Mr. Szwed but when Dr. Drazic did it, it was  
17 straight leg raising is asymptomatic bilaterally, right?

18 A. That's fine.

19 Q. And there was no instability, correct?

20 A. Correct.

21 Q. And when he expected sacral spine -- withdrawn. Sacral  
22 is below the lumbar?

23 A. Correct.

24 Q. And that was fine. That was normal?

25 A. That was fine.

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 Q. No problem. Now, let's move forward to August 14th,  
2 2024. Now, he comes back after he has had epidural injection,  
3 after he has had medial branch block, after he has had a  
4 discectomy and his pain rate is now 7 out of 10. Do you see  
5 that?

6 A. Yes.

7 Q. And so it increased from the first time that you saw  
8 him, yes?

9 A. Correct.

10 Q. And you know that he had three lumbar epidural  
11 injections with Dr. Moise, yes?

12 A. Yes.

13 Q. You aware he actually L4, right?

14 A. Three or four. It doesn't make a difference.

15 Q. Okay. Right. Well, it does make a difference  
16 depending on the period of time that you have it, right?

17 A. After three injections lumbar epidural injections can  
18 be more a band aid procedure, yeah.

19 Q. So will you take my word for it and assume there has  
20 been testimony Dr. Moise did four epidural injections to the  
21 lumbar spine within a year?

22 A. Yes.

23 Q. Now, you note for the first time ever -- withdrawn.

24 From September 2019 up until 2024 you never sent him  
25 for an MRI, right?

## DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST

1 A. I didn't have a need for it.

2 Q. And now you go and you evaluate his range of motion for  
3 the lumbar and it's restricted to 30 degrees; is that right?

4 A. Correct.

5 Q. So that's again worse than when you first saw him?

6 A. Correct.

7 Q. In fact, if I tell you there has been testimony that he  
8 had gone up to as much as -- withdrawn. I am going to withdraw  
9 it. I don't want to misquote anybody, but he had gone to even  
10 beyond the 45 degrees when he was seeing Dr. Moise and  
11 Dr. Mohamed. This would not be worse, right?

12 A. I am not sure what you talking about.

13 Q. The 30 degrees would be worse. Is that the worse he's  
14 been from all the records that you reviewed?

15 A. Yes, absolutely.

16 Q. Now, you recommend him for home exercises, correct?

17 A. Correct.

18 Q. And you indicate that the frequent lifting should not  
19 exceed five pounds. You see that?

20 A. Yes.

21 Q. Are you aware that he's able to lift more than five  
22 pounds?

23 A. I am sure he can lift more but that's my recommendation  
24 of what I want him not to do.

25 Q. You know there has been testimony that he can lift up

**DR. LERMAN - CROSS - DEFENDANT - MS. PROVOST**

1 to 10 pounds now?

2 A. I am sure. Again, this is purely my recommendation.

3 THE COURT: I apologize, Doctor. Can I just ask  
4 you to put the mic back up.

5 THE WITNESS: I start coughing. I don't want to  
6 start coughing inside this.

7 A. Yeah. That's purely my recommendation when he can lift  
8 more is based on the providers recommendation, but this is mine  
9 until again I would see the new MRIs, et cetera.

10 Q. On his own testimony, Doctor, do you know that he  
11 testified that he can lift up to 25 pounds?

12 A. Again, we are not discussing how much he can lift. You  
13 asking me about my recommendation. My recommendation is no more  
14 than five pounds.

15 Q. Doctor, between the time you saw him on August 14, 2024  
16 and September 4, 2024 before trial you did -- you referred him  
17 for an MRI; is that right?

18 A. Correct.

19 Q. Or is that someone from your office that referred him  
20 for an MRI?

21 A. No, I referred him for the MRI.

22 Q. So the signature of the prescriber that's your  
23 signature?

24 A. I don't know what you looking at.

25 Q. On the prescription, Doctor, 8/14/2024?

1 A. Can I see it again. I don't have it on me.

2 Q. You don't have the prescription?

3 A. Again, we have electronic medical records now. It gets  
4 generated. Besides any prescription we send those. This is our  
5 PA signs this.

6 THE COURT: This is what? I am sorry.

7 THE WITNESS: One our PAs signs this script.

8 Q. So it wasn't you that signed it. It was the PA. The  
9 physician's assistant?

10 A. I see my patient, I sign the note, I send out the  
11 electronic part of it and if patient specifically requests for  
12 the script it might be who is there takes care of it.

13 Q. Now, Doctor, does your -- who writes the notes you or  
14 the physician's assistant?

15 A. I write them.

16 Q. You write them. So when you indicate, Doctor, low back  
17 pain onset September 30, 2019 that was you that wrote that?

18 A. Yeah.

19 Q. Okay. I have nothing further. Thank you.

20 THE COURT: Thank you.

21 Redirect.

22 MR. LIAKAS: Just briefly.

23 REDIRECT EXAMINATION

24 BY MR. LIAKAS:

25 Q. You mentioned you only testify on behalf of your

**DR. LERMAN - REDIRECT - PLAINTIFF - MR. LIAKAS**

1 patients. Why is that?

2 A. Because at this point I am practicing physician and my  
3 goal is to be in the operating room and seeing patients and  
4 being inside the courtroom at this point in my life I am not  
5 ready for.

6 Q. Now, with regard to some period of time when Mr. Szwed  
7 reported to some of the physicians that his pain had gotten  
8 better or to some degree resolved. Do you know the status of  
9 his ability to bear weight during those periods of time?

10 MS. PROVOST: Objection.

11 THE COURT: I am sorry. Let me get the question  
12 back. I don't think there was a problem.

13 (Whereupon, the Court Reporter read the requested  
14 portion of the record.)

15 THE COURT: Sustained certainly as to form.

16 If you want to ask him a specific time period, but  
17 to just say at the time that he reported to somebody else  
18 that something happened I am not sure we can ask him to  
19 remember when plaintiff reported.

20 MR. LIAKAS: I will ask.

21 Q. Doctor, I like you to assume during the period of time  
22 that Mr. Szwed reported a decreased in his back pain he was on  
23 non-weight bearing status would that be consistent with the  
24 lumbar spine injury to your knowledge?

25 MS. PROVOST: Objection.

**DR. LERMAN - REDIRECT - PLAINTIFF - MR. LIAKAS**

1 THE COURT: I still think as to form, yeah.

2 Q. Doctor, if someone is not loading their spine by  
3 bearing weight how would that, if at all, affect their symptoms?

4 MS. PROVOST: Objection.

5 THE COURT: Overruled. How if at all would it be  
6 likely to affect him.

7 MS. PROVOST: Also outside the scope.

8 THE COURT: I don't think it's outside the scope.

9 MS. PROVOST: Of my cross.

10 THE COURT: I don't think it's outside the scope  
11 of your cross, but it's going to be one question and we will  
12 move on.

13 You didn't get an answer to your question.

14 THE WITNESS: Can I answer?

15 THE COURT: Yeah.

16 A. When someone is not bearing full weight on both lower  
17 extremities we are relying on another. Whether it's cane or  
18 another crutches so we don't have the shooting force or sagittal  
19 balancing that we always talk about. Especially, when we do  
20 deformity cases. From your head you have to have a straight  
21 line to your back which again slows direct pressure on your  
22 lower extremity.

23 When you have any kind of supporting devices there the  
24 sagittal balancing is not there. Therefore, the pressure or the  
25 vector forces are not there, therefore, you would have a phantom

**DR. LERMAN - REDIRECT - PLAINTIFF - MR. LIAKAS**

1 decreased of pain or phantom decreased of the symptomatology  
2 because you really not putting the weight of your entire body in  
3 your sagittal body.

4 Q. Thank you, Doctor.

5 THE COURT: Okay. Sir, you are excused. Thanks  
6 so much.

7 This is marked in evidence. We will take this.  
8 This is still subject to redaction?

9 MR. LIAKAS: Yes. That's marked 57.

10 THE COURT: This is one marked 57 subject to  
11 redaction and it's still subject to redaction.

12 (Whereupon, Plaintiff's Exhibit No. 57 was marked  
13 into evidence subject to redactions.)

14 THE COURT: Plaintiff, at this point want to say  
15 something?

16 MR. LIAKAS: I was going to --

17 THE COURT: This is your last witness?

18 MR. LIAKAS: I was going to ask if I can review my  
19 notes and I will rest after lunch.

20 THE COURT: Sure.

21 Can I talk to the staff for one second on the  
22 side.

23 Sit tight we just want to let you know when you  
24 can come back from lunch.

25 All right. We are going to recess now. We are



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1 going to try to be back on the bench by 1:30.

2 MS. PROVOST: Judge, real quickly. What is  
3 Exhibit 56?

4 MR. LIAKAS: 57.

5 THE COURT: 57 is the chart that was marked. It's  
6 his chart and subject to redaction.

7 The only other thing we are going to do with it  
8 and I want to finish the sentence I was saying. The only  
9 other thing we are going to do is staple it in the order they  
10 are in so the pages don't go flying. The doctor asked not to  
11 staple it until he's finish. Now we will staple and nothing  
12 will get lost.

13 We will be back at 1:30 that way we can get --  
14 defendant has a witness. We want to try to get her witness  
15 on the stand and make as much progress before we end for the  
16 day.

17 Thank you for all your work. Don't discuss the  
18 case. Don't have any contact with any outside people. See  
19 you after lunch. Thanks very much.

20 COURT OFFICER: All rise. Jury exiting.

21 (Whereupon, the jury exited the courtroom.)

22 (Whereupon, a luncheon recess was taken.)

23 **A F T E R N O O N S E S S I O N**

24 (Whereupon, the following takes place on the  
25 record, in open court, in the presence of the Court, and the

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1       respective attorneys.)

2               THE COURT: We are on the record. I understand  
3       you have something you want to bring up that you believe you  
4       saw and you believe you perceived. Go ahead.

5               MS. PROVOST: It's not something I believe.

6               THE COURT: Just tell me what your concern is.

7               MS. PROVOST: I was informed over the lunch break  
8       that Juror No. 1 communicated something to Mr. Liakas. She  
9       mouthed something. He was stuck on a word. He was trying to  
10      figure out the word and she mouthed something to him and he  
11      withdrew the question and he continued to talk and on that  
12      basis I am moving for a mistrial.

13              I will allow --

14              THE COURT: There is no allow. Only I allow  
15      things in the courtroom. If you want to ask something of me,  
16      permit something of me. Something like that.

17              MS. PROVOST: If your Honor wishes to you can  
18      inquire of Ms. Hassenfratz what she saw, but I have been  
19      instructed that I have to make the record.

20              THE COURT: Sure. So I appreciate you bringing it  
21      to my attention.

22              I want to make sure that I understand correctly  
23      that you or your assistant sounds like your associate  
24      believes she saw a juror mouth a word related to a question  
25      that in the end was not asked because it was withdrawn. Is

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1           that it? Just yes or no. Is that it?

2                   MS. PROVOST: That was my statement but --

3                   THE COURT: Is that an accurate description. You  
4 believe the witness mouthed the word. That was it. You  
5 don't know what the word was. That the juror mouthed a word  
6 while Mr. Liakas was asking a question that she did in front  
7 of everybody, that the question was then withdrawn and not  
8 asked.

9                   Do I understand?

10                  MS. PROVOST: That's not what I said.

11                  THE COURT: Let me understand what you think you  
12 saw, Chloe.

13                  MS. HASSENFRATZ: To my recollection Mr. Liakas  
14 was stuck on a word. I believe it was morphology or  
15 something and ultimately that is when she mouthed some word.

16                  THE COURT: In front of everybody, not in secret,  
17 not in private to the plaintiff's attorney?

18                  MS. HASSENFRATZ: Right. He also withdrew that  
19 question and rephrased and asked it in a different phrasing.

20                  THE COURT: Without the word morphology?

21                  MS. HASSENFRATZ: Correct.

22                  THE COURT: Back to my original point. The  
23 allegation is that a juror mouthed a word in open court in  
24 front of everybody in the direction of the plaintiff's  
25 attorney to a question that in the end was not asked. Yes.

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1 MS. HASSENFRATZ: Then he rephrased, right.

2 THE COURT: Was not asked.

3 There is no allegation that I heard so far and I  
4 just want to clarify. You have no allegation that Mr. Liakas  
5 responded in any way. That Mr. Liakas has had any private or  
6 anybody from his office or the plaintiff himself had any  
7 private communication with any juror, correct?

8 MS. HASSENFRATZ: Right.

9 THE COURT: That, No. 1, is communicating with  
10 plaintiff's counsel, plaintiff's counsel staff in any way  
11 outside the courtroom, correct?

12 MS. HASSENFRATZ: Correct.

13 THE COURT: Great. The motion is denied. The  
14 motion is denied.

15 We have on a fairly regular basis times when there  
16 is a translator. You know, foreign language interpreter in  
17 the courtroom and you will see witnesses -- withdrawn.

18 Jurors who speak that same language make gestures  
19 making, you know, mouthing words to themselves maybe the  
20 interpreter has spoken the wrong word.

21 We see lawyers, judges, people correct a word,  
22 repeat a word they think somebody said wrong, whatever, all  
23 the time. I would be very concerned if I thought that there  
24 was an allegation that the juror had attempted to contact  
25 Mr. Liakas outside. Had attempted to give Mr. Liakas

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1 substantive advice. Had used her medical education in  
2 someway to influence the outcome of the trial. That  
3 Mr. Liakas or his staff had reached out to a juror or had  
4 even thanked the juror in private for saying the word out  
5 loud in private but that is not anything. That is not  
6 improper. That is not volitional as far as I can tell.

7 The only way to inquire of the juror is to accuse  
8 the juror which we still don't grant mistrial. Nearly  
9 guarantee that the juror has feelings about one side or the  
10 other. I can't imagine that is productive.

11 I don't even know what word she said except you  
12 think she was trying to say the word morphology at the time  
13 it happened. That is not improper. No ex parte. It is not  
14 anymore than a juror sneezes we all say God bless you.  
15 Gazoon tight we had some improper interaction with the juror.  
16 The motion is denied.

17 Mr. Liakas.

18 MR. LIAKAS: Plaintiff would like to move in  
19 limine with regard to Dr. Wolstein's report which was not  
20 e-mailed, not exchanged. It was E-filed last night at  
21 10 p.m. It's a 30 page addendum which includes opinions that  
22 were not expressed until or I should say -- I am sorry.

23 THE COURT: Reports that were filed after business  
24 hours the night before. The night before a witness  
25 testimony?

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1                   Now, I am not saying that's what happened, but at  
2                   least as a general principle we are not amending our  
3                   witnesses reports at ten o'clock the night before they  
4                   testify.

5                   You don't have to respond to it yet. I'm going to  
6                   give you a chance to respond. I am not saying the witness  
7                   has to happen. Just a general principle.

8                   What's the issue? You have a 3101 for this  
9                   witness?

10                  MR. LIAKAS: I have.

11                  THE COURT: You have an original report?

12                  MR. LIAKAS: Yes.

13                  THE COURT: When was that exchanged?

14                  MR. LIAKAS: The report is dated November 11th. I  
15                  believe it was dated November 11th of this year.

16                  The report is dated November 11, 2022. I believe  
17                  it was exchanged about two years later. I am sorry. Yeah.

18                  THE COURT: In November 2024 while we were already  
19                  on trial?

20                  MR. LIAKAS: No. I don't have the exchange  
21                  information. It was quite sometime later. I actually  
22                  rejected the original.

23                  THE COURT: You did. You gave a written objection  
24                  to the original report?

25                  MR. LIAKAS: Yes.

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1 THE COURT: Was there any motion practice  
2 thereafter?

3 MR. LIAKAS: This is the motion practice.

4 THE COURT: I know that. Meaning at the time your  
5 objection -- you saying your motion if I understand it  
6 correctly now is to preclude the addition of this last minute  
7 which you described as a last minute 30 page addendum to the  
8 witness' report?

9 MR. LIAKAS: Correct.

10 THE COURT: It sounds like I should try to  
11 preclude the witness entirely.

12 MR. LIAKAS: I didn't get to that part yet.

13 In violation of the PC and CC order the expert's  
14 3101 was being exchanged -- here it is. August 14th of 2024.

15 THE COURT: Was that before or after Judge  
16 Fisher's last word on these questions of disclosure?

17 MR. LIAKAS: Before.

18 THE COURT: So why didn't you move at the time --  
19 cross move to preclude this witness given that you rejected  
20 their 3101 exchange?

21 MR. LIAKAS: Your Honor, I given them an  
22 opportunity to cure. It they haven't.

23 THE COURT: You see what I am saying. I am not  
24 saying you can't. This is the same issue and I also note for  
25 the record that you not submitting papers on this motion and

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1 I haven't accepted papers on this motion and at least you  
2 preserved your objection by objecting to the 3101 original,  
3 but, I guess, I am in a loss four weeks into this trial as to  
4 why nobody moved when the other motions were being made with  
5 respect to discovery so we can have a definitive answer and  
6 it's not because I going along with Judge Fisher, but we  
7 would have to decide before jury selection.

8 Did you ask counsel to cure it?

9 MR. LIAKAS: In the reject?

10 THE COURT: In the reject you said please cure  
11 this issue?

12 MR. LIAKAS: I outlined it. I don't know that I  
13 said it specifically.

14 THE COURT: Let's do it in the order it was  
15 brought up rather than chronological order in which things  
16 are alleged to happen in general or your office uploaded a  
17 new addendum to your expert's report last night.

18 MS. PROVOST: So the updated report is not -- it  
19 doesn't have any new information other than, Judge, IMEs that  
20 were done after Mr. Wolstein interviewed the plaintiff and  
21 the social worker information because we didn't have that  
22 before trial.

23 THE COURT: I don't think you didn't have it  
24 before trial. That's the subject of motion. That's before.

25 MS. PROVOST: No, the social security, Judge. We



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1 had the W2s and we initially used only the W2s for 2017 and  
2 2019. We never had 2018.

3 So in effect, Judge, he now has the 2018 income  
4 that he didn't have before.

5 THE COURT: How does that become a 30 page  
6 addendum?

7 MS. PROVOST: It's not a 30 page.

8 THE COURT: Once plaintiff rejected our other  
9 report in August or whenever it was what steps did you take  
10 to cure plaintiff's objections to the report?

11 MS. PROVOST: You mean to cure the objection that  
12 it's late. That was the --

13 THE COURT: That it was late and otherwise  
14 deficient.

15 MS. PROVOST: There was no other deficiency that I  
16 am aware of.

17 MR. LIAKAS: The objection I made was that  
18 deficient and it violated the PCC and CC order.

19 They basically held onto the report for almost two  
20 years and that was the issue and prior, right before trial  
21 they served that initial report which is 25 pages and last  
22 night despite --

23 THE COURT: I apologize. This is the economist?

24 MS. PROVOST: No, vocation rehabilitation.

25 MR. LIAKAS: Last night -- I didn't get an e-mail.

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1 I didn't get a copy this morning. There is no affidavit of  
2 service attached to the addendum. It is 30 pages.

3 I am looking at the document right now. The last  
4 page is page 30. It was filed at 10 p.m. last night and it  
5 says it was dated November 7, 2024 and it was updated  
6 yesterday at some point time. It says December 5, 2024.

7 THE COURT: You can't add new reports the night  
8 before the witness is suppose to testify. You can't do that  
9 and as to the social security records -- as to the social  
10 security records for the 2018 income that has been had I  
11 think since how far many weeks ago when it was originally  
12 marked for identification and when your office was offered an  
13 opportunity to copy the records. Is that wrong, is that not  
14 when it was submitted?

15 MR. LIAKAS: About what?

16 THE COURT: The social security records to the  
17 general point to counsel's point that the social security,  
18 that she didn't have the 2018 income claims, right. 2018  
19 income data until the time of trial.

20 I thought I recall that the social security  
21 information was given -- was exchanged or brought to court  
22 anyway some number of weeks ago not in the last few days.

23 MR. LIAKAS: It was, your Honor.

24 THE COURT: When was that?

25 MR. LIAKAS: When we were first assigned and that

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1 box that is still sitting in the back of the courtroom.

2 THE COURT: That's all prior to the date that  
3 defense counsel's staff was given access to come in and copy  
4 and scan records?

5 MR. LIAKAS: Yes. They were given authorization  
6 for the tax returns and I believe the W2s which they included  
7 for the years that were applicable.

8 THE COURT: Including 18?

9 MR. LIAKAS: Including 18. Whether or not they  
10 got them I can't speak to that but I gave authorization for  
11 it. That's all --

12 THE COURT: I know and Judge Fisher in the case  
13 you compiled with the order.

14 MS. PROVOST: May I speak?

15 THE COURT: You may.

16 MS. PROVOST: So as you aware, Judge, we never had  
17 the tax returns until right very close to trial and you, your  
18 Honor.

19 THE COURT: I thought the issue --

20 MS. PROVOST: That's what you were told but that's  
21 not true. They needed the proper tax returns.

22 Mr. Wolstein -- Dr. Wolstein actually. Last night  
23 when I was talking to him I realized that he only had 2017  
24 and 2019.

25 THE COURT: That's on him.

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1 MS. PROVOST: Judge.

2 THE COURT: That's on him. That's on him for not  
3 coming back to you and saying I don't have the set of  
4 records.

5 MS. PROVOST: It's the law office's fault, Judge,  
6 not the witness.

7 THE COURT: That's right.

8 MS. PROVOST: However, there is no prejudice to  
9 plaintiff because it includes information that he would want.

10 THE COURT: No, no. He doesn't need your witness  
11 to be fully prepared. He needs his witness to be fully  
12 prepared. If your law office failed to provide your expert  
13 with a set of records and as a result of that didn't opine  
14 upon them in a timely way that's between you and your law  
15 office and your client and your carrier. That has nothing to  
16 do with the requirement for the plaintiff or the Court to  
17 accept it.

18 I appreciate -- by the way, I say this genuinely.  
19 I appreciate you owning into law the fact that your witness  
20 didn't get or didn't ask for the missing records is on nobody  
21 but your witness and your office and that is not something  
22 they required to allow you to amend at ten o'clock the night  
23 before trial or two weeks before trial or anything else.

24 So that is precluded and if your witness says I  
25 didn't have all the records that's going to be a topic of

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1 cross-examination and that's unfortunate, but that's, again,  
2 between you, your office, your clients and your carrier.

3 That's it. Let's get the witness.

4 MS. PROVOST: May I just add one more thing?

5 THE COURT: No.

6 We are on the record.

7 Ms. Provost, I advised you already based on my  
8 ruling that anything that was added as a supplemental at ten  
9 o'clock last night is precluded. That anything that relates  
10 to records that you said on the record that you acknowledge  
11 were a law office failure or law office failure to provide to  
12 the witness that you now trying to supplement the witness  
13 report by handing late and exchanging late is precluded.

14 I appreciate your were forthwith that it was your  
15 law office's failure to provide it. I apologize for what I  
16 am about to say to this witness.

17 I am sorry you didn't say, hey, I am missing this  
18 one year. However many years you went through the report  
19 when you asked for it but here is where we are. You can't  
20 call an audible and correct the deficiency particularly where  
21 counsel objected and said that the report was insufficient  
22 and actually and said you were exchanging things late and he  
23 preserved his right.

24 He is correct. You acknowledged the issue with  
25 your office and I appreciate that but here is where we are.

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1 You may want to take your witness in the hallway and talk to  
2 him because otherwise this is going to be an objection. At  
3 this time we are off.

4 COURT OFFICER: Your Honor, ready for the jury?

5 THE COURT: Yes.

6 (Whereupon, the jury entered the courtroom.)

7 THE COURT: Thanks very much. You can all be  
8 seated.

9 Defense, call your next witness into the record.

10 THE COURT: I apologize. He said it off the  
11 record but not to the jurors.

12 Does the plaintiff have any other witness at this  
13 time?

14 MR. LIAKAS: No, your Honor. Plaintiff rest.

15 THE COURT: Okay. You rest?

16 MS. PROVOST: Any motion?

17 THE COURT: You can make motions after if you  
18 want. Go ahead.

19 MS. PROVOST: Dr. Dan Wolstein.

20 THE COURT: Call Dr. Wolstein.

21 THE CLERK: You swear or affirm the testimony you  
22 are about to give would be the truth, the whole truth and  
23 nothing put the truth?

24 THE WITNESS: Yes.

25 D R. D A N W O L S T E I N, having been first duly sworn,

**DR. WOLSTEIN - DIRECT - DEFENDANT - MS. PROVOST**

1 was examined and testified as follows:

2 THE CLERK: In a loud clear voice state your name  
3 and address.

4 THE WITNESS: Dan Wolstein, W-o-l-s-t-e-i-n. 1  
5 University Plaza, Suite 302, Hackensack, New Jersey 07601.

6 THE CLERK: Your first name is Dan?

7 THE WITNESS: Dan.

8 THE CLERK: Not Kincaid?

9 THE CLERK: No.

10 THE COURT: Thank you. You may proceed.

11 MS. PROVOST: Thank you, your Honor.

12 DIRECT EXAMINATION

13 BY MS. PROVOST:

14 Q. Is it Dr. Wolstein?

15 A. Yes. Dr. Wolstein.

16 THE COURT: PhD, M.D., something else?

17 THE WITNESS: PhD.

18 Q. Dr. Wolstein, could you please tell the Judge, the  
19 Court, what your profession is?

20 A. I am a rehabilitation counselor and a consultant  
21 evaluator rehabilitation counselor. I work with individuals  
22 with disabling conditions that are seeking in some way to achieve  
23 work force reentry or in other words reintegrating into the  
24 labor market.

25 As a consultant evaluator that's what I am here today

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1 as I testify before you. Using the same skill sets I will  
2 evaluate the individual with regards to their ability to work  
3 and I will testify in court as such.

4 MR. LIAKAS: Your Honor, does the witness have a  
5 laptop?

6 THE COURT: Do you have a laptop in front of you?

7 THE WITNESS: Yes.

8 THE COURT: You need to close it.

9 Q. Dr. Wolstein, in addition to evaluating individuals for  
10 testimony in court do you do anything else within your practice?

11 A. Yes. Aside from professional activities like trade  
12 conferences I also have a clinical case load. So I meet with  
13 individuals who are seeking to return to work.

14 I also joined a federal program. The Office of  
15 Worker's Compensation program. So I do vocational testing.  
16 Case workers will send me their consumers or their clients and I  
17 will do some testing and I will make recommendations for  
18 occupations or retraining efforts. That would be a clinical  
19 case load because there is no court litigation proceedings  
20 attached to it.

21 Q. And, Doctor, can you tell us a little bit about your  
22 educational background?

23 A. I obtained a Bachelor's from Ramapo College, Master's  
24 degree from Rutgers University and back then it was the  
25 University of Medicine and Dentistry of New Jersey. I obtained



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1 a rehabilitation degree, doctorate, from East Carolina  
2 University. Major area of study rehabilitation counseling and  
3 administration and I also have six or seven evaluation  
4 credentials or licensures.

5 Q. And just to be clear, Doctor, you're a PhD not an M.D.,  
6 correct?

7 A. Right. The M.D. would be my twin brother. I don't  
8 make medical determinations. I just have a PhD.

9 Q. And at some point will your brother be joining you?

10 A. Yes. Actually, I am putting him through -- my company  
11 is putting him through a Master's program and he will eventually  
12 be joining as a medical and vocation rehabilitation expert  
13 sometime hopefully within the next year.

14 Q. And can you --

15 THE COURT: Sorry. Someone's phone is ringing.  
16 If you would shut that off.

17 THE WITNESS: Not me.

18 THE COURT: Keep going. I'm sorry.

19 Q. The name of your -- well, let me ask you this. What is  
20 your professional experience?

21 A. So I started working in the field under  
22 Dr. Charles Kincaid in 2006. Back then it was Kincaid  
23 Vocational and Rehabilitation Services. As I graduated from  
24 different educational programs I kind of ascended through the  
25 career ladder rising to higher levels of responsibility.

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1           So I started initially with just clerical and  
2 administrative work, then I started doing research. Eventually,  
3 I started doing interviews. When I obtained my PhD I became a  
4 signatory on the reports and at some point after 2018 when I  
5 assumed leadership of the company I was testifying as well.

6           I should say that sometime in the 2015 to 2018 range in  
7 that time period I was also testifying in hearings for the  
8 Social Security Administration. So disability hearings. That's  
9 when an administrative law judge would call me up and ask me  
10 questions about the labor market and I would answer to the best  
11 of my ability about different hypothetical questions.

12         Q.     Do you have any additional licenses and certificates?

13         A.     Yes. I have five, six, maybe seven credentials. I am  
14 a certified rehabilitation counselor, certified life care  
15 planner. I was on the registry. It's no longer active but it  
16 was the professional vocational evaluation registry. I am a  
17 licensed rehabilitation counselor in New Jersey. A forensic  
18 vocational expert and part of the American Board of Vocational  
19 experts as a diplomate. I am also a certified vocational  
20 evaluation specialist.

21         Q.     And within your role as a vocational rehabilitation  
22 specialist do you have any leadership roles?

23         A.     Yes. So I belong to a few different or a couple of  
24 different organizations. The one that I believe is most  
25 important is the American Board of Vocational experts. It's

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1 like a board certifying agency.

2 So if you went to have a doctor you may -- it may be  
3 important to you that that doctor is part of the American Board  
4 of Orthopedist or the American Board of Anesthesiology. That  
5 means that they met the minimal eligible criteria to be board  
6 certified because it's a board certifying agency.

7 The American Board of Vocational experts is a board  
8 certifying agency for vocational experts. I started out there  
9 as part of just the general membership. Shortly after joining  
10 the general membership I joined the board, so a leadership  
11 position as a director at large.

12 So attending board meetings, talking about the general  
13 direction of the organization. I worked my way onto the  
14 executive committee and treasurer. So that's the top four or  
15 top five positions on the board. Then I was elected by the  
16 board to become president elect which I served for a two year  
17 tenure. As I testify here before you I assumed my role as a  
18 president which I will hold until March of that organization.  
19 At which point I will transition over for past president for two  
20 years.

21 Q. And have you testified in court before?

22 A. Many times.

23 Q. And have you ever given instruction talk?

24 A. Yes. I've instructed in various capacities. When I  
25 was at East Carolina University for one or two semesters I was a

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1 graduate assistant for occupational rehab and occupational  
2 analysis, then I taught my own course to undergraduate students.  
3 That was the introduction to rehabilitation. Then I became  
4 somewhat like an adjunct professor for the University of Florida  
5 teaching introduction to forensic rehabilitation and I am also  
6 part of the education committee. So I do try to give back to  
7 the field at the American Board of Vocational expert or ABE. So  
8 if one were to take that intermediate forensic curriculum you  
9 will hear my voice on most of the power points.

10 Q. You've done presentations then?

11 A. I do presentations. I've done presentations at Ramapo  
12 College, at Rutgers. I have done presentations at conferences.  
13 I've done presentations at -- one of the presentations I did was  
14 with a very well respected figure in my field. His name is Jeff  
15 Truthan. He owns the company SkillTRAN which is a software  
16 program. A suit of products used by many vocational experts.

17 I did a little bit of research with him and I presented  
18 at the North Carolina conference National Organization of Social  
19 Security Claimant's Representatives. I am a presenter. I  
20 sometimes go to different places and present my research. I  
21 presented at the Colorado State Bar Association on some research  
22 I published. Just various experiences presenting.

23 Q. Doctor, given your credentials in the field of  
24 vocational rehabilitation have you always been qualified as an  
25 expert when you appear in court?

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1           A.       Yes. On every occasion in which I been offered to the  
2 court.

3                   MS. PROVOST: Your Honor, at this time I offer  
4 Dr. Wolstein as an expert in vocational rehabilitation.

5                   MR. LIAKAS: No objection.

6                   THE COURT: Without objection he's accepted as an  
7 expert.

8           Q.       Doctor, are you being compensated for your time today?

9           A.       Yes, I am.

10          Q.       And how much are you being compensated?

11          A.       \$6,000 for the court appearance, two hours of travel,  
12 about three and a half hours of trial preparation.

13          Q.       And in addition to the trial preparation and the travel  
14 have you also invoiced for your review of records and your  
15 report?

16          A.       Yes. For initial vocational evaluation, report and a  
17 second addendum report as well, yes.

18                   MR. LIAKAS: Objection.

19                   THE COURT: Sustained.

20          Q.       And, Doctor, as an expert in your field you're  
21 constantly retained by law firms, yes?

22          A.       Yes, I am.

23          Q.       And you been retained by both plaintiffs and  
24 defendants, yes?

25          A.       Yes. About 50 percent of the time I am retained by

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1 plaintiffs and about 50 percent of the time I am retained by  
2 defense counsels.

3 Q. Doctor, have you ever been retained by the Liakas firm?

4 A. Yes.

5 Q. And you testified for them?

6 A. I did not.

7 Q. Do you know how many cases you've worked on for the  
8 Liakas firm?

9 A. Not offhand, no.

10 Q. Can you estimate?

11 A. Probably under five times.

12 Q. And I am going to ask you about some experts that have  
13 appeared here at trial and just I am going to ask you to let me  
14 know if you familiar with any of these persons. Have you ever  
15 heard of Ms. Kristin Kucsma?

16 A. Yes. I like her very much.

17 Q. And do you know which side she typically testifies for?

18 A. In my experience working with her usually I believe she  
19 is usually retained by plaintiffs. Although I have seen her on  
20 both sides, but I think the majority of the time I see her  
21 retained by plaintiff's counsel.

22 Q. What about doctor -- actually, Mr. -- formally  
23 Dr. Harold --

24 MR. LIAKAS: He's a doctor.

25 THE COURT: He's not formally doctor and this was

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1 asked of him on direct and he said he is a doctor but he  
2 doesn't practice as a chiropractor.

3 He didn't mind you kept calling him Mr. He is a  
4 doctor. He has the degree and I believe he still has the  
5 license but he has the degree not Mr.

6 MS. PROVOST: I apologize.

7 THE COURT: The objection is sustained.

8 Q. Doctor, do you know or have you heard of  
9 Dr. Harold Bialsky?

10 A. Yes. I like Dr. Bialsky as well.

11 Q. Do you know what he is a doctor in?

12 A. Chiropractic care if I recall correctly.

13 Q. Do you know him to be a vocational rehabilitation  
14 expert as well?

15 A. Yes, I've come across him in the field before.

16 Q. What about a Dr. Stuart Kahn?

17 A. Yes. My understanding if I recall correctly I believe  
18 I've seen him on both sides. I also I believe I may have seen  
19 some of his life care plans.

20 Q. And what about Dr. Jessica Gallina?

21 A. Yes. Orthopedist I believe if I can recall correctly.  
22 I wouldn't be able to tell you whether I seen her more on  
23 plaintiff's side or defense side.

24 Q. And by the way, the experts and the physicians that I  
25 am asking you about some of them have not yet testified but we

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1 wouldn't be able to have you back so I am asking you now. What  
2 about a Dr. Jarod Brandoff?

3 A. Yes. If I recall either pain management or possibly  
4 ortho, but I believe I usually see him on the defense side.

5 Q. And Mr. Stephen Dripps have you ever heard of him?

6 A. I don't recall Dr. Dripps.

7 Q. Do you know have you ever heard of his partner Chad  
8 Staller?

9 A. Yes. Chad I've spoken to over the phone a few times.  
10 Economist.

11 Q. What about a doctor Jonathan Luchs?

12 A. Yes. I've come across that name maybe a hand full of  
13 times.

14 Q. Ms. Kim Kushner?

15 A. I believe she is a nurse. The last case I was on where  
16 I saw her name I believe she was hired by the plaintiff and I  
17 was retained by defense.

18 Q. And have you ever heard of a Dr. Kaushal Shah?

19 A. It doesn't ring a bell at this time.

20 Q. And, Doctor, at my firm's request did you conduct a  
21 vocational evaluation of and earning capacity for Mr. Szwed?

22 A. Yes, I did.

23 Q. And can you please tell us when and where that was  
24 done?

25 A. So that was off a video conference on January 19th of



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1 2022. So we are each in our respective locations so it's just  
2 virtually held.

3 Q. Does your evaluation involve any type of physical  
4 examination?

5 A. No. It's just a verbal interchange. So questions and  
6 answers.

7 Q. And can you tell us what your methodology is to do the  
8 evaluation?

9 A. Yes. I try to simplify it so it's not such a mouth  
10 full because I can go on and on about it.

11 Basically, I do a record review and some form of  
12 interview. Then I use government data. It's called the  
13 Dictionary of Occupational Titles. In the same way Merriam  
14 Webster dictionary defines a word the dictionary of Occupational  
15 Titles defines an occupation so I can understand the different  
16 categories of occupation, the amount of physical exertion, the  
17 amount of intentional work typically required of an occupation.  
18 I use the dictionary of occupation title to occupy passwords  
19 that set the baseline so I can see what the individual is  
20 capable of.

21 If I interview somebody who is an attorney I know using  
22 the Dictionary of Occupation Title if there is a lot of  
23 intellectual requirements. If I interview a construction worker  
24 such as in this case I know there is a great deal of physical  
25 exertion.

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1                   We have different categories. Mental and physical  
2 categories. I use the Dictionary of Occupation Titles to  
3 compare against the world of work, right. So I understand like  
4 a baseline this person demonstrated the ability to work with. I  
5 have physical labels and labor, then I look at the universal of  
6 jobs. I see what they have access to. What they can perform at  
7 similar levels.

8                   In other words, if you evaluating an attorney I will be  
9 able to say, well, their baseline matches that of an attorney  
10 and everybody less. Like they can be a paralegal or an  
11 administrative assistant. You know which jobs in the profession  
12 labor force with their skills and ability match. Where with the  
13 construction worker you know what jobs in the blue collar labor  
14 force would those match.

15                   So basically what that is called labor market access  
16 and the analysis in order to do it is called a transferable  
17 skill analysis. It sounds fancy. It's kind of court speak  
18 really.

19                   What it is, is how your skill and ability penetrates  
20 the job labor market. What jobs can you do. Again, I use the  
21 work history to set the baseline and then I review medical  
22 records to come up with a second profile which is a post injury  
23 profile.

24                   So in this case looking at the past work of  
25 construction worker it's at the highest level physical exertion

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1 or they heavy.

2 After reviewing the medical records I limited Mr. Szwed  
3 to the lowest level of physical exertion or sedentary or light  
4 work. Those are the two lowest categories going upwards.  
5 Medium, heavy and very heavy. Very heavy is the most essential.  
6 That's the majority of my methodology.

7 After the transferable skills analysis is done that's  
8 when I render my opinion within a reasonable degree of  
9 vocational certainty as to the type of work an individual can  
10 perform and the type of wages that can be expected in those  
11 occupations.

12 Q. And before we get to the level that you assessed  
13 Mr. Szwed at did you take some background information on him  
14 such as education and as you said before?

15 A. Demographic background and other background details.

16 He was born in Poland. I believe he had completed up  
17 to the 10th grade and if I recall correctly had eventually  
18 obtained a general equivalency diploma, then he did some  
19 construction training. Maybe the OSHA 30 safety class and then  
20 as far as his work history, because, again, in a vocational  
21 report the employment history is a critical aspect of the  
22 analysis.

23 So I understood during my interview with him that he  
24 had done construction work, some handy man work, residential  
25 sheetrock installing. So I have an entry from the Dictionary of

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1 Occupation Titles that I use for that work and at the time of  
2 his injury he was a concrete and cement laborer. So I have  
3 titles for that as well. That's pouring concrete, smoothing out  
4 concrete. It could be different projects like sidewalks that  
5 are made of concrete, but it can be concrete that's used in  
6 pouring the foundation for buildings or columns for high rise  
7 buildings, but that is the type of concrete work.

8 I summarize that background using the Dictionary of  
9 Occupation Titles, but that's a general overview of some of the  
10 details that I glean during the vocational interview. I also  
11 ask about pain levels and impairments, current doctors.

12 Q. And by the way you said he completed 10th grade you  
13 said?

14 A. That's what my report reflects.

15 Q. And where did he go to high school?

16 A. Health Professional and Human Services High School in  
17 New York, New York.

18 Q. And in your interview of or your evaluation of  
19 Mr. Szwed did you learn anything about whether or not he had  
20 obtained any certificates for his field?

21 A. If I can just refresh my recollection. I don't see any  
22 certificates reflected in my report.

23 Q. Did he complete any OSHA training classes?

24 A. I couldn't hear you.

25 Q. OSHA 30.

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1 A. The OSHA 30 hour class, yes.

2 Q. And to your knowledge joined the union as well, right?

3 A. I believe he was in the third year of his  
4 apprenticeship.

5 Q. Now, Doctor, did you evaluate and determine what types  
6 of jobs Mr. Szwed would qualify for?

7 A. After being injured?

8 Q. After being injured.

9 A. Right. Post injury, yes. So that's the transferable  
10 skills analysis. Preinjury set by the baseline I look at  
11 sedentary and light work least exertional levels. So, again,  
12 the transferable skills analysis is how your skill penetrates  
13 the labor market.

14 In short basically construction work doesn't really  
15 translate into sedentary work. So it matches two few  
16 occupations at the sedentary level to consider him employable  
17 without retraining.

18 In other words, he would need some type of retraining  
19 or course work or vocational rehabilitation services and that's  
20 basically me and people that perform what I do but in a clinical  
21 role. So working with a counselor to retraining or to do  
22 simulation interviews or provide information about the labor  
23 market.

24 So, again, working with a counselor would probably be  
25 most ideal at the sedentary level because he doesn't have any

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1 real residual employment. That also means that one would need  
2 to reestablish. So if I don't have any transferable skills at  
3 the sedentary level but I become a receptionist or secretary  
4 those are sedentary jobs and now you have the market training.

5 At the light level what I found for post injury  
6 employment his profile matched maybe somewhere between 20 to 30  
7 percent of the preinjury profile. So in other words there is  
8 residual skills that you can use to return to work at the light  
9 level. That might be something like light jobs.

10 You can consider those jobs where you are on your feet.  
11 So it can be like security guard or a fast food type of -- fast  
12 food worker. A gate guard or cashier. Those are some of the  
13 light jobs that would be available or were likely included in  
14 the output of the transferable skill analysis.

15 Q. And, Doctor, just to go back a little bit. When you  
16 reviewed his work experience did you know what his duties and  
17 responsibilities were in the positions that he has held in the  
18 past?

19 A. So for the construction work where I believe he was  
20 working in his father's company installing sheetrock I believe  
21 there is some light plumbing, connecting pipes. There are some  
22 light electrical. So that could include wiring of switches,  
23 outlets, plugs. Those types of electrical items.

24 Also there was some painting I believe in that line of  
25 work. It sounded more residential. So working in home

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1 renovations and things like that.

2 The cement, concrete labor those responsibilities  
3 included I believe working with assisting some of the carpenters  
4 but also demolition laborers. A lot of times they transport  
5 materials around the work site. He reports he was moving rebars  
6 and those are the structural steel bars that add structural  
7 support and they usually put in the concrete columns before they  
8 poured.

9 Q. And so given your description of the jobs that he can  
10 now do post accident I am going to ask you to assume, Doctor,  
11 that there has been testimony from the plaintiff and the  
12 plaintiff's wife that the plaintiff has applied for certain jobs  
13 and I am just going to give you an example of some and you tell  
14 me whether it fits the type of employment that Mr. Szwed is  
15 capable of doing based on the assessment.

16 For example, TV and internet installation technician.  
17 What type of job would that be?

18 A. That likely falls outside of sedentary or light work.  
19 So it's probably medium work. In other words, it's a little bit  
20 more exertional because in my experience interviewing these  
21 types of individuals they sometimes have to dig trenches or  
22 bring the signal from outside the home, get it into the hall,  
23 connect some TV. It's a little bit more exertional.

24 Q. What about if their application included as an  
25 apartment renovation project manager?

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1           A.       It would depend the specific requirements of the  
2 position, but if there is some renovation going on that's  
3 usually more than light work. It's more exertional. It depends  
4 on the actual job responsibility. If you doing taping that's  
5 not as exertional or as laborious, but if you doing something  
6 like demolition that can be heavy.

7           Q.       And what about a job such as front desk and social  
8 media assistant?

9           A.       So that's less exertional. That would fit into  
10 sedentary or light work. One would be using computer skills  
11 cause social media is used on computer platforms like your  
12 cellphone or laptop or desktop computer but it's less  
13 exertional.

14          Q.       And assuming there has been testimony that Mr. Szwed  
15 doesn't use the computer how would this translate to his ability  
16 to do that?

17          A.       If he's not using -- I consider cellphones a computer  
18 too. It's a smaller computer and it's not used more  
19 responsible. It's typically catered to a desktop or laptop  
20 computer, but some responsibilities can be performed through a  
21 cellphone like communication, e-mails, but in that case like the  
22 graphic or social media, that type of thing, some computer  
23 training may be indicated. So usually these skills would be  
24 learned either by a short formal training or it can be learned  
25 on the job. It depends.



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1 Computer programming is something that I would  
2 recommend. I wouldn't be able to do computer programming, but  
3 that's more like you working with computer language and it's  
4 very, very -- it's like learning a second language if you will,  
5 but using a number of user platforms. You just clicking and  
6 using different functions that have already been developed by a  
7 software engineer. Those types of skills in my experience can  
8 be learned with training, you know, within three to six months.  
9 It may take some time.

10 I've testified in the past that repetition is the  
11 essence of learning. Meaning sometimes these skills need to be  
12 incorporated over a certain number of months and need to be  
13 learned over time, but, you know, it would, again, require a  
14 little bit of training or computer skills.

15 Q. That would be the same for like a position of  
16 secretary?

17 A. Secretary one of the things that is useful. Computer  
18 skills that are useful for being a secretary is telephone and  
19 communication skills, but also going through a typing class and  
20 typing classes are available online. So you can log onto  
21 various websites or you can use an internet search engine and  
22 you just search for typing tests and, again, repetition is the  
23 essence of learning. So doing that for a certain period of time  
24 to become a better typist it would be good or it will be helpful  
25 or it would be an asset searching for work as a secretary or a

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1 receptionist or administrative assistant. Some type of office  
2 work.

3 Q. Mr. Szwed testified he can cook and there is an  
4 application for him to be a pizza cook. What do you think about  
5 that job?

6 A. Pizza baker if I recall correctly is classified in the  
7 Dictionary of Occupation Titles as medium work. So if I were  
8 working clinically I would probably recommend a cook that's less  
9 exertional than a pizza baker. They throwing dough into the air  
10 and that can be problematic for range of motion issues, but  
11 there are other types of short order cooks that can be less  
12 exertional. Again, my experience is that pizza baker is medium  
13 work if I recall correctly.

14 Q. And TV and internet installer is that light sedentary  
15 or something else?

16 A. No, again, that can require digging ditches. It can  
17 require climbing telephone poles. So it's more exertional. I  
18 would probably stick to something a little bit, again,  
19 sedentary, light.

20 Q. Would that be the same thing for an apartment  
21 renovation project manager?

22 A. If you doing the management and not the physical  
23 renovations then it can be consistent with sedentary and light  
24 work. If you going to be doing the actual labor that's more  
25 exertional than light work.

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1 Q. Dr. Wolstein, I believe you answered this already. I  
2 am going to ask you to assume that there has been testimony from  
3 plaintiff's vocational rehabilitation expert with respect to  
4 computers. That he can only do two finger typing. What is your  
5 assessment of that?

6 A. Well, a typing class would -- again, repetition is the  
7 essence of learning. So a typing class could be a good thing  
8 for learning. Settle your hands and your fingers on the home  
9 row which I think those are the typing keys A, S, D, F and maybe  
10 J, K, L and semi colon. That's where you should be situating  
11 your hands and a typing class can help one to situate their  
12 hands properly so then they would be able to be more productive  
13 and type at a faster pace.

14 Q. Are those classes or trainings that you speaking of is  
15 that a part of vocational rehabilitation purposes?

16 A. Vocational rehabilitation services would connect such  
17 an individual, such services. So retraining efforts the  
18 vocational rehab counselor would coordinate that process.

19 Q. And assume there has been testimony that Mr. Szwed  
20 would like to attend college. Is that something that you think  
21 can be done given your assessment of plaintiff?

22 A. It would be helpful, if possible. Sometimes you need  
23 compensatory strategies, so extra study time, but if possible it  
24 would be an asset to returning to work.

25 Q. And did you conduct any type of testing to determine

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1 whether or not he had the capacity from an education standpoint  
2 to go to college?

3 A. Yes. I had an assessment done. It was called the  
4 career scope. His scores on the academy areas range from the 11  
5 percentile up to 38 percentile. The 11 percentile were  
6 numerical mathematics and arithmetic's. That may be an area he  
7 needs to focus. Maybe get prerequisites done or going through  
8 that course again in order to help out those skills and ability.

9 General learning and verbal ability were in the 33 and  
10 38 percentile if I recall correctly so he had mix abilities.  
11 When I look at those scores and their totality I wouldn't say  
12 that I see a PhD. I would see somebody that I would probably  
13 work with to look at some of like maybe community college  
14 courses. They are not the highest scores but it's also not at  
15 the lowest level either kind of range from the 11 to the 38 so.

16 Q. So in reference to the 38 percentile number that you  
17 got how did you come about those numbers?

18 A. Those were his testing results. So he answers the  
19 questions. Maybe math and arithmetic questions or geometry that  
20 would result in the score on the numerical ability at the 11  
21 percent. Where as verbal questions would constitute the score  
22 either at the 33 or 38 percentile.

23 Q. Can those percentile numbers be impacted by the effort  
24 when the test is given?

25 A. Then I would say it's multi factorial. Meaning, effort

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1 making. Sure. That you put in your best effort. It can be,  
2 you know, also pain levels too. Past education as well but one  
3 would need to put in their best effort in order to have a true  
4 representation of the highest scores.

5 Q. Based on your experience as a vocational rehabilitation  
6 expert when doing your evaluation have you ever experienced any  
7 times when you felt that the evaluatee was not giving a maximum  
8 effort?

9 MR. LIAKAS: Objection.

10 THE COURT: Has it ever happened. Overruled.

11 A. There are times when I see people with higher levels of  
12 education that don't score as high as I would expect them to. I  
13 think it's happened in the past.

14 Q. Could you tell whether or not it happened in this case  
15 with Mr. Szwed?

16 A. I wouldn't say I be able to tell. His scores were  
17 mixed. The only thing I would hone in the numerical score at  
18 the 1 percentile. The other two obviously the scores were mixed  
19 so I won't be able to say obviously the one score that was low  
20 was the numerical and perhaps with some training that can be  
21 higher.

22 Q. I noted that when -- as far as numerical, when you  
23 looked at Mr. Szwed's past experience and discussing his  
24 experience especially with working with his father you noted in  
25 carpentry that it includes framing and reading blueprints and

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1 installation of cabinets and sheetrock. Does that require any  
2 type of mathematical skills?

3 A. The blueprints I would imagine so, but more so like  
4 measuring for framing, measuring for installing cabinetry it's  
5 less classroom, less academic, more hands on and realistic, but  
6 still there is some mathematics, some calculations being done  
7 there.

8 Q. And did you in your evaluation come to a conclusion  
9 or -- withdrawn.

10 Did you do an analysis as to Mr. Szwed's preinjury  
11 earning capacity?

12 A. Yes. I reviewed his historical earnings.

13 Q. And what were those historical earnings that you  
14 reviewed?

15 A. So a birds eye view I would say some years were as low  
16 as zero and some years his highest level of earning was up to  
17 45.

18 MR. LIAKAS: Objection. Move to strike.

19 THE COURT: Sustained. Strike that.

20 Q. In your report of November 2022?

21 A. In my November report the earning ranged from \$2,000 up  
22 to just under \$23,000.

23 Q. Would those numbers change if -- withdrawn.

24 Did you come to a one number with respect to his  
25 preinjury earning capacity based on those numbers?

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1 MR. LIAKAS: I couldn't follow the question.

2 Q. Based on the number that you reviewed for those years  
3 that you looked at and if I am not mistaken there were two years  
4 that you looked at, correct?

5 A. Yes.

6 Q. That was what was available to you at that time?

7 A. Yes.

8 Q. What was -- if you can give me a slid one number, that  
9 or wage earning capacity from prior to his injury just based on  
10 what you reviewed.

11 A. Sure.

12 MR. LIAKAS: Objection. That document is not in  
13 the report.

14 THE COURT: It's not in the report. I don't have  
15 the report in front of me but if it's not in the report it  
16 would be objectionable.

17 Q. Okay. Dr. Wolstein, assume there has been testimony  
18 that in 2017 Mr. Szwed earned -- withdrawn.

19 MS. PROVOST: May I have 55 in evidence, please.

20 MR. LIAKAS: Objection, your Honor. That's the  
21 document that Mr. Wolstein has not reviewed.

22 THE COURT: Hasn't reviewed in his 2022 report?

23 MR. LIAKAS: Correct.

24 THE COURT: Okay. Is it accurate, was it not  
25 reviewed?

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1 MS. PROVOST: It's now in evidence.

2 THE COURT: Was it not reviewed as part of his  
3 2022 report?

4 He's not a treating doctor?

5 MS. PROVOST: 2022.

6 THE COURT: That's the only report?

7 MS. PROVOST: No. It wasn't reviewed in 2022.

8 THE COURT: Correct. Then the objection is  
9 sustained.

10 MS. PROVOST: Okay.

11 Q. Based on your review of the information that was  
12 available to you, Dr. Wolstein, until 2022 when you did your  
13 evaluation what was your conclusion as to Mr. Szwed's preinjury  
14 earning capacity?

15 A. He reported that he was earning 966 per week. That the  
16 tax returns showed earnings of just under \$23,000. So that's  
17 the highest that I had seen as far as official documentation  
18 just under 23,000.

19 Q. You actually reviewed tax returns or that was what  
20 Mr. Szwed reported to you?

21 A. The \$23,000 figure were tax returns.

22 Q. What is your conclusion, Doctor, based on the  
23 information that you had in your possession in -- withdrawn.  
24 Withdrawn.

25 MS. PROVOST: Let me just get that response back.



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1 (Whereupon, the Court Reporter read the requested  
2 portion of the record.)

3 Q. And that was for 2017, correct?

4 A. Yes, I believe so.

5 Q. And you also reviewed nothing for 2018, correct?

6 A. Correct.

7 Q. And did Mr. Szwed offer you as to -- any information as  
8 to what he earned in 2018?

9 A. No. The only information that I recall --

10 Q. Without anything -- without taking anything that you  
11 reviewed after 2022. I am talking about --

12 MR. LIAKAS: Objection.

13 THE COURT: Sustained.

14 The jury will disregard any reference to anything  
15 the witness did after 2022 which was the report that was  
16 submitted and accepted by the Court.

17 Q. My question, Dr. Wolstein, when you did your 2022  
18 evaluation were you given any information regarding Mr. Szwed's  
19 earning for 2018?

20 A. No.

21 Q. And when you interviewed him did he offer you any  
22 information as to what he earned in 2018?

23 A. Not specifically. I just had his weekly wage.

24 Q. Okay. And his weekly wage at that time was?

25 A. He reported 966.

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1 Q. And for 2019 do you have anything for that?

2 A. Yes, I do.

3 Q. What was the amount of the 2019?

4 A. \$2,004.

5 Q. And based on that information that you received  
6 regarding those years did you calculate a pre-accident earning  
7 capacity for Mr. Szwed?

8 A. The pre-accident earning capacity that I would say it  
9 was \$23,000 or just under from the tax returns which is lower  
10 than minimum wage. So it's kind of a dialog or discussion  
11 between those two points.

12 Q. So you working off of the 2017 information and nothing  
13 else?

14 A. Yes. At this time for the 2022 report, yes, I am  
15 working off the 2017 figures.

16 Q. And you didn't average out the other years?

17 A. That's correct I did not.

18 Q. Did you review any -- oh, withdrawn.

19 Based on your information that you gathered after  
20 evaluating Mr. Szwed's post injury did you make any calculations  
21 or reach any conclusion as to his post accident earning  
22 capacity?

23 A. Yes. So this would again be for the sedentary and  
24 light occupations. I am looking at entry level positions. So  
25 you can consider, again, gate guards, cashier, food checker,

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1 sedentary, security guard. For the entry level occupations I  
2 would look at minimum wage to slightly above. As of I believe  
3 January 2025 minimum wage will be going up to 16.50 which  
4 analysis to 34,300.

5 MR. LIAKAS: Objection. Not in his report.

6 THE COURT: Sustained assuming it's not in his  
7 report.

8 Q. Can you tell us the number that is in your report?

9 Withdrawn.

10 The calculation that you giving to the jury based on  
11 the 2025 number obviously that's not in existence yet?

12 A. Right. Not yet to pass.

13 Q. Even if it was -- even if you -- withdrawn.

14 There is no way for you to put a calculation that  
15 doesn't exist yet?

16 MR. LIAKAS: Objection.

17 THE COURT: Overruled.

18 Here is what I would say. Overruled except that I  
19 would say, and this comes up with the economist too and I am  
20 not suggesting that this witness is qualified as an  
21 economist.

22 If, for example, in 2022 when he wrote the report  
23 there were already pass minimum wage calculations through  
24 2025 and he made an estimate based on these that were already  
25 in law.

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1 MR. LIAKAS: I have no objection.

2 THE COURT: There would be no objection to that.

3 To the extent that he didn't opine about these  
4 things in his report period doesn't mean he didn't do the  
5 calculations. Much less calculations for later years that  
6 would be that work, okay.

7 To the extent he speculates -- without being an  
8 economist speculates about future wage growth in a field  
9 where he's not an economist qualified to speculate about wage  
10 growth then I would agree about that, but if these figures  
11 existed in 2022 and he's just using figures that are already  
12 out there I don't have a problem with it.

13 MR. LIAKAS: I don't have a problem with that.

14 Q. Dr. Wolstein, the figure of the 2025 minimum wage was  
15 that available to you in 2022?

16 A. No.

17 Q. It's available to you now, right?

18 A. Yes. This is part of my day-to-day research in opining  
19 on availability of earning capacity.

20 Q. At the time when you did -- in 2022 when you did the  
21 calculations what information was available to you at that time?

22 A. The minimum wage at that time was \$15 per hour  
23 analyzing to 31,200 per year.

24 Q. And since then minimum wage has increased, correct?

25 A. Yes.

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1 Q. And is there any set number that it increases to or is  
2 it something that we have to wait for other experts to come up  
3 with?

4 A. Right. It varies state by state. But, for example, I  
5 am not aware right now what the minimum wage would be in 2026 or  
6 2027. Usually, it varies by state but it can be set as you  
7 approach the date for the new year.

8 Q. So if another expert came in and testified, who had  
9 interviewed Mr. Szwed this year regarding his earning capacity  
10 for the future you would expect that his number would be a  
11 little higher than yours, correct?

12 A. Yes. I would expect it to be consistent with the  
13 minimum wage as for the time that he's searching for  
14 reemployment.

15 Q. Did you look at Mr. Bialsky's report?

16 A. Yes.

17 Q. Dr. Bialsky?

18 A. Yes.

19 Q. How does his report compare to yours?

20 A. Actually, there are plenty reports I see that are much  
21 more polarizing. Meaning farther reports. Dr. Bialsky agreed  
22 to look at sedentary work or light and we both looked at entry  
23 level positions.

24 When an individual is not established in work history,  
25 his work history is set in construction work, sedentary or light

1 work is not really there. He's going back to entry level. So  
2 it's fairly consistent between experts.

3 THE COURT: Meaning experts between you and  
4 Dr. Bialsky?

5 THE WITNESS: Yes, your Honor.

6 Q. Dr. Wolstein, just one last question. What is your  
7 opinion within a reasonable degree of vocational certainty as to  
8 whether or not Mr. Szwed is employable?

9 A. Within a reasonable degree of vocational certainty he  
10 is employable with retraining or vocational rehabilitation to  
11 facilitate the process. So he's going to need a little bit of  
12 counselling, but he's a younger individual, age 33, and there is  
13 a lot of time for retraining. But, again, not going back to the  
14 established work. For going back to the entry level work force.

15 Q. Thank you. I have nothing further.

16 THE COURT: Thank you. Cross-examination.  
17 Counsel, you need a minute?

18 MR. LIAKAS: No.

19 THE COURT: Jurors okay? Great. Let's keep  
20 going.

21 CROSS-EXAMINATION

22 BY MR. LIAKAS:

23 Q. Dr. Wolstein, we can agree that Mr. Szwed's career in  
24 construction is over?

25 A. I won't return him back to construction work.

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1 Q. We can agree it's over?

2 A. Yes. I wouldn't look into those types of occupations.  
3 It's too exertional out of sedentary and light work.

4 Q. And we mentioned that some of the jobs that he and his  
5 wife had applied for may be somewhat out of reach for Mr. Szwed  
6 at this moment, correct?

7 A. Yes. I had testified that I would look more in the  
8 sedentary and light categories.

9 Q. So do you think that he would benefit from working  
10 directly with a vocational rehab specialist in a clinical  
11 setting?

12 A. Yes. That would be helpful towards getting back to  
13 work in a suitable alternative capacity.

14 Q. If Dr. Kahn included that in his life plan as a  
15 criteria of what Mr. Szwed is going to need in his life would  
16 you agree with that as well?

17 A. I would agree that it's a reasonable service to utilize  
18 to go back to work.

19 Q. Now, there are some things that I want to ask you about  
20 towards assistive devices that after doing your analysis you  
21 believe Mr. Szwed would need and we can agree on.

22 MS. PROVOST: Objection.

23 THE COURT: I don't know the question yet. What  
24 was the last one for the record?

25 MR. LIAKAS: You want me to restate it?

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1 THE COURT: I want to hear the reporter read it  
2 back.

3 (Whereupon, the Court Reporter read the requested  
4 portion of the record.)

5 THE COURT: As to form sustained.

6 MR. LIAKAS: Okay.

7 Q. Dr. Wolstein, did you assess any need for assistive  
8 devices when you did your report in 2022 regarding Mr. Szwed?

9 MS. PROVOST: Objection.

10 THE COURT: The only question was, did he assess  
11 that in his report. The answer is yes or no. The objection  
12 is overruled.

13 A. Yes. There is a section for it. I didn't do -- I  
14 provided a table of some of the devices that are available. I  
15 didn't do any physical exam to determine if they would be  
16 helpful or not.

17 Q. Do you recall writing in your report that some  
18 assistive technologies can reasonably be expected to improve  
19 Mr. Szwed's daily function?

20 A. Yes.

21 Q. And some of those assistive technologies that you  
22 listed were things like a chair lift?

23 A. That's in my report. It's a device that is available  
24 if at some point it were needed.

25 Q. An ergonomic chair if he does return to the work force,



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1 correct?

2 A. Right. To help positional comfortably, discomfort.

3 Q. A walker?

4 A. That's in my report as well.

5 Q. Electric scooter?

6 A. Yes, sir.

7 Q. An adjustable table to work at?

8 A. Yes, sir.

9 Q. Motorized bed frame for his home?

10 A. Yes. They are all listed in my report.

11 Q. Adjustable mattress to go with it?

12 A. Yes.

13 Q. And back support, correct, a back support pillow?

14 A. Yes.

15 Q. These are all things that you agree would reasonably  
16 expect to improve Mr. Szwed's daily function. So not only would  
17 it be helpful to him on the job but it would also be helpful to  
18 him in the home, fair?

19 A. I would say some of these are more applicable than  
20 others, but there are options that are available and could be  
21 helpful for him, yes.

22 Q. And if Dr. Kahn included that in his life plan you  
23 would agree with that as well?

24 A. Depending on each item. I would have to go through  
25 each item. If he's not ambulating. If he's ambulating

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1 independently some items may not be relevant at the current  
2 time. It's on a case by case. I try in my report to list those  
3 options that are readably available.

4 THE COURT: Not readably. You wrote reasonably  
5 improve Mr. Szwed's daily function.

6 THE WITNESS: Yes.

7 Q. This is after reviewing the medical records and things  
8 of the sort, interviewing him?

9 A. Yes, sir.

10 Q. Now, you mentioned a few names of doctors that you  
11 either are familiar with or had occasion to see in court,  
12 experts, and two names that I see that you reviewed reports,  
13 reports from Dr. Evan Mair. You know who Dr. Evan Mair is?

14 A. Not off of top of my head.

15 Q. If I were to tell you that Dr. Evan Mair was a  
16 radiologist that the defendant hired would that refresh your  
17 recollection as you read his report according to your notes?

18 A. I didn't memorize all the medical records because they  
19 quite voluminous. I can answer any questions you may have  
20 regarding specific areas of my report.

21 Q. Did you review a report of Dr. Evan Mair and you can  
22 refer to your report to refresh your recollection?

23 A. What's the spelling of the last name?

24 Q. M-a-i-r.

25 I do see an imaging review on August 24th of 2021. You

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1 actually were given that document by Mr. Provost, her firm,  
2 fair?

3 MS. PROVOST: Objection.

4 THE COURT: Overruled. I think you can ask a  
5 foundational question.

6 Q. Who provided the documents you have in your report?

7 A. Retaining counsel.

8 Q. That would be Ms. Provost's firm?

9 A. Yes. Wood Smith Henning & Berman.

10 Q. Did Wood Smith Henning & Berman provide you with a  
11 report of Dr. Evan Mair?

12 A. That should be in my record.

13 Q. And you reviewed that report?

14 A. Yes, sir.

15 Q. And they also provided you with a report of Dr.  
16 Marshall Keilson, correct?

17 A. Yes, sir.

18 Q. You reviewed that report?

19 A. Yes, sir.

20 Q. In both of those reports did it contain medical  
21 information pertaining to Mr. Szwed. Fair enough?

22 A. Yes.

23 Q. Correct me if I am wrong. Did Ms. Provost mention  
24 either of those two members on direct examination when you  
25 referred to doctors or experts she may be calling in this trial?

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1 A. Not to my recollection, no.

2 Q. Now, Dr. Wolstein, I want to ask you have there been  
3 occasion where you've done a vocational assessment for a member  
4 of a union and included not only the wages but the union  
5 benefits in your assessment of their pre-injury earnings?

6 A. Like review of collective bargaining agreements?

7 Q. Right.

8 A. I've reviewed those documents, yes.

9 Q. You understand obviously that the Collective Bargaining  
10 Agreement may include alternative benefits, pension, a new  
11 title?

12 MS. PROVOST: Objection.

13 THE COURT: Overruled.

14 Q. And that has value to an employee, correct?

15 A. Yes. The benefits package. I've seen those, yes.

16 Q. And you have personally done vocational assessments of  
17 union members, right. Whether it's Local 20, Local 78, Local 79  
18 any of the above and in your assessment you have previously  
19 included those benefits as part of their pre-injury earning  
20 capacity. Fair enough?

21 A. I would say that I've usually put it in my report as,  
22 you know, a clear per hour figure in terms of straight pay, then  
23 I will say plus benefits. So it would be included in that way.

24 Q. In this particular instance despite Mr. Szwed being a  
25 Local 20 apprentice and completing more than half of his

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1 apprenticeship, being an apprentice of the year just a week  
2 before the accident --

3 MS. PROVOST: Objection.

4 THE COURT: Overruled.

5 Q. You didn't include any of the union benefits outside of  
6 the dollar amount of his wage in his pre-injury earning capacity  
7 did you?

8 MS. PROVOST: Objection.

9 THE COURT: Overruled. You objected to the same  
10 question on the same premises.

11 MS. PROVOST: I was waiting for him to finish.

12 THE COURT: You objected to same premise I keep  
13 overruling.

14 A. The answer to your question. That's correct. I am  
15 only -- I couldn't provide those. I am only to provide based on  
16 the records I had available to me. In this case I didn't have  
17 those records available to me.

18 Q. As you said earlier the records are made available to  
19 you and sent to you by defense counsel, fair?

20 A. Yes. That's part of the process.

21 Q. In addition to that when you calculated your pre-injury  
22 earning capacity you outline specific numbers for years 2017 and  
23 2019. Fair enough?

24 A. Yes, sir.

25 Q. And that's in your report of 2022. However, the number

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1 that you recorded for 2017 is not accurate is it?

2 A. I took it directly from the documentation so it's  
3 accurate for that document that I reviewed.

4 Q. Which wasn't all the documents?

5 A. If there are additional documents I can of course  
6 review that and offer my opinion if it's available.

7 THE COURT: Not on the date of trial you can't.

8 THE WITNESS: Okay.

9 Q. Well, in 2018 did you offer any dollar amount for his  
10 earning capacity pre-injury in your 2022 report?

11 A. No, sir.

12 Q. And I want you to assume, Dr. Wolstein, that the actual  
13 specific year was the year that Mr. Szwed made the most amount  
14 of money as a Local 20 cement concrete worker. Would that  
15 benefit your earning capacity?

16 A. It would be a data that I can utilize in my analysis.

17 Q. Would it change -- withdrawn.

18 Would it have an affect on your overall opinion of his  
19 pre-injury earning capacity?

20 A. I would say there is a couple of ways to analyze it,  
21 but in these types of cases I usually use two benchmarks. I  
22 will take an average and also take the highest year. So it  
23 sounds like it would impact or reflect the highest year.

24 Q. Now, we can also agree, sir, as it stands today  
25 Mr. Szwed is not currently employed, fair?

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1 A. That's my understanding.

2 Q. So despite all the efforts he's made and all the  
3 applications he submitted it's not looking good for him. At  
4 this moment he's going to need some sort of retraining. He's  
5 going to need something else. He's not able to do work right  
6 now?

7 MS. PROVOST: Objection.

8 THE COURT: Objection. To the extent it's not a  
9 question I agree.

10 Q. Is he able to go to work as he sits here today?

11 A. My answer to that would be with retraining efforts or  
12 counselling efforts it's my opinion that he is employable.

13 Q. I am asking about today?

14 A. Today he's in court so he's not going to work while  
15 he's in court.

16 Q. Without getting that retraining, without getting a shot  
17 at a job, at an entry level job that will accommodate him for  
18 his disability he is not able to go to work, fair?

19 A. It depends on the category. The level of labor. If  
20 you looking at sedentary work he requires retraining. If you  
21 look at light work he would probably need training on the job.  
22 So as we sit here today some retraining would be indicated.

23 Q. So just so I can get a yes or no answer. As he sits  
24 here today having all the knowledge, experience, the willpower,  
25 everything that he has here today is he employable as he sits

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1 now, yes or no?

2 MS. PROVOST: Objection.

3 THE COURT: Overruled.

4 Overruled because you've asked him to give you a  
5 yes or no answer.

6 Q. Yes, he just wants a job?

7 A. At the sedentary level, no. Assuming the capacity to  
8 perform light work it would be possible.

9 Q. It would be possible for him to start today?

10 A. Not -- So when you get --

11 Q. Yes or no. We will make it simple. Yes or no?

12 A. Without retraining from the employer I would say he's  
13 not returning to work today.

14 Q. Okay. Despite this if Ms. Kucsma who you know and  
15 respect, fair?

16 A. Yes. I respect Ms. Kucsma.

17 Q. If Ms. Kucsma came in and actually evaluated his loss  
18 of earning capacity and his economic loss for his future wages  
19 and has already taken into consideration the fact that one day  
20 he will get a job. He will get a chance and return to the labor  
21 force, that would be consistent with your understanding of  
22 Mr. Szwed's future, fair?

23 A. I would need a little bit more information. Generally,  
24 yes, but the date of work force reentry and the type of wage  
25 that you would utilize to represent the return to work those



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1 would be details that would be helpful for me.

2 Q. And you mentioned on direct that the minimum wage at  
3 the time in 2022 was \$15, right?

4 A. Yes, sir.

5 Q. But in your report you actually wrote \$16 which would  
6 mean his post injury earning capacity as your report currently  
7 sits is actually greater than what the minimum wage was when you  
8 offered the report in 2022, fair?

9 A. I didn't come to court today memorizing what the  
10 minimum wage was in 2022, but generally from my knowledge it  
11 was -- in the past two to three years it's been somewhere  
12 between 15 to 16 an hour.

13 MS. PROVOST: Your Honor, I like to have this  
14 marked for identification, please.

15 THE COURT: I want to see what it is first and  
16 show it to Ms. Provost first.

17 With no objection this is pass this year?

18 MR. LIAKAS: No.

19 THE COURT: Marked for ID is fine.

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

22 (Whereupon, Plaintiff's Exhibit previously marked  
23 for identification was shown to the witness.)

24 Q. Dr. Wolstein, you recognize what has been handed to  
25 you?

1 A. Yes. This appears to be a minimum wage chart.

2 Q. Does this chart refresh -- withdrawn.

3 Is this a chart submitted from the Department of Labor  
4 from New York City?

5 A. It appears to be, yes.

6 Q. Does this refresh your recollection as to what the  
7 actual minimum wage was in 2022 when you offered your report?

8 A. Yes.

9 Q. What is that number?

10 A. From December 31, 2021 up until January 1st of 2024 the  
11 minimum wage was 15 per hour.

12 Q. Not 16 as your report states?

13 A. 15, correct.

14 Q. Thank you. No further questions.

15 THE COURT: Redirect.

16 REDIRECT EXAMINATION

17 BY MS. PROVOST:

18 Q. So, Dr. Wolstein, am I correct you did no physical  
19 evaluation of the plaintiff, correct?

20 MR. LIAKAS: Objection. Outside the scope.

21 THE COURT: I am actually not sure that you didn't  
22 ask that on cross, but as to one question I will let her ask  
23 it. I can't remember.

24 A. I don't do a physical exam. That's correct.

25 Q. So anything that you do with respect to an evaluation,

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1 any assessment that you make is based on what the plaintiff  
2 tells you?

3 A. Yes. Verbal exchange, yes.

4 Q. And it's also based on the records that you review,  
5 correct?

6 A. Correct.

7 Q. And your assumption is that the records that you  
8 reviewed from Mr. Szwed's treaters are all accurate, correct?

9 A. Right.

10 MR. LIAKAS: Objection: Leading and outside the  
11 scope.

12 THE COURT: Leading and outside the scope.  
13 Sustained.

14 Q. Your assessment, Doctor, of plaintiff needing an  
15 ergonomic chair that was based on your review of the records,  
16 correct?

17 A. Yes and it's something that you include in most reports  
18 just cause it's a readily accessible option.

19 Q. And ergonomic chair is something that anybody working,  
20 any working person, an attorney, can use to help them support  
21 their back, correct?

22 A. Yes. The X-Chair is something you might see on  
23 commercials when you watching television or being able to modify  
24 the back position, the headrest position and the armrest it's  
25 available to the general public.

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1 Q. And your assessment of Mr. Szwed needing a walker that  
2 came from where, Doctor?

3 A. It's something that I include -- if an individual isn't  
4 using it it's not -- it may not be applicable, but it's  
5 something that I listed in my report because it goes in most of  
6 my reports.

7 These are things that the general public -- most people  
8 are familiar with this type of device so it's readily accessible  
9 and something I include in most reports.

10 Q. So the other things like adjustable table is that like  
11 an adjustment desk?

12 A. Yes. I can't remember -- the Varidesk,  
13 V-a-r-i-d-e-s-k. It sits and stands.

14 Again, it's something that many people can know about  
15 but its readily accessible. It's readily available to the  
16 public. It's not specialized -- strike. It's not necessarily  
17 customary like a prosthesis.

18 Q. The adjustment mattress same thing?

19 A. Available to the public, yes.

20 Q. To your knowledge does Mr. Szwed or has Mr. Szwed used  
21 any of these devices up to today?

22 A. Not to my knowledge and not at the time of my  
23 interview.

24 Q. And at the time of your interview was Mr. Szwed in  
25 possession of a cane?

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1 A. Yes. My understanding he reported to me and it's  
2 contained within my report that he was using a cane at the time.

3 Q. And you aware that -- withdrawn.

4 If I told you to assume that Mr. Szwed has been coming  
5 to court everyday without a walker or a cane or an electronic  
6 scooter would that change your opinion as to whether or not he  
7 needs these things in the future?

8 A. Per my credibility I would still list it in the report,  
9 but it doesn't appear to be applicable at this time.

10 Like I said, its something that I list in most reports.  
11 So it's representing those items that are available, but if the  
12 individual isn't using it, it wouldn't be applicable.

13 But, again, for my credibility I am relatively  
14 consistent that I usually include it.

15 Q. And you were asked if you reviewed a benefits package  
16 or a union package for Mr. Szwed when you did this report and I  
17 believe you indicated that you did not, correct?

18 A. I don't recall reviewing a collective bargaining  
19 agreement.

20 Q. That's the proper term. Thank you. Collective  
21 bargaining agreement.

22 Doctor, do you know if the person who was sending the  
23 material had that information?

24 MR. LIAKAS: Objection.

25 THE COURT: Sustained. Sustained. The person who

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1 is sending that material was from your office so sustained.

2 Q. Doctor, who is Cathleen Giannetta?

3 A. I believe she was an attorney that was working for Wood  
4 Smith Henning & Berman.

5 Q. And when you sent this report in 2022 do you know what  
6 was in Ms. Giannetta's possession when she first retained you?

7 MR. LIAKAS: Objection. I guess I will withdraw.  
8 I will object to the next one.

9 THE COURT: It calls for a speculation but, yeah,  
10 withdrawn. I appreciate you.

11 A. I'm not sure what was is in her archive of files.

12 Q. In 2022 do you know whether or not defense counsel had  
13 any of the information that you were asked about, correct?

14 MR. LIAKAS: Objection: Calls for speculation.

15 THE COURT: Calls for speculation and it's the  
16 subject of a court's ruling.

17 Calls for speculation. The objection is  
18 sustained.

19 Q. In January 2022 --

20 THE COURT: Calls for speculation as to what the  
21 content of your files were in 2022. It calls for the witness  
22 to speculate.

23 Q. Now, Dr. Wolstein, you were asked questions about  
24 whether or not Ms. Szwed is employable today. Whether he can  
25 work today. You recall that?

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1 A. Yes, I do.

2 Q. And your answer, and you tried to be as accurate as  
3 possible, is that he probably does, right?

4 A. Right. My ultimate opinion is the retraining or  
5 vocational rehabilitation counselling could facilitate work  
6 force reentry.

7 Q. And, Dr. Wolstein, are you aware of any jobs within the  
8 City of New York where you are paid while you being trained?

9 MR. LIAKAS: Objection: Outside the scope.

10 THE COURT: Outside of the scope. Sustained.

11 Q. Dr. Wolstein, you were asked on cross if Mr. Szwed was  
12 employable today, correct?

13 A. Yes.

14 Q. And your response was if he were retained, correct?

15 A. Yes.

16 Q. Are there jobs that exist in New York City where one  
17 can be trained while they getting paid?

18 MR. LIAKAS: Objection: Asked and answered.

19 MS. PROVOST: He didn't --

20 THE COURT: Hold on. It's not that it's asked and  
21 answered because your objection was to scope and I agreed  
22 about that.

23 Hold on. You don't get to tell me why I made a  
24 ruling. It's outside the scope because the witness was  
25 specifically directed to restrict his opinion to whether the

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1 plaintiff could work today. Not at some hypothetical time in  
2 the future but today and in response to that question the  
3 witness indicated that the plaintiff could not work today  
4 because he would not have yet had the retraining. Whether  
5 that was on the job training or outside the job training.

6 Q. Can you elaborate on your answer then, Dr. Wolstein,  
7 that you gave on cross regarding the training or retraining of  
8 Mr. Szwed as it relates to getting a position where he would be  
9 compensated?

10 THE COURT: For some time in the future?

11 MS. PROVOST: Well, not today because the day is  
12 over.

13 THE COURT: Not today but sometime in the future,  
14 fine.

15 A. At some point in the future let's take a couple of  
16 different occupations. A couple of different examples. If it's  
17 a fast food worker or if it's a secretary or receptionist one  
18 doesn't just get onto the job and know what to do so we call it  
19 retraining, but basically you need to show a person what to do  
20 and how to do their job and so in those cases once they  
21 receive -- once they are told what to do or in formal terms  
22 obtains the retraining that's when their pay would be starting,  
23 that's when they would be hired for a job and engaging in  
24 compensable work force activity.

25 Q. So let me see if I understand this correctly. You just



1 talked about -- I believe as far as work did you say cashier.

2 Did you say that?

3 THE COURT: He said secretary, fast food worker.

4 MS. PROVOST: I apologize. Thank you, Judge.

5 Q. Fast food worker. Is it your testimony that until you  
6 know how to do fast food work, if you get a job at McDonald's  
7 you are not going to get paid until you know how to do that  
8 work?

9 A. During the process where you learning those skills  
10 that's usually paid hourly work.

11 Q. Okay. Thank you. I have nothing further.

12 THE COURT: Thank you.

13 Recross.

14 RECROSS EXAMINATION

15 BY MR. LIAKAS:

16 Q. Ms. Kucsma included that start rate to begin January  
17 2025. Would that be reasonable that Mr. Szwed may be employable  
18 by the start of the --

19 A. It's generally consistent with entry level work, yes.

20 Q. Thank you.

21 THE COURT: Sir, thanks for being here. Enjoy  
22 your weekend.

23 (Whereupon, the witness exited the courtroom.)

24 THE COURT: We don't have anything else for the  
25 jury?

## P R O C E E D I N G S

1 MS. PROVOST: No.

2 THE COURT: Monday morning.

3 MS. PROVOST: I am still working on it, Judge.

4 THE COURT: Can I ask the jurors to give us 10, 15  
5 minutes leeway so we can try to track down what is going on  
6 Monday morning. Thanks very much.

7 COURT OFFICER: All rise. Jury exiting.

8 (Whereupon, the jury exited the courtroom.)

9 THE COURT: Take a few minutes.

10 (Whereupon, a brief recess was taken.)

11 (Whereupon, the case was adjourned to Monday,  
12 December 9, 2024 in Part 91.)

13

14 \* \* \* \*

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16 Certified to be a true and accurate transcript of  
17 the stenographic minutes taken within.

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\_\_\_\_\_  
Harold Ortiz  
Senior Court Reporter

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