1996 WL 34421124 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
New York County

Peggy WURM, D.D.S.,
v.
COMMERCIAL INSURANCE COMPANY OF NEWARK, et al.

No. 1996-602270.
1996.

(Transcript of Thomas Kolb)

Name of Expert: Thomas M. **Kolb**, M.D.
Area of Expertise: Medical & Surgical >> Radiology
Area of Expertise: Medical & Surgical >> Pediatrics
Representing: Unknown
Jurisdiction: New York County, New York

[Note: Pages 1-402 missing in original document]

THE COURT: Okay.

(At this time the jury entered the Courtroom.)

THE COURT: Good morning, everybody. Let me just start by saying that you notice that we have had a change in the lineup, and that is because juror number five, Mr. Lang, had a personal problem. He's okay, but we have had to move everybody down and replace him as a juror in this case.

So let's swear in the witness.

THOMAS KOLB, called as a witness by Plaintiff, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILLER:

THE CLERK: State your name and address for the record.

THE WITNESS: Thomas Kolb, 222 East 68th Street, New York 10021.

Q Good morning, Dr. Kolb.

A Good morning.

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Q Dr. Kolb, what is your occupation?

A I'm a diagnostic radiologist.

Q Where do you currently work?

A My office is at -- is on 68th Street between Second and Third in Manhattan.

Q I'm just going to ask you a couple of questions about your background.

Before I do that, have you ever had the opportunity to examine any radiological films of Dr. Peggy Wurm?

A Yes.

Q Where did you attend college?

A I went to college here in Queens, Queens College, City of New York, from 1976 through 1979.

Q Did you graduate with honors or marks of distinction?

A Yes, I graduated with honors. My major was in biology. I graduated with honors with some marks of distinction.

Q Why don't I ask you a couple of questions about that. Have you ever heard of phi beta kappa?

A Yes, I belong to phi beta kappa, which is an organization of distinction, higher education standing.

Q How did it come about that you became a member of phi beta kappa?

A It was based on my academic record.

THE COURT: Your mother must have been very proud.

THE WITNESS: My mother was very proud.

Q Is it an exclusive society?

A Exclusive to those who belong to it. It's based on your academic record. And if you do well in school, you can belong to it. Actually, they seek you out. You don't apply to it.

Q They sought you out?

A They must have. Or my mother sought them out.

THE COURT: Your mother sought them out?

THE WITNESS: No. Just finishing up the thought process there.

Q Have you ever heard of the Martin H. Dahlman Memorial Award for Scientific Achievement?

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A Yes, that was an award I won at Queens College.

Q How did you obtain that award?

A I did a research project that was accepted and was shown basically at conference, and it was deemed to be important enough to be the recipient of that award and they funded the research.

Q You received funding based upon winning that award?

A I didn't receive anything, of course. The laboratory receives funding for the research that I was doing. This was back when I was in college, yes.

Q Where did you attend medical school?

A Downstate Medical Center here in Brooklyn, from 1979 through 1983, and graduated of course with an M.D. in 1983.

Q Did you graduate with any honors or marks of distinction?

A Yes. Again, I had some honors in research. I did renal -- kidney -- research during my time at Downstate, and again graduated with those honors. I was a recipient again of an award which gave money to the laboratory that I was working for.

Q Have you ever heard of the National Institutes of Health Research Training Ground?

A Yes, that was the institute that granted the money towards my research in medical school.

Q And the National Institutes of Health provided you with a training grant?

A Exactly. For me to carry out my research.

Q Did you do that?

A Yes.

Q How did it come about that you were awarded this grant from the National Institutes of Health?

A I was sponsored by a very well-known prominent physician who was at my medical school, and I became sort of his protege, and I worked underneath him doing this research project, so I submitted my name to the National Institutes of Health, which is, of course, a federal organization, and they granted this amount of money for the purposes of doing the research and presenting the research, which I did do back in Chicago I think in 1982 or 1983.

Q Following medical school, did you do an internship?

A Yes. I did an internship and residency -- internship one year, residency two wears -- in pediatrics in the Bronx at Albert Einstein College of Medicine. And I became in 1986 Board certified in pediatrics.

Q Let's take there one at a time.

First of all, what exactly is an internship?

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A Internship is the year after medical school where you work many hours per day and per week and you complete the one year of training, and that's considered an internship.

Q Can you tell us what a residency is?

A Residency is the time period after the internship where you actually focally specialize in what you would like to specialize in as a physician.

Q You at this time chose pediatrics?

A That's right.

Q What is Board certification?

A In order to be Board certified in your specialty, which was pediatrics at that time, I had to pass a written examination. And based on that, I had to go and pass an oral examination, I think given in Los Angeles. And when I passed those examinations, I became a member of the Board of Pediatrics and became Board certified. I became a diplomate of the Board of Pediatrics.

Q What did you do next in the field of medicine?

A I went back and I did a four-year residency in diagnostic radiology at Columbia-Presbyterian Medical Center from 1986 through 1990. And I still -- I graduated there in 1990 in diagnostic radiology, and in 1990 became Board certified again in diagnostic radiology, which entailed a written examination, another oral examination, in Louisville, Kentucky, which I passed and became a diplomate of the Board of Radiology, so I became double-boarded in pediatrics and radiology.

Q Dr. Kolb, I'm assuming you have heard of an MRI, magnetic resonance imaging?

A Yes.

Q What is that? (missing testimony?)

A I still continue my association with Columbia College of Physicians and Surgeons now. I'm assistant clinical professor of radiology of Columbia University College of Physicians and Surgeons, and I have published.

Q I'm going to get into that in a couple of minutes. I should go to that right now then.

Why don't you -- have you ever published any papers?

A I have published, while I was in residency at Columbia, one of the earliest papers on cardiac MRI, which was MRI of the heart. And since that time, I have really specialized in breast cancer diagnosis from 1992 on.

While I was still in my residency, I had a lot of experience with MRI scans, which I assume we'll talk about here, and I was a clinical advisor to a company in Massachusetts called Advanced NMR Systems, which had a very state-of-the-art technique at that time, which is now in common usage.

So I had a lot of exposure to MRI back in the mid '80's. And since that time in 1992, while I still read a lot of MRI scans at this time, I also specialize in breast cancer diagnosis, and I have published major paper in 1998, and a number of abstracts as well, defining a newer way to find breast cancer in spite of a mammogram being normal or the physical examination of the breast being normal, that is by using breast ultrasound. And so that has taken up a lot of my time right now.

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And I lecture around the country. I give many lectures but the theme is breast cancer diagnosis. So I travel a lot and teach a lot, as well.

Q You mentioned something called NMR. Would you explain what that is?

A The original name for an MRI was NMR. It was nuclear magnetic resonance, but the people who built the machines thought when the population heard the word nuclear, they wouldn't want the test, so they changed the test to magnetic resonance imaging, MRI. So the original name is different than the name we have now, just for PR purposes, but it's the same test.

Q If you could just explain what your involvement was. I think you indicated you worked with advanced nuclear magnetic resonance. Why don't you tell us what that is?

A They had a new technique which took the MRI scanning from many, many minutes, getting it down to smaller portions of time, because it's hard to lie in a machine for a long time to get these MRI exams. And they developed a new technique in the early '80's and they sought me out and consulted with me in the mid and late '80's how to take this new technology and better serve patients and utilize this in the population, and now their technology is quite prevalent.

Q You mentioned earlier that you are clinical professor of radiology at Columbia-Presbyterian Medical Center?

A Clinical assistant professor of radiology.

Q What exactly does that entail?

A It's a teaching position. I go to Columbia and I teach there.

Q You teach. Who did you teach?

A I teach the residents. I also given conferences to all the physicians there who are beyond residency.

Q In what field? What specialty?

A I teach a lot of breast imaging. I show MRI cases, as well, but it's breast cancer diagnosis.

Q Are you a member of any professional societies?

A American Board of Radiology, Radiologic Society of North America, New York Metropolitan Breast Cancer Group, American Society of Breast Disease, American Board of Pediatrics, along those lines.

Q Have you ever been qualified to testify as an expert within in the past?

A Yes, I have.

Q Approximately how many times?

A Approximately I think five to six times per year, and that's for the past maybe six years, seven years.

MR. HILLER: Your Honor, we ask the witness be qualified as an expert in the field of medicine and specialty in radiology.

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MR. BEGOS: Voir dire, your Honor?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. BEGOT:

Q Dr. Kolb, you said that you from 1992 to the present, you have specialized in breast cancer diagnosis?

A It's two. My practice consists of reading MRI scans and breast cancer diagnosis.

Q I thought I heard you say you specialize in breast cancer diagnosis.

A I did. That's correct.

Q That's an ultrasound procedure?

A No, that's mammography, physical examination and ultrasound, and if necessary, MRI of the breast, as well.

Q And you have written --

A And -- I'm sorry, and biopsies. I do biopsies, as well.

Q Have you written about using ultrasound to help diagnose breast cancer?

A Yes.

Q You said that is taking up a lot of your time now, the work on breast cancer diagnosis; isn't that correct?

A Yes.

Q You discussed your teaching responsibilities at Columbia, and you said you teach significantly breast cancer diagnosis?

A Yes.

Q Your publications appear to be mostly about breast cancer diagnosis?

A I had that period of time where I spent a lot of time in MRI. And the last eight years, I would say the larger proportion of my time is in breast cancer diagnosis and a lesser time on MRI.

Q You have never examined Dr. Wurm; have you?

A Never.

Q In fact, you haven't met her until fairly recently; is that correct?

A That's correct.

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Q Your first contact with Dr. Wurm in any way was when you reviewed an MRI in 1999; is that correct?

A Yes.

Q Is it correct that your only personal knowledge regarding anything related to Dr. Wurm is from your review of films taken of Dr. Wurm?

A Yes.

Q And you haven't reviewed any films taken in 1994 of Dr. Wurm; have you?

MR. HILLER: Objection.

THE COURT: What did you say about 1994?

MR. BEGOS: Has he reviewed any films taken of Dr. Wurm in 1994.

THE COURT: Did he review them in 1994 or --

MR. BEGOS: I will clarify the question.

Q Have you reviewed at any time, Dr. Kolb, any films taken in 1994 of Dr. Wurm?

MR. HILLER: Objection. The question assumes there are films from 1994.

MR. BEGOS: I'm simply asking if he's reviewed any.

Q Are you aware of any films taken of Dr. Wurm in 1994?

A I don't know the exact dates of films that I did review, other than a film in 1999 that I did, and there was, I think it was a 1988 that I reviewed, as well. There were films in between. I don't remember the dates of them.

Q You don't have a specific recollection of reviewing a film from 1994?

A I don't remember. I can't tell you for sure that I did or didn't.

Q Now, after you reviewed the 1999 film, at some point you met with Mr. Hiller; isn't that correct?

A Yes.

Q And Mr. Hiller asked you about your review of that film?

MR. HILLER: Objection. Privileged.

MR. BEGOS: Privileged?

MR. HILLER: Your Honor, may we approach please?

THE COURT: No. I didn't hear what your objection is.

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MR. HILLER: Objection, privileged.

THE COURT: Objection to what?

MR. HILLER: Privilege.

THE COURT: No.

Q Mr. Hiller talked to you about your review of that film?

A Yes.

Q And he showed you films that had been taken of Dr. Wurm at earlier dates; isn't that correct?

A Yes.

Q And he asked you to look at those films?

A Yes.

And he asked you to see if you could find any problems in those films?

A Absolutely not.

MR. HILLER: Objection.

THE COURT: Sustained anyway.

Q You haven't formed any opinion, any medical opinion, as to whether Dr. Wurm was able to practice dentistry at any time; have you?

A No, absolutely not.

Q That's not what. you're here today to talk about?

A No.

Q Now, in your discussions with Mr. Hiller, he reviewed the kinds of questions that he was going to ask you; is that correct?

MR. HILLER: Objection.

THE COURT: Well, this is not about -- this is cross-examination. I thought you had voir dire.

MR. BEGOS: I will move on, your Honor.

Q You were hired to testify today; isn't that correct?

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A I was asked to come in to show my findings and I am being paid for my time being here by canceling my schedule of patients this morning, many of whom were scheduled for a while, in order to be here.

Q How much are you being paid?

THE COURT: This is not voir dire.

Q You testified that you have been qualified as an expert five to six times?

A Per year.

Q For the last six years approximately?

A Approximately.

Q Could it be more than six times a year?

A It's possible. But if it is, it may be seven, may be five, may be four. It more likely would be less than more, out it's possible.

Q And so you began testifying as an expert in approximately 1995?

A Yes, give or take a year.

Q That was about 15 years, 12 years after you graduated from medical school; is that correct?

A I graduated medical school in '83. Twelve years let's say.

MR. BEGOS: Your Honor, I have no objection to Dr. Kolb.

THE COURT: No objection. You are an expert. BY MR. HILLER:

Q Dr. Kolb, have you ever reviewed an MRI before?

A Have I ever reviewed an MRI?

THE COURT: We just heard that.

A Daily.

THE COURT: He's an expert.

MR. HILLER: I understand.

Q I just want to clarify a couple of things.

Approximately how many times have you reviewed films, MRI films for patients?

A Maybe between seven hundred times a year, eight hundred times a year.

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Q And how about CAT scans?

A In the past, much more frequently. Now MRI has become more ordered, so it used to be from -- in CAT scans, it maybe used to be a few hundred a year, maybe a thousand a year when I was training, now maybe a hundred a year now.

Q How about X rays?

A Used to be thousands a year. Now it's probably many hundreds per year.

Q You are currently in private practice?

A Yes.

Q Have you ever diagnosed patients with back problems?

A Back problems, yes.

Q What structures of the body typically do you evaluate when you diagnose patients with back problems?

A We look at the spine. The spine contains bones and nerves. Those are the major parts of the spine. So we look at the bones, we look at the nerves, we look at the spinal cord, of course, which is --

Q Let's talk a second about the structures of the spine, if we can.

Dr. Kolb, could you explain, if you would, what the various structures of the spine are?

A Sure. These hard substances here of course are the bones. And this is the entire spine starting from the bottom of the head, so the brain is up here, and this is the bottom of the patient, the legs are down here, and this is the pelvis.

And the spine is divided into four sections. There's the neck, which is the cervical spine, and it has seven bones.

Then there is the back, mid back, which is the thoracic spine. That is 12 bones.

Then the lower back, the lumbar spine, which has five bones.

And then there is the sacrum, which is more bones even lower down. We all have the exact same anatomy.

So each of these are the bones here. And in between the bones you will see the softer structures, these thinner structures, and those are the disks. We've all heard of disks in the back, lumbar disks and so on. And the function of these disks is like shock absorbers between the bones, so when we jump up and down, the bones don't crunch into each other. That's not a good thing. So we have disks in between.

Now, disks have to stay in their normal position in order to function correctly. So something holds them in place or else when we jump up and down, the disk would just spurt out.

And it turns out that there are ligaments that hold things in place, and there is a ligament that runs down the front of the spine, and everything else has a fancy medical name.

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This is called the anterior -- or the front -- longitudinal -- or long -- ligament. So there is a front longitudinal ligament running down the front. And then there is a back ligament which is behind these bones but not in between the front and the back. It's behind these bones here in the front. So there are ligaments in the front and ligaments in the back that hold the disks in.

But also there is a third covering, and that covering goes around the disk at each level, so at each disk there's a covering that goes around and that is called an anulus. And each of these coverings are very thick and tough. And that holds the disk in place. And the disk -- these coverings are very tightly applied to the bone, so that the disk should only come to the margin of the bone and stop because these coverings, these ligaments, hold the disk in place.

If the coverings break or tear, then the disk can go through that hole or push out, and we have things that we call disk bulges, which there is a partial tear of the ligament. The disk can bulge out into a place that it shouldn't be.

Or if there's a complete tear in the ligament, the disk can actually herniate through the hole in that ligament and go to somewhere that it shouldn't be, go to an abnormal position.

Now, from the brain comes the spinal cord. And the spinal cord runs in between these bones in the back and the bones in the front. And that's because we need the protection for the spinal cord, so we have bones around it. But we need those nerves that are in the spinal cord to get out of the spine to go to our hands and legs and go to our entire body so that we can move. And they get out of the spine by these holes on the side, and there are holes on the left side and there are holes on the right side.

And you can't see the spinal cord in here, but you see these rubber thingies coming off the sides, and these are the nerve roots. So the nerves come out of the spinal cord at every level, let's say between the second bone and the third bone, between the third bone and the fourth bone. Between each bone there are holes on the sides that allow the nerves to go out, and these nerves will travel out to where they are supposed to go so that we can move, so that we can feel pain, we can feel vibration, hot, cold, things like that.

And that's basically the anatomy.

The only other thing you might have to know is that -- well, the nerves come down, the spinal cord comes down, around the spinal cord is the spinal fluid. This, we all heard of because we do spinal taps and take liquid out. So there is a spinal fluid around the spinal cord.

What holds the fluid in so it just doesn't fall out from the body is a special membrane which we call the sac. It's in a sac. And that's called the thecal sac.

So what we have are the bones, we have the disks in between the bones. We then have the structure called the thecal sac, which is almost like a balloon that holds the spinal cord in the middle, and the spinal fluid around it, and then the nerve punches out through the sac and goes out through the holes to the sides.

That is pretty much everything you need to know about the back.

Q How is it that an MRI scan is used to evaluate various structures in the back?

A Well, an MRI is a very sensitive test. An MRI uses magnetic waves, and we can make a picture of the back based on the way we use those magnetic waves, and we can see almost all the structures I have told you about.

We can see the bones beautifully, or actually the bone marrow in the bones. We can see the disks. We can see the spinal cord. We can see the nerve roots. We can see these holes here, which is very different from an X ray, which X rays have been around for a hundred years now. We can only see the difference between hard and soft, meaning you can only see the bones. But you

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will see a space between the bones on an X ray where the disk is, but you won't see the disk. You will just see a space. The disk is there, but you don't see it. You don't see muscles. You don't see the tendons. You don't see the ligaments.

But with an MRI, you can just about see everything. And that's why the MRI now is such a popular test for looking at back pain, a much better test than just a regular X ray.

Q What is the difference between MRI and a CAT scan?

A A CAT scan is just a special X ray. The only difference is, is that the computer can take very thin little slices of our body and look and see what it looks like on an X ray, as opposed to taking, for example, if I just take an X ray of your hand, I will see all the bones of the hand the way I take it, but if I take a CAT scan, I can actually cut the hand into small little slices. No one gets cut here, it's just a term. And you can see very minute detail.

So CAT scans shows us minute detail and also show some of the ?? tissues that a regular X ray couldn't, but a CAT scan is an X ray. It's just a very fancy X ray where the computers can now manipulate how the X rays are given and how we look at it.

CAT scans and X rays are very related. MRI has absolutely nothing to do with CAT scans or X rays.

DIRECT EXAMINATION

BY MR. HILLER:

Q Dr. Kolb, you mentioned you previously examined films of Dr. Wurm.

A Yes.

Q How did that come about?

A The patient was referred to me by her doctor.

Q Who was that?

A Show me the reports so I can read it to you. If I remember correctly, it was Dr. Kaplan.

(Handing.)

A Dr. Lebowitz.

Q Do you know who Dr. Kaplan is?

A Yes, I know Dr. Kaplan. I know he called me about my findings.

MR. BEGOS: Objection.

THE COURT: Don't tell us about any conversations, please.

Q Without saying what you spoke to him about or he spoke to you about, you had a conversation with Dr. Kaplan?

A Yes.

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Q Do you remember when that was?

A Soon after reading the scan.

Q In 1999?

A Yes.

Q And Mr. Begos asked you about you and I meeting. When was that?

A Maybe a month ago.

Q Now, Doctor, you indicated in response to Mr. Begos's questions that you only met Dr. Wurm recently.

A Yes.

Q How common is it for you to meet with patients for whom you're examining MRI films with respect to the back?

A Never. I never meet with the patients directly. I just make my findings with the anatomy that is there, the objective findings of what is there.

Q Now, let's talk about the bone tissue of the back. Have you ever heard of the term spongy bone?

A People describe bones -- spongy and there is cancellous bone, different terms of how much marrow is in the bone. It's a medical term pathologists like to use.

Q Why don't you discuss the structures of the bone.

A Bone, there is marrow in the bone. Some bones have more marrow, some have less. The marrow is what makes the cells in your body, red blood cells in your body. And covering that marrow is what we know, is what we call the bone which is the hard stuff and that is some bones are spongier, have more marrow, some bones have less marrow. All bones are covered by the cortex which is a hard covering that we feel.

Q I want to show you what has been pre-marked and admitted into evidence as Plaintiff's Exhibit 44-A. Do you recognize this?

A The patient Wurms, Dr. Wurm, November 20, 1988.

Q What exactly are we looking at?

A This is a regular x-ray of the back, the lower back lumbar spine.

Q If you would, can you describe what it is you see in this film.

A Here we're looking from the side, so it's as if we were looking at this skeleton from the side also and these squares here are these squares here which are the bones. In between the bones are the disks. I told you on x-ray you're not going to see the disks. You'll see them later on MRI, but the spaces are this darker area, that is exactly what we're looking at.

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This is the fifth bone lumbar spine. It's not a test, but remember the fifth, there are five bones in the lumbar spine and this is the fifth, fourth, third, second and the first. You could see that they're all perfectly square and this is normal. All of the bones from the bottom going toward the top are perfectly square just like they should be.

Now, if you look here at this bone, five, four, three, two, one, L1, there is a line here and there is collapse of this bone here. The top part of this bone has collapsed. What has happened here, this bone is fractured. This is the L1 vertebral body. The L1 bone and it's fractured. In other words, it's crushed. The top of the bone has been crushed down. It should look like that, but it doesn't. It looks -- can I mark this?

Q Sure.

A You see instead of coming straight across, it goes down and then up and you will see in the front there is also the bone is pushed out in the front -- that is because the bone is fractured and it's basically been crushed from the top. You will see this better in other pictures.

Q Let me show you what has been marked and admitted into evidence as Plaintiff's 44.

A It's bigger now. It's the same picture. It should look like that and it should look like that and like that. But it doesn't, it looks like that and the bone has been crushed from the top here, pushed down. This line shouldn't be here. It should be a perfect square just like that.

Q I show you what has been pre-marked and admitted into evidence as Plaintiff's 46. Do you recognize this?

A This is a CAT scan and reconstruction of a CAT scan on this patient Peggy Wurm. And here you can -- we talked about how CAT scans take very thin slices. X-rays are very gross, but CAT scans are much finer.

So this here is looking from the top down on the disk. If you can imagine just looking that way because we're taking a cut this way, pulling it back and showing it to you. You see here, let me show you, there is a line going across which is the fracture line. This line doesn't belong here. It shouldn't be here. All of these have fracture lines. It's, we're just taking very thin pictures of the same level. This line here is the fracture that goes through from the crush of L1.

Q Have you ever heard of the term displacement?

A Sure.

Q Can you take a look at the fracture and take a look at what it is.

A The reason there is a line there is because the bone has pulled away from the bone and you can measure it, maybe one or two millimeters or three millimeters that has actually been pulled off. So there has been a crush to the bone with separation of the back part of the bone from the front part of the bone.

Q Let me see if I can get a better picture for you to look at. This has been marked, pre-marked and admitted into evidence.

A This is a much better way to look at it. This is the one that is fractured, just looking down further. This is L1.

Q Maybe if I can trouble you to use this.

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A This is the first bone. We are just going down. And this is the second bone. This is normal. This is the way the bone should look. This is a perfectly normal looking bone and this is a very obvious -- you don't need a radiologist for this, anyone can see this. This is a fracture through the bone with the bone being pulled off. So there is a fracture of the back.

Q How is a fracture like that caused?

A Well, trauma, some sort of trauma has to have occurred in order to fracture a bone. This is obviously some sort of significant trauma, some sort of significant injury to the back that would cause such a fracture like this in the back. It's not that uncommon to see fractures of the back. We talk about bad backs and fractured backs, but this is what it looks like.

Q Let me show you what has been pre-marked and admitted into evidence as Plaintiff's Exhibit 47. Take a look at this on the light box, if you would. What is that?

A This is an MRI of the back. The anatomy is all the same. Those squares, the gray squares are the bones. The white objects here are the disks in between. And I told you that the disk's held in place by three coverings and that the disk can only go to the edge of the bone and stop because those coverings hold it there.

And this is the fifth bone, five, and this is the next which is called S, the sacrum which is underneath. So we call this level 5-1 so that we know which level we're talking about. And if you look here you will see that the disk at 5-1 is being pushed back further than the confine of the bone. I think we will be able to show it to you a little better in a second, but it's being pushed back so there is actually a tear.

You could see the ligaments that are too small, but there must be some sort of tear in the ligament, in the annulus to allow this disk to herniate back. And I'll show it to you a little better. There is a disk herniation at this level 5-S1.

Also, look at all the colors of the squares here and look, this is 5, 4, 3, 2, 1. Look at the color 1. It's white. All the others are gray. You see this is white, but it's not a square, it's not as square, as big as the square here. It's a square that is half the height. What you're looking at is the fracture of this bone being crushed down because it's much smaller now than the other bone. If you measure the height of this, it may be half the height of a regular body, so it looks half of the height by being crushed down and also white.

The way we take the MRI is that anything in this particular -- anything that is white has water in it, everything that is dark has no ?? in it. Now, the marrow generally doesn't have a lot of water in it. There is a lot of fibrous tissue, but not a lot of water or a lot of marrow elements. So it's dark. The disks have a lot of water in them so it's white.

But you see that this bone here is a different color than the other bones and that is because, due to the fracture, there is now swelling of the bone. The swelling causes water. Obviously, that is what swelling is, more water to go into the bone. So we see a fracture here with swelling of the marrow inside the bone here. So that is the injury that you see up there, but now you could see actual changes in the marrow. It's the safe bone, L1.

Now, also this is the same level, they just look at the patient a little higher, just adjust how we're looking at the patient. You see the squares again, the gray squares, and that is all normal. Then you see a problem here, that is L1 and, again, above it T12 normal. Again, everything is normal except for this one level here. This square is not a square anymore, but we know that what has also happened is that the disk that was between T12 and L1 has been pushed down into the bone because of the crush injury.

So we're seeing a fracture of the bone, we're seeing swelling of the bone and we're seeing the disk being herniated down into the bone where obviously it shouldn't be, and then at a different level we're seeing a herniation at 5-S1 which is removed from the fracture site. Those are the major findings of this MRI.

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Q What is the date of that film?

A December 6, 1988.

Q Let me show you what has been pre-marked and admitted into evidence as Plaintiff's Exhibit 47. Perhaps we can use the easel again. What is this?

A This is the same as these two pictures. This one, Exhibit 47, these two pictures are hard to see because they're far away. With those two pictures you could see them a little better. And I'm not telling you anything new, it's the same thing, it's just a blowup. That is the same picture.

If you look here, look at the disk material, you can look at all the other disks here between 2-3, 3-4, 4-5, 5-1 and you'll see that the disk is pushed out and it goes beyond the bone, and you could see it pushing on the white. And the, white is cerebral spinal fluid that we talked about before.

You could also see, if you measure the disk, that this is the marrow, in other words, the height of this disk is lower here than it is on the other disk, which is not unusual because once you herniate a disk, the disk is pushed out, it thins down a little bit, which makes sense because if you have a piece of dough and you squash the dough it comes out or back wherever it's going ?? come out and it gets flatter.

Then again you see this is the area of the herniation. All of this white here is swelling of the bone. That is very different than all the other areas. The fracture is here with the disk being -- coming down, this disk coming down into the fracture site and the top of L1. Those are all the findings on this MRI.

Q If you would just explain, you mentioned, I think, two herniations. I'd like you to explain what they are exactly.

A Well, the one here, 5-1 is a herniation that goes back toward the thecal sac which contains the nerve roots so that when we talk about the herniation here if is going down into the back, but down into the fractured bone.

Q Is there a medical term when a disk goes downward into the bone?

A It's an intrabody disk herniation.

Q You mentioned a number of times the term 5-1. Can you just elaborate what you mean by that.

A There are five bones in the back. The first bone is fractured. The second bone, third, fourth and fifth are normal. The disk between 1 and 2, 2-3, 3-4, 4-5 are normal. The disk between the fifth bone -- this is a different part of the spine, the sacrum between 5 and 1 is herniated. So that is the numbering system. Here it's marked. You could tell, you could see the fracture and the disk material coming down into the top of L1. You see how it's compressed down and it's white, but that is just, that is the swelling in the bone, the white.

Q Now, I want you to make certain assumptions for my next question. I want you to assume that Peggy Wurm was involved in an accident on November 12, 1988 involving a horseback riding accident. And I want you to assume as part of this question that in the horseback riding accident she was thrown to the ground, struck the ground on her buttocks and her right hip, right side. And I'd like to know whether or not you can testify to a reasonable degree of certainty as to whether or not that accident has anything to do with the findings you just testified to.

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MR. BEGOS: Your Honor, I object. Dr. Kolb testified that he reviews MRI findings. And his findings are limited to the anatomy that is there on the film. That is what he provides in his job as a radiologist. He shouldn't be offering testimony today about the cause of the anatomy that he finds on the film.

THE COURT: When you looked at these films for objective findings, is it relevant medically to know the history?

THE WITNESS: The film tells me that there's been a very recent trauma to the back because of the swelling in the bone which is extremely abnormal.

THE COURT: Do you need to know how it got there?

THE WITNESS: Whether it's a horseback riding accident or car accident or anything -- or flying out of a window doesn't make a difference, doesn't make a difference how the accident happened.

MR. HILLER: My question is, can the witness testify to a reasonable degree of certainty how -- I'm sorry. How it is that the patient has developed these conditions in the spine, assuming that she has been involved --

THE COURT: Do you need to know medically what happened to the body at the stable?

MR. BEGOS: Your Honor, Dr. Kolb has testified that he doesn't do that ?? his job as a radiologist. What he does is look at the films and describe the anatomy that is there.

THE COURT: I'm not so clear about that.

Doctor, let us understand, what Mr. Hiller is asking you, is that within the scope of your ordinary medical work? I mean, your regular medical work?

THE WITNESS: If you ask it one more time and I'll tell you.

Q Assuming that -- I want you to make certain assumptions. I want you to assume that my client was involved in a horseback riding accident on November 12, 1988. That at the time of the accident she struck the ground on her buttocks and her right side. And I want you to assume that prior to the accident she did not have any back pain or any associative pain in her back or right buttocks. But that since the accident she has.

I'd like to know whether the findings that are reflected in your film, whether you can testify to a reasonable degree of certainty whether or not those findings can be related to the accident I just described.

A Yes.

MR. BEGOS: Judge, the question is whether that is within his normal medical duties.

THE WITNESS: Yes. In this case it's because there is an obvious finding --

MR. BEGOS: I object. He's answering the question, not your question as to whether --

THE COURT: Stop, stop. I know very well what everybody said. When you say in this case, do you mean that this case is in some way an aberration of what you normally do or is it quite, a quite frequent occurrence in your work that you do or is it not?

THE WITNESS: It's a frequent occurrence.

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THE COURT: When you say in this case, let's be clear, you don't mean of all the thousands of these that you review, that this one is something different?

THE WITNESS: No, they're always asking the same question of me on every single case. That's why patients are sent for MRIs, to answer that question.

Q Would you be able to answer the question?

A Yes. Your question was, can I relate the findings here to an incident that she had?

Q Yes.

A The answer is yes, and in this case specifically where we're talking about -- definitely my answer is definitely yes because we have been, we have swelling in the bone. Now, swelling in the bone from the MRI has to have been a recent occurrence.

In other words, just hypothetically if somebody, if this would be an injury that would be 20 years old there wouldn't be swelling there in the bone. In other words, whatever would happen to the bone would happen to the bone. It would either heal as a deformity or it would heal with no deformity, but that swelling with time will go away. The fact there is swelling tells you that this had to have been a quote-unquote recent injury.

Q I'd like to ask you about the condition you also described with the disk between L5 and S1 vertebrae.

A Based on your question, the patient had no back problems before an injury and had back problems after an injury and has a herniation with all the disks looking perfectly normal, it's only logical and consistent that this was most likely, most likely the cause of that was the trauma.

Remember, it's not easy to break bones in the back. There are some forces involved to break a bone in the back and to be swollen and to have this disk herniation into the bone in the back. And the patient, I'm told, had no symptoms before and now has symptoms. So it's the most reasonable explanation is that this happened together with that.

Q Dr. Kolb, based upon the film you reviewed, can you express an opinion to a reasonable degree of certainly as to why -- withdrawn.

I want you to assume as the next part of this question, in addition to the other things I asked you to assume, that my client has been complaining of pain in her right buttocks and her right posterior thigh and right hip for the past 13 years.

Based upon the films you reviewed, can you express an opinion to a reasonable degree of certainty as to why Dr. Wurm has been experiencing the pain or symptoms I have described to you for the past 13 years?

MR. BEGOS: Objection, your Honor. Dr. Kolb doesn't examine patients. He looks at MRI film.

THE COURT: Please clarify your question.

Q Based on the films that you have reviewed, assuming that my client has been complaining of the same pain for the past 13 years, right hip, right buttocks, right posterior thigh, can you express an opinion to a reasonable degree of certainty as to, again, based upon what you're looking at in terms of the films, why my client has been experiencing pain and other symptoms that I have described to you for the past 13 years?

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MR. BEGOS: Same objection. Dr. Kolb ??esn't make those kind of findings. He reviews MRIs in the ordinary course of business. He shouldn't be offering opinions.

THE COURT: Doctor, that is not something you do on a regular basis, or is it?

THE WITNESS: I'm asked frequently by the clinician who sends them my opinion as to how recent the injury is or whether it can be related anatomically to the patient's symptoms.

THE COURT: When you said before you can tell from the swelling there whether it's new or it's years old, that was something you are called upon to do?

THE WITNESS: Absolutely, but I also have been asked if the anatomy of the site of the herniation correlates with the patient's symptoms because I don't examine the patient. The clinician would call me and ask me that.

And if through looking at the nerve roots that it can be localized to S1, this herniation, then yes, the answer is certainly that this herniation is causing the patient's problem.

Q If the herniation, so the record is clear, if the herniation at L5, S1 is causing the pain that we just described, right hip, right buttocks, right posterior thigh?

A It makes the most sense that it does, absolutely.

Q Is it reasonably likely that my client had a herniation at this level prior to the accident?

MR. BEGOS: Objection to the form, your Honor.

THE COURT: Sustained.

Q Dr. Kolb, have you ever heard of something called sciatic distribution?

A Yes.

MR. BEGOS: Objection, leading.

THE COURT: Overruled.

Q What is that?

A It's the bundle of nerves that go down the back down to the -- through the buttocks in the back, in the back of the leg and many people use the term sciatica to describe that pain, that back pain.

Q How, if at all, does a sciatic distribution correlate to the objective findings you have just mentioned with respect to the films?

MR. BEGOS: Objection.

THE COURT: Do you understand the question, Doctor?

THE WITNESS: Yes.

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THE COURT: You may answer.

A We have a herniation here at 5-1 level which is where the sciatic nerves are, S1 most prominently, and so we have compression on the sac that contains that nerve. So there is a relationship between the sciatic nerves and specifically S1 and the herniation at L5-S1.

Q Have you ever heard of something called a dermatome chart?

A Yes, sure.

Q This is actually Mr. Begos's and he was gracious enough to let us use it. Can you show us what you mean when you talk about sciatic distribution. Why don't you tell us first what dermatome is.

A As I told you, the nerves come out of our back and go to both aides of our body. And they have to go all the way from the bottom of your head all the way to our toes because we have to be able to feel and move and so on. And each one of these nerves goes to one specific area of our body to do their function.

We are all the same. This is the back of the person. Obviously, this is the front. And if you look at the back here you will see that S1 which is the nerve root, S1 goes from the lower back down the side of the thigh, down toward -- and also the side and back of the calf. S2, which is the next nerve down, goes a little bit inside, medial toward the middle of the back of the buttocks and down. And S3 is just the inside here whereas, you know, L3, the third lumbar nerve comes here and L4 goes down here. So every nerve goes somewhere.

The sciatic nerve that people talk about is centered on this S1-S2 nerve. And that goes down behind the lower buttocks and then behind the thigh and then outside of the thigh. So, this is a chart -- you can see the numbers. I don't know if you could see the numbers. There are different colors. Each color is a different nerve.

Q Continue.

A You see S-1 and S-2 here. This is the back and this is the front. It goes behind the buttocks here, and we see the sciatica. It's what we hear about, sciatica. It's back pain here. S-1/S-2. All the nerves for the buttocks. L-1. The first nerve root goes to higher than that, off to the side. Nerves go down to the toes. We have nerves that go down to our fingers. We all have the exact same nerves in the exact same places. This the S-1/S-2. That's how we work.

Q Now that you have explained to us how it is that it also works, maybe if you leave those side by side for just a second.

You talked about how S-1 goes down the right buttock over here. Can you show us on the actual film of Dr. Wurm how the disk relates to the dermatome that you just identified in the chart?

A Well, you don't see that. You just have nerve roots that are in the sac. And as they come out to the side, the nerve roots go out.

Q So how is the sciatic distribution related at all to the disk at L-5/S-1?

A L-5/S-1, the exiting nerve root at S-1 has to be involved by something in order to feel that pain. We have a herniation of 5-1 which is the most reasonable explanation as to what is causing that “something” that's causing the problem with that nerve.

Q Is it reasonably possible for someone to experience pain without associative weakness or numbness?

A Of course.

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Q Would you explain why that is?

MR. BEGOS: Objection. This is clinical, not radiology.

THE COURT: Is that connected to the work you do?

THE WITNESS: The question is whether you can have pain without --

THE COURT: I know what the question is. Would you make such a determination?

THE WITNESS: No. It's an examination of the patient.

THE COURT: Fine, sustained.

Q Let's take a look now at a more recent film.

May I show you Plaintiff's Exhibit 48, which has been admitted into evidence?

A This is again something that we're familiar with now, this is an MRI of the back, same patient.

Q Is it possible to move that closer?

A Yes. This is an MRI of the back. Again, this is -- the date of this is 1999, July, 1999. The squares are the bones. In between the squares are the disks. Look here: Five, four, three, two, one. L-1, you see the disk coming down into the bone. That is the intrabody disk herniation that the patient had in 1988. That is still there. The bone is still deformed but it's the same color. The bone now is gray, same color as all the other films because the swelling has gone away. It's been ten years. The deformity of the bone is still there.

The disk herniation at 5-1 that we saw before is still there. I will show it to you better. It is more prominent now and it's pushing out again into the sac.

We also have another area where the disk is pushing out, and that is between 2 and 3. So there is a herniation between L-2 and L-3.

And so those are the findings on this film here.

You will see here that the disk in between 5-1 is now black. It's now a different color than the other disks. The disks are starting to lose a little water between 2-3, 3-4, 4-5 and 5-1. 5-1 is black. The disk is black. And it's also narrower than the other disks. It was narrow before because it herniated, like the dough we talked about, that squirted out like dough, but it's now black.

Remember, I said that the disks are white because it has a lot of water in them, now it's lost that water, which is not unusual. It can happen after a disk is damaged. It dries out and it turns gray. And that is what happened to this disk here at 5-1.

So we have a new herniation at 2-3. We have the same herniation, maybe a little bit larger, at 5-1. The disk now has become brittle and lost its water.

And if you go out to the sides, remember I told you there were holes in the inside on the spine where the roots go through. Well, these are those holes. You can see them. I will show them all to you in another way.

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These holes here are the keyhole-shaped white structures because there is a lot of fat in there. So it's white. There's a little dot on top of the hole. It's hard to see, but that little dot is the nerve root actually coming out. You see that there is a pushing in of this keyhole structure. It's normal up here, 12-1 and 1-2. When you go lower down between 3-4 and 4-5, you lose the normal structure in the keyhole, which means that the disk is now pushing out to the sides at two new levels. At 3-4 and 4-5, the disks are now going that way, pushing on those holes. That is happening in both sides. I think you can see it better here. Normal.

Q Do you want to use a marker to identify it?

A We're okay. This key hole here is white. This long structure is white. Here, it's pushing a little bit. It's 2-3. Below is 4-5. This is 1-2. So this is normal. 2-3 is pushing in a little bit. 3-4, almost losing it. Look at the difference again, 3-4 and 2-3 and 4-5. It's gone also. Pushed in.

So those disks are not herniating at 3-4 and 4-5, but they were bulging out. I think it's shown better on the blowups.

And those are the major findings.

Q Let me show what has been -- I'm sorry.

A This is the intrabody disk herniation here. This is the herniation we saw before which is very obvious now pushing out beyond the bone. There's a herniation here at 2-3 which is also now pushing out.

And if you look at the sides, not the back, but the sides, you will see that 3-4 and 4-5, it's a bulging of the disk, the disk is bulging, which pushes on the neural foramina, the nerve roots.

You can see that the disk between L-5 and S-1 is black. The others are sort of gray. This one is normal at 2-3. 1-2 is a normal disk. All the others are a little gray. Black is brittle and the other disks are on the way to becoming brittle.

Those are the major findings.

Q Let me see if I can provide you with a blow-up.

Let me show you what's in evidence as Plaintiff's Exhibit 48-A.

A These are the same pictures I just showed you but blown up. I'm just going to label it so you know what levels we're at.

Now, you can see very well this disk herniation. Let's look at a normal level. 1-2, this disk here between the first bone and second bone is the way every disk should look. There is no pushing. Right below at 2-3, look how it's being pushed in. Right here. This is new. It wasn't there before. So 2-3 is now herniating, pushing back onto the thecal sac. The spinal fluid is being pushed on.

Again, you go down to 5-1 and now you see it even much better. Look how much it goes beyond the bone. The bone ?? to here and here. And you see the disk very obviously pushing through here. And it looks like it's even bigger here than it was ten years before.

So, of course this is the normal disk again at 1-2. Look at the one above the disk going down into the body. This is the remnant, the deformity of the fracture of L-1 and that's still there. That will never heal. That will always stay the way it is.

And you can see here, this is black. The disk should look like this, this color, this whiteness. If you look underneath, it's a little bit grayer, not quite black, but look at 5-1. It's totally black, so that it's lost its water because it's herniated, and it's herniated for a long while now.

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Q What is the significance, if at all, of the fact that there's a herniation at T-12/L-1 and then the other disks are white except for L-1 -- withdrawn. Let me ask you another question.

Why don't you just tell us what the objective significance is, if any, of these findings.

MR. BEGOS: Objection, your Honor.

THE COURT: Why?

MR. BEGOS: I don't understand the question.

THE COURT: All right. Counsel doesn't understand the question. Clarify it.

Q Is there any significance to the findings you just discussed in connection with the spine?

MR. BEGOS: Objection to the form. And it seems to be calling for an opinion beyond the scope of his expertise.

MR. HILLER: I asked him the significance of what his findings are. I don't know how that's beyond.

THE COURT: I'll allow it.

A Well, there are multiple herniations and multiple bulges in a fracture. All of this does not bode well for this back necessarily.

This is a small contained area here there are a lot of nerves coming and going, and there are abnormalities in the back which are now, A, pushing on the structures that they shouldn't be pushing on and, B, there's evidence of a fracture deformity which has always been there and, C, the disk that has been herniated for awhile is now brittle.

So those are the significant problems in this back.

Q I think you indicated that the disk between L-1 and L-2 is normal?

A Yes.

Q But what about the rest of the disks in the lumbar spine?

A They are abnormal, as I have said.

Q What is the significance of that?

MR. BEGOS: Objection, asked and answered.

MR. HILLER: I don't believe I have asked that question.

THE COURT: Well, I don't remember either so what is the answer?

A The significance is that there are multiple problems from L-2 down. The disk weakness is greatest at the lowest level coming up, so if 5-1 is the weakest disk, you will see the most herniations at 5-1, and then the next weakest is before that at 4-5.

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And you will see herniations in a back that is unstable or weak in this distribution. This is not an unusual picture in a back that has been damaged.

Q Let's talk about that for a minute.

Can you express an opinion to a reasonable degree of certainty as to what caused Dr. Wurm's back to come to be in this condition?

MR. BEGOS: Objection, your Honor.

THE COURT: You mean from the point of view of this doctor's perspective?

MR. HILLER: Yes. From the films that he reviewed, based upon the assumptions that were previously provided.

MR. BEGOS: I object to that.

THE COURT: Overruled.

A I think it's clear that this patient had a significant trauma of some sort that fractured a bone. It's clear to me that there is a herniation at the same time at a lower level, which is now degenerated. And it's clear to me that there's some instability to the back from a trauma of this severity.

And the remainder of the disks from L-2 down are problematic as well.

I think over time, this is not unusual, this is not a surprising finding, that over time after such a trauma, that we could have this appearance of the spine as degenerating, being basically unstable now.

Q Let me show you, if I can, Plaintiff's Exhibit 47-A. This was the MRI of the spine, of Dr. Wurm's lumbar spine on December 6, 1988, approximately three-and-a-half weeks after the accident.

What if any significance is there to a comparison to the film of December 6, 1988, to the films of July 20, 1999?

A I think that -- two things. First of all, the level of the original herniation has gotten bigger. Look at that one and look at this. I think it's progressed and gotten bigger. It has certainly become black. It should look like that.

Just equate this color, this appearance with that. That is normal right now. All of the disks in the back are normal. Yes. Yes. Yes.

Q Referring to December, 1988?

A Yes. You're starting to get a little loss of water at 5-1, and then years later it's gone. There is no more water at all. That's progressed. It's now becoming arthritic and degenerative at 5-1.

Then we have findings at the other levels which we didn't have before.

So we have a progression occurring in this back right now, beginning with 1988. The fracture has not -- is still deformed. That deformity will always be there, the herniation progresses on, and there are new findings which is not unusual in a back that's now become unstable.

Q Can you testify to a reasonable degree of certainty why that is?

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A There was something that happened to this back that triggered this all off. And in this particular MRI, it's clear that there was a fracture, there was a significant trauma to the back that caused these problems to occur.

Q Dr. Kolb, is it reasonably possible that Dr. Wurm could have just developed this condition normally?

MR. BEGOS: Objection to the form.

THE COURT: Well, is the question whether without being given a history of the patient, in looking at that, you could say that that was a normal situation? Is that what you're asking?

MR. HILLER: Yes.

A I don't need a history for this particular MRI because there is a fracture here.

THE COURT: So I think the question is, for clarification, is whether or not you know the history, you could look at that and say it was not a normal progression based on age.

THE WITNESS: Right. It's not a normal progression.

Q Can you elaborate on that please?

A Well, we know that we are starting off with abnormal. We are starting off with the trauma severe enough to cause a fracture. That is what we are starting with. At the same time, there is a herniation in the lower back. And now we have it progressing on.

The most consistent and reasonable way to look at this is that the back has been damaged. If you want to assume that this would have happened anyway over time, it's a pretty big assumption. Clearly, it is much more reasonable to assume and to believe that this back has been damaged. I don't think that's -- I mean, to me, it's something that is obvious. You don't have to be a radiologist to know that there is a fracture in the back and there is a herniation at the same time at the time of the injury.

So to say that it's due to the normal aging process is highly unlikely.

Q Having reviewed the films in 1988, 1999, can you express an opinion to a reasonable degree of certainty as to the condition of Dr. Wurm's spine in May or June of 1994?

A Well --

MR. BEGOS: I object to the form.

THE COURT: All right. Sustained.

MR. HILLER: I will rephrase the question.

Q Can you express an opinion to a reasonable degree of certainty as to the condition of Dr. Wurm's spine in May or June of 1994?

MR. BEGOS: Objection.

THE COURT: I'm sorry. You know when that easel is right in your way, it's very difficult. Say it again.

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Q Can you express an opinion to a reasonable degree of certainty as to Dr. Wurm's -- the condition of Dr. Wurm's spine in May or June of 1994?

MR. BEGOS: Objection. There are no films in '94.

MR. HILLER: He can testify as to what -- Mr. Begos can cross-examine on the issue, but this witness can testify what the condition was, if he can.

THE COURT: Do you do that, without looking at films, Jay this is what is going to happen or this is what --

THE WITNESS: I have a film from one extreme in time and another film from another extreme in time. And someone is asking me what I think has happened in the middle of that time. I have already said that it's a continuum from the injury on.

THE COURT: So from a radiological point of view, then can you say with a reasonable degree of medical certainty --

MR. HILLER: What the condition of Dr. Wurm's spine was in May or June, 1 ?

THE COURT: In that period on your continuum?

THE WITNESS: Yes.

THE COURT: In other words, so we're not confused here, you can infer based upon two sets of X rays -- not X rays, but --

THE WITNESS: MRIs.

THE COURT: MRIs, what one in the middle would have shown if you had it; is that correct?

THE WITNESS: Yes -- well, within a reasonable amount. Yes.

THE COURT: To a reasonable degree of medical certainty?

THE WITNESS: Yes.

MR. BEGOS: I still object unless he does that in his normal practice, he does a radiology report where he does use a film where he has one ten years earlier and ten years later.

THE COURT: Let's put it this way: Would it be out of the scope of what you and other radiologists in this community would do, that is, to infer what the missing picture would have shown?

THE WITNESS: I'll be asked that question by a clinician, how bad was the injury originally compared to how it is now, to what I thought it was in the middle. I will be asked that question.

THE COURT: Overruled.

A Well, the answer is that the patient had what she had in '88, she had what she has now in '99, the spine degenerating as we discussed. So there is some midpoint, '94 or '95, where things started happening.

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In other words, this herniation at 2-3 happened at some period after 1988, as did the bulgings at 3-4 and 4-5, as did the desiccation or making of this disk losing its water. And it's a continuum. You just don't wake up one morning in 1988 and 1997 with all these things there.

The logical, reasonable thought process is that this is an on going process. In 1994, we had some additional problems that weren't there in '88, but yet we don't have more problems than we're going to have in '98.

So the answer is that this is a continuum, it is happening as time goes by. In '94, there were other problems.

Q Dr. Kolb, is it reasonably possible that the herniation at L-5/S-1 which you identified on the December 6, 1988 film, ceased to be herniated sometime in 1994 or 1995?

MR. BEGOS: I object to the form.

THE COURT: Sustained.

Q Is it reasonably possible, Dr. Kolb, that the herniation at L-5/S-1 -- withdrawn.

Is it reasonably possible, Dr. Kolb, that the disk at L-5/S-1 at some point in time ceased to be herniated during the period of 1994/1995?

MR. BEGOS: I object to the form. Leading.

MR. HILLER: I'm asking is it possible.

THE COURT: In other words, you want to know with a reasonable degree of medical certainty, could you say looking at the first set and then the ones that you said were at the other extreme in time, could you say that somewhere in the middle this herniation did not exist? Is that the question?

MR. HILLER: Yes.

A The answer is no -- the answer is, medically, once a herniation, once a disk is herniated, it never goes back. So there is no -- there is no reason to even begin to think that films in '94 would have shown no herniation at 5-1. Because once the ligaments are torn, once the annulus is torn, once the disk is punched through, the disk just doesn't go back and the ligaments heal. That never happens. So once a herniation is there, a herniation is there.

Q Let me ask you the same question with regard to the fracture at L-1 and the intrabody herniation that you identified on both films.

Is it, to a reasonable degree of certainty, reasonably possible that that fracture could -- that the bone could have leveled off and the intrabody herniation in a sense moved out of the L-1 vertebra at some point in time between 1988 and 1999 and then subsequently re-herniated?

MR. BEGOS: Objection.

THE COURT: Does that question make sense to you?

THE WITNESS: It was the same question.

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THE COURT: That's what I thought.

THE COURT: So it's been asked and answered.

MR. HILLER: It's at a different level.

THE COURT: You can answer.

A No. It's impossible. Once the bone is fractured, it's deformed. Nothing got better and then got worse again. Nothing gets better in these things that we have talked about.

Q Can you express an opinion to a reasonable degree of certainty as to whether or not Dr. Wurm's spine is ever going to improve over time?

MR. BEGOS: Objection.

MR. HILLER: I will rephrase the question.

Q Dr. Kolb, can you express an opinion to a reasonable degree of certainty as to whether or not the conditions that you just identified on the films were permanent?

A Absolutely. They are.

Q And what is that opinion?

A They are absolutely permanent. Nothing is going to get better. The disk will not get water back. It's gone. The disk is herniated. It will not go back in. The bone was fractured. There is no more swelling in the bone, but it's going to stay deformed. That's just the way it's going to be.

Q Doctor, you previously testified that clinicians will call you up and ask you if your findings match the patient's diagnosis?

A Yes.

Q Could you just describe that process without saying specifically what one person said to you? Just give us an idea of what that process is.

A A clinician will call up and say, “I have a patient --”

MR. BEGOS: Objection, your Honor. This is hearsay.

MR. HILLER: I'm just asking -- it's not being offered for the truth. I want to find out generally what the protocol is in terms of when doctors call up.

THE COURT: So ask it in that way.

Q Doctor, what is the protocol when doctors have called you up and asked you if findings match the diagnosis?

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A I would get a phone call, and the doctor will have a report, and the doctor will say, “This patient has a headache and we have this MRI of the brain. Do you think the patient's headaches are from that?” Or, “There is a disk herniation. The patient has pain. Do you think it's related to that?”

Q How often do you do that?

A It's infrequent.

Q Pardon me?

A Infrequent. It is not that common.

Q It's something that you do?

A It happens. It's not unusual. It doesn't happen in the majority of cases, but it's not unusual.

Q My question for you is during the course of your practice, have you in the past been called by doctors asking whether the objective findings on the films match the patient's clinical symptoms?

A Yes.

Q Dr. Kolb, based upon your experience and your review of the films, can you state an opinion to a reasonable degree of certainty as to whether or not the symptoms that were previously described to you matched the objective findings that you made on the films?

MR. BEGOS: Objection, your Honor. He hasn't examined Dr. Wurm. He said these consultations are infrequent. I think this is beyond the scope of his expertise.

THE COURT: No, overruled.

A Yes. I have been told that the pain and the distribution of the pain is anatomically consistent with the level of the herniation.

MR. BEGOS: Objection, your Honor. There is no foundation for that in the evidence today. I'm not sure who he was told this by. Mr. Hiller didn't include anything about that in his hypothetical.

THE COURT: Back up and clarify it.

MR. HILLER: Okay, your Honor.

Q Let's work with the assumptions that we have discussed earlier.

You have a woman who's asymptomatic prior to her horseback riding accident of any pain in her back, subsequently she has this horseback riding accident, she falls on her buttocks and right hip and sustains a 1.3 compression fracture.

Subsequently, the patient begins to experience pain in the right hip, right buttock, right posterior thigh and that pain continues for 13 years.

Doctor, based upon those -- assuming those clinical symptoms and based upon her history, would you be able to testify to a reasonable degree of certainty as to whether or not the objective findings on the films match those clinical symptoms?

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MP. BEGOS: Objection.

A Yes.

THE COURT: Overruled.

A Yes. As I just said, you are telling me that this patient has pain which correlates with the level of the herniation. And so it does correlate with the herniation.

We do have a re son for the patient having this pain, and so it is most reasonable to say that this herniation is causing the patient's symptoms just from pure logic.

THE COURT: Mr Miller, how much more do you have on direct?

MR. HILLER: ?? a couple minutes, your Honor.

THE COURT: ?? rally a couple of minutes?

MR. HILLER: I would say less than five minutes.

THE COURT: Ok??.

Q Dr. Kolb, I want to make another -- answer another question based upon series of assumptions.

I want you to take the same assumptions you did before, but one differe?? one, and that is, the radiologist who looked at th December 6, 1988 film, for one reason or another didn't ??dentify to the clinician, the orthopedist, that there v s a herniation -- I should say that the orthopedist -- it the radiologist didn't identify the disk herniation L-5/S-1.

MR. BEGOS: O??ction, your Honor. There is no foundation for that in the evidence.

MR. HILLER. Of course there is.

THE COURT: I'll allow it.

Q I want you to assume that the radiologist on December 6, 1988, for some reason or another didn't identify the herniation at L-5/S-1. Would that present any problems for the orthopedist in terms of diagnosing the patient?

MR. BEGOS: Objection, your Honor. This is an orthopedics question.

THE COURT: Sustained as to the form.

MR. HILLER: I will ask it another way.

Q If a radiologist, working off the same assumption before, a woman involved in a horseback riding accident, she fractures her L-1 vertebra, there is an ?? herniation, she has pain in the right hip, right buttock, right posterior thigh, and this pain continues over a period of time, but for one reason or another, the radiologist who looked at this film did not report to the orthopedist that there was a herniation at L-5/S-1. Would that present any problems in identifying the objective correlation between the symptoms and the findings?

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MR. BEGOS: Objection, your Honor. This is an orthopedics question.

THE COURT: Did you say would it present any problems?

MR. HILLER: Present any difficulty in diagnosing, yes.

MR. BEGOS: For the orthopedist. That's an orthopedics question.

THE COURT: Sustained.

Q Let me ask you the question another way.

I'm not going to go through the whole question again. Using the same assumptions before with the radiologist reading the film and not seeing the L-5/S-1 herniation, would that present a difficulty in explaining Dr. Wurm's pain?

MR. BEGOS: Objection, your Honor.

MR. HILLER: I'm not asking about orthopedics, Judge.

THE COURT: Who are you talking about?

MR. HILLER: I'm asking the witness whether it would present any difficulty understanding the objective correlation.

THE COURT: For him?

MR. HILLER: Yes.

MR. BEGOS: Dr. Kolb doesn't explain pain. Dr. Kolb gets statements from orthopedists or clinicians. It's not within the scope of his expertise.

MR. HILLER: That's not correct.

THE COURT: You might have to ask it a different way.

MR. HILLER: I will try one more time.

Q Dr. Kolb, let's go back for a second.

You indicated that part of what you do as a radiologist, you from time to time receive telephone calls or requests for information from doctors asking you -- you have received phone calls or requests from time to time from doctors who ask you to correlate the symptoms with the objective findings you have made on films.

MR. BEGOS: Objection, your Honor. Leading, asked and answered.

THE COURT: I'll allow it.

MR. HILLER: It's foundation.

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Q Is that correct?

A Yes.

Q So let's take a look now at this particular instance.

If a radiologist failed to identify the L-5/S-1 disk herniation, would that create any difficulty in correlating the complaints of pain with the objective findings on the film?

MR. BEGOS: Objection, your Honor.

THE COURT: Sustained.

MR. HILLER: Your Honor, I have no further questions at this time.

THE COURT: Okay. You have some cross; don't you?

MR. BEGOS: Yes.

THE COURT: We'll take a few minutes before we go onto cross-examination. Please do not discuss the case.

(At this time the jury filed out of the Courtroom.)

(At this time a brief recess was taken.)

CROSS-EXAMINATION

BY MR. BEGOS:

Q Dr. Kolb, previously we were discussing your conversations with Mr. Hiller and you said under Mr. Hiller's questioning that you met with him first a month age, about a month ago.

A Approximately.

Q And you met with him on a couple of occasions, isn't that correct?

A Um-hmm.

Q And during those meetings you discussed with him the questions that he was going to ask you today?

A No, that is incorrect.

Q You didn't discuss all the questions he was going to ask you. Did you discuss at all the subjects that he was going to ask you about?

A He asked me my findings on the MRIs and I told him my findings on the MRIs. He showed me several films. I told him my findings on those films. That was pretty much the substance of everything that went on.

Q Did you discuss at all the questions that I might ask you?

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A No, absolutely not.

Q You met with Mr. Hiller this morning, isn't that correct?

A I met with him this morning in the hall.

Q You discussed your testimony with Mr. Hiller?

A No, he told me where everything was in the court, how it is laid out, but I didn't discuss with him anything that hadn't been discussed before, which I told you was focused on the findings on the MRIs.

Q Did he highlight for you any particular findings on the MRIs that he wanted you to discuss?

A Him?

Q Yes.

A No.

Q Now, you're being paid for your testimony here today?

A Yes.

Q How much are you paid to be here today?

A Forty-five hundred dollars.

Q Forty-five hundred dollars, that is for half a day?

A Yes.

Q Now, you said previously that that was based on having to cancel appointments with patients.

A That is how the number is arrived at.

Q That is how the number is arrived at, but it's the same number all the time, is that correct?

A It's half a day of the office work, yes.

Q You have testified you said I would guess probably about 35 times or so in the last six years, give or take?

A Give or take.

Q Would that be mostly on plaintiff's side?

A It would be mostly on the films that are sent to me by the doctors, and if those are plaintiffs --

Q You know when you come into court which party you're testifying for?

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A Yes.

Q It's mostly for the plaintiff's side?

A Yes.

Q You typically testify for people who are suing to collect money from somebody else?

MR. HILLER: Objection.

THE COURT: Sustained.

Q It's rare that you testify for the defense as an expert, is that correct?

A I wouldn't say it's rare at all. In fact, I just finished a large malpractice case where I was the defense expert. I'm on a list of malpractice medical insurance organizations like Medical Liability, Mutual Insurance Company of New York. And I'm on their defense list. They're medical insurance companies.

So I wouldn't say that it's rare. I do a lot of counseling for attorneys on cases on both sides. I testify in court both ways. A majority of the time has been for plaintiffs.

Q If you have testified about 36 times, would you say it was 18 or 19 for the plaintiff and :16 or 17 for defendant?

MR. HILLER: Objection.

THE COURT: Sustained. The numbers that you mentioned, court appearances, is that an approximation?

THE WITNESS: Yes.

Q How many times do you specifically recall testifying for the defendant in a lawsuit as an expert?

A I can't give you an exact number because I also speak to them out of the courtroom and I don't remember the exact times in the courtroom whether it's plaintiff or defense because I speak to both sides out of the courtroom as well. I don't know which ones are coming up for trial, which ones are not. So I can't give you exact numbers.

Q Would you say 75 percent of the time you're testifying for plaintiffs?

MR. HILLER: Objection.

A I don't want to guess.

Q Now, isn't it correct, Dr. Kolb, that you can't tell whether a person is experiencing pain from looking at an MRI?

MR. HILLER: Objection to the form.

THE COURT: I think you have to ask that question again.

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Q Isn't it correct you can't draw a conclusion to a reasonable degree of medical certainty whether a person is experiencing pain by looking at an MRI that shows disk problems?

A That is correct.

Q Because the MRI shows the structure of the spine, isn't that correct?

A That's correct.

Q It shows the structure of the disks, is that correct?

A That's correct.

Q But it doesn't show whether a particular disk problem is causing pain, isn't that correct?

A That's correct.

Q In fact, isn't it correct that there are many disk problems that don't cause pain?

MR. HILLER: Objection.

THE COURT: Sustained.

Q Isn't it common, Dr. Kolb, to see disk bulges or herniations without their being any clinical findings of pain in that patient?

MR. HILLER: Objection.

THE COURT: Isn't it true that --

Q Isn't it true that it's common to find problems with disks without associated pain?

MR. HILLER: Objection.

THE COURT: Sustained.

Q Have you ever heard of an asymptomatic disk problem?

A That means what you just said. Well, if you can define what problem better. It means there is no pain, but there is a disk problem.

Q And you have come across asymptomatic disk problems in your practice as a radiologist?

A As you just said, I don't see pain on an MRI. I see disk herniation and disk bulge. So whether a patient has pain or not you would ask the clinician that. As you asked me many times, and I agree, I don't examine the patient.

Q You've testified you didn't examine Dr. Wurm.

A Correct.

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Q And just looking at the 1999 MRI, without any of the assumptions that Mr Hiller asked you to make. you can't tell whether the person whose back that ?? suffering pain. can you?

A Of course. I cannot ??.

MR. HILLER: Objection. Asked and answered.

MR. BEGOS: It was unclear.

THE COURT: You cannot --

THE WITNESS: I can give an opinion statistically whether one would have pain or not based on those findings, but I can't for each specific patient who has those findings. I could not tell whether that patient is having pain.

Q Because there are patients who have those findings who aren't suffering any pain, is that right?

A It's possible.

Q Let's take a look, Dr. Kolb, at the 1988 MRI. This is Plaintiff's Exhibit 47-A. I'll hold it up. You testified that down here at L5-S1 -- you've testified that down here at L5-S1 you see a herniation of that disk.

A Yes.

Q And is :t your testimony that it's a clear herniation?

A Yes.

Q No question about it?

A Yes.

Q Any radiologist looking at this film wouldn't see anything other than a herniation?

MR. HILLER Objection.

THE COURT: There could be a radiologist somewhere who would make a mistake or be incompetent or whatever else -- good medical practice.

THE WITNESS: Right.

Q Let me show you what has been marked as Defendant's Exhibit G for identification. These are the notes of Dr. Patrick O'Leary. I'd like you to turn to the note for December 20, 1988 which is about two weeks after this MRI was taken.

A Yes.

Q The last paragraph of that note he says, “With regard to the MRI study which was done, it shows evidence of fracture of the superior end-plate of L1 with some intrinsic destruction of the T12-L1 disk which is compatible with the injury she sustained. There is no evidence of disk herniation as such. The overall spinal alignment is good. The anticipation will be one of progressive healing and improvement, but the timing of recovery cannot be fully predicted at this point in time.”

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Obviously, Dr. O'Leary didn't see the herniation at LS-S1 that you see.

MR HILLER: Objection. Lack of foundation.

MR. BEGOS: Withdrawn. I'll rephrase it.

Q There is no indication in this report that Dr. O'Leary saw herniation that you see in the 1988 film. is that correct?

MR. HILLER: Objection, lack of foundation. There is no evidence that he even saw the MRI.

THE COURT Sustained.

Q There is no indication from Dr. O'Leary's report that anybody saw a herniation at LS-S1 that you see in the 1988 film?

A No, that is not what he's saying.

Q That is not what he's saying?

A I don't know that he saw the film or didn't see the film. He may be repeating what somebody, what a radiologist said to him for all I know, but I mean, don't pin it on this doctor that he's saying it isn't there. Without him looking at the film is to me, you know, unusual.

Q Did you review the MRI taken of Dr. Wurm in 1989?

A As I said before, I saw a number of films, but I don't remember the dates of the films.

Q You don't remember particularly what the 1989 MRI showed?

A That's right.

You recall reviewing the radiologist report of the 1989 MRI?

A No, absolutely not.

Q You don't know what the radiologist who took that MRI reported seeing in the films?

MR. HILLER: Objection, lack of foundation.

THE COURT: Repeat the question.

Q You don't know what the radiologist who viewed e 1989 MRI reported seeing in the films, do you?

MR. HILLER: Objection.

THE COURT: Overruled.

A No.

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Q You don't know whether he saw the same herniation ?? you saw appear in the 1988 film?

MR. HILLER: Your Honor, there is no May 1989 report in evidence. He's asking about questions that are not in evidence. Lack of foundation.

MR. BEGOS: You're saying there is no 1989 report? I'm happy to introduce -- why don't I offer this into evidence. This is the report of May 12, 1989 of the MRI taken of Dr. Wurm.

MR. HILLER: Objection. Your Honor, may I take a look at the document?

(Handing.)

MR. HILLER: I thought he was going to show him the film. May we approach the bench?

(Off the record discussion.)

Q Can you tell me whether you have previously seen this report. Dr. Kolb?

A No, not that I recollect.

Q Now, you testified that the herniation of the L5-S1 disk that you see in the 1988 film couldn't heal, couldn't go away.

A Right.

Q So if a herniation of the L5-S1 disk -- withdrawn.

You don't know, sitting here today what, if anything, the 1939 MRI study shows regarding the herniation, regarding the L5-S1 disk, is that correct?

A Correct.

Q So if the 1983 MRI study doesn't show a herniation of the L5-S1 disk, because the herniation doesn't go away, isn't it true that you're mistaken about their being a herniation in the 1988 film?

A No. If you're going to say that there was a report read saying there was no herniation at that level 5-1 in 1989, I think we should look at the films and see whether there was or wasn't a herniation, not rely on somebody else's reading.

Q You don't recall whether you looked at those films?

A That's correct. If you have them, I would be more than happy to look at them.

Q I'm sure Mr. miller has all the films here.

MR. HILLER: Objection to that comment.

THE COURT: Please, that would be disregarded by the jury. Who has those, if anyone?

MR. BEGOS: The films belong to plaintiff.

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THE COURT: Please don't make a speech. We don't have them here, we don't have them.

MR. BEGOS: Mr. Hiller has the film, they're sitting in the pile --

MR. HILLER: Objection.

THE COURT: Do not accuse another lawyer of something that is improper and unprofessional.

MR. BEGOS: If you have it, give it to me.

MR. HILLER: Your Honor, as I told you at the bench, the reference is to four films -- only one of them exists and I believe the claim file shows that three of them are --

THE COURT: Is it here?

MR. HILLER: I don't have them here. The insurance company has them.

THE COURT: I can tell you that I don't have it and the doctor doesn't have them. Go ahead.

Q Dr. Kolb, you testified with regard to the 1988 film, you said that there was white, a white, lighter spot up here in the L1 vertebrae.

A Yes.

Q You testified that was a bruise or an edema of the L1 vertebrae?

A Absolutely.

Q And that showed that there was a relatively recent trauma to that vertebrae?

A Absolutely.

Q Edema goes away after a relatively short period of time.

A It goes away, let's put it that way.

Q Isn't it correct there is no edema in the L5 vertebrae or S1 vertebrae in the 1988 MRI?

A No, nor would I expect there be.

Q And edema, is it correct that edema in a vertebrae that is not -- is not something that can occur naturally without a trauma?

A Without some abnormality. There has to be something abnormal.

Q Something abnormal that happens to the vertebrae?

A Or a tumor.

Q And that abnormality of the vertebrae can cause problems with the disk next to the vertebrae, is that correct?

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A Yes, as this has.

Q And this does -- are you talking about the T12-L1 disk up here?

A Yes.

Q You said that was an intrabody disk herniation?

A Yes.

Q That is a herniation where the disk goes down into the vertebrae material, is that correct?

A Yes.

Q Now, you testified that a disk problem can cause pain by compressing or pressing on a nerve root. It goes to nerves on another part of the body, correct?

A Yes, causing abnormal pressure on the nerve root.

Q You said that by following a dermatome you can try to link up pain with a particular level of a person's spine, isn't that correct?

A Yes.

Q Herniation of disk that doesn't impact a nerve root at all typically isn't going to cause any pain, is that correct?

A Well, you just asked me before whether herniation can be asymptomatic or have no symptoms. So there is a range of having severe symptoms to no symptoms.

Q Isn't it correct that intrabody disk herniations like occurred at the T12-L1 level typically doesn't put pressure on nerve roots at that level?

MR. HILLER: Objection.

THE COURT: Can you answer as to typically?

THE WITNESS: Yes, that is correct It's between just the body of the disk, not in the nerve root.

Q It's not pressing out on the nerve?

A No, that type of herniation is not pressing back.

Q Because it's not pressing back, an intrabody disk herniation is unlikely to cause pain in the lower body, is that correct?

MR. HILLER: Objection.

THE COURT: Sustained.

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Q Intrabody herniation of the T12-L1 disk is unlikely to cause herniation -- is unlikely to cause pain along the T12 dermatome, isn't that correct?

A That is not. All we have here --

Q My question relates to the herniation.

A If there was no fracture of the bone and just a disk coming down, I would more likely say that it's less likely. This is not what we have here, but as far as your question is concerned, I would say it's less likely.

Q Based on your review of Dr. Wurm's MRIs and x-rays and CAT scans, you weren't able to form any conclusion as to whether or not Dr. Wurm was disabled, were you?

A No.

Q You weren't asked to form any conclusion as to whether she is disabled?

MR. HILLER: Objection. Beyond the scope of direct.

THE COURT: The answer is no.

Q I'll show you, Dr. Kolb, what has been marked as Defendant's Exhibit AB for identification. When you reviewed Dr. Wurm's 1999 MRI you prepared a report, is that correct?

A Yes.

Q And is that your typical practice when doctors ask you to review an MRI, to prepare a report?

A Yes.

Q And that is how you communicate to the doctor who ordered the MRI your findings?

A Yes.

Q Now, this report goes through in some detail the specific findings that you see at the different levels of Dr. Wurm's lumbar spine, is that correct?

A Yes.

Q And you've testified on direct to a number of those findings that you have in your report, is that correct?

A Yes.

Q Now, Mr. Hiller asked you if you could draw any conclusion based on your review of the 1988 film and your review of the 1999 film what the condition of Dr. Wurm's back was in 1994. Do you recall that?

A Yes.

Q You couldn't prepare a report like this, like Defendant's AB as to the condition of Dr. Wurm's spine in 1994, could you?

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MR. HILLER: Objection.

THE COURT: Sustained.

Q For example, in 1999 you say that there is a posterior disk herniation at the L5-S1 level which impinges upon the thecal sac and narrows the neural foramina bilaterally.

MR. HILLER: Objection. The document is not in evidence.

THE COURT: What is the question?

Q Could you say whether the neural foramina at the L5-S1 level were narrowed in 1994?

A No.

Q Could you say whether the herniation at L5-S1 impinged on the thecal sac in 1994?

A No, I answered that before. What I can say is that --

Q I'm just asking you what you can't say.

MR. HILLER: I think the witness should have the opportunity to answer the question.

MR. BEGOS: He has answered the question.

MR. HILLER: Mr. Begos interrupted his answer. I don't think it's appropriate that the witness be interrupted in the middle of an answer.

THE COURT: Have you finished your answer?

THE WITNESS: No, I was going to complete it.

THE COURT: All right.

THE WITNESS: What I said before was that this was a significant injury that we all see here from 1988 progressing to a more significant injury in 1999. And so while, as I said, I just agreed with you that I can't tell you which nerve root is affected and which nerve isn't, if you were to ask me in 1994 how did her back look, I would say pretty bad, worse than in 1988.

Q Not as bad as 1999?

A I think with time everything is going to get worse.

Q Isn't it correct, Dr. Kolb, that with time, everyone's back does get worse regardless of whether a trauma is suffered?

MR. MILLER: Objection to form.

THE COURT: Sustained.

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Q If you looked at an MRI, two MRIs of a person's spine taken ten years apart, would you expect to see degeneration in the later MRI that wasn't in the earlier MRI?

MR. HILLER: Objection.

THE COURT: Sustained.

Q Let me ask it this way:

Let's look at the 1999 MRI. Let's forget for a second about the fracture at L-1. I'm focusing on the disks from L-1/L-?? down to S-5 -- I'm sorry, L-5/S-1.

MR. HILLER: I object to the form of the question since I couldn't understand what he was talking about.

Q Dr. Kolb, have you ever seen in your experience an MRI of the lumbar spine that shows the type of disk problems that you've identified at L-1/L-2 down to L-5/S-1 without there being a fractured vertebra?

A Yes.

Q So these Kinds of disk problems can occur without a fractured vertebra?

A They can.

Q Now, you say in your 1999 film you see a posterior disk herniation at L-2/L-3?

MR. HILLER: Objection, reading from a document not in evidence.

Q You testified that you saw a herniation at L-2/L-3?

A Yes.

Q You don't know whether that herniation you saw in 1999 was present in 1994; do you?

A I have just answered that. I can't give you the specifics. I have told you my reasoning.

Q You can't say whether the herniation at L-2 --

MR. HILLER: I believe the witness --

THE COURT: Would you stop interrupting?

MR. HILLER: I apologize. I believe the witness was answering the question and he was being interrupted.

THE COURT: You are objecting that he's interrupting your witness, and you are interrupting, too.

MR. HILLER: I'll stop if Mr. Begos stops.

THE COURT: He'll stop if you stop.

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MR. BEGOS: It's a simple yes or no question.

Q Dr. Kolb, you can't say whether the herniation at L-2/L-3 that you see in the 1999 films was present in Dr. Wurm's back in 1994; can you?

A No.

Q And you can't say whether the bulges, the bulge that you see at the L-3/L-4 disk in the 1999 film was present in 1994; can you?

A No. But as I have said --

Q It's a yes or no question, doctor. Yes or no?

A The answer is no. Maybe I can qualify it later.

Q You will have a chance to do that.

Yes or no, the bulges that you see at L-4/L-5 in the 1999 film, you can't say whether that was present in 1994; can you?

A That's correct.

Q Now, this 1999 film is taken from Dr. Wurm's left side; is that correct? This particular view?

A It's going from one side to another side.

Q This is the back, this is the front?

A Yes.

Q That's as if we were looking at her from the left side?

A It is going from side to side, that's correct.

Q This is Plaintiff's Exhibit 49-A. This is another blowup of the 1999 MRI?

A Yes.

Q And this is also from the left side, this is her front, this is her back?

A It is from a side. I would have to look at the entire sequence of films, then I could tell you whether it's the left or the right.

Q You can't tell whether this particular view is the left side of her spine or the right side of her spine?

A As I just said, if you give me the entire films, I will tell you whether that is left or right, unless it's stated on there.

Q Here is Plaintiff's Exhibit 48.

A This is the right side. Eight and ten are the right side.

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Q Where on this sequence is the left side?

A This side, the top panel.

Q Now, you testified that you see -- I forget the exact words you used, but there was a problem with the neural foramina down at the L-5/S-1 level?

A Well, you are pointing to 4-5, but there's also a problem at 5-1, as well, yes.

Q That was narrowing of the foramina?

A Yes.

Q And that's where the nerve roots pass from the spinal cord out into the body?

MR HILLER: Objection to form. “That's where.”

THE COURT: Sustained.

Q The nerve roots pass through the neural foramina from the spinal cord to the rest of the body?

A From the thecal sac. There is no cord at that level, but the idea is correct.

Q And you can actually see perhaps not on this blowup but on an MRI, generally you can see the actual nerve root; is that correct?

A You can see it on this one too.

Q And a narrowing of the neural foramina in and of itself doesn't cause pain in a person's leg; does it?

A No. There has to be pressure on the nerve root.

Q It's only if the narrowing of the foramina causes pressure on the nerve root that there might be pain in some other part of the person's body?

A Correct.

Q And you didn't record, you didn't testify or report that you saw any pressure on the nerve root at the L-5/S-1 level; did you?

A I didn't put it in my report. I could show it here.

Q Your report was intended to be your description of what you saw upon reviewing the MRI?

A I'm agreeing with you.

Q This is what you did in the ordinary course of your job as a radiologist?

A I'm agreeing.

Q In your report, you didn't say there was any pressure on the nerve root at L-5/S-1?

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MR. HILLER: Objection. Asked and answered.

THE COURT: Sustained.

Q Are you saying now that despite not including it in your report that --

MR. HILLER: Objection.

Q -- that you say there's pressure on the nerve root at L-5/S-1?

THE COURT: There was an interruption. Now you have to ask it again. Please stop interrupting.

Q Is it your testimony, Dr. Kolb, that you are prepared to testify today that you see pressure on the nerve root at L-5/S-1 even though you didn't include that in your report?

MR. HILLER: Objection.

THE COURT: Sustained.

Q In the film of the 1999 MRI, is it correct that there is also narrowing of the neural foramina on the left side of the L-5/S-1?

A Yes.

Q Now, doctor, there is a nerve root that goes through each of these neural foramina; is that correct?

A Yes.

Q The left side neural foramina takes the nerve root to the left side of the body?

A Yes.

Q And the right side neural foramina takes the nerve root to the right side of the body?

A Yes.

Q Now, it is your testimony that the narrowing of both sides is equal at the L-5/S-1 level?

A Yes.

Q So whatever problems that narrowing is causing on the right side, it should also be causing on the left side; is that correct?

MR. HILLER: Objection. I'll withdraw the objection.

THE COURT: What?

MR. HILLER: I'll withdraw the objection.

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A No. That's incorrect statement. You previously just said before that you can have disk herniations where you don't have any pain at all, and you can have the same herniations and have extreme pain. What I said is that you can have a herniation, which I just told you we agreed, I just told you is on both sides, and your question, shouldn't you have on one side pain and the same pain on the other side is absolutely incorrect.

Q So you can have at the L-5/S-1 level the identical degree of narrowing of the neural foramina on the left side and the right side, and yet not the same symptoms that occur or result from that narrowing?

A Of course. We just said that you can even have a disk herniation without having pain and have the same herniation and extreme pain. So the answer is of course it is correct.

Q It is also correct just by seeing narrowing of neural foramina, you can't say whether there are any symptoms at all?

MR. HILLER: Objection. Asked and answered.

Q The answer is you can't?

A Of course not.

Q Did you also see narrowing of the neural foramina at L-4/L-5?

A Yes.

Q And did you see that on both sides?

A Yes.

Q Now, the L-4/L-5 neural foramina, that is the L-5 nerve root that passes through that?

A I believe so.

Q And can you show is where on the dermatome chart the L-5 nerve root goes to?

A It goes in the front down here in the calf and down the foot.

Q So if that particular narrowing was causing pain, you would expect it to cause pain at the calf and the foot?

A If that assumption is correct, yes.

Q It's an assumption whether a particular narrowing of a particular neural foramina is causing pain?

A No, because we have the patient's symptoms to relate it to.

Q You don't have any personal knowledge of this patient's symptoms?

A Let me clarify then.

If you want to say that a neural foramen is narrowed and is pushing on a hole where the nerve comes out, if the patient complains of pain that is related to that nerve root, we have found the cause of the pain.

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If the patient says there is no pain related to that bulge, the narrowing of that hole where the nerve comes out, then that bulge is not causing pain. It depends what the patient says.

Q You don't see patients when you analyze MRIs; is that correct?

A Absolutely correct.

Q You don't ascertain whether a patient has particular symptoms of pain in the course of analyzing an MRI?

A Again --

Q I'm simply asking you.

MR. HILLER: Your Honor, objection.

THE COURT: Sustained.

MR. BEGOS: I thought he said “correct.”

MR. HILLER: I believe the word was --

THE COURT: I didn't hear a question. I heard a statement.

Q I have misunderstood what you were saying. Now I forget my question.

What I'm asking you about, Dr. Kolb, is simply the review of the MRI and the MRI films, and isn't it correct that just by -- I withdraw the question.

MR. HILLER: Are you done with the film, Mr. Begos?

MR. BEGOS: For the moment, yes.

Q Now, Dr. Kolb, actually I do have another question about the film, or you can look at the blow-up too. It is on either.

There is a white spot down here at the bottom of the L-5 vertebra in the 1999 film?

A Yes.

Q That is that edema?

A No.

Q That is not. What is that white spot?

A That's arthritis.

Q Did you find any edema in the L-5 vertebra upon reviewing your 1999 films?

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A No. I don't think so. Oh, I did. I'm sorry. I'm incorrect. I misread. Yes.

Q So you did find edema?

A I misread my report just now.

Q You did find edema in the L-5?

A Yes.

Q You found edema in the S-1 vertebra, as well?

A Yes. Around the site of the herniation that's correct. I'm sorry.

Q You testified previously that edema is a sign of some sort of trauma?

A No, I didn't say that. I said abnormality.

Q Abnormality.

A I was clear about that. It doesn't have to be trauma. In fact, I said to you it could be a tumor, it could also be arthritis.

Q It can be trauma?

A It can be trauma, yes.

Q And you find edema at the bottom of the L-5 vertebra and at the top of the S-1 vertebra; isn't that correct?

A Yes.

Q And that's the same, the bottom of the L-5 vertebra and the top of the S-1 vertebra are what surround the L-5/S-1 disk; is that correct?

A Correct.

Q In 1999, there is edema on the vertebra that surrounds the L-5 --

MR. HILLER: Objection. Asked and answered twice.

THE COURT: Sustained.

A Yes.

THE COURT: You know the thing is we're trying to finish this examination before the luncheon recess.

MR. BEGOS: I agree. I will try to move along quicker, your Honor.

Q An MRI can show a misalignment of the spine; can't it?

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A I'm not sure what you mean by “misalignment.”

Q Can it show any problems with the alignment of the spine?

A If you could define it a little bit better. It would be -- I could give you a better answer. I'm not sure I understand your question.

Q Have you ever used the term alignment in reporting on your review of an MRI?

A I use the term alignment when bones are aligned in a fracture, for example. I don't use the term alignment on an MRI report.

Q What term do you use if you are reporting the structure of the spine being somewhat abnormal?

A Structure?

MR. HILLER: Objection to form.

A I use all the words that we have talked about.

Q You testified that the disks can experience a phenomenon where the water inside the disk dries out?

A Yes.

Q And isn't it correct, I believe you testified that that can occur following a herniation of a disk?

A Yes.

Q Isn't it correct it can also occur without a herniation of a disk?

A Sure.

Q And isn't it correct that that's something that occurs over time?

A Yes.

Q It's not -- the loss of water isn't something that happens overnight?

A Usually not.

Q Now, on your 1999 MRI, the L-1/L-2 disk, that's the disk right below the vertebra that was fractured?

A Yes.

Q There are no problems with that disk that you saw in the 1999 MRI; is that correct?

MR. HILLER: Objection to form.

THE COURT: Sustained.

Q Did you see any problems with the L-1/L-2 disk in the 1999 MRI?

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A No.

Q You testified that there was a narrowing of the thecal sac in the lumbar vertebra, lumbar spine in the 1999 MRI?

A Yes.

Q The thecal sac is the membrane that surrounds the spinal cord?

A No. There is no spinal cord there.

Q At that level.

MR. HILLER: Your Honor, he's interrupting the witness' answers.

Q You can answer.

A It is the membrane that surrounds the spinal fluid that bathes the nerve roots at that level.

Q At the lumbar spine, the spinal cord ends and there are nerve roots going down in the interior of the vertebra?

A No. The vertebra are the bones. The interior of the thecal sac.

Q And what you saw was a narrowing of the thecal sac in the lumbar vertebra in your 1999 MRI?

A In the lumbar spine, yes.

Q Let me show you what's been marked Defendants' Exhibit C.

MR. HILLER: Your Honor, may we approach?

THE COURT: Yes.

(At this time a discussion was held off the record among the Court and counsel.)

Q Now, you testified on direct examination that it is in your opinion logical that Dr. Wurm's accident caused the herniation that you see in 1988 at the L-5/S-1 disk?

MR. HILLER: Objection to form.

THE COURT: Overruled.

A Yes.

Q That conclusion is based on the assumption that there actually is a herniation at the L-5/S-1 disk in 1988; isn't that correct?

A Obviously.

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Q And if there is, in fact, no herniation, if you are wrong about there being a herniation in the L-5/S-1 disk in 1988, you can't draw any conclusions about what effect the accident had on that disk; isn't that correct?

MR. HILLER: Objection.

THE COURT: Sustained.

Q Let me you ask you this: If it was only narrowing at the L-5/S-1 disk in 1988 and not a herniation, can you draw conclusions or reasonable medical certainty as to whether the accident caused the narrowing?

MR. HILLER: Objection.

THE COURT: Whether it caused the narrowing?

MR. BEGOS: Yes.

THE COURT: Sustained.

Q You testified in looking at the 1999 MRI that the herniation at L-5/S-1 was very “obvious now” were your words.

A Yes. The pictures that I showed you here, yes.

Q It was less obvious in 1988; is that correct?

A I think it got bigger '88 to '99.

Q You said it was very obvious now in 1999?

A I also said that it got larger during my testimony here.

Q So it was smaller and less obvious in 1988; is that correct?

MR. HILLER: Objection.

THE COURT: Sustained.

Q Now, you testified that once there is a herniation, it never goes back?

A Yes.

Q Is it your testimony that once a herniation causes pain, it's forever going to cause pain?

A No.

MR. HILLER: Objection. Mr. Begos objected when I wanted to ask questions about this witness' ability to discuss pain.

MR. BEGOS: And your Honor allowed him to testify.

THE COURT: Did I?

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MR. HILLER: Not correct.

MR. BEGOS: As to matching up findings of pain with particular findings on an MRI.

MR. HILLER: That's different from what the question has been asked now.

THE COURT: I think so too. You can ask the question some other way.

Q If you have one of your infrequent consultations with a doctor who refers patients to you for MRI, and you see a herniation in the MRI, and there is a present symptom of pain that's associated with that herniation, can you draw a conclusion about whether that pain will continue for as long as the herniation exists?

MR. HILLER: Objection.

THE COURT: Sustained.

MR. BEGOS: I have nothing further.

THE COURT: Do you have any questions?

MR. HILLER: Yes, I do.

THE COURT: They have to be very brief.

MR. HILLER: I know. I will be as brief as I possibly can.

THE COURT: In other words, we only have about five minutes.

MR. HILLER: I will try to get through as much as I can.

THE COURT: If you don't, then we have to continue this afternoon because there is a judges' meeting at 1:05.

REDIRECT EXAMINATION

BY MR. HILLER:

Q Dr. Kolb, a couple minutes ago Mr. Begos asked you about narrowing at the L-5/S-1 level?

A Yes.

Q Is that common in situations when there is a herniation at that level?

MR. BEGOS: Objection, leading.

MR. HILLER: I'll rephrase the question.

Q Doctor, is there any correlation between narrowing of the disk spaces and disk spaces at particular levels?

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A Yes. I explained that we discussed how it's like dough, when it spurts out, the disk gets smaller, or less high, gets narrow.

Q I'm just going to read to you a portion of the report June 19, 1990, that is in evidence. This is from Dr. O'Leary.

“We will have to consider whether or not her pain is coming from the L-5/S-1 disk or from the T-12/L-1 disk. And these X rays will be considered at her next visit. The condition should be more comfortable by now, but she still has persisting pain which seems to be two separate sources, and these will be considered at her next evaluation.

“If patient is still left with significant pain over the next six months prior to her next visit, she should get an MRI scan of the lower thoracic and entire lumbar spine to check out the disk at T-12/L-1 and also the disk at L-5/S-1.”

Why would it be necessary to check out the disk at L-5/S-1 under the circumstances you have just heard?

MR. BEGOS: Objection, your Honor.

THE COURT: Why would it be necessary?

MR HILLER: I will ask it another way.

Q Why would it be appropriate, as Dr. O'Leary put it, as he said in his report, why would it be appropriate for an MRI scan to be done to look at the L-5/S-1 disk?

MR. BEGOS: Objection, your Honor. A scan was never done, so it was obviously not appropriate to do it.

MR. HILLER: I believe the document says it was appropriate.

THE COURT: You are not a doctor.

MR. BEGOS: Mr. Hiller asked -- I object.

THE COURT: Thank you. Sustained.

Q You indicated that edema could be caused by a number of different conditions.

A Yes.

Q And one of the instances of edema that Mr. Begos mentioned was here at the L-5/S-1 -- I'm sorry, at the bottom of the L-5 vertebra; is that right?

A Yes.

Q What is the cause of that?

A There is arthritis there now.

Q How is it that arthritis develops at the L-5 vertebra?

MR. BEGOS: Objection, your Honor.

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THE COURT: How is what?

MR. HILLER: Why is it that there is arthritis at the L-5 vertebra? Mr. Begos asked the question as to what it is. Now I'm asking why it is there.

MR. HILLER: Your Honor, I object.

THE COURT: Sustained.

MR. HILLER: Is it to form?

THE COURT: State your objection.

MR. HILLER: I want to know.

MR. BEGOS: It's form because it calls for speculation, because Dr. Kolb didn't see this film until '99.

THE COURT: A variety of reasons. It's sustained.

Q Dr. Kolb, can you testify to a reasonable degree of certainty what the cause of the edema is at the L-5 vertebra?

MR. BEGOS: Same objections, your Honor.

THE COURT: You want to know if he can tell us why the arthritis presents itself?

MR. HILLER: Yes.

THE COURT: In anyone?

MR. HILLER: On this particular vertebra that Mr. Begos asked about on cross-examination.

MR. BEGOS: Your Honor, I object.

THE COURT: Well, let me see if I can straighten this out.

If you see arthritis present in an MRI -- tell me if this is the question -- are you then able to say how it got there or why it's there?

THE WITNESS: I think I did already, so the answer to your question is yes.

THE COURT: Therefore --

Q What is the cause of the arthritis on Dr. Wurm that is present on Dr. Wurm's L-5 vertebra?

MR. BEGOS: Same objection.

COURT: You are able to say with a reasonable degree of medical certainty what the cause of that syndrome is; is that correct?

WITNESS: Yes.

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COURT: And what is it?

A As I have said before, the disk is herniated and has become brittle and arthritic, and now the spine has become unstable because of the dryness of the disk. And the bone is reacting to that and becoming -- that little area has become swollen because of that. It's an irritation from the arthritis.

Q Now, in response to one of Mr. Begos' questions, he had asked you about --

MR. BEGOS: Your Honor, can Mr. Hiller just ask a question?

MR. HILLER: I need to provide the context.

THE COURT: Why don't you just stop cluttering the record and everything else.

But seriously, if you have more than a question or two, we're not going to be able to do it.

MR. HILLER: I will do the best I can, your Honor, and get as much done as possible.

THE COURT: Doctor, you will have to come back this afternoon if you're not able to finish in a couple of minutes.

Q Dr. Kolb, you indicated on cross-examination that you could show us where the pressure was on the nerve root at L-5/S-1?

A I can show you where the nerve root is and where the narrowing is and show you how close the structures are.

Q Can you show us that please?

A Remember, this is normal up here, let's say at 1-2. This dot in the top here is the nerve root coming out. This dot. Here is normal. Here is the dot. Here is pretty much normal. That's at 3-4. Here is the dot. Here it's being pushed in. You can see this dot, this round dot here where it should be here normal, is now being pressed up because of the pressure here against the bone here.

So all I said is that, what I can say is that it's a narrowing of the neural foramen, the nerve root itself, though I believe it is still under pressure. But that's for the clinician to infer if there are symptoms referable to that site.

In other words, it would not at all be surprising if there were symptoms referable to the site that that disk bulge would be causing the symptoms by means of putting pressure on the root.

Q Mr. Begos asked you about edema, there being no edema at L-5/S-1 level in the December, 1988 MRI?

A Yes.

Q Would you expect that it would be shown on the MRI?

A No.

MR. BEGOS: Objection, your Honor.

MR. HILLER: I will rephrase the question.

Q Is it at all significant that there is no edema present in the L-5/S-1 in the December, 1988 MRI?

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MR. BEGOS: Objection, your Honor.

THE COURT: That it is not present?

MR. HILLER: Yes.

THE COURT: Okay. Overruled.

A It is not significant. As I have said, I don't expect to see swelling of the bone there.

Q Why is that?

A Because this is just a fresh herniation that is relatively recent. And the disk itself has not yet degenerated and become arthritic. So I don't expect to see the swelling in the bone, as is not surprising ten years later to see it.

Q With respect to the intrabody herniation that Mr. Begos asked you about, he asked whether the herniation would cause pain. What about the fracture?

A Of course. The fracture could push out and push on nerves. It is always possible.

Q When it pushes on nerves, using the dermatome chart, can you show us where the L-1/T-12 dermatomes are?

A L-1 is here in the lower back, and T-12 is just above it, so it's right around here.

Q Right around the right hip?

A Right above. The lower back, right above the hip.

Q Where my client has been complaining of pain for the last 15 years?

MR. BEGOS: Objection. Leading.

THE COURT: Sustained.

Q Now, you indicated that an MRI can't show pain; right?

A That's right.

Q But is it possible for the symptoms, such as pain, to be clinically correlated to objective findings in an MRI?

A Yes. We have done that.

Q And is that common to do?

A Always.

Q Can it cause other symptoms, as well, besides pain?

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A Yes, of course.

Q Does it have to cause other symptoms besides pain?

A No.

MR. BEGOS: Objection.

THE COURT: Overruled.

Q If a herniation is causing pain, I want you to assume that for a moment, does it have to cause other neurological symptoms, as well?

A No.

MR. BEGOS: Objection.

THE COURT: It was answered.

Q So, for example, there is a herniation and it's causing pain, it's possible that it wouldn't necessarily cause weakness?

MR. BEGOS: Objection. Leading.

THE COURT: Sustained.

MR. HILLER: I have no further questions.

THE COURT: Okay. Thank you.

BEGOS: No redirect.

THE COURT: All right, doctor. Thank you very much.

(At this time the witness was excused by the Court.)

THE COURT: Okay. We'll resume at 2:15. Please do not discuss this case.

(At this time the jury filed out of the Courtroom.)

(At this time a luncheon recess was taken.)

AFTERNOON SESSION

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