User Name: Jasen Abrahamsen
Date and Time: Friday, June 3, 2022 12:26:00 PM EDT
Job Number: 172462733

Document (1)

1. *TRIAL TRANSCRIPT OF DR. ANDREW ANGELO MEROLA, 2004 Trial Trans. LEXIS 1302*
   Client/Matter: 000000.000000
   Search Terms: andrew /2 merola
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Expert Witness Analysis	-None-

TRIAL TRANSCRIPT OF DR. ANDREW ANGELO MEROLA; 2004 Trial Trans. LEXIS 1302

Supreme Court of New York, Appellate Division-first Department

New York County Clerk's Index No. 124258/02

December 1, 2004

Reporter
2004 Trial Trans. LEXIS 1302 *

DENNIS CIOFFI and SHERYL CIOFFI, Plaintiffs-Respondents, - against - AMERICAN AIRLINES, INC., and V.R.H./TORCON, A JOINT VENTURE, Defendants-Appellants.

Expert Name: Dr. Angelo Merola, M.D.

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Counsel

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Proceedings

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[1]Proceedings

[2]this is one of those situations where we are

[3]interrupting the previous witness' testimony to call

[4]the next witness, who is a doctor.

[5]And, as you can imagine, doctors' schedules

[6] **[*2]** are very hard to change, so we are trying to work

[7]around that.

[6]MR. BOROWICK: He, apparently, stepped out

[9]to the rest-room, He should be here.

[10]I know he is here.

[11]THE COURT: The case of the vanishing

[12]doctor.

[13](Pause.)

[14]MR. BOROWICK: If the Court wants, we can

[15]premark an exhibit. That will save time.

[16](Pause.)

[17](The aforementioned Accident Report was

[18]marked Plaintiffs' Exhibit 2, for identification, as

[19]of this date.)

[20](Continued on next page.)

[21]

[22]

[23]

[24]

[25]

[26]
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[1]

[2](Witness enters Courtroom.)

[3]A N D R E W M E R O L A, M. D.,

[4]Manhattan, New York, called as a witness on behalf of

[5]the Plaintiffs, having first been duly sworn, was

[6]examined, and testified as follows:

[7]MR. BOROWICK: May I proceed, Judge?

[8]THE COURT: Yes.

[9]DIRECT EXAMINATION

[10]BY MR. BOROWICK:

[11]Q Sir, will you tell the jury your occupation?

[12]A I am an orthopedic reconstructive spinal surgeon.

[13]Q Are you licensed in the State of New York?

[14]A Yes.

[15]Q What is your educational background which allows

[16]you to say you are **[*3]** whatever you just said you are?

[17]A I went to medical school.

[18]After medical school, I did orthopedic

[19]surgery residency.

[20]After my orthopedic residency, did a

[21]fellowship in spinal reconstruction.

[22]Board Certified after that.

[23]I have been in private practice since.

[24]Q What does "Board Certified" mean?

[25]A A board certification process whereby we fulfill

[26]academic and clinical requirements of our field, which

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[1]

[2]means completing an accredited residency program, taking

[3]two exams, one is a written examination after your

[4]residency is finished; the other is an oral examination

[5]after you have been in practice for two years.

[6]After you do that, you pass both

[7]examinations, you fulfill the requirements of the board of

[8]orthopedic surgery, and, therefore, are certified.

[9]Q Tell the jury, are you affiliated with any

[10]hospital in the City of New York?

[11]A Yes, I am.

[12]Q What does that mean, to be affiliated, and where?

[13]A Sure.

[14]I am chief of spinal reconstruction for the

[15]Department of Orthopedic Surgery at SUNY Downstate in

[16]Brooklyn. **[*4]**

[17]I am on the staff of -- as attending

[18]surgeon, at St. Vincent's Hospital in Manhattan.

[19]That allows me to -- the privilege of

[20]admitting and treating patients at those institutions, so

[21]the hospital recognizes my qualifications and credentials.

[22]Q Are you a member of any professional societies in

[23]your field?

[24]A Yes, I am.

[25]Q What are those?

[26]A I am a member of the -- Fellow of the American
Page 110

[1]

[2]Academy of Orthopedic Surgeons, also, Fellow of the

[3]Scoliosis Research Society.

[4]Q Now, will you tell the Jury, with regard to your

[5]patients with your private practice, what kind of patients

[6]come to you?

[7]You don't treat patients with a cold, right?

[8]A Correct.

[9]I see patients that have musculoskeletal

[10]problems, mostly dealing with the neck and back.

[11]That is -- can be patients that injured

[12]themselves through trauma, or patients that have acquired

[13]things like cancers, infections, or other illnesses of the

[14]neck and back.

[15]Q When you talk about "musculoskeletal," what is

[16]the skeletal features related to the spine?

[17]A The spine **[*5]** itself is composed of a number of bones

[18]that are then held together by disks.

[19]Those bones interact with each other through

[20]joint muscles, tendons, and ligaments.

[21]Q I will ask you to look at this exhibit, which I

[22]will ask be used as a demonstrative exhibit, not

[23]necessarily --

[24]MR. BOROWICK: Any objection?

[25]MR. WHITELEY: No.

[26]Q Will you describe for the jury -- if you could,
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[1]

[2]come down, and just give us a little bit of an anatomy

[3]lesson to understand your testimony about the spine.

[4]A Sure.

[5]MR. BOROWICK: with the Court's permission?

[6]THE COURT: Yes.

[7](The witness leaves the witness stand.)

[8]A This is a model of what is known as functional

[9]spinal (indicating) --

[10]THE COURT: You know, when you turn away,

[11]you have to shout.

[12]The Reporter cannot hear you.

[13]A This is a model of what is known as a functional

[14]spinal unit (indicating).

[15]Basically, it is two bones.

[16]These are the vertebral bodies

[17](indicating).

[18]In between, there is a disk (indicating).

[19]In back of those bones, in this area here"

[20] **[*6]** (indicating), known as the spinal canal, are the spinal

[21]nerves that run past the bone and past the disk into your

[22]legs.

[23]Q How do they come out of the spinal cord?

[24]A The spinal cord itself terminates or ends

[25]somewhere up in your upper back.

[26]This is your lower back (indicating). It
Page 112

[1]

[2]contains all the nerve roots that come off the spinal cord

[3]and run into your legs.

[4]They exit the spinal canal at these areas

[5]called the foramina (indicating), or the opening for the

[6]nerves.

[7]Q With what proximity to the disks are the

[8]foramina?

[9]A The disks themselves -- the disk itself actually

[10]forms the floor of the foramen. It's the bottom part of

[11]the foramen as that nerve exits to travel into the legs.

[12]Q Now, using the -- the other plastic on the

[13]diagram or the model, what is the disk made of, and what

[14]can happen to them?

[15]A The disk itself is a structure that has two major

[16]components, it has an inner -- like, inner jelly core, it

[17]has an outer, hard or harder area called the anulus.

[18]The disk has two primary functions.

[19]The first is, they absorb **[*7]** stress and shock

[20]within the spinal column.

[21]The other thing it does is, it holds these

[22]two bones together (indicating) so that they can move or

[23]slide on each other appropriately.

[24]It has a stabilizing function as well as a

[25]shock-absorption function.

[26]Q Does it play into flexibility of the spine?
Page 113

[1]

[2]A Yes.

[3]Q How?

[4]A It -- it allows the bones themselves to move

[5]normally with respect to each other so there is no injury

[6]to the nerves that pass through the spinal canal.

[7]Q Now, what kind -- do you treat the trauma

[8]relating to disks?

[9]A Yes.

[10]Q And what kind of disk injuries occur through

[11]trauma?

[12]A There are several types of disk injuries that

[13]occur traumatically.

[14]One of them is known as an anular tear.

[15]The anulus is the outer covering of the

[16]disk.

[17]An anular tear means that hard outer layer

[18]has been twisted and torn, and it can, therefore, leak

[19]certain chemicals that produce pain.

[20]The other type of injury that can happen is

[21]that the outer section of the disk can have a defect in it

[22]that causes the **[*8]** jelly on the inside of the disk to

[23]protrude, and that can result in herniation or a disk

[24]protrusion.

[25]Q When a disk herniates, you mentioned the pain

[26]chemical.

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[1]

[2]What about disk herniation -- how does that

[3]result in a problem to the patient?

[4]A Two things happen when a disk herniates.

[5]The first thing is, that inner jelly core

[6]contains certain chemicals.

[7]Those chemicals leak out into the area where

[8]the nerves are. They produce what is known as an

[9]inflammatory response or swelling around the nerve.

[10]That produces pain.

[11]Another thing that happens is that the disk

[12]protrusion itself, because it's sitting directly next to

[13]the nerve root, puts pressure on the nerve, and pushes it

[14]up against the other bony element of the spinal canal.

[15]There is a pressure effect and a chemical

[16]effect on the nerve.

[17]Q Once there is a rupture of the anulus, and the

[18]jelly comes out as you described, does it ever go back?

[19]A The jelly itself does not go back into the disk,

[20]no.

[21]Q Is there anything you can do surgically to cram

[22]that back in there? **[*9]**

[23]A The surgical procedure to treat that problem with

[24]protrusion is, if the protrusion is fresh -- and the disk

[25]is a soft disk, which means a removable disk, or disk that

[26]can be sucked out of the canal -- you would remove that
Page 115

[1]

[2]gelatinous material from the canal, and take it away from

[3]the nerve.

[4]If the disk itself becomes calcified or

[5]hard, which is the body's normal response to injury, which

[6]occurs over a long period of time, it's impossible to

[7]remove the disk protrusion because in so doing, you can

[8]injure the nerve roots that pass by.

[9]In that case, what you need to do, you need

[10]to do a formal opening of the spinal canal in the area

[11]where the nerve root is.

[12]That is a laminectomy with foraminotomy.

[13]Q Have you treated patients with no trauma or

[14]accident history, but with spinal problems relating to

[15]disk either tears or herniation, again, without any

[16]accident?

[17]A Yes.

[18]Q What causes those things in those patients that

[19]have those injuries?

[20]A In those patients, where trauma is not involved,

[21]one generally sees a gradual thinning out and **[*10]** disruption

[22]over the anulus over time, with a gradual onset of

[23]symptoms and complaints.

[24]Q Now, if they come to you with symptoms, can

[25]people have a disk -- let me ask you about the aging

[26]process.

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[1]

[2]Does the aging process affect all of us, and

[3]all of our disks?

[4]A Yes.

[5]Q How so?

[6]Will you describe, for the jury, what is

[7]going on, in our bodies?

[8]A A normal, healthy disk, before you start to incur

[9]the aging process, contains water.

[10]Our bodies are made up mostly of water.

[11]The disks hold on to the water.

[12]The water inside the disk helps to enable

[13]that disk to absorb shock, and function properly.

[14]As we age, the water leaves the disk, and it

[15]becomes dry.

[16]There is a drying of the disk over time.

[17]With that drying of the disk over time, what

[18]we can see is that the bones start to collapse down on

[19]each other, and we can see what is known as a gradual

[20]symmetrical bulge of that disk.

[21]The entire disk can begin to flatten itself

[22]out as water dries itself out of the disk, it is not --

[23]not as fluffy and spongy.

[24] **[*11]** We see a gradual bulging of -- of the disk

[25]over time, as well as the loss of water.

[26]Q Will the natural aging process in a 20-, 30-,
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[1]

[2]40-, 50-year-old, with different stages, does it do that,

[3]every disk, whether or not there are symptoms?

[4]A It does not do that for all disks, no.

[5]Q What about in the low back or neck?

[6]A It can do that to disks in the low back and neck.

[7]Q You can resume your seat, Doctor.

[8](The witness resumes the witness stand.)

[9]Q Now, the term "degenerative disk disease," what

[10]does that mean?

[11]A Degenerative disk disease is that term which

[12]implies desiccation, and gradual bulging, over time, of

[13]whatever disk we are talking about, cervical disk,

[14]thoracic, or lumbar.

[15]Q When does it start generally, absent trauma?

[16]A Without trauma, that process can be seen to start

[17]somewhere in the neighborhood of about, 30 years and up.

[18]Q Okay.

[19]Who has it?

[20]A We all get some stage of degenerative disk

[21]disease.

[22]Q Are there sometimes symptoms?

[23]A The disk can sometimes become symptomatic, and

[24]sometimes **[*12]** not.

[25]Q How is that?

[26]Why would it be symptomatic to some, and not
Page 118

[1]

[2]for others?

[3]A A lot of it depends on our body's own

[4]susceptibility to pain, and the effects of these chemicals

[5]that leave the disk or the anula.

[6]It depend on how much stress and strain are

[7]on the disk and the bone.

[8]And everybody is different.

[9]Q If degenerative disk disease is not necessarily

[10]symptomatic, is it necessarily disabling?

[11]A It is not necessarily disabling, no.

[12]Q Are there some people that have a mild to

[13]moderate form of it that don't even know it?

[14]A Yes.

[15]Q Are there people with that kind of level of

[16]disease that don't feel it?

[17]A Yes.

[18]Q It does not affect their work --

[19]A Correct.

[20]Q -- their play?

[21]A Right.

[22]Q Can people go through their entire life with some

[23]measure of degenerative disk disease without it ever

[24]cramping or affecting their life?

[25]A Yes.

[26]Q Now, I want you to assume, Dr. Merola, that my
Page 119

[1]

[2]client, Dennis Cioffi -- by the way, have you ever -- have

[3]I ever represented **[*13]** other patients of yours besides Dennis

[4]Cioffi?

[5]A Yes.

[6]Q Who referred Dennis Cioffi to your office?

[7]A My partner, Steven Touliopolus.

[8]Q Your partner, is he an orthopedic surgeon?

[9]A Yes.

[10]Q What is his specialty?

[11]A Sports medicine.

[12]Q Does he have a part of the body that he

[13]specializes in?

[14]A He does the -- he does shoulders -- shoulders,

[15]knees, ankles.

[16]Q When did he first refer the patient to you for

[17]treatment?

[18]A In May of 2003.

[19]Q bid you, during -- by the way, are you still

[20]treating him?

[21]A Yes.

[22]Q When I say, "still," when is the last time you

[23]saw him in your office?

[24]I don't mean today, in the Courthouse.

[25]When did you see him in your office for the

[26]last time?

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[1]

[2]A I saw him on October 18.

[3]Q When -- when you have patients -- by the way, do

[4]you have patients who have experienced industrial

[5]accidents?

[6]A Yes.

[7]Q Do you have more than one?

[8]A Yes.

[9]Q Would you explain that?

[10]A Yes.

[11]A lot of what I do specifically involves **[*14]** the

[12]neck and back, involves persons injured, and particularly,

[13]people in -- patients that are working in construction and

[14]heavy labor.

[15]Q When a patient is injured and brings a lawsuit,

[16]such as Dennis Cioffi, are there occasions where you will

[17]come into Court to offer opinions on diagnosis, treatment,

[18]prognoses for one of your patients?

[19]A Yes.

[20]Q When you come to Court, do you exact a fee from

[21]the lawyer, like my firm, for your time away from your

[22]practice?

[23]A Yes.

[24]Q Sir, will you tell the jury, when did you

[25]first -- when you first met Dennis Cioffi, did you do an

[26]initial exam?
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[1]

[2]A Yes.

[3]Q In addition to the exam -- I'll get to the exam

[4]in a moment -- in addition to the exam, have you reviewed

[5]the records from the day of the accident from Mary

[6]Immaculate, have you reviewed other doctors' treating

[7]records, et cetera?

[8]A Yes.

[9]Q Tell us about -- who is -- I'll get to your

[10]review in a second.

[11]Who is Dr. Sisto?

[12]A Dr. Sisto is Mr. Cioffi's orthopedist in

[13]California.

[14]Q Who is Dr. Lefkowitz?

[15]A Dr. **[*15]** Lefkowitz is a pain management physician.

[16]Q Where is he?

[17]A He is here in New York City.

[18]Q Who referred the patient to him?

[19]A I did.

[20]Q Who is Dr. Hausknecht?

[21]A He is a neurologist.

[22]Q Where is he?

[23]A In New York City

[24]Q Now, I want you to assume, for a moment -- I want

[25]to give you some information about the activity of the

[26]life of this individual before the accident, because I
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[1]

[2]will ask you a follow up question.

[3]I want you to assume that Mr. Cioffi was 42

[4]at the time of the accident, and, for the 20 or so years

[5]before the accident, he had -- or 18 years before the

[6]accident, he had been working at -- actively as a

[7]construction worker, specifically, an ironworker.

[8]I want you to assume his average of those

[9]years in the union in New York City was about 1,600 -- a

[10]little more than 1,600 hours per year, and that takes into

[11]consideration down time, seasonal changes, et cetera.

[12]Assume further that he was -- and this is

[13]subject to connection -- that he was an avid athlete,

[14]surfing, scuba diving, is playing baseball with **[*16]** retired

[15]professional baseball players, and he was extremely active

[16]and athletic.

[17]Assume, before this accident, other than a

[18]muscle strain in the early '80s, which resolved within

[19]days, other than that, he had, up until the time of the

[20]accident, for those 20 years, no symptoms, no treatment,

[21]no medication, no therapy, and no physical limitations.

[22]Sir, do you have an opinion as to whether or

[23]not that muscle strain in the early '80s was a significant

[24]past medical history?

[25]A That muscle strain was insignificant.

[26]Q To your knowledge, based on your review of all
Page 123

[1]

[2]the records and your treatment of him over the last year

[3]and a half, did he have any preexisting condition which

[4]was either symptomatic, disabling, or problematic for him?

[5]A No.

[6]Q In any way limiting for him?

[7]A No.

[8]Q Sir, when you examined him for the first time,

[9]what was the history you produced?

[10]A Mr. Cioffi told me he had sustained a twisting

[11]injury in a fall, landing on the left side of his body.

[12]He injured his left shoulder, left knee, and

[13]lower back.

[14] **[*17]** Q Now, at that point in time -- and let's confine

[15]your testimony subject to producing Dr. Touliopblus --

[16]where did you confine your treatment of this man?

[17]I'll refrain, or keep the testimony within

[18]that for my question.

[19]A My area of concentration for treating Mr. Cioffi

[20]was his lower back.

[21]Q Okay.

[22]Have you treated any other part of his body

[23]in the spine, any other level of the spine beside the low

[24]back?

[25]A Yes. More recently, his neck.

[26]Q Now, in the initial hospitalization, and --
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[1]

[2]MR. BOROWICK: Do you have the record you

[3]wanted me --

[4]MR. WHITELEY: Just the subpoenaed records

[5]for Mary Immaculate.

[6]MR. BOROWICK: Judge, I know we have -- have

[7]time constraints with the other witness.

[8]May I offer that subject to taking the time

[9]of marking it?

[10]MR. WHITELEY: Mary Immaculate, I have no

[11]problem.

[12]MR. BOROWICK: All right.

[13]Q I want you to assume, Dr. Merola -- I will read

[14]from the -- you have seen the hospital record, correct?

[15]A Yes.

[16]Q I want you to, for purpose of your testimony --

[17]let me ask you **[*18]** take my word for it that in the hospital

[18]record, there are complaints made initially, immediately

[19]after the accident, of left shoulder pain, left knee pain,

[20]and lower back pain.

[21]Do you have an opinion, based upon his past

[22]medical history, and no relevant past medical history

[23]relating to the injuries, do you have an opinion as to

[24]what was the competent producing cause of the injuries

[25]that he sustained?

[26]A His fall at work.

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[1]

[2]Q And, in connection with the record of Dr. Sisto,

[3]Dr. Lefkowitz, Dr. Hausknecht, did you also review

[4]objective tests done by those physicians, or at the behest

[5]of those physicians?

[6]A Yes.

[7]Q Have you examined films?

[8]A Yes.

[9]Q What is an MRI?

[10]A An MRI is also known as a magnetic resonance

[11]imaging scan.

[12]That is the process whereby we obtain

[13]photographs of the inside of the human body with a

[14]magnetic field.

[15]It tells us about soft tissue, bone, inside

[16]the body, to look at them more closely without having to

[17]open a person up.

[18]Q And were there MRIs done on this man's body?

[19]A Yes.

[20] **[*19]** Q Again, I will ask you not to refer to the

[21]shoulder or the knee MRI, and confine yourself to the

[22]spine.

[23]What parts of the body were MRIed, if -- for

[24]want of a better word?

[25]A Lumbar spine, and more recently, the neck.

[26]Q With regard to the lumbar spine, can you tell the
Page 126.

[1]

[2]jury -- by the way, are these tests done before operations

[3]are had?

[4]A Yes.

[5]Q Did you, ultimately, operate on Mr. Cioffi?

[6]A Yes, I did.

[7]Q What did the MRI tell you -- by the way, you

[8]reviewed the films, correct?

[9]A Yes.

[10]Q Did they confirm the report of -- the film by the

[11]radiologist?

[12]A Yes.

[13]Q Will you tell us -- and if you need to refer to

[14]your chart, feel free to refer to your chart to refresh

[15]your recollection -- what was the significance of the MRI

[16]of the low back, first?

[17]A The MRI of his lower back that was done in

[18]December, after the accident, demonstrated two things,

[19]one, it showed disk protrusion at the L4-L5 level.

[20]It showed an anular tear at L5-S1 level.

[21]Q Let me stop you.

[22]You used a term, "L4-L5," or "L5-S1."

[23] **[*20]** Help us out.

[24]What does that mean?

[25]A Those refer to the levels of the lumbar spine

[26]where the disks are located.

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[1]

[2]There are five bones in the lumbar spine.

[3]The last bone comes in contact with the

[4]sacrum. That is S-1.

[5]The L4-L5 level refers to the disk in

[6]between the fourth and the fifth bone in the lower back,

[7]and the L5-S1 level referring to the disk between the last

[8]bone in the lumbar spine and the sacrum.

[9]Q Okay.

[10]Now, how many lumbar vertebrae are there?

[11]A Five.

[12]Q How many -- what is the next level up as you go

[13]up the back?

[14]A It goes from 5, 4, 3, 2, 1, then T-12, which is

[15]the lowest one --

[16]Q How many T vertebrae are there?

[17]A Twelve.

[18]Q Now, you mentioned that you have been treating

[19]him for his neck, there was an MRI of the neck.

[20]How many levels, or how many vertebrae are

[21]in the neck?

[22]A Seven.

[23]Q Are they all delineated by the initial "L," or

[24]"T, or "L" -- "C," "T," "L," cervical, thoracic, lumbar,

[25]are they all numbered after that?

[26]A Yes.

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[1]

[2]Q When **[*21]** you refer to a disk, you refer by it the

[3]vertebra above and below?

[4]A Yes.

[5]Q That having been said, will you tell the jury

[6]what it means to have a protrusion, and what significance

[7]it is in his case, protrusion at L4-5, and an anular tear

[8]at L5-S1?

[9]A Sure.

[10]"Protrusion" means there is a focal,

[11]discrete area where the disk has leaked out or protruded,

[12]if you will, herniated, and that is different than a

[13]bulge, which is symmetric.

[14]A bulge is what we expect to see over time,

[15]over, even in the normal condition.

[16]A protrusion is an abnormal finding, which

[17]means there is a discrete area of disk sticking out into

[18]the spinal canal, and near the spinal nerve.

[19]That is the significance of protrusion.

[20]Q Is that traumatic, or degenerative?

[21]A Traumatic.

[22]Q Where is the anular tear?

[23]What is the significance of that, and is it

[24]degenerative, or traumatic?

[25]A An anular tear is at the lowest level, between

[26]L-5 and S-1.
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[1]

[2]An anular tear is significant because it

[3]means the outer covering of that disk, the anulus, which

[4] **[*22]** is the hard, rubbery outer covering of the disk, is torn.

[5]It's usually torn where -- when there is

[6]twisting of that disk traumatically.

[7]That tear causes a leakage of an

[8]inflammatory chemical into the spinal canal.

[9]Q What is a dermatome?

[10]A A dermatome is an area of the body on the skin

[11]that relates to a spinal nerve. We have them from head to

[12]toe.

[13]Each spinal nerve has its own area that --

[14]that it feels sensation in. That is a dermatome.

[15]Q I want you to tell me, during your exam, were you

[16]able to correlate any of the symptoms reported by

[17]Mr. Cioffi with any of the objective testing, or your own

[18]clinical examination?

[19]A Yes.

[20]Mr. Cioffi's complaints were, not only in

[21]the lower back, although that is the majority of the pain

[22]and symptoms, they also referred themselves into the

[23]dermatome of the lower leg.

[24]The specific dermatome they referred

[25]themselves into corresponded to the L4 and L5 nerves,

[26]which are directly adjacent to those injured disks at both
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[1]

[2]L4-L5 and L5-S1.

[3]Q Given the history, can you correlate the accident

[4] **[*23]** and mechanics of the accident that he described to you to

[5]the cause of these tears and protrusion?

[6]A Given his history, yes, those are, indeed,

[7]traumatic injuries that resulted in his complaint.

[8]Q When you first saw him, what did you -- did you

[9]decide to operate immediately?

[10]A No.

[11]Q Why not?

[12]A Oftentimes, the disk protrusion, or anular tear,

[13]or post-traumatic injuries, because there is a chemical

[14]effect from the injured disk on those nerves and

[15]inflammatory response, we can sometimes make the patient's

[16]symptoms get better and tolerable by treating them with

[17]medication and physical therapy.

[18]Q What is physical therapy?

[19]A Physical therapy involves getting a patient

[20]exercises and treatment that stabilize the lower back, and

[21]decrease pain in those areas where they are feeling pain.

[22]Q Did he have it?

[23]A Yes.

[24]Q Did it cure him?

[25]A No.

[26]Q What is medication therapy?
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[1]

[2]A Medication, particularly for these problems, are

[3]two types, one is a pain medication which is like a

[4]narcotic that acts to decrease the pain that **[*24]** the patient

[5]feels.

[6]Other medications are anti-inflammatory

[7]medicines that act to neutralize the effects of the

[8]chemicals that have leaked but of those injured disks.

[9]Q Did he receive them?

[10]A Yes.

[11]Q Did they cure him?

[12]A No.

[13]Q Did they eliminate the symptoms?

[14]A No.

[15]Q What are epidurals?

[16]A An epidural is the injection of an

[17]anti-inflammatory medication, particularly steroids, into

[18]the spinal canal area, where those injured disks are, to

[19]directly try to neutralize the chemical effect of the disk

[20]injury.

[21]Q Did he receive them?

[22]A Yes.

[23]Q How many?

[24]A Three, at least three.

[25]Q By whom?

[26]A Dr. Lefkowitz.
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[1]

[2]Q Did they cure him?

[3]A No.

[4]Q Did they eliminate the symptoms?

[5]A No, no.

[6]Q What is radiofrequency in the nature of

[7]conservative treatment?

[8]A Radiofrequency is another pain management

[9]technique whereby a special needle is placed into the area

[10]where the disk derangements are, the needle vibrates very

[11]quickly. As it vibrates, it heats up, and **[*25]** it destroys the

[12]pain nerves that are around the area where the disks and

[13]the joints are to try to alleviate the pain in the lower

[14]back.

[15]Q Now, for how long did you continue him on this

[16]course of treatment before you decided to operate?

[17]A He underwent all those conservative care and

[18]management programs from the time of his injury through

[19]when I saw him up until we operated in October of 2003.

[20]Q By the time you operated in October of 2003,

[21]approximately, a year after the accident, had he gotten --

[22]had -- especially with the area you were concerned with,

[23]his low back, had he gotten better, worse, or stayed the

[24]same?

[25]A His low back did not get any better at all.

[26]Q Did it stay the same, or get worse?
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[1]

[2]A It had gotten worse.

[3]Q Can you tell me, by the time you -- you operated

[4]on his low back, had he complained of any symptoms

[5]relating to his neck, cervical spine?

[6]A Yes.

[7]Q The interrelationship of the injuries of his left

[8]knee, left shoulder, low back, does that have any impact

[9]on a person's neck?

[10]A Yes.

[11]Q Assuming **[*26]** he had no problem with the neck before,

[12]never had an injury, chiropractor, therapy, medication,

[13]anything for the neck, how do you account for the onset of

[14]cervical symptoms given that he did not complain of the

[15]neck in the hospital record?

[16]A Several things.

[17]One, his extremity injuries.

[18]The knee makes his gait antalgic. He can no

[19]longer have a smooth walk.

[20]Because there is no -- can no longer move

[21]smoothly, there is excessive stress on his back and on his

[22]neck.

[23]The shoulder injury and use of the cane

[24]concomitantly affects the neck more specifically in terms

[25]of increasing stress and strain on the cervical spine.

[26]These things add up in combination, and make
Page 134

[1]

[2]the problem worse.

[3]Q Is there a balance in the spine, based on the

[4]geometry of the spine, that that is a -- a natural balance

[5]that we have if we are not feeling pain?

[6]A Yes.

[7]Q Would you describe the mechanics of the geometry

[8]of the spine, and how, if it's off kilter like that, with

[9]an antalgic gait, it's disrupted?

[10]A The purpose of the spine is to hold your head

[11] **[*27]** squarely over your center of gravity, which is located in

[12]the pelvis.

[13]Your neck has a backward curve to it, upper

[14]back placed forward, lower back has another backward

[15]curve.

[16]If you look from the spine from a side view

[17]it looks like an "S."

[18]It balances the head on top of the middle of

[19]your pelvis.

[20]When you walk, you try to keep your head on

[21]the pelvis.

[22]When you injure your disk and injure your

[23]extremities, that normal balance and the ability of your

[24]spine to maintain the head 6ver your pelvis is altered.

[25]Now, what happens is, the disks in your neck

[26]and your back, as well as muscles, are working overtime to

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[1]

[2]try to maintain your head over your pelvis.

[3]Q At some point -- when you did surgery in October

[4]of '03, what was the surgery you did?

[5]A What I did was, I decompressed his

[6]hemilaminectomy, or cleaning out of the pressure on the

[7]nerve in the lower back, as well as fusion or gluing

[8]together of the joints in the lower back to try to

[9]decrease painful motion in the lower back.

[10]Q Sir, I will show you this exhibit which is marked

[11] **[*28]** for ID as Exhibit 2.

[12]Do you know what this represents?

[13]A This is a representation of the surgical

[14]procedure.

[15]Q Is it a fair and accurate depiction of the

[16]surgical procedure, not of anybody, but of Mr. Cioffi?

[17]A Yes.

[18]Q Is it -- would it be helpful, for the jury to

[19]understand your testimony, if you were able to

[20]demonstrate, during the discussion of your surgery, what

[21]actually was done visually?

[22]A Yes.

[23]MR. BOROWICK: I offer it in evidence.

[24]MR. WHITELEY: No objection.

[25]THE COURT: We will mark it later.

[26]Q Step down, please.
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[1]

[2]And keep your voice up so you do not have to

[3]move so far back.

[4]THE COURT: You know, I think that easel is

[5]blocking the Reporter.

[6]It is going to be hard to hear the witness.

[7]Am I right?

[8]Perhaps the doctor can stand on the other

[9]side.

[10]MR. BOROWICK: I'll move out of the way.

[11](The witness leaves the witness stand.)

[12]Q First, what was your preoperative diagnosis?

[13]A Disk derangement in the lumbar spine with neural

[14]foraminal stenosis.

[15]Q What **[*29]** is that a fancy term for?

[16]A Pressure on the nerve.

[17]Q Okay.

[18]Tell us what you did.

[19]A Sure.

[20]The first thing you do is, when -- a patient

[21]is taken into the operating room, put on an operating

[22]table so their back, and the skin of the low back is

[23]available for you to operate on after they have been

[24]anesthetized.

[25]After that, we localize the low back area

[26]with an x-ray machine in the operating room, known as a
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[1]

[2]fluoroscope.

[3]After that is done, an incisional site and

[4]area are well-delineated, we prep and drape the area so it

[5]is sterile, and the next thing is the approach.

[6]The approach involves getting down to the

[7]area where the problem is, where the bone and the nerves

[8]are.

[9]The first part of the approach is the akin

[10]incision.

[11]I make a skin incision of the lower area of

[12]the lower back, and, utilizing special retractors and

[13]special dissecting tools called electrocautery, I move the

[14]muscles off of the bones of the lower back so I can get

[15]down into the area where the problem actually is.

[16]Retractors hold the muscle out **[*30]** of the way so

[17]I can see those bones.

[18]After I see those bones, and I am sure that

[19]I am where I need to be with an x-ray, and by feeling

[20]certain landmarks in there, certain particular bones;

[21]namely, the sacrum, I then start to do what is called

[22]laminectomy.

[23]Laminectomy involves removing the roof of

[24]the spinal canal.

[25]It -- that is known as a lamina.

[26]Laminectomy is removal of the roof.

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[1]

[2]That is done with a kerasin.

[3]A kerasin is a surgical instrument that is

[4]made to sneak under the roof of the bone by using small

[5]bites, removing the bone without injuring the nerves that

[6]are underneath it.

[7]Laminectomy itself --

[8]Q Let me interrupt.

[9]How do you control bleeding?

[10]A Several ways.

[11]Bleeding can be controlled by slowing the

[12]blood pressure during the operation, and there are

[13]retractors putting pressure on the muscles, and nerves,

[14]and arteries that -- that control bleeding.

[15]I use the electrocautery, which is an

[16]electrical device that I can touch bleeding areas to

[17]control the bleeding.

[18]Q How does that control **[*31]** it?

[19]A It coagulates the bleeding like a hot poker

[20]coagulates.

[21]When you barbecue something, you have the

[22]area of charcoal on the hamburger, hot dog or steak --

[23]charcoal don't bleed, as they say in Texas.

[24]That prevents bleeding.

[25]That charcoal tissue coagulates, and stops

[26]blood from coining through the open vein or artery.
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[1]

[2]Q Now, you have gotten under there with the biting

[3]thing.

[4]What do you do next?

[5]A I expose the dura, or covering of the nerve,

[6]which is this gray, cylinder-like structure (indicating),

[7]and I look for the nerve roots themselves under the area

[8]where the neural foramina are.

[9]I gradually open those exit holes for the

[10]nerve with this special tool called keratin in order to

[11]free the nerve up.

[12]In so doing, I begin to release the pressure

[13]in the lumbar canal.

[14]The other thing I do is, I look at, and I

[15]try to identify the disks that are in the canal.

[16]I move -- I put a retractor on the dura

[17]itself.

[18]I pull the dura out of the way.

[19]I pull the nerve out of -- out of the way,

[20]and look at the **[*32]** disk.

[21]If the disk is soft and easily removable, I

[22]can suck it out of the spinal canal and get it away from

[23]the nerve.

[24]If the body's started to form what we call

[25]an osteophyte or hard disk, meaning it is beginning to

[26]calcify, removing it can pull the nerve out or tear the
Page 140

[1]

[2]dura.

[3]It's better to leave it alone in that area,

[4]and make a larger opening for the nerve to exit to give it

[5]more room.

[6]Q Let me ask you, when you say, "calcify," if --

[7]over the course of a year, after an accident like this,

[8]with the injuries you have described, what would happen

[9]over the year that the surgery -- not, has been delayed,

[10]but what happens, over the year, to the vertebrae and the

[11]disk?

[12]A Over that year of time, what happens, the body

[13]tries to heal that disk protrusion and the disk injury, so

[14]it -- it sends in cells and material to heal over the disk

[15]injury, and it makes it hard, it calcifies it, it turns it

[16]into a piece of cement on the spinal canal.

[17]Q Without interruption, please go through the rest

[18]of the surgery, and move it along.

[19]A Okay.

[20] **[*33]** After that has been completed, and I have

[21]the nerves open, free and clear, I am satisfied that the

[22]pressure is off of them.

[23]The next thing is the fusion portion of the

[24]procedure.

[25]There are different ways to do a fusion.

[26]There are minimally invasive fusions, maximally invasive
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[1]

[2]fusions.

[3]For Mr. Cioffi, we used screws known as

[4]facet screws, which are screws, stainless steel, placed

[5]into the joints of the lower back to hold them together

[6]while the bones themselves can be glued together through a

[7]process called "fusion."

[8]Screws are placed across the joints, the

[9]bones covering those joints, and those vertebral bodies

[10]are scraped away with a high-speed burr. It makes the

[11]bone bleeding-- bleeding is good because the bleeding is

[12]the forbearer of healing and fusion.

[13]I then take a bone graft, which I used from

[14]Mr. Cioffi, all this stuff I took out, all the bone I took

[15]out to do the laminectomy, I grind it up, make a paste,

[16]combine that with some of his own bone and blood, I make a

[17]bony glue, and then I put that over the screws and the

[18]scraped-away bone to **[*34]** fuse the lower back.

[19]That is this process here (indicating).

[20]That fusion or gluing together of the bones

[21]in the lower back decreases the rubbing together of those

[22]bones, and thereby, should decrease the amount of back

[23]pain he has by buffering the action of those injured

[24]disks.

[25]Q Was the surgery successful?

[26]A Yes.
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[1]

[2]Q What does that mean?

[3]A That means that we had no complications, smooth

[4]surgery, and complete decompression of the nerve roots and

[5]dura.

[6]Q Did he tolerate the procedure well?

[7]A Yes.

[8]Q Given it was surgically successful, and he

[9]tolerated the procedure well, was he cured?

[10]A No, he is not cured.

[11]Q How can it be successful when he tolerated it

[12]well, and not cured?

[13]A It meant -- successful and tolerated means I did

[14]not hurt Mr. Cioffi by doing the procedure. We had no

[15]complications.

[16]The cure comes with the ability of those

[17]nerves to recover from the damage they have suffered.

[18]Q You can resume your seat, if you will.

[19](The witness resumes the witness stand.)

[20]Q Sir, will you **[*35]** tell the jury, postoperatively, did

[21]the symptoms disappear, and did he resume normal function?

[22]A Immediately following the operation, his

[23]symptomatology decreased, he got better, and he noticed

[24]improvement.

[25]As time has gone on since then, he has had

[26]recurrence of lower back pain, with some leg pain as
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[1]

[2]well.

[3]Q What does that tell you?

[4]What is the significance of that?

[5]A That tells us that the nerves that are in the

[6]lower part of the back, decompressed, are hypersensitive,

[7]and have long-standing damage.

[8]Q In your opinion, what is the future course for

[9]Mr. Cioffi to return to pain-free function, if at all?

[10]A Poor.

[11]Q What would the course be if the prognosis is

[12]poor?

[13]Is there anything you can do, or would do to

[14]address that?

[15]A Yes.

[16]Q What is your opinion as to what he needs to at

[17]least give him a chance?

[18]A To at least give him a chance, he will require

[19]additional surgery from the front side or belly side in

[20]order to remove those disks entirely, and add what is

[21]called anterior fusion to what he currently **[*36]** has now.

[22]Q Is that similar to the process you referred to

[23]with the decompressive surgery?

[24]A It's different. It's different.

[25]It's an additional fusion and a

[26]reconstruction of vertical height with anterior or

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[1]

[2]through-the-belly surgery versus what we have done in the

[3]past, which was through-the-back surgery.

[4]Q How do you compare it?

[5]A It's more invasive than the back surgery.

[6]Q How do you compare the rehab or convalescence

[7]time, expense, and effort required from that surgery?

[8]A Longer for all of those.

[9]Q Now, in the year, and half that you treated

[10]Mr. Cioffi, would you tell the jury, have you found him to

[11]be a cooperative patient?

[12]A Yes.

[13]Q Would you tell the jury, as part of your

[14]practice, do you sometimes get phonies who come in?

[15]A Yes.

[16]Q And --

[17]THE COURT: Is that a medical term?

[18]MR. BOROWICK: What?

[19]THE COURT: Is that a medical term?

[20]MR. BOROWICK: Yes.

[21]Q Are you -- are you trained, in your practice or

[22]experience, over the course of a number of years, to

[23]detect whether or **[*37]** not someone is reporting subjectively,

[24]their own reports, symptoms which you cannot correlate

[25]clinically?

[26]A Yes.
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[1]

[2]Q Okay.

[3]Did you find Mr. Cioffi to be at all one of

[4]those people?

[5]A No.

[6]Q What is a malingerer?

[7]A A malingerer is someone who purposely takes

[8]advantage of a situation to get themselves out of work,

[9]and has no objective evidence correlating with either

[10]findings or imaging studies.

[11]Q Were his imaging studies -- did we discuss EMG?

[12]A You asked if I had seen one.

[13]Q He had them, you reviewed them?

[14]A Yes.

[15]Q Would imaging studies, whether EMG, orthopedic

[16]MRI, would they -- were his symptoms, and what you

[17]eyeballed when you opened him up consistent with the

[18]objective tests?

[19]A Yes.

[20]Q What is adjacent segment disease?

[21]A Adjacent segment disease refers to early

[22]degeneration and breakdown in the area of a previous

[23]fusion.

[24]MR. WHITELEY: Judge, I am going to object.

[25]May we approach?

[26]THE COURT: You're objecting?
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[1]

[2]MR. WHITELEY: To the line of questioning

[3] **[*38]** that is coming out.

[4]THE COURT: I know that.

[5]On what ground?

[6]MR. WHITELEY: On the ground none of this

[7]was exchanged.

[8]MR. BOROWICK: It's --

[9]THE COURT: On what?

[10]MR. WHITELEY: On the ground none of this

[11]was exchanged to us, and it's outside --

[12]THE COURT: You have not seen the --

[13]MR. BOROWICK: Judge, I'll ask it a

[14]different way.

[15]MR. WHITELEY: May I approach?

[16]THE COURT: It is withdrawn.

[17]He is asking --

[18]MR. WHITELEY: I also --

[19]THE COURT: It does not matter.

[20]He will ask a different question.

[21]MR. WHITELEY: The other surgery, I also

[22]ask, Judge, for a corrective ruling.

[23]That was not exchanged either.

[24]The future claim for future surgery is the

[25]first time we are hearing it.

[26]MR. BOROWICK: Judge, I believe it was, and
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[1]

[2]we will look at the pleadings.

[3]MR. WHITELEY: The pleadings are right here.

[4]THE COURT: I will have to look at it.

[5]MR. WHITELEY: It was a month ago, and a

[6]half a month ago.

[7]There is no reference to future surgery, no

[8]reference to bone **[*39]** diseases.

[9]MR. BOROWICK: There are consequences of --

[10]THE COURT: Do you have the relevant

[11]documents?

[12]MR. BOROWICK: I am looking for them. Judge.

[13]MR. WHITELEY: Here they are, counsel.

[14](Pause.)

[15]MR. BOROWICK: My associate will take a

[16]minute while I go on to something else.

[17]THE COURT: Okay.

[18]Q Doctor, let me move on to the neck.

[19]You described how the symptoms started

[20]presenting themselves later on.

[21]How did you treat his neck?

[22]What did the objective finding of the test

[23]show?

[24]A Right now, treatment for the neck is

[25]conservative, anti-inflammatory pain medication, physical

[26]therapy.

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[1]

[2]He has decreased cervical, with spasm in the

[3]muscle of the neck itself.

[4]And there is an MRI to --

[5]Q What is spasm?

[6]A Spasm is when a muscle is tense and swollen, it

[7]locks up like a charleyhorse.

[8]Q Can somebody fake a spasm?

[9]A Hard to do.

[10]Q In your opinion, up until the present time, has

[11]my client been disabled from construction work?

[12]A Yes.

[13]Q And is he presently disabled **[*40]** from construction

[14]work?

[15]A Yes.

[16]Q Do you have opinion, with a reasonable degree of

[17]medical certainty in your field, as to whether or not he

[18]is permanently disabled from construction work?

[19]A He is permanently disabled from construction

[20]work.

[21]Q Has he -- based on the present film, based on

[22]your review, treatment, and surgery, has he been, to --

[23]for the last two years, has he been disabled from any

[24]work, even sedentary work?

[25]A Yes.

[26]Q What about at the present time, is he presently
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[1]

[2]disabled from even sedentary work?

[3]A Yes.

[4]Q Why?

[5]A The problem with sedentary work is, when you are

[6]in, for example, a seated position for prolonged periods

[7]of time, your intra-distal pressure is elevated.

[8]What you need to do is get up and move

[9]around.

[10]The lowest amount of intra-distal pressure,

[11]lowest amount of pressure in the spine, is when you are

[12]lying flat on your back, elevating your head or lower

[13]back.

[14]It's what we call -- it's the weight of your

[15]body piled up on the disk, and increasing the pressure.

[16]Sitting **[*41]** is a particularly increased pressure

[17]risk on the lower back, so sitting for prolonged periods

[18]of time is not recommended.

[19]Q Sir, can a patient with the problem that he

[20]has -- and I just, again, isolate it to the back and

[21]neck -- can a patient have good days -- does this patient

[22]have good days and bad days?

[23]A Yes.

[24]Q Okay.

[25]Would you describe -- based on your

[26]treatment and discussion with him, what would you
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[1]

[2]characterize as a good day for this man?

[3]A A good day -- we use a pain scale, zero and ten.

[4]Zero is no pain at all.

[5]Ten, you are, like, dipped in hot oil.

[6]A good day makes, him in the five to six

[7]neighborhood for pain.

[8]A bad day would be, you would not be able to

[9]get out of bed.

[10]Q Would there be any guarantee, future surgery,

[11]even though -- though he needs it --

[12]MR. WHITELEY: Objection.

[13]We raised this issue. It was not resolved.

[14]He had exchanged a BP that does not have any

[15]claim --

[16]THE COURT: Apparently, there is -- may I

[17]see it?

[18]MR. WHITELEY: You may see the exchange, too

[19]your **[*42]** Honor.

[20](Handed.)

[21]MR. WHITELEY: They are the medical

[22]exchanges from the doctor --

[23]THE COURT: What?

[24]MR. WHITELEY: Those are 3101 responses.

[25]MR. BOROWICK: They're not 3101. They're

[26]actual treating doctors.
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[1]

[2]THE COURT: From the record I am looking at,

[3]the Supplemental Verified Bill of Particulars and the

[4]exchange --

[5]MR. BOROWICK: The reference is on the

[6]second page, Judge.

[7]THE COURT: Of the exchange?

[8]MR. BOROWICK: Yes.

[9](Pause.)

[10]THE COURT: Well --

[11]MR. BOROWICK: Excuse me.

[12]THE COURT: -- I have reviewed both, and it

[13]appears in both.

[14]MR. WHITELEY: Sorry?

[15]THE COURT: It appears in both documents.

[16]The exchange --

[17]MR. WHITELEY: The medicals do not have any

[18]reference --

[19]THE COURT: Excuse me.

[20]I am reading.

[21](Pause.)

[22]MR. BOROWICK: Can we do this afterward, and

[23]I can go on to something else?

[24]THE COURT: Come up, and I will show it to

[25]you in case you do not believe me, which you seem not

[26]to,
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[1]

[2](Pause.)

[3]THE COURT: **[*43]** You appear to be correct.

[4]MR. WHITELEY: We ask for a corrective

[5]charge.

[6]MR. BOROWICK: Excuse me.

[7]Can I see it?

[8]MR. WHITELEY: She said it was correct.

[9]I ask for a curative charge, your Honor.

[10]THE COURT: Just hold it.

[11](Pause.)

[12]THE COURT: The testimony is limited to the

[13]extent that only future examination and testing will

[14]tell whether future spinal surgery is in order.

[15]That is what it is.

[16]Q Sir, based upon your present analysis of his

[17]back --

[18]MR. WHITELEY: Objection, your Honor.

[19]That has not been exchanged in terms of any

[20]need for future surgery.

[21]I will argue this in private, judge.

[22]It's not in the four corners of his

[23]exchange, it is not.

[24]THE COURT: In preparing your -- your

[25]report, did you conclude that future MRIs are what

[26]would determine if, an additional back surgery was
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[1]

[2]required?

[3]THE WITNESS: Yes, he would require testing,

[4]correct.

[5]THE COURT: Testing?

[6]THE WITNESS: Correct.

[7]MR. BOROWICK: I have a doctor's report we

[8]have exchanged.

[9] **[*44]** THE COURT: Another one.

[10]Okay.

[11]MR. BOROWICK: We can do this after the

[12]doctor -- there are legal issues -- I am not going

[13]into --

[14]THE COURT: What are you showing me, what

[15]page?

[16](Pause.)

[17]Q Doctor, Dr. Merola, with regard to his neck and

[18]his back -- and those are the areas I want you to limit

[19]yourself to -- how would you characterize the level of his

[20]disability in terms of a scale of mild, moderate, severe?

[21]First, his neck.

[22]A The neck is, at this time, moderate.

[23]Q What about his low back?

[24]A Severe.

[25]Q And would you tell us what types of activities

[26]would he be limited in if he wanted to do activity

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[1]

[2]painlessly?

[3]I don't know if I am clear.

[4]Could he walk, could he climb stairs, could

[5]he walk a half mile?

[6]What could he do painlessly now, with those

[7]two parts of his body disabled, as you described?

[8]A Painlessly, very little.

[9]Activities that involved any type of

[10]postural changes, any bending, any lifting, any twisting,

[11]standing for a prolonged period of time, sitting for

[12]prolonged periods **[*45]** of time, walking in excess of three or

[13]four blocks, they are all painful activities.

[14]Activities that involve the use of the upper

[15]and lower extremities, for example, bending over a sink at

[16]home to wash dishes, difficult, painful.

[17]Q Sir, other than these activities of daily living,

[18]what about avocation, sports, can he resume his sports,

[19]can he play baseball; surf --

[20]A No.

[21]Q -- ever again?

[22]A No.

[23]Q Do you have an opinion as to whether or not his

[24]type of injuries -- take the whole patient -- his type of

[25]injuries affect his ability to enjoy a physically,

[26]romantically -- relationship with his wife?
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[1]

[2]A Yes, they do.

[3]Q Let's talk about -- I don't want to get graphic.

[4]How does it relate in a general way?

[5]Without getting graphic, how does it relate

[6]to that disability.

[7]MR. WHITELEY: Objection, Judge.

[8]Again, this is not anything exchanged.

[9]THE COURT: What?

[10]MR. WHITELEY: This is not anything that has

[11]been exchanged or made known to the Defendant.

[12]MR. BOROWICK: It's --

[13]THE COURT: Again, I don't **[*46]** know.

[14]I have to review --

[15]MR. BOROWICK: It's the claim, the wife's

[16]derivative claim.

[17]This is not new.

[18]THE COURT: Well, he says it is new.

[19]I don't know.

[20]MR. WHITELEY: There is a claim for

[21]consortium, Judge. It does not encompass medical

[22]testimony.

[23]This doctor has provided no testimony or

[24]opinion --

[25]THE COURT: That is what consortium entails.

[26]MR. BOROWICK: I am talking about mechanical
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[1]

[2]changes.

[3]THE COURT: I'll allow it.

[4]It is not -- Doctor, are you able to answer

[5]the question?

[6]THE WITNESS: Yes.

[7]THE COURT: We are talking about

[8]participating in sex, isn't that correct?

[9]MR. BOROWICK: Yes.

[10]A Can you --

[11]Q How does that affect his ability in that arena,

[12]in that general nature?

[13]A He is unable to do that.

[14]He has to assume a passive role, and cannot

[15]utilize upper or lower extremities or spine during that.

[16]Q As a physician, can you tell us whether or not,

[17]even if he is totally passive -- and talking now about

[18]loss of enjoyment of life -- is there any loss of

[19] **[*47]** enjoyment of those activities?

[20]THE COURT: The jury can conclude that on

[21]its own.

[22]MR. BOROWICK: Got it.

[23]Thank you.

[24]Q I -- at your request -- did you, at my request,

[25]review the reports of Mr. Whiteley's examining doctor,

[26]Dr. DiGiacinto?

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[1]

[2]A Yes.

[3]Q I will ask you some points that were made.

[4]Do you agree this man's problems were all

[5]chronic, has nothing to do with the trauma?

[6]A No.

[7]Q Do you agree that there was no pathology

[8]appreciated in the case, on surgery, there was nothing

[9]wrong?

[10]A Absolutely not.

[11]Q What is "myelopathy"?

[12]A That refers to neurological changes in the spinal

[13]nerves.

[14]Q Did he have it, or not?

[15]A Yes.

[16]Q And, at my request, did you speak with Mr. --

[17]Dr. Kinkaid, a life care planning specialist?

[18]A Yes.

[19]Q Did you communicate with him about the cost of

[20]the future surgery and rehab?

[21]A Yes.

[22]MR. WHITELEY: Objection.

[23]Q Are you an economist?

[24]MR. WHITELEY: Objection.

[25]THE COURT: One at a time.

[26]You are objecting to the question, **[*48]** are you
Page 158

[1]

[2]an economist?

[3]MR. WHITELEY: The question before that.

[4]MR. BOROWICK: Did he communicate with

[5]Dr. Kinkaid?

[6]THE COURT: Do you know Dr. Kinkaid?

[7]THE WITNESS: Yes.

[8]THE COURT: Have you communicated with him?

[9]THE WITNESS: Yes.

[10]THE COURT: Do you adopt that question?

[11]MR. BOROWICK: That is what it is about.

[12]THE COURT: You communicated with

[13]Dr. Kinkaid about this patient.

[14]What is the next?

[15]Q And did you discuss with him issues of future

[16]care and future cost? J

[17]A Yes.

[18]Q Sir, would you tell us, if Dr. DiGiacinto is

[19]right, and all these problems, he had before, at least

[20]with the back and the neck, do you see any evidence of

[21]that anywhere in his history or his work history, working

[22]1,600 hours a year over the last 20 years?

[23]Do you see anything to support that?

[24]A No.

[25]Q Did you see anything, when you eyeballed his

[26]spine, to support this injury was just a chronic
Page 159

[1]

[2]degenerative condition?

[3]A No.

[4]Q If he had any degeneration like you described

[5]that we **[*49]** all have, would that make him, as any of us, more

[6]vulnerable to a trauma to sustain an injury which would be

[7]symptomatic?

[8]A Yes, it makes him more vulnerable.

[9]Q If he had any -- any degeneration we might all

[10]have, would -- did his trauma, if that was even remotely

[11]in the picture, but did his trauma activate the symptoms,

[12]orthopedic problems that may have been festering

[13]asymptomatically?

[14]A Yes.

[15]MR. BOROWICK: Nothing further.

[16]THE COURT: Are you ready for cross?

[17]Do you need a few minutes?

[18]MR. WHITELEY: If the jury would like a

[19]short break --

[20]THE COURT: Does anybody need to step out?

[21](Jury shakes heads in the negative.)

[22]MR. WHITELEY: Then we will go right ahead.

[23]MR. BOROWICK: Before I finish, I would like

[24]to offer that in evidence, the model.

[25]THE COURT: What?

[26]MR. BOROWICK: The model.
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[1]

[2]THE COURT: No objection to that?

[3]MR. WHITELEY: No objection.

[4]THE COURT: We will mark that and the other

[5]things later.

[6]CROSS-EXAMINATION

[7]BY MR. WHITELEY:

[8]Q Good afternoon, Doctor.

[9] **[*50]** A Hello.

[10]Q You are being paid by Sacks & Sacks for your

[11]testimony here today?

[12]A Yes.

[13]Q How much?

[14]MR. BOROWICK: Excuse me.

[15]That is really amateurish.

[16]Not for his testimony.

[17]THE COURT: What?

[18]You object to the form of the question?

[19]MR. BOROWICK: I don't think you meant for

[20]your testimony.

[21]Q For your time and testimony?

[22]A For my time.

[23]Q Yes?

[24]A Yes.

[25]Q How much are you being paid?

[26]A $ 400 an hour.
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[1]

[2]Q What does that work out to in this case with

[3]regard to the work you put in on this case?

[4]A I don't have a final number as of yet.

[5]Q How many hours, approximately, have you been

[6]working on the case, including today's testimony?

[7]A So far, including today?

[8]Q Correct.

[9]A Somewhere in the neighborhood of about, ten hours

[10]or so.

[11]Q About $ 4,000 in addition to the medical fees you

[12]received in treating the Plaintiff, and so forth, correct?

[13]A For medical fees, were not for testimony, no.

[14]Q I'm not saying they were in addition to medical

[15]fees **[*51]** you -- you're receiving 4,000?

[16]A For time, and not my testimony, correct.

[17]Q And, Doctor, have you ever testified for the

[18]office of Sacks & Sacks, or for Howard Borowick of

[19]counsel, on any prior occasion?

[20]A I have testified for my patients.

[21]Q How many times?

[22]A About three times, I would say.

[23]Q How many times this year?

[24]A This year?

[25]Q Yes.

[26]A Perhaps, in total, -- and not for this law firm
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[1]

[2]only, about two or three times for the year.

[3]Q Doctor, what does the term "exacerbation" mean to

[4]you?

[5]What does that term mean in medical terms

[6]for the Jury?

[7]A Exacerbation?

[8]Q Yes.

[9]A Exacerbation can mean something is being made

[10]worse.

[11]Q And what does "exacerbation aggravation" mean to

[12]you?

[13]A That is, something has been made worse, and has

[14]been instigated to be made worse.

[15]Q Does that term, by itself, indicate that there

[16]was some things that were happening before it?

[17]A Not necessarily.

[18]A lot of it depends on the context in which

[19]it is used.

[20]Q If something is exacerbated, **[*52]** something had to

[21]have been exacerbated, correct?

[22]A Yes.

[23]I can see it happens in multiple contexts.

[24]Q Exacerbation aggravation of an L4-5 disk bulge --

[25]what is an L4-5 disk bulge?

[26]A Which disk bulge are we talking about?

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[1]

[2]Q L4-5 disk bulge in --

[3]MR. BOROWICK: Are we talking about this

[4]patient, or just generally?

[5]I am just --

[6]MR. WHITELEY: This patient.

[7]This is their exchange, Bill of Particulars.

[8]Q An L4-5 disk bulge, Doctor, what is that?

[9]Tell the jury.

[10]A Mr. Cioffi has an L4-5 disk protrusion.

[11]Q Excuse me?

[12]A Mr. Cioffi has an L4-5 protrusion,

[13]Q Disk bulge before the accident, did he have a --

[14]A Did he have a bulge prior?

[15]Q He never told you about--

[16]MR. BOROWICK: I'm sorry --

[17]Can we approach?

[18]THE COURT: If you have to.

[19](Discussion held off the record.)

[20]MR. WHITELEY: They're his Bill of

[21]Particulars.

[22]MR. BOROWICK: Can you curtail the

[23]discussion?

[24]THE COURT: Ask it the right way.

[25]Q Tell us, Doctor, tell the jury what is meant **[*53]** by

[26]the term exacerbation aggravation of an L4-5 disk bulge.
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[1]

[2]THE COURT: Maybe, to clarify it --

[3]MR. WHITELEY: Thank you.

[4]THE COURT: -- are you familiar with that

[5]term, or --

[6]THE WITNESS: That is not a term I would.

[7]use.

[8]THE COURT: All right.

[9]Q Have you heard the phrase "disk bulge" used in

[10]the context of the -- your practice of lumbar

[11]orthopedics that you are engaged in, sir?

[12]A Disk bulge, yes.

[13]Q Tell us what it means.

[14]A Disk bulge -- we reviewed this before -- we talk

[15]about a bulge as a symmetrical protrusion of a disk over

[16]time, and that loses water and degenerates as vertebral

[17]bodies collapse down own each other.

[18]MR. WHITELEY: Can I use the model in

[19]evidence?

[20]THE COURT: Yes.

[21]Q If you can, show the jury, with your model, and

[22]use whatever you want here, explain what a disk bulge is,

[23]and how that looks on that same model.

[24]A With a bulge, a disk bulge would look exactly

[25]like this disk without (indicating) -- this is a

[26]protrusion or herniation (indicating).
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[1]

[2]I will cover that **[*54]** up.

[3]Let's make believe the herniation does not

[4]exist.

[5]A bulge merely means you are seeing the

[6]exact same disk you are seeing now, but it comes outside

[7]the confine of the edges of the vertebral body.

[8]Q But whether or not something comes outside the

[9]confines of the edges of the vertebral body, as you just

[10]said more here clearly than I, does that -- is that an

[11]area where -- where the disk material can come in contact

[12]with a nerve root?

[13]MR. BOROWICK: Objection as to what could

[14]and --

[15]THE COURT: Ask it another way.

[16]Q Is that where the nerve root is located, outside

[17]the vertebral body, where the disk bulge could be?

[18]MR. BOROWICK: Objection, the same thing,

[19]where it could be.

[20]It has nothing to do with the patient.

[21]THE COURT: Is that where it is?

[22]MR. WHITELEY: Right.

[23]A The nerve root is outside the vertebral body.

[24]Q So I am clear, if something is asymptomatic at

[25]the time of the accident, if a disk bulge is not

[26]symptomatic at the time of the accident, what does that
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[1]

[2]mean to you in medical terms, so we understand **[*55]** that?

[3]A If a disk bulge is asymptomatic, it means there

[4]are no symptoms produced from that disk bulge.

[5]Q At the time of the accident --

[6]A Then there are no symptoms from --

[7]Q -- an exacerbation and aggravation of the disk

[8]bulge --

[9]MR. BOROWICK: Of an asymptomatic disk

[10]bulge?

[11]Q -- what would that mean to you, if there was at

[12]the time of the accident?

[13]THE COURT: Do you understand the question?

[14]THE WITNESS: I'm a little confused.

[15]THE COURT: The witness is confused.

[16]Q If something is asymptomatic, and there is

[17]exacerbation and aggravation at the time of the accident,

[18]what does that tell us about the condition?

[19]A The exacerbation and aggravation means that you

[20]are aggravating something, so, then, it's not

[21]asymptomatic.

[22]Q You cannot have something asymptomatic if there

[23]is a disk bulge there, correct?

[24]MR. BOROWICK: Objection.

[25]THE COURT: Do you understand that?

[26]MR. WHITELEY: I will withdraw it.
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[1]

[2]THE COURT: Okay.

[3]Q Doctor, were you ever informed by Mr. Cioffi, or

[4]by any of the **[*56]** attorneys that retained you, about a

[5]preexisting disk bulge?

[6]MR. BOROWICK: Objection, Judge.

[7]What he is doing is reading from a legal

[8]document that we have to prepare, not a medical

[9]document.

[10]Lawyers don't tell him what a medical

[11]condition is.

[12]THE COURT: Thank you.

[13]Thank you for the summery.

[14]Thank you both very much.

[15]Now, to your knowledge, did you have

[16]something of that nature in the history?

[17]THE WITNESS: No.

[18]Q Your impression, Doctor, of Mr. Cioffi, is based,

[19]in large part, is it not, on what Mr. Cioffi tells you?

[20]A His history, the examination, our diagnostic

[21]imaging studies.

[22]Q When was the first time you ever saw Mr. Cioffi?

[23]A In May of 2003.

[24]Q So, about six months after the accident happened?

[25]A Yes.

[26]Q That was the first time you laid eyes on him?
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[1]

[2]A Yes.

[3]Q You were not there at the time of the accident,

[4]so, basically, everything you know about the accident

[5]itself is stuff that Mr. Cioffi has told you?

[6]A Although I had the opportunity to review the

[7]report **[*57]** from the hospital which he was taken to after the

[8]accident.

[9]Q Right.

[10]Not anything about the disk bulge?

[11]MR. BOROWICK: Objection.

[12]It's a legal document.

[13]THE COURT: Thank you.

[14]Sustained.

[15]MR. WHITELEY: I presume it comes from --

[16]MR. BOROWICK: It's a legal document.

[17]Objection.

[18]THE COURT: Have a seat.

[19]MR. BOROWICK: He added commentary.

[20]THE COURT: You have another witness.

[21]Q Doctor, when you were talking earlier, on direct

[22]examination, you mentioned all of us have, in our spine,

[23]from age 30 on, degeneration of our spine, is it -- am I

[24]saying that correctly?

[25]A As we age, we do.

[26]We have degenerative changes that occur
Page 169

[1]

[2]within our spine, yes.

[3]Q All of us have that?

[4]A Yes.

[5]Q And you also said that when someone has --

[6]whether or not we develop back pain depends, in large

[7]part, upon whether or not there is stress and strain on

[8]the disk and the bone, that was the quote I tried to get

[9]from you, I think.

[10]Is that correct?

[11]A No, I did not say, in large part.

[12] **[*58]** That is one of the factors that goes into

[13]whether or not we develop pain.

[14]Q Stress and strain on the disk and the bone?

[15]A Is one of the factors that go into pain, yes.

[16]Q Would you say someone, an ironworker for 18 years

[17]doing construction work would be someone who would

[18]routinely have a great deal of stress and strain on his

[19]disk and bone?

[20]A He does have a significant amount of stress and

[21]strain on the bone, yes.

[22]Q Would you say someone who is an athlete like

[23]Mr. Cioffi, who plays baseball, and golfs, and scuba

[24]diving, and I think he mentioned surfing also, if someone

[25]is an athlete, and out here doing these sports, would that

[26]kind of person, in your opinion, have stress and strain on
Page 170

[1]

[2]his disk and bone?

[3]A He would.

[4]Q And, if someone has an occupation or a hobby that

[5]has a lot of stress and strain, is it possible that

[6]Mr. Cioffi, in your opinion, could have had an injury to

[7]his back at any time in his lifetime?

[8]MR. BOROWICK: Objection.

[9]THE COURT: Sustained.

[10]Q You mentioned, Doctor, that the surgery that you

[11]performed was **[*59]** a successful surgery?

[12]A Yes.

[13]Q Could you have done anything greater than what

[14]you did for Mr. Cioffi in the surgery that you performed?

[15]A Not at the time, no.

[16]Q You indicated it was tolerated -- it was

[17]tolerated well, and no complications, is that correct?

[18]A Yes.

[15]Q Now, if someone has an x-ray, that does not

[20]always tell us whether or not there is a problem with the

[21]disk material, would that be a fair statement medically?

[22]A X-rays can sometimes tell us whether or not there

[23]is a problem with the disk.

[24]Q You're aware there were x-rays taken on the first

[25]day of this accident?

[26]A Yes.
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[1]

[2]Q You reviewed those?

[3]A Yes.

[4]Q What did the x-rays say with regard to the lumbar

[5]spine?

[6]A I don't have the reading in front me.

[7]Q Do you have any recollection of that?

[8]That is an important medical document, isn't

[9]it?

[10]A It's an important medical document.

[11]I don't recall what they said offhand --

[12]Q Do you know if there was an x-ray of the cervical

[13]spine on the day of the accident?

[14]A **[*60]** I don't recall, no.

[15]MR. WHITELEY: These are both in evidence.

[16]Can -- he can mark them.

[17]These are the x-rays from the Mary

[18]Immaculate chart.

[19](Handed.)

[20](Pause.)

[21]MR. BOROWICK: I'll take your word.

[22]MR. WHITELEY: You can check the chart.

[23]MR. BOROWICK: I said, I will take your word

[24]for it.

[25]I am taking your word for it.

[26]You want me to check, I'll check it.
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[1]

[2]Q What is an anterior osteophyte?

[3]A An anterior osteophyte?

[4]Q Yes.

[5]A Bone spur in front of the vertebral body.

[6]Q Can you get those in the cervical or lumbar

[7]spine, or both?

[8]A You can get those in both.

[9]Q If someone had an anterior osteophyte on the day

[10]of the accident, would it be fair to say that was a

[11]condition that existed for some period of time before the

[12]accident?

[13]A Yes.

[14]Q You cannot get an anterior osteophyte like that

[15]on the day of the accident, correct?

[16]A Yes.

[17]Q I ask you to look at the radiology report dated

[18]November 1, 2002, the date of the accident.

[19]Just confirm for the jury, **[*61]** if you would,

[20]sir, that report indicates he had an anterior osteophyte

[21]in the cervical spine on the day of the accident.

[22](Handed.)

[23]Q Or read it.

[24]A It says, "Small anterior osteophyte noted at

[25]C-6."

[26]"The remainder of the bony structures, soft
Page 173

[1]

[2]tissues and joint spaces about the cervical spine show no

[3]radiographic abnormality. There is no evidence of

[4]fracture or dislocation."

[5]Q So, after the accident, so I am clear, Doctor, an

[6]x-ray is a very good indicator if there is fracture or

[7]dislocation, correct?

[8]A Yes.

[9]Q There is no fracture and there is no dislocation

[10]of the cervical spine, according to the x-ray, on that

[11]day?

[12]A Yes.

[13]Q With respect to the lumbar spine -- I will try to

[14]finish up quickly -- with respect to the lumbar spine -- I

[15]ask you to read from that document also in evidence --

[16]tell the jury what was done on the accident date.

[17]A "There is a suggestion of a grade I

[18]retrolithiasis of L-3 on L-4. There is a minimal disk

[19]narrowing at L4-L5."

[20]"The remainder of the vertebral bodies,

[21]disk space and **[*62]** pedicles show no radiographic

[22]abnormalities."

[23]Q No radiographic abnormality of the lumbar spine

[24]other than disk space narrowing and retrolithiasis?

[25]A Yes.

[26]Q What is retrolithiasis?

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[1]

[2]A Backward slipping of one bone on the other.

[3]Q Where was that?

[4]A At L3-L4.

[5]MR. WHITELEY: Thank you very much, Doctor.

[6]We will have Joe Desthers.

[7]MR. BOROWICK: Can I?

[8]THE COURT: Do you have any redirect?

[9]MR. BOROWICK: Yes.

[10]REDIRECT EXAMINATION

[11]BY MR. BOROWICK:

[12]Q Sir, counsel just asked you about disk bulges,

[13]and I think you mentioned, on direct, disk bulges is the

[14]pancake while it retains its shape.

[15]Do they necessarily have nerve root

[16]impingement?

[17]A No.

[18]Q When he asked you could it, is there any evidence

[19]here -- I want you to assume that the work record of this

[20]man, for the 20 years before the accident, includes 1,600

[21]hours, no limitation, and no medical treatment, no

[22]complaint, no limitation, no medication, physical therapy,

[23]chiropractor.

[24]Is there anything you have seen, or anybody

[25]has shown **[*63]** you, anybody, that suggested there was

[26]preexisting impingement, when there was pancaking as
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[1]

[2]natural degenerative disk disease?

[3]A No, I have not seen it.

[4]Q Counsel asked about the stress and strain of

[5]ironwork.

[6]By the way, have you treated other

[7]ironworkers?

[8]A Yes.

[9]Q Do all ironworkers have stress and strain that

[10]relate -- that result in traumatic herniation of their

[11]disks?

[12]A No.

[13]Q Traumatic protrusion of the disks?

[14]A No.

[15]Q Suffering and symptoms, do all of them have that

[16]absent the trauma?

[17]A No.

[18]Q He asked about a bone spur.

[19]He said, was there bone spurs?

[20]When you read that, "anterior osteophyte,"

[21]was that, in any way, symptomatic before the accident?

[22]A No.

[23]Q About the lumbar spine, the retrolithiasis, one

[24]or two questions.

[25]You said it was a slippage.

[26]Can -- a retrolithiasis of grade I, is that
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[1]

[2]severe, or minimal?

[3]A Minimal.

[4]Q A minimal retrolithiasis -- after a twisting

[5]accident which herniates, protruded the disk, and tears

[6] **[*64]** the anulus, can that cause a grade I retrolithiasis?

[7]A Yes.

[8]Q And minimal narrowing, and no other finding

[9]besides minimal narrowing of the L4-5, is that consistent

[10]with the degenerative disk disease that we all suffer as a

[11]result of aging, plus athlete and ironworker?

[12]A Yes.

[13]MR. BOROWICK: Nothing further.

[14]RECROSS-EXAMINATION

[15]BY MR. WHITELEY:

[16]Q Doctor, your opinion is that Mr. Cioffi cannot

[17]perform construction work, is that correct, in the future?

[18]A Correct.

[19]Q Do you have an opinion with regard to other forms

[20]of work?

[21]Is it possible he could work in a more

[22]sedentary job?

[23]A He can.

[24]Q Thank you, Doctor.

[25]MR. BOROWICK: Excuse me.

[26]That is not fair.

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