In The Matter Of:

Russell J. Lester v.

JD Carlisle Development Corp., et al.

May 15, 2018

Supreme Court - Civil Term

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Min-U-Script® with Word Index

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL DIV. : PART 47

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RUSSELL J. LESTER,

Plaintiff,

- against -

Index No. 152112/12

JD CARLISLE DEVELOPMENT CORP., M.D., CARLISLE DEVELOPMENT CORP., and 835 6th AVE MASTER LP,

Defendants.

----------X

JD CARLISLE DEVELOPMENT CORP., MD CARLISLE DEVELOPMENT CORP., AND 835 6TH AVE. MASTER LP,

Third-Party Plaintiffs,

- against -

FACADE TECHNOLOGY, LLC and CENTURY MAXIM CONSTRUCTION CORP.,

Third-Party Defendants.

----------X

FACADE TECHNOLOGY, LLC

Fourth Third-Party Plaintiffs,

- against -

EXTERIOR ERECTING SERVICES, INC.,

Fourth Third-Party Defendants.

----------X TRIAL

80 Centre Street
New York, New York
May 15, 2018

B E F O R E :

HON. PAUL A. GOETZ,
Justice, and a Jury.

ROBERT PORTAS/MICHELLE MAHAFFEY
SENIOR COURT REPORTERS

PROCEEDINGS

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K. Kucsma - By Plaintiff - Direct

(Whereupon, at the request of counsel and with the consent of the Court, the following exhibits were marked for identification: Plaintiff's exhibits 20, 21 and 22.)

COURT OFFICER: All rise. Jury entering. Court please be seated.

THE COURT: Folks, good morning, and welcome back. And Mr. Clark, call your next witness.

MR. CLARK: Thank you. I would call Kristin Kucsma.

KRISTIN KUCSMA, called as a witness by the Plaintiff, having been first duly sworn, testified as follows:

COURT OFFICER: Please be seated. State your name for the record.

THE WITNESS: Kristin, K-R-I-S-T-I-N; Kucsma, K-U-C-S-M-A.

COURT OFFICER: Business address, please.

THE WITNESS: 293 Eisenhower Parkway, second floor, Livingston, New Jersey, 07039.

THE COURT: Okay. Thank you. Mr. Clark?

MR. CLARK: Thank you very much.

DIRECT EXAMINATION

BY MR. CLARK:

Q Good morning, Ms. Kucsma.

A Good morning.

Q Are you presently employed?

A Yes, I am. I am currently the managing director and chief economist of Sobel Tinari Economics Group.

Q And would you tell us, what are your duties and responsibilities?

A Most of the work that I do involves working with attorneys, both plaintiffs' attorneys and defense attorneys, to calculate or evaluate economic damages in a wide variety of litigated matters, matters involving personal injury, wrongful death, employment-related matters and so on.

My other main responsibility as a managing director involve simply running the day to day operations of the group: Recruiting, mentoring, training and so on.

Q And how long have you been working in that capacity?

A I have been with the Sobel Tinari Economics Group since January of 2008, so a little over ten years right now.

Q Would you tell us about your educational background, where you went to school and your degrees?

A Sure. I have a Bachelor of Arts degree in economics that I received from Seton Hall University, where I was graduated with highest honors. I have a Master of Arts degree in economics that I received from Rutgers University. And in addition to my Master of Arts degree, I also completed all of my course work and doctoral program, passed my qualifying examinations and have begun to develop a thesis.

Q And in your experience, have you had any teaching duties and responsibilities?

A Yes. When I joined the Sobel Tinari Economics Group in early '08, I enjoyed what I like to call my first career, which was as a college professor. I was a member of the full-time faculty at Seton Hall University and also at Drew University, and I was an adjunct professor at Rutgers University and St. Peters college.

I taught primarily in economics, both in graduate and undergraduate levels. On occasion I taught finance and statistics, and I was a college professor for about 14, 15 years.

Q Do you have any field of specialization in your experience?

A I do. At present my sort of practicing field of specialization if that's what you want to call it, is a field of forensic economics, which means that I use the tools, techniques and methods of economics for a specific purpose; and that purpose is, as I mentioned earlier, to calculate economic damages in litigated matters.

In addition to that, though, I have several other areas of specialization that includes applied microeconomic theory, which simply means I use mathematics to study and understand how individual consumers and businesses and so on make decisions every day. And I also have an area of

specialization called American economic history, which is particularly useful in my current employment, because one of the things that I need to do in order to calculate economic damages is form opinions about what things like wages and prices, unemployment rate and so on are likely going to be going forward. Having a good understanding of what has caused those things to change in the past is very useful.

Q Are you a member of any professional associations or organizations?

A Yes. I am a contributing member of the Eastern Economic Association and also a contributing active member of the National Association of Forensic Economics.

Q Have you been published in your field of expertise?

A I have. The two -- well, the one publication and the other paper that are probably most relevant for today's discussion is, number one, an article that was published in the Journal of Forensic Economics. In that article I discuss how to calculate the economic damages in personal injury and wrongful death matters. The focus of that article is on New Jersey, but the economic methodology is the same state to state, even though the court rules may be different.

In addition to that, I am also in the process of developing a paper. I presented it at a conference, a paper that describes in detail how economists like myself calculate the monetary or the economic value of household services; the

chores, the maintenance, the management of a household.

Q Have you received any honors and awards?

A I have. I have been very privileged throughout the years to receive several honors. When I was teaching, I was named professor of the year several years in a row. I also received several teaching commendations based on evaluations of my work by my students and my peers.

In my current profession I have been named number one economic expert in New York for several years in a row. Last year I also was inducted into the 2017 New Jersey class of the top 50 women in business in New Jersey.

Q Have you given continuing education to lawyers within your field of expertise?

A Yes. I continue to be very involved in education in general. One of the things I regularly do is teach continuing legal education courses to members of the legal community. I also work with law schools on mock trials and things like that, and I am also a mentor for the women's leadership studies program at Seton Hall University.

Q Have you given any continuing education to defense attorneys?

A I have, yes. One of my recent CLE's or, I should say, one of the recent CLE's that I taught was actually in-house for a defense firm in southern New Jersey.

Q In your practice, are you available for consultation

by defense attorneys?

A I am. About 30 percent of the cases I review are at the request of defense counsel.

Q Can you tell us, in your experience, approximately how many cases you've analyzed for economic loss involving claims of personal injury or wrongful death?

A Since 2008 I have offered thousands of reports. I would estimate that at least two or three thousand of those reports involved personal injury or wrongful death.

Q Have you testified in court?

A I have, yes.

Q And have you been qualified as an expert within your field in federal and state court?

A Yes, I have.

Q Can you tell us about how many times you have been qualified as an expert within your field?

A To date I have been qualified in court approximately 270 times, give or take.

Q In this case of Russell Lester, were you consulted by my law firm in order to perform an analysis?

A Yes.

Q And would you tell us what you were asked to do?

A I was asked to calculate the economic losses suffered by Mr. Lester as a result of an injury as a result of an accident.

Q And did you calculate those economic losses?

A I did, yes.

Q And did you render a report regarding your analysis?

A Yes, I did.

Q And was your office paid for your time and services rendered for preparation of the analysis in this case?

A Yes, we were.

Q Now, would you tell us, in order to do the analysis, what steps you took, what you did?

A The first thing I needed to do was review a variety of documents that had been provided to me, documents that included legal documents, copy of the bill of particulars, a copy of Mr. Lester's examination before trial.

I also received a completed fact-finding questionnaire. That is a document that we will frequently provide to attorneys. It's designed to elicit basic information about the case: The plaintiff's date of birth, employment and so on.

I also reviewed documentation of Mr. Lester's earnings. Those documents included W-2 wage and tax statements as well as tax returns, and I also reviewed a variety of union documents. I reviewed wage and benefit schedules which showed me the various benefits Mr. Lester was eligible for as a union member, as well as the regular hourly rates that union members were paid.

I reviewed something called a summary plan description for the pension plan. That provided me with the description of pension benefits that as a union member, Mr. Lester was eligible for, and more importantly, described a description of how those pension benefits were calculated.

Q If I show you what's been marked for identification as Plaintiff's Exhibit 22, looking at those records, would they include the records and documents that you reviewed in order to perform your analysis?

A Yes. These appear to contain all of the earning documents, W2, the tax returns, all of the union documents that I reviewed, the wage and benefit schedules, booklets about various retirement plans and so on.

Q And when you say "union benefits and records," could you explain what records you reviewed in order to do your analysis?

A Yes. I reviewed, as I mentioned before, wage and benefit schedules, and those are, basically, grids that simply show the hourly rate that union members are paid for their work. It also includes information about the employee contribution into what we call an annuity fund. So within the benefits Mr. Lester was eligible for is annuity fund, which is one of the two retirement funds that he got. An annuity fund is really like a savings plan like a 401(k) plan, except for so whatever hours Mr. Lester worked, his employers would have to

put money into that fund and once he retired, he would be able to withdraw that money and use it as income.

In addition to that, Mr. Lester also was eligible and was enrolled in a pension plan. The pension plan is a retirement plan, but it works differently from the annuity. The annuity is called a defined contribution plan, which means the employer puts X amount of dollars into the plan, and that money is available for Mr. Lester when he retires.

The pension plan works differently. The benefits that Mr. Lester ultimately collects when he retires from the pension plan are actually based on formula based on the number of credits that he accrues throughout the years, which is based on the number of years he works and number of hours he works and so on. So I needed that information so I could properly calculate the pension benefits he would have collected, had he continued working and retired at his statistical retirement date.

There is also information in these documents about health insurance. The fact that as a union member Mr. Lester also received health insurance, that's another benefit that I needed to include when I calculated his loss compensation.

Q And you told us that you reviewed his tax returns and W-2?

A Yes.

Q And could you tell us over what period of time you

reviewed those tax returns and W-2 and what you noted about his past employment history?

A Sure. I examined his personal income, tax returns and accompanying W-2 for the periods 2005 through 2010 and then 2012 through 2015.

I also had been provided with another pension document, specifically a document from the pension fund itself, in order to calculate a union member's pension benefits. The pension fund has to keep track of the number of hours that person works every year, and I had a document that provided me that information. Those documents, the tax returns, the W-2 and that pension, allowed me to examine how much Mr. Lester had in fact earned in the years 2005 through 2010 which, of course, is the year in which he was injured, and I was also able to examine the number of hours he worked at each of those years from 2005 through 2010. That was useful information for me, because in order to calculate how much he would have continued to earn if he hadn't been injured, I needed to have an understanding what he had in fact earned during the years immediately preceding his injury and also the number of hours he worked each year again immediately preceding his injury.

Q Having reviewed all of these materials, did you come to an opinion with reasonable economic certainty as to the economic losses suffered by Mr. Lester as a result of the injuries that he suffered on July 23, 2010?

A I did, yes.

MR. ECKERT: Objection. Judge.

THE COURT: I'm sorry. I didn't hear you.

MR. ECKERT: The projected losses. They are not actual losses. They are projected losses.

THE COURT: Sustained.

Q Did you come to an opinion with reasonable economic certainty as to the projected past and future losses that Mr. Lester suffered as a result of the injuries suffered on July 23, 2010?

A I did, yes.

Q If I can show you Exhibit 20 for identification, does Exhibit 20 represent a 22 page report of your analysis of the projected losses that Mr. Lester suffered as a result of the injuries suffered on July 23, 2010?

A Yes. This is a copy of the analysis I prepared in October of 2016.

Q And when you prepared that analysis to my office, was your office paid for all your time in reviewing these materials and the preparation of the report?

A Yes, we were.

Q And do you know the amount that your office was paid for that?

A We received a total of $4,500 for the analysis we undertook in this case.

Q And is that the typical fee your office charges when they do an analysis for projected losses of somebody who suffered personal injuries or wrongful death?

A It is consistent with the general range. The general range is about 4,000 to $4,800 for the preparation of analysis like this.

Q And does it depend upon the particular case and the materials and the amount of time that you spend in doing the analysis?

A It does. It depends on the amount of research I need to do. It also depends on the number of elements of economic damages I have to calculate.

Q And were you asked by my office to come to court and give testimony regarding your opinions with reasonable economic certainty of the projected losses for Mr. Lester?

A Yes.

Q And are you being paid for your time in court to give testimony and present your opinions?

A My firm has received compensation for my time here today, yes.

Q And what is the amount of compensation that your firm receives for your time in coming to court and presenting your opinion?

A The firm received $4,100.

Q Now, did you prepare certain demonstrative aids in

order to assist you and the jury in presenting your projected losses?

A I did, yes.

(Whereupon, Robert Portas replaced Michelle Mahaffey as the official court reporter at this time.)

(Continued on the next page.)

K.KUCSMA-DIRECT/Clark

Q And if I show you what's been marked as Exhibit 21 for identification, do these 14 pages represent the demonstrative aids that will assist you in presenting your opinions to the jury?

A Yes.

MR. CLARK: If I can, Your Honor, with your permission, ask Miss Kucsma if she can come down. I have a blowup of those demonstrative aids which I would like to present.

THE COURT: Sure. I thought that those were rather small demonstrative aids.

MR. CLARK: They were. But I couldn't mark those big ones so I made copies of the small ones.

THE COURT: All right. Yes. Ma'am, you may step down so that you can point.

THE WITNESS: Thank you, Your Honor.

THE COURT: Except we have to allow defense counsel to be able to see.

MR. BOULÉ: Your Honor, can I sit over here (indicating)?

THE COURT: Sure.

MR. CLARK: So is this a good place (indicating)? I don't know if everybody can see.

THE COURT: They're going to take over your table.

MR. CLARK: I know. That's okay.

K.KUCSMA-DIRECT/Clark

MR. BOULÉ: Judge, the closer he gets the less he angles it, I can't see.

THE COURT: I know. Back a little more.

MR. CLARK: Okay. Let me get out of the way.

BY MR. CLARK:

Q So, with respect to the first page that's on there, could you explain to us what that includes.

A Yes. If we look at the bottom first, you'll see in the bottom I've simply listed the different elements of economic damages that I actually calculated. So the first two adjusted earnings in past and future years, the first thing I did was calculate how much additional compensation Mr. Lester would have received had he not been injured in July of 2010 and had he continued working as a union carpenter.

I also had to take into account those fringe benefits I mentioned before, the annuity benefits are going to be included just like you would include 401K contributions, they're going to be included in my calculation of lost earnings. The pension benefits I had to calculate separately because I needed to use the formula provided in the summary plan description. Mr. Lester also received health insurance as a union member. And then the last element of economic damages that I evaluated was the monetary impact, or I should really say the impact that this injury has had on Mr. Lester's ability to perform various household services, and I was able to calculate the monetary

value of that.

Now, before I could actually start calculating each of these elements of economic damages I needed to obtain some basic information about the case, so I needed to understand Mr. Lester's date of birth, when he was injured, how old he was at the time of his injury, where he was living, what his highest level of education was. I needed to have an understanding of what his employment had been. He was a union carpenter. And I also wanted to have an understanding of his marital status. So once I had obtained that basic information before I could actually start my calculations I also needed to do some preliminary economic research. And, very specifically, the three things that I needed to research before I could really get started --

MR. BOULÉ: Objection, Judge. What was the question, what she considered? I mean, this is -- are we at a lecture or is this question and answer?

THE COURT: Restate your question.

MR. CLARK: Yes.

Q Could you tell us what personal information you needed to research and obtain in order to assist you in performing the analysis?

A Sure.

THE COURT: Okay, so that question has been answered, I believe. And now we can go on to the basic

economic question.

MR. CLARK: Okay.

Q I just want to cover the statistical retirement age that you have on the document. Could you tell us the source of that information.

A Sure. In order to determine Mr. Lester's statistical retirement age so that I can determine how many more years he would have worked if he hadn't been injured I reviewed U.S. Government data and I looked very specifically at the actual experience of 54/55-year-old males who have some college but no degree. So I was looking at males like Mr. Lester, for lack of any better phrase. And, based on the actual experience of 54/55-year-old males with some college with no degree they retire at or around the age of 66.19 years on average. So had Mr. Lester not been injured in 2010 I determined he would have continued to work as a union carpenter through May of 2022.

Q What is work life ratio?

A The retirement data that I reviewed tells me one thing and one thing only, and that is that a 54/55-year-old male with some college but no degree will retire at or around the age of 66.19 years. What that data does not tell me is that that 54/55-year-old male will work continuously through age 66. And, in fact, when I review the U.S. Government data and, again, look at the actual experience of 54/55-year-old males with some college but no degree I find that they typically do not work

continuously through retirement, they work about 85.7 percent of the time, or alternatively they spend about 14.3 percent of the time out of the workforce. They get injured, they get ill and so on.

So this is significant, because what you will see is in each and every year when I calculate Mr. Lester's lost earnings I'm going to make a downward adjustment of 14.3 percent to take into account the probability that in any given year Mr. Lester may have missed some work now and then because of injury, illness, so on.

Q And the life expectancy is calculated as what for Mr. Lester?

A Mr. Lester's statistical life expectancy, based on the national vital statistics reports, the U.S. Government document, is estimated at 80.47 years.

So when I perform my calculation of the household services those will continue, and the pension benefits for the remainder of Mr. Lester's lifetime, they will continue through August of 2036.

Q Okay.

Now, if you could go to Page 2, please, the earnings and hours history. And explain to us what information you reviewed that's reflected on Page 2.

A What we're looking at here is a history of what Mr. Lester actually earned from 2005 through 2010 as well as a

number of hours that he actually worked each year from 2005 through 2010. This information was useful for me because in order to determine how much Mr. Lester would have earned had he not been injured in 2010 I needed to determine on average how much he would have continued to earn each year going forward and on average how many hours he would have worked each year going forward.

Q So do your calculations include the annual hours that he worked during those years?

A Yes. This information was provided in the pension documents that I mentioned earlier, and the earnings information was provided in the W2 wage and tax statements.

Q And those are reflected from the year 2005 up until the date of his injury on July 23, 2010?

A Yes.

Q And what is "Pre-injury earnings base"? Could you explain that?

A Yes. In order to calculate the lost compensation, I needed to determine first how much Mr. Lester would have earned on average had he not been injured. I needed to consider kind of his pre-injury earnings capacity, if he hadn't been injured what would he have continued to earn going forward. And in order for me to determine how much Mr. Lester would have earned on average each year going forward I simply took an average of how much he in fact earned in the year 2007 -- the years 2007,

2008 and 2009, the three years immediately preceding his injury in 2010.

In 2010 he was injured about midway through the year, he was on track to earn well over $100,000, but since he hadn't completed the year in this case I considered just the last three full years of employment before 2010 to make sure that I didn't pick up any payments that may have been made to him after he was injured in July of 2010.

Q So, based on your review of the tax returns and W-2s and documents, what was the pre-injury earnings base you came up with?

A Based on my analysis, I determined that if Mr. Lester had not been injured in July of 2010 he would have continued to work and earn on average $98,267 each year, if he didn't miss any work -- I'm going to make an adjustment to this later -- and I also determined that he would have continued to work on average 1,832 hours each year, again, based on the number of hours he in fact worked in the years 2007, '8 and '9.

Q Now, would you go to Page 3, please.

That says "Gross earnings in past years." Could you explain what information is reflected there.

A Yes. These figures that you see here in the third column reflect or represent, I should say, how much Mr. Lester would have earned each year if he had been able to work the full year in 2010, work 2011, '12 and so on if he never missed a day

of work, if he had no job-related expenses and if he received no benefits. That's what these figures represent. I had to take into account the fact, of course, that as a union member if Mr. Lester had continued working in 2011, '12, '13 and so on his wages would have increased on average year over year. And I know that because I was able to review union documents, I was able to review wage and benefit schedules, I was able to look at the hourly wage rate year over year, and that hourly wage rate in fact increased year over year. And you see the amount by which those rates increased here in the second column (indicating).

So, according to the union documents, in the year 2011 rates increased by 2.92 percent. There was no increase in the rates in 2012. The rates were then increased by 2.23 percent in 2013 and so on.

Had Mr. Lester continued his work as a union member his rates would have increased pursuant to these wage and benefit schedules. And that, again, allowed me to calculate what he would have earned each year if he never missed a day of work, had no job-related expenses and so on.

Q Now, what is "Earnings adjustments"? What does that mean?

A In order for me to ultimately calculate lost earnings I certainly could not assume that Mr. Lester never would have missed a day of work, I could not assume he'd have no

job-related expenses, no union dues, no cup of coffee in the morning, and I know, of course, that he did receive annuity benefits. So in order for me to ultimately calculate the lost earnings I needed to take these numbers, make one upward adjustment, add in the employer contribution into the annuity fund and then I needed to make three downward adjustments each year. The first one I already described.

The first downward adjustment is a downward adjustment to these numbers every year in the amount of 14.3 percent to take into account a couple of days, a couple of weeks when Mr. Lester may have missed work because of injury, illness and so on.

I made a second downward adjustment, though, to take into account the fact that Mr. Lester may have missed work now and then, not because he was injured or ill but because there simply wasn't work available. He may have simply been unemployed. So I made another downward adjustment each and every year in the amount of 3.9 percent to reflect periods of unemployment.

And, lastly, I made a third downward adjustment each and every year in the amount of 6 percent to take into account the fact that if Mr. Lester had continued to work he would have had to spend some of this money on job-related expenses, transportation to and from work, union dues, a cup of coffee in the morning, a hotdog for lunch and so on.

Q So what was the adjusted earning factor that you calculated to apply?

A Once I combined these three downward adjustments and also add in the annuity benefits I'm going to at each and every year reduce these figures by 11.88 percent.

Q Would you go to Page 4, please.

Did you form an opinion with reasonable economic certainty as to the loss of earnings Mr. Lester suffered from his injury of July 23, 2010 from the date of the injury up to the current date?

A I did. And I took into account the fact that Mr. Lester had worked part of 2010, so I subtracted out what he actually earned in that year.

Q And if I could just ask you, could you tell us -- and we will come to the basis for it.

A Sure.

Q Could you give us your opinion with reasonable medical -- could you give us your opinion with reasonable economic certainty as to the total loss of earnings and benefits --

MR. CLARK: Let me withdraw that.

Q Do you have an opinion with reasonable economic certainty as to the total loss of past lost earnings Mr. Lester suffered from July 23, 2010 up to the current time?

MR. BOULÉ: Objection.

K.KUCSMA-DIRECT/Clark

THE COURT: Restate the question.

Q Do you have an opinion with reasonable economic certainty as to the loss of earnings that Mr. Lester suffered as a result of his injury of July 23, 2010 up until the present time?

MR. BOULÉ: Objection.

MR. ECKERT: Objection.

THE COURT: What's the basis?

MR. ECKERT: It's a projection.

THE COURT: Overruled.

A Yes. In my professional opinion I determined that had Mr. Lester not been injured in July of 2010, had he continued working through the present time he would have received an additional $724,297 in salary and annuity benefits.

Q And does Page 4 reflect -- break down year by year of that loss from --

A Yes, it does.

Q Okay.

Now, going to -- on the bottom of that page it says, "Adjusted upward for fringe benefits, 12 percent, and downward for job maintenance expenses, 6 percent." What does that mean?

A That's simply referring to the fact that I had to take into account the fact that Mr. Lester did work for part of 2010. I know specifically that in the year 2010 he earned a total of

$60,314. I also know, however, that he received annuity benefits on top of that, and I also assume that he did have some job-related expenses. So this figure of $63,933 takes into account what he earned in terms of salary. I added on top of that the annuity benefits and then I also reduced that figure to take into account union dues and other job-related expenses.

Q So, in your opinion, with reasonable economic certainty the past loss of earnings comes to $724,297?

A Yes.

Q Going to Page 5: What information did you review and that's calculated here?

A In this case I simply continued the calculations that I had begun in past years. And specifically here I calculated how much additional compensation, salary and annuity benefits Mr. Lester would have earned if he had continued working from the present time through his statistical date of retirement, May 18, 2022.

Q And did you come to an opinion with reasonable economic certainty as to the projected future loss of earnings that Mr. Lester has suffered from the current date up until the projected time of his retirement?

A I did. I determined that had Mr. Lester continued working from the present time through his statistical date of retirement he would have earned an additional $434,627 in salary and annuity benefits.

Q And could you explain the calculations to come to that in terms of what adjustments were made and how you did that.

A Sure. I used basically the same methodology I described before. I started by determining on average how much Mr. Lester would have earned each year if he never missed a day of work, had no job-related expenses, didn't receive any annuity benefits. I then took into account the fact that if Mr. Lester had been able to continue working as a union carpenter his wages would have continued to increase on average year over year. In future years I determined that on average Mr. Lester's wages would have increased 3.6 percent each year.

And that was based on my review of several sources of information. I started by looking back at specifically how wages had increased according to the union documents I reviewed; I also considered data published by the U.S. Department of Labor about how much wages have in fact increased year over year for individuals in the construction industry; I also considered projections of future wage growth published by the Board of Trustees of the Social Security Administration; and, lastly, I also reviewed publications by the Building Congress of New York that provides projections and information about the rate of growth of construction projects, employment and so on specifically in New York City. And, based on my review of all of those sources, I determined that on average had Mr. Lester continued working his earnings would have increased 3.6 percent

each year. I then made the downward adjustments I've described earlier to arrive ultimately at the loss of adjusted earnings.

Q And the publications you're referring to, are they generally accepted government data that economists rely upon?

MR. BOULÉ: Objection.

THE COURT: Overruled.

(Continued on the following page.)

oOo

A They are, yes.

Q Now, would you then go to Page 6.

What is the next calculation you determined?

A The next category of economic damages I evaluated was the loss of pension benefits. As a union member Mr. Lester was enrolled in a pension system, he was eligible for pension benefits. I reviewed the summary plan description that told me very precisely how union members' pension benefits would be calculated once they retired. And you'll see there are sort of two pieces to the benefit formula. This is largely due to the fact that two unions merged, so earlier in his career Mr. Lester was a part of one union that then became another union.

For any employment that Mr. Lester had before 2011 basically his pension benefits were calculated based on what we call a benefit rate. So Mr. Lester would work year over year based on the number of hours he worked, he would get pension credits each year, and, then, based on the number of pension credits he would get some sort of benefit rate, $75 per month for each credit earned through the end of 2011, plus $68 per month for credits earned, I should say prior to 2002 and so on.

So for all of the work that he did, for all of the hours that he accrued, all of the credits he accrued up through the end of 2011 I'm going to apply this formula. For the work that -- or for any work that he would have done if he had not been injured in 2010, of course he would have continued to work

past 2011, for any work that he would have done after 2011 and through his statistical retirement in 2022 this formula applies. The formula is simply 1 percent of employer contributions. If Mr. Lester hadn't been injured he would have continued to work. His employers would have paid X number of dollars per hour into the pension fund for every hour that Mr. Lester would work. So in any given year his employer would have made contributions into the pension fund based on the number of hours Mr. Lester worked. The pension fund then would take those contributions for Mr. Lester, multiply them by 1 percent and that's how they would get the monthly pension benefit. So for the time he would have worked after 2011 I applied this formula.

(Continued on the following page.)

oOo

Q So now looking at page 7, did you form a calculation with reasonable economic certainty as to the projected monthly benefit for the pension loss?

A I did. Through the end of 2011, I took the number of pension credits that Mr. Lester had actually earned, of course, up until the time of his injury. I added projected pension credits. This is the -- these are, I should say, the pension credits he would have earned from July 2010 through the end of 2011. I knew what the per credit rate was. That was determined, of course, through the pension plan. $68 per month through the end of 2001, $75 per month through the end of 2011, and then I simply multiply the number of the credits times the credit rate for the monthly credit for all the work he would have done through the end of 2011.

Starting in 2012 I had to use that other formula, the employer contribution times 1 percent, in order to calculate the employer contributions. The employers would pay into 2012 $11.81 per hour. This is simply pursuant to the wage and benefit schedule, $11.81 per hour for every hour that Mr. Lester would have worked. I determined in this case that on average, Mr. Lester would have worked 1,493 hours each year after I adjusted the number of hours he in fact worked downward to account for work life and up employment. And you might recall that when I looked at the number of hours that Mr. Lester had in fact worked in the years leading up to his

injury, he had in fact worked 1,382 hours per year, but again, I took into account the probability going forward he may have missed some work because of injury, illness and unemployment. So I ultimately used an adjusted figure of 1,493 hours each year to determine what the employee contributions would have been, and applying that formula then allowed me to ultimately determine that if Mr. Lester had not been injured in July 2010 when he retired in May 2022 he would have been entitled to a monthly pension benefit in the amount of $3,494.91 and would have collected that for the remainder of his life expectancy.

Q Now, looking at page 8, did you come to an opinion with reasonable economic certainty as to the projected loss of pension benefits that Mr. Lester suffered for his injury of July 23, 2010?

MR. BOULÉ: Objection.

THE COURT: Overruled.

A I did. Based on my analysis as I mentioned a moment ago, I determined that pursuant to the summary plan description and the other union documents I reviewed, had Mr. Lester continued to work through May of 2022 and then started collecting his pension benefits, he would have collected approximately $3,500 per month; approximately $41,939 each year. Obviously, he would have retired in May, so he would not have collected a full year of pension benefits in that year. I didn't see any indication in the summary plan description that

as a retiree, Mr. Lester would have received any increases, any cost of living adjustment. So I assumed there were none and I kept that figure constant.

Q So what is the total amount of projected pension benefits loss that Mr. Lester suffered as a result of his injury of July 23 of 2010?

A I determined that had Mr. Lester retired in May of 2022, begun to collect his pension benefits at that point and collected them through his statistical life expectancy, he would have collected a total of $598,887.

Q Now, going to page 9, does that reflect your analysis of health insurance loss to Mr. Lester?

A Yes.

Q And would you tell us what you reviewed and what you calculated with respect to his loss of health insurance?

A In this case as a union member Mr. Lester received individual health insurance, and in order to calculate the value of that individual health insurance -- this was covered for and paid for by the union -- I considered data that was published by what is called the Kaiser Institute. The Kaiser Institute for decades has collected data on health insurance premiums, insurance premiums paid by employers, and they report this data for different regions of the United States. And I was able to specifically look at the average annual premium for individual or single health insurance in the northeast in 2017,

and it was in fact $7,001 per year.

I was also able to determine by reviewing that Kaiser data that the cost of health insurance has increased, on average, five percent each year. So I determined that on average these premiums will continue to rise at five percent per year, and I was able then to calculate the value of this fringe benefit that Mr. Lester would have continued to receive if he was able today to continue working as a union carpenter from today through his statistical date of retirement. I calculated the value of this employer benefit at $31,992.

Q And I did not ask you, but with respect to the future annual earning loss that Mr. Lester suffered, was there a growth rate that you used at 3.6 percent?

A Yes, there was.

Q And what was the basis for that growth rate?

A That was based on my review of past wage growth, the wage and benefit schedules published by the union I reviewed, as well as U.S. Department of Labor data where I looked never specifically at how wages for people in the construction industry have in fact increased over the years.

I also looked at projections of future wage growth published by the board of trustees of the Social Security Administration, and I reviewed, as I mentioned before, the Building Congress reports that contain information specifically about anticipated growth in projects, employment, and so on in

construction within New York City.

Q Were all these projections made by you with reasonable economic certainty?

A Yes.

Q Going to page 10, does that reflect the loss of household services?

A Yes.

Q Could you explain, what is household services and how did you go about evaluating that loss?

A Sure. When we talk about household services, "we" meaning economists, are talking about various households chores: Shopping, cooking, doing the laundry; maintenance of the home, for example, changing a light bulb; shoveling the snow and also management of the household, paying bills, opening mail and so on. This is really what we think about when we talk about household services.

Household services represent legitimate economic activity that economists have been valuing for decades well over a hundred years. The reason that household services oftentimes are not thought of as economic activity is because most household services are either done by a person or themself or sometimes these household services are done by one family member for another family member, but in any event, these household services -- nobody is paying for the provision of these household services in this case. They are provided by

family members.

I use this term very loosely, "free of charge," but that doesn't change the fact that they represent legitimate productive economic activity. So, as an economist, I am able to use a method that economists have been using for many decades, to simply calculate the value of the household services Mr. Lester was performing for himself before he was injured and would have continued to perform for himself, had he not been injured in July of 2010.

Q Does that account for the individual performing those services for themself by taking a longer time to do that?

A Yes. That certainly is one way that a loss of household services can occur. A loss of household services may exist because an injured person can no longer do certain things. It may be that they can do certain things, but it takes them much longer, so both of those would result in some sort of a reduction in a person's ability to officially perform household services.

Q And what is the source of the hourly rate calculations you make for loss of household services?

A In order to calculate the monetary value of household services, economists really ask a very simple question, and that is if someone wanted to replace the household services that they were performing, that their spouse was performing or parents were performing, how much would they have to pay a

stranger in the marketplace to perform those household services, and that's what these hourly rates reflect. These hourly rates are based on data published through the U.S. Department of Labor as well as data published in various surveys, surveys conducted by Met Life for example, Genworth and so on.

Q Would you go to page 11, please.

Did you come to an opinion with reasonable economic certainty as to the amount of the loss Mr. Lester suffered for household services from the date of his injury up until the present time?

A I did, and I will tell you exactly how I got there in just a moment. What we are looking at right here, though, is.

MR. BOULÉ: Objection. Could she answer the question, Judge?

THE COURT: Sustained.

Q Okay. Did you come to an opinion with reasonable economic certainty as to the total loss of household services Mr. Lester suffered from the date of the injury up until the present time, if you look at page 11?

A Well, I did. The problem is these are actually the loss of household services, so I have to kind of work backwards. So I do apologize, Your Honor. The figures that we are looking at before on page 11, and I assume we will go back in a moment, but these figures that I first calculated

represented what the loss would be if Mr. Lester were not capable of doing anything anymore around the household.

I am not a medical doctor, I am not a vocational expert, and I am not a member of the jury, so I am not offering any specific opinion about precisely what the loss of household services.

THE COURT: Ms. Kucsma, let's pause for a moment while we let the sirens subside a bit.

(Pause.)

THE COURT: We're safe for the time being.

THE WITNESS: Thank you, Your Honor.

A (Continuing) These figures, again, represent what the loss would be if Mr. Lester were incapable of doing anything around the house.

Based on my review of the fact finding questionnaire and Mr. Lester's examination before trial, he indicated that he was still capable of performing household chores. He also indicated, though, that it took him a lot longer to perform those household chores than it used to prior to his injury.

So what I did, based on that information, was provide a framework that shows how the trier of fact could determine the precise loss of household services, depending on what the trier of fact determined.

MR. BOULÉ: Objection. There is no foundation for these numbers, Judge.

K. Kucsma - By Plaintiff - Direct

THE COURT: Overruled.

Q Did you come to an opinion with reasonable economic certainty as to the range of loss Mr. Lester suffered for household services?

A I did. Based on my review of the information, I determined that on average, if Mr. Lester were still capable of doing about 60 percent of everything around the house; in other words, if he were entitled to a 40 percent loss of household services, then the appropriate loss would be $189,780. If, on the other hand, the trier of fact determined Mr. Lester could still do about half of what he was able to do in the same amount of time, he would be entitled to a 50 percent loss.

MR. ECKERT: Objection, Judge. Judge, objection.

MR. CLARK: Could she finish her answer?

THE COURT: Step up, counsel.

(Whereupon, a discussion was held off the record at the bench.)

MR. CLARK: If I may, Your Honor?

THE COURT: You may ask one more question.

MR. CLARK: Okay.

THE COURT: Regarding --

MR. CLARK: The basis?

THE COURT: Yes.

Q What was the basis for your opinion regarding your calculations of household service lost?

A Information provided by Mr. Lester in the fact finding questionnaire I reviewed as well as testimony of his during his examination before trial.

MR. BOULÉ: Objection.

MR. ECKERT: Objection.

MR. BOULÉ: Move to strike all testimony relating to the loss of household services.

MR. BRIDGES: I join him.

THE COURT: The objection is sustained. All testimony regarding loss of household services is stricken and the jury shall not consider it.

MR. CLARK: May I ask one further question about the source of the information as to whether that is a professional --

THE COURT: Counsel, we heard the source and I made my ruling.

MR. CLARK: Okay, Judge. All right. Thank you.

Q Could you go to page 14, please. Did you come to an opinion with reasonable economic certainty as to the economic losses that Mr. Lester suffered as a result of his injuries of July 23, 2010?

A Yes.

Q And you gave -- what is your opinion regarding the range of loss?

MR. ECKERT: Judge --

K. Kucsma - By Plaintiff - Direct

MR. BOULÉ: Objection.

MR. ECKERT: I object. It needs to be redacted.

THE COURT: I can't see it. I need to see it.

MR. CLARK: If I exclude half --

THE COURT: Step up, gentlemen.

(Whereupon, a discussion was held off the record at the bench.)

THE COURT: Flip that over, Mr. Clark. Folks, we are going to take a ten minute break. And remember, don't talk about the case, and we will see you in ten minutes.

COURT OFFICER: Okay. Jury exiting.

THE COURT: Counsel, I think I need you all to ensure that the proper portions are redacted.

(Off the record.)

(A recess was taken.)

(After the recess the following occurred:)

COURT OFFICER: All rise. Jury entering. Court please be seated.

THE COURT: Okay. Welcome back, folks, and let's reposition the demonstrative aid so that defense counsel can see it as well.

MR. BOULÉ: Thank you. All right.

THE COURT: Mr. Clark.

MR. CLARK: Okay.

Q Ms. Kucsma, taking out the household services, do you

have an opinion with reasonable economic certainty as to the loss of earning, benefits and health insurance that Mr. Lester suffered as a result of the injury of July 23, 2010?

A I do. I had calculated --

Q What is your opinion?

A The total economic loss in this matter at $1,789,803.

Q And what is the calendar -- how is that calculation reached, what are the various components for that calculation?

A I determined that had Mr. Lester not been injured in July 2010, had he continued working through the present time, he would have received an additional 724,297 in salary and annuity benefits.

Had Mr. Lester continued working from today's date through his statistical date of retirement May of 2022, he would have earned an additional $434,627 in salary and/or, I should say, wages and annuity benefits.

I also calculated the loss of pension benefits. Had Mr. Lester continued working through May of 2022 and then started collecting pension benefits, had he collected those through the remainder of his statistical life expectancy, he would have received $598,887 in pension benefits.

And lastly, had Mr. Lester continued to receive single or individual health insurance from today through his statistical rate of retirement in May of 2022, the value of that health insurance is $31,992.

K. Kucsma - By Plaintiff - Direct

Q That comes to the total of $1,789,803?

A Yes.

MR. CLARK: Judge, at this time I would move into evidence Exhibit 21 for identification, which is a copy of the chart referred to by Kristin Kucsma, redacted so as to remove those pages referring to household services, and substituting for the last page a copy of the summary that's up on the board.

MR. BOULÉ: Objection. For demonstration.

THE COURT: Counsel, step up.

(Whereupon, a discussion was held off the record at the bench.)

THE COURT: Let's mark the demonstrative aid, the larger one as 21-A, the whole thing, the front page.

(Plaintiff's Exhibit 21-A marked for identification.)

COURT OFFICER: 21-A is so marked.

MR. BOULÉ: For identification.

THE COURT: The objection is sustained.

MR. CLARK: Judge, I'd like to offer into evidence Ms. Kucsma's report which has been marked for identification as Exhibit 20 to be redacted.

MR. BOULÉ: Objection.

MR. ECKERT: Objection.

MR. BRIDGES: Objection.

THE COURT: That's her report?

MR. CLARK: Yes, Your Honor.

THE COURT: The objection is sustained. It's not entered.

MR. CLARK: I have no further questions.

THE COURT: Okay. Mr. Eckert, cross-examination?

MR. ECKERT: Absolutely, Judge. Thank you.

CROSS EXAMINATION

BY MR. ECKERT:

Q I am going to ask you some questions. I am just going to ask you to keep your answers to a "yes" or "no," and if you can't answer "yes" or "no," just tell me without answering.

A I will do my best.

Q Yes or no, is that okay?

A I will do my best, so yes.

Q Now, your report is based on assumptions, yes?

A I did need, yes, to make some assumptions. Of course.

Q And assumptions can be wrong?

A I wouldn't agree with that, but certainly.

Q Assumptions can be wrong.

MR. CLARK: Objection.

Q Whether or not they are is not the question. Can they be wrong?

THE COURT: Overruled.

A Again --

Q I am asking you to answer my question.

A I wouldn't agree with that, because these assumptions are about what likely will happen in the future. It isn't clear to me.

Q I am just going to ask you to confine your answer to yes or no.

A That question I am afraid I cannot answer yes or no.

Q Please say that. Are all assumptions facts when you give them?

A No. Assumptions are certainly not facts.

Q Can you just answer yes or no? I don't need a speech. Just answer yes or no.

MR. CLARK: Objection, Your Honor.

THE COURT: Mr. Eckert, let her answer the question.

Q Did you review plaintiff's medical records in forming your opinions?

A No, I did not.

Q Why not?

A I am not a medical doctor. I am an economist.

Q So if plaintiff was not able to go back to work, that is not important either?

A That is certainly not here to offer an opinion.

Q Is it a yes or no? I don't want you to extemporize. I just want on a yes or no.

K. Kucsma - By Plaintiff - Cross/Eckert

MR. CLARK: Objection.

THE COURT: Sustained.

A I saw no indication Mr. Lester could return to work. In fact, I did review the opinion of Dr. Smith, I believe was his name, and he indicated and I noted that in my report. He indicated very specifically that Mr. Lester, quote, "has a severe partial and permanent disability to his left upper extremity caused by the subject occurrence on 7/23 --"

MR. BOULÉ: Objection to the reading of the record.

THE COURT: Sustained.

Q Did you read the report of Orlin & Cohen saying plaintiff is not in any pain?

A No, I did not review it.

MR. CLARK: Objection. Objection.

THE COURT: Overruled.

A I did not review any medical records. The only medical document I reviewed --

Q I know you want to speak --

A The answer is no, I did not review medical records. Correct.

Q But you did review a expert hired by the plaintiff; yes or no?

A I reviewed Dr. Smith's report yes.

Q How about Orlin & Cohen who was not hired by

plaintiff?

A No.

Q Yes or no?

A The only medical record I reviewed was Dr. Smith's opinion.

MR. ECKERT: Your Honor, I am going ask for --

THE COURT: You answered the question, so your objection is overruled. Ask your next question.

Q Did you review any of the defense experts?

A No.

Q And why not?

A To my knowledge was not -- I don't know if there are experts, but I was not provided with any reports.

Q And you would have been provided everything you needed from plaintiff's counsel, who is paying you?

A The information I relied upon, yes, was provided me by plaintiff's counsel.

Q So if defendants have an expert that say plaintiff can go back to work, it would change all of your projections; yes or no?

MR. CLARK: Objection.

THE COURT: Overruled.

A It would have absolutely no impact on my analysis. I am not the trier of fact here. I only calculated what Mr. Lester would have continued to earn, had he continued his

employment as a union carpenter, and that is my role here today.

Q And you used the assumption?

A No, I did not build any post incident earnings, but I am not here to offer that opinion one way or another.

MR. CLARK: Objection.

THE COURT: Overruled.

Q That would have lowered your name?

A My analysis, to be very clear for the record, would remain unchanged. Whether the jury adjusts my number is a different story but I am not a member of the jury and would not will be happen.

MR. ECKERT: Judge.

THE COURT: Sustained.

MR. ECKERT: And move to strike please.

THE COURT: Okay. The answer is stricken. And Ms. Kucsma, when there is an objection, wait before you continue speaking so that I can rule.

THE WITNESS: Yes, Your Honor.

Q Now, did you look into what percentage of union carpenters is 66 years old?

A Not specifically, no.

Q Why not?

A That information was not directly relevant for my analysis.

Q So if there are no union carpenters that are 66, is it your opinion that somehow plaintiff would be one?

A Yes.

Q Okay. You're basing that opinion on what?

A On my statistical research.

Q Did you use the at that time research using the carpenters unions age of average retirement?

A I did not specifically review that data no.

Q So if the average age of a carpenter is 55, say, that would significantly change your numbers, yes or no?

A I would not rely upon that.

Q Yes or no?

A It would not change my analysis.

THE COURT: Your objection is overruled, Mr. Eckert.

Q So you're using an overall U.S. population to, I guess, interpolate instead of extrapolate the average age for a union carpenter?

A That is one source I considered.

Q Are you aware of any union carpenters that are 66 years old?

MR. CLARK: Objection. Asked and answered.

THE COURT: Overruled.

A Specifically do I know one? I can't think of one as I sit here today.

Q How about 65?

A Yes.

Q You personally know a 65 year old union carpenter?

A I do not personally know one. I have worked on cases involving individuals in their early to mid sixties who are still employed as union carpenters and union electricians.

Q And what percentage of carpenters are over age 60?

A That I don't know specifically.

Q Thank you. And you didn't take into consideration any of the information available to you that would lower these numbers, did you?

A Sure I did.

Q You did?

A I made adjustment for work life expectancy, unemployment, job-related expenses, absolutely.

Q How about is plaintiff currently getting health insurance?

MR. CLARK: Objection.

MR. ECKERT: Really?

THE COURT: Sustained.

Q Do you know if plaintiff is currently getting his pension?

MR. CLARK: Objection.

THE COURT: Sustained.

Q Now, how many drafts of that report did you engage in?

A One.

Q Okay. So you write one draft, only one draft; no discussions with plaintiff, no changes?

A One draft of the report and then the updated calculations I presented here today.

Q Changes including those changes?

A Updated and then updated again after the Court's ruling, yes.

Q Now, when plaintiff filled out his questionnaire, did you compare his answers in the questionnaire to his deposition answers?

A I reviewed both, yes.

Q Did they change at all?

A No.

Q No? And did you rely on any trial testimony in formulating your opinion?

A I did not review the trial testimony of the plaintiff, no.

Q So you are aware that plaintiff -- well, let me ask you this. Are you aware that plaintiff has residual capacity in his life: He can walk, he can move, he can use his arms, he can actually go back to work if he so choose?

MR. CLARK: Objection.

Q Are you aware of that?

MR. CLARK: Objection.

THE COURT: Overruled.

MR. ECKERT: You don't have to yell.

THE COURT: Overruled.

A I am certainly aware of the fact the plaintiff can walk. I believe he is here in the courtroom. In terms of any residual capacity, I am not a vocational expert. I am not a medical expert. So I am not here to offer any opinion about that.

Q So if the vocational expert has an opinion, would that be important to include into your analysis?

A I was not provided with any vocational opinion.

Q Are you aware that there is one?

A I believe you folks may have a vocational expert, yes.

Q When you say "you folks," what does that mean?

A Defense. I believe I am talking about you, the defense.

Q And we have exchanged it with your counsel. Are you aware of that?

MR. CLARK: Objection.

Q That these folks have given it to those folks?

THE COURT: Sustained.

Q Are you aware that we have provided a vocational rehabilitation expert's opinion with regard to plaintiff's past and future employability; yes or no?

MR. CLARK: Objection.

K. Kucsma - By Plaintiff - Cross/Eckert

THE COURT: Sustained.

Q Do you have the questionnaire that the plaintiff filled out?

A I believe so, yes. Hang on a second.

Q Did you provide that to us?

A I provided nothing directly to you. I never provide anything directly to opposing counsel.

Q Did you provide it to your counsel?

A Yes.

MR. ECKERT: Did you provide it to us?

MR. CLARK: I gave you have everything I received.

Q And how many times have you met plaintiff personally before today?

A I've actually never met him even today. I have never seen him in the courtroom. I have never sat and spoken to him.

Q Wouldn't it have been important to you to find out whether or not plaintiff could in fact work?

MR. CLARK: Objection.

Q Does that help your opinion by meeting with him and asking him, hey, can you go back to work?

MR. CLARK: Objection.

THE COURT: Overruled.

A No. Again --

Q Yes, the answer is no?

A I am not a trier of fact. I am not a vocational expert.

Q Ms. Kucsma, I am asking you to answer yes or no and you have already done that. You said no, it's not important for you to have met with plaintiff. Did I summarize that correctly?

A That's correct. Yes.

Q And had plaintiff told you that you know what, there are certain things I can do it and certain things that I just don't feel like I would be able to do, sort of like sales, for instance, would that factor into your opinion?

MR. CLARK: Objection.

A No.

THE COURT: Overruled.

A Again, I am not a vocation expert. It would be irrelevant for a economic expert that specific information you just quoted.

Q So if your client tells you, you can go to work, you can go to work, you would still write a report that says he can't?

MR. CLARK: Objection.

A My report --

THE COURT: Overruled.

A -- does not say he can't. Not at any point in time today in court did I state that he cannot return to work. What

K. Kucsma - By Plaintiff - Cross/Eckert

I have done is calculate what he would have earned if he had been able to return to work as a union carpenter. If the jury feels that he can do something else --

MR. ECKERT: Judge.

THE COURT: Sustained. You answered the question, Ms. Kucsma.

Q You will agree, yes or no, you will agree your report does not put in any past earnings for future earnings; yes or no?

A I am not sure I follow your question to the extent --

Q I will explain it to you, okay. In your report there is zeros for income after 2011; correct?

A Correct. He did not work.

Q And the future earnings out to 2022, those are also zero; correct?

A Correct.

Q Okay. So am I accurate in saying that you didn't incorporate into your report any capacity that plaintiff may have, because you never met with him to discuss it, yes?

A It's not because I didn't meet with him.

Q You didn't meet with him; correct?

A No. Let's be clear for the record.

MR. CLARK: Objection.

THE COURT: Sustained.

A The reason --

THE COURT: So you can continue.

THE WITNESS: Thank you, Your Honor.

THE COURT: I mean overruled.

A (Continuing) The reason I did not consider any residual earnings capacity is because I am not a vehicle expert, I am not a medical doctor, and I am not a member of the jury. That's why it's in there, not because I didn't meet with the client. Even if I had met with him and he had said, "I would love to go back to work," that would not change my analysis at all.

Q Are you aware plaintiff has a vocational expert?

MR. CLARK: Objection.

A No.

THE COURT: Overruled.

Q You are not aware of that?

A I reviewed Dr. Schmidt. I don't know what report you're referring to.

Q I am asking. I am not referring to any report. You are. I am asking if you are aware whether plaintiff has an expert that says -- a vocational expert that says that there are no jobs that plaintiff can do?

A Other than the report of Dr. Schmidt, I did not review anything else.

Q Is Dr. Schmidt a vocational expert? Please focus on my question.

A Not to my knowledge, but he did offer an opinion regarding --

Q And he is not a vocational expert; correct?

MR. CLARK: Objection.

A Not to my knowledge.

Q To your knowledge, does he have any knowledge of the U.S. labor market, Dr. Schmidt?

MR. CLARK: Objection.

THE COURT: Overruled.

A You have to ask him.

Q Well, you were aware you were just about to offer an opinion about what Schmidt knew or doesn't know. He is a medical doctor; correct?

A Correct.

Q And he is not a vocational expert; correct?

A That's correct.

Q And you are also aware that plaintiff is not presenting a vocational expert at trial or in contemplation of your report; correct?

MR. CLARK: Objection.

A Not to my knowledge.

THE COURT: Overruled.

A (Continuing) Not to my knowledge.

Q And had he offered this, you would have necessarily put it in your report; correct?

A Had I been provided with a vocational opinion and there was information relevant for my analysis, of course it would have been reflected in my analysis.

Q Would a vocational expert be relevant for your analysis?

MR. CLARK: Objection.

THE COURT: Overruled.

A Possibly.

Q What does "possibly" mean; is that a yes or a no?

A It's neither, because I couldn't say whether it would be relevant until I actually reviewed the report that was provided by that vocational expert.

Q And the defendants have one?

A That's my understanding.

Q And you didn't look at it, so you have no idea whether it is relevant or not, do you?

A That is certainly not relevant for me, because I am not a member of the jury. It is not appropriate for me to determine whether testimony --

MR. ECKERT: Judge, I'm so sorry.

THE COURT: Okay. It's sustained. Thank you, Ms. Kucsma. You have answered the question.

(Whereupon, Robert Portas replaced Michelle Mahaffey as the official court reporter at this time.)

(Continued on the next page.)

MR. ECKERT: No further questions, Judge. Thank you.

THE COURT: Mr. Bridges...?

MR. BRIDGES: Yes, Your Honor.

CROSS EXAMINATION

BY MR. BRIDGES:

Q Good morning, Miss Kucsma.

A Good morning.

Q Miss Kucsma, is it fair to say that your function is limited here today and that is to talk about Mr. Lester's job as a union carpenter and what income, earnings, benefits he lost in the past and what you project into the future?

A Yes.

Q Okay.

And, now, you used certain statistics. I think you used a person's retiring at age 66.1; correct?

A Yes.

Q Now, what was that? What did you base that on? What table was that?

A That's based on data -- U.S. Government data specifically for 54/55-year-old males whose highest level of education is some college but no degree.

Q And that includes all jobs; correct?

A Yes.

Q Physical jobs, laborers, desk jobs, sales jobs, all

jobs.

A That's correct.

Q Okay.

Now, you know you're coming here to project losses in the future and the past because he can no longer work as a union carpenter. Did you think it might be more accurate to look at the union records and his employer's records as far as what the average retirement age was?

A I reviewed union records. That information, though, I did not see in the union records.

Q Did you ask for it?

A I don't recall whether I specifically asked for that information.

Q Okay. But you knew you were going to come here and testify that Mr. Lester could retire or would have worked and retired at age 66. Do you think it would have been a good idea to contact the union or the employer, Exterior, and say, "You know, on average, when do your people retire?"

A Again, I don't believe I requested that information.

Q Okay.

And do you know what the earliest retirement age is for Mr. Lester's carpenter's union? When are they first eligible?

A Off the top of my head I don't recall it is discussed in the summary plan description.

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Q If I told you it was 55, would that seem reasonable?

A It is possible.

Q Okay.

So Mr. Lester could have worked another about a half a year, seven months, and then retired; correct?

A I suppose that's correct. There was no indication that he was planning to retire any time soon at the time of his injury, however.

MR. ECKERT: Objection, Judge.

THE COURT: Sustained. It's stricken.

Q But he could have.

MR. CLARK: Objection.

Q He could have chosen to do that; correct?

MR. CLARK: Objection.

THE COURT: Sustained.

Q And if Mr. Lester or anyone in Mr. Lester's spot who's a union carpenter would voluntarily retire at age 55, what would that do to those numbers?

A Specifically I couldn't say. Obviously his earnings would not continue as far into the future. His pension benefits, however, would begin earlier. So ultimately specifically how my calculations would be impacted I couldn't say.

Q And you never spoke to Mr. Lester; correct?

A That's correct. I did not.

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Q And you know that in this particular job, I mean the complete job, the whole project which started much earlier, that Mr. Lester had to work up 50 floors, 50 stories out in the open with heavy metal laboring? You knew that was a part of his job?

MR. CLARK: Objection, Judge. What's the -- objection.

THE COURT: I heard you. Overruled.

A I don't recall as I sit here today whether that was discussed during Mr. Lester's examination before trial. It's not relevant for my analysis, so I simply don't recall.

Q Isn't it relevant to your analysis when you say he could retire at 66 that you have a 66-year-old man in all weather up on a man-lift installing heavy, sharp -- razor sharp metal?

MR. CLARK: Objection.

THE COURT: Overruled.

A Not at all. Many union folks go on to fill supervisory roles as they get older. I certainly did not assume that whatever project Mr. Lester was working on in July of 2010 is the same project he would have been working on in 2015, 2020 and so on. And, in fact, again, because of longevity, I typically see exactly the opposite when I work on cases involving union workers.

MR. BOULÉ: Objection.

THE COURT: Sustained. The last phrase, what she

sees in cases involving union workers, is stricken.

Q Now, to arrive at these and their other figures, is it fair to say that you assumed Mr. Lester would work till he's 66?

A Yes. It is based on that statistical retirement age, my analysis is.

Q And if he worked less than that those figures would go down; correct?

A Well, again, as I indicated a moment ago, I cannot say specifically how my numbers would change. He wouldn't have received earnings for as many years, but he would start to collect his pension benefits earlier.

Q But it would affect what he would receive.

A Certainly if I used some other statistical retirement age, yes, my calculations would definitely change. But specifically how I couldn't say as I sit here today.

Q And you're assuming in making these projections, I think you said a 3.6 percent annual increase in his earnings. You're assuming there would be a steady increase; correct?

A On average, yes.

Q And that 3.6 percent, what did you base that on?

A A review of the wage and benefit schedules published by the union. So I looked at how much union wages had in fact increased in the recent past; I also looked at U.S. Department of Labor data for how much wages have in fact increased in the recent past and before the recent recession in the construction

industry; I looked at projections of wage growth published by the Board of Trustees of the Social Security Administration; and, lastly, I reviewed information published by the Building Congress, specifically information regarding employment, projects and so on for construction projects in New York City.

Q And now you're talking about, I think you mentioned there was a rate of increase for the union carpenters. Now, that's the rate that they're paid -- Correct? -- per hour or however they figure it?

A Very specifically I noted in my report that the yearly increase that I presented and that I calculated is based on the yearly increase for the wage rate and the vacation benefit rates that are published in the wage and benefit schedules each year.

MR. ECKERT: Judge, may we approach, please?

THE COURT: Yes.

(Bench conference.)

THE COURT: Okay, Mr. Bridges, you may continue.

MR. BRIDGES: Okay.

BY MR. BRIDGES:

Q And I think one of the assumptions you made was that there would be steady work; correct?

A No.

Q No?

A No. I specifically made an adjustment every year to take into account periods of unemployment and also other periods

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of missed work.

Q But you're still projecting the 3.6 percent annual increase and you're not projecting steady work?

A I'm not sure I follow your question. That would be a correct statement, I think, what you just said, sure.

Q Okay.

The life expectancy. I think you referred to life expectancy tables. Do you know whether those -- are those the tables that are used by the Court when they charge the jury?

A Yes. The National Vital Statistics reports provide the data that underlies the tables that accompany the pattern jury instructions. Having said that, with all due respect to the Court, I believe that the statistics that are appended to the pattern jury instructions are outdated and do not reflect the most up-to-date statistical life expectancy figures.

MR. ECKERT: Judge, I'm going to move to strike that.

THE COURT: Sustained. It's stricken.

Q These are basically just a statistical average; correct?

A That's correct.

Q So it includes healthy people, people who have hypertension, people who have high cholesterol, people who drink, people who smoke, it includes health nuts, vegetarians, everybody; correct?

A It includes all people, all health conditions, all lifestyles of a particular age, obviously, and gender.

Q Okay. So just a statistical average for the whole country.

A That's correct.

Q Now, just a couple more things.

You had -- I believe you reviewed tax records from the plaintiff.

A Yes.

Q And do you remember -- I don't know if you had it, but did you have the 2005 wage and tax statement?

A Hang on a second. We have a whole bunch... Uht, there it is.

Q Now I'll let you get it back together. Are you all right?

A Okay.

Q Now, you were talking about these various annuities that plaintiff had the benefit of; correct?

A The annuity benefits for which he was eligible? Yes.

Q Okay.

Now, are you again assuming that those annuities would continue to grow and would continue to be undisturbed, will just keep growing?

A No. Not at all. In fact, I did not take into account any rate of return that may have been received on the annuity.

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The only thing I took into account was the fact that as a union member for every additional hour Mr. Lester worked his employers would have put X number of dollars into that annuity fund.

Q And that would have continued to accumulate assuming that annuity fund wasn't invaded; correct?

A It may have. But I did not build into it -- take into account any capital gains, any returns. If I had my calculations could potentially have been larger, but I didn't include that.

MR. ECKERT: Objection, Judge. Move to strike. Didn't answer the question.

MR. CLARK: Objection.

THE COURT: Overruled.

Q Now, as part of the 2005 tax records that you had, did you have a Copy C of a form 1099R which showed that Mr.---

MR. CLARK: Objection.

THE COURT: Step up.

(Bench conference.)

BY MR. BRIDGES:

Q Here we go again.

A Okay. Ready.

Q Now, I have to ask the questions this way. Okay? Assuming, assuming, that Mr. Lester in 2005 --

THE COURT: I'm sorry, counsel, the objection's sustained. Now you can continue.

MR. BRIDGES: Okay. Right.

BY MR. BRIDGES:

Q Assuming that Mr. Lester in 2005 made a $257,798.92 withdrawal from a Vanguard Fiduciary Trust Company in Valley Forge, Pennsylvania from an annuity and taxes were paid on that, state and federal, would that reduce the amount of the numbers you projected for the income from the annuity, the total gross?

A No. It's wholly irrelevant. If Mr. Lester had continued working for every hour that he worked after July 2010 through retirement, additional brand new fresh money would have gone into an annuity account. I didn't take into account that that would have grown, but that's all fresh money that would have gone into that account from 2010 through 2022 and that's a new fresh pile of money, setting aside any rate of return that he could have withdrawn in 2022. This has nothing to do with my calculations.

Q Fresh money would have gone into the existing money which was taken out; correct?

MR. CLARK: Objection.

THE COURT: Overruled.

A But, no, your question really doesn't -- it doesn't quite make sense. Whether there was zero dollars in the annuity, $10, $500,000, doesn't change the fact that on top of whatever was or wasn't in there there would have been brand new

dollars on top of that and that difference would have been available to Mr. Lester when he retired in 2022, even if that annuity was empty and had nothing in it in 2010 it would have built itself back up. And I didn't even take into account, as I mentioned, the return on that money, I just took into account the dollars that would have gone into it. I didn't add interest, capital gains, dividends or anything else that would have accrued.

Q But, again, if you can answer it as concisely as possible, wouldn't it be that if that money had been left in and grew whatever rate it grew, that when Mr. Lester retired, whether at 55 or 66.1, there would have been more money that he would have gotten?

MR. CLARK: Objection, your Honor.

THE COURT: Overruled.

A I suppose that's technically true, sure.

MR. BRIDGES: Thank you.

THE WITNESS: Thank you.

THE COURT: Mr. Boulé...?

MR. BOULÉ: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BOULÉ:

Q Good afternoon.

A Good afternoon.

Q It's not the first time you've testified, is it

Miss Kucsma?

A That's correct. It is not.

Q So, fair to say that you've testified in court about 200 times?

A Over 200 times at this point. That's correct, yes.

Q And all of those, except for one, have been on behalf of plaintiffs, the party bringing the lawsuit; correct?

A No. But nearly all have been at the request of plaintiff's counsel, that's correct.

Q Two? Two haven't been for plaintiffs? How many? There's one I know of. Is there more since 2017?

A So since 2017, that's a different question. I have not testified more than 200 times since 2017.

MR. ECKERT: Objection, Judge. Move to strike.

THE COURT: Overruled.

Q Okay, let's start over: You've testified in court over 200 times; correct? Yes or no?

A Since 2008, yes.

Q Okay. It's -- it's "Yes" or "No" or "I can't answer it yes or no." Can we agree to that?

A I'll do my best. But, again, I want to make sure --

Q Okay, because you haven't done a good job up to this point.

MR. CLARK: Objection.

THE COURT: Mr. Boulé, don't argue with the

witness.

Q You've testified over 200 times in your career as a forensic economist; yes or no?

A Yes.

Q And one of those cases was on behalf of a defendant; yes or no?

A No. Well, yes, one was. But more than one was.

Q As of 2017 when you testified in the Kelly Rivera case, one of those was on behalf of a defendant; correct?

A I don't believe that's correct, but if I can look at my testimony I would be happy to explain it to you.

Q I'm not asking you to explain anything, I'm asking you to answer my question. So if in 2017 you testified that as of that time you had testified a total of 170 times and 169 of those were on behalf of the plaintiffs, that means once you testified for a defendant; correct?

A That would be correct, the math, yes.

Q Okay. Thank you.

And you would agree with me based upon that that the large majority of your work is on behalf of the plaintiffs, the party bringing the lawsuit; correct?

A 30 percent of the cases I review is at the request of defense counsel. But I'm not asked to testify in court obviously very often by defense counsel.

Q Okay.

Again, just about every question I ask is going to require a yes or no answer. If you can't do it say "I can't answer yes or no," please.

And you review 650 cases each year; correct?

A Between 550 and 650 cases each year, that is correct, yes.

Q And you charge $4,500 for each of those cases; correct?

A On average my firm does, yes. I don't, but my firm does. We have sixteen staff members.

Q Wait, you're a partner in that firm; correct?

A No, I'm the principal in my parent company. I have no ownership interest. I'm managing director of my group and we have a team of sixteen that are paid and rent and everything else from the fees from our reports.

Q Your company has a website; correct?

A Yes, it does.

Q And on that you provide various types of information about your activities; correct?

A That's correct.

Q And on January 5, 2016 you were elected to the partner group at Sobel & Company; correct?

A Correct. I'm technically a principal because I'm not a CPA. My parent company is an accounting firm, so I can't be a partner, I'm a principal.

Q A principal is an owner; correct?

A No. I have no equity ownership, period. There are profit sharing principals and there are equity principals. I am not an equity owner in my parent company --

Q Your compensation is based upon the amount of money the firm generates; yes or no?

A No. I am paid salary and a yearly bonus.

Q And you generate on behalf of the firm 2.6, $2.7 million per year through your reports and your testimony; yes or no?

A Our team of sixteen analysts and economists, yes.

MR. ECKERT: Objection, Judge.

THE COURT: Overruled.

Q I'm asking you about --

MR. CLARK: Objection, Judge.

THE COURT: You're objecting to the objection?

Defense's objection is overruled. And you may answer the question.

Hang on, Mr. Boulé, she was -- let's see if she was finished.

Were you finished?

A (Continuing) I would love to say I do all of this myself. I don't. I have a team of sixteen people, economists, analysts and administrative team, all of us work together every year, and, yes, we probably do generate over $2 million of revenues. But I certainly do not do it by myself.

Q Who wrote the report you've been talking about?

A This report is coauthored by one of the other economists, Kenneth Betz, and myself.

Q So you didn't even write the report you're here testifying about?

A Sure, I did. I'm a coauthor on the report.

Q Okay. What parts did you author and what parts did Mr. Betz author?

A Specifically I don't recall what parts either one of us typed up.

Q Well, no. But -- so was he a typist or an author of the report?

A He's a coauthor. But every bit of research, every assumption, every opinion in this report belongs to me, which is why I'm here testifying in court today about it.

Q So you did all that research; correct?

A No, I had the assistance of Ken Betz in this case. But it doesn't change the fact that the research that was done was done at my request under my supervision. I decided what assumptions to make. I'm the one that authored the opinions.

Q Are you capable of answering a question yes or no? Yes or no, please. We don't need a speech in response to every one of my questions.

THE COURT: Mr. Boulé, do not argue with the witness. If you have an objection, make an objection.

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MR. BOULÉ: I have.

THE COURT: It's overruled. Ask your next question.

Q So it was Mr. Betz who did the research that supports your report; is that what you're saying?

A No. I actually didn't say that at all. He certainly did some. As the economists in the group our regular daily practice is to undertake research. Every day I do research, every day Mr. Betz does research. It's my job as an economist to be fully aware of the up-to-date data, publications and so on.

Q So you did all the research necessary to reach the opinions that you're here giving in court today; correct?

A I have, yes.

Q Okay.

Now, you have given several seminars on topics related to economic damages for plaintiffs' attorneys; correct?

A I have, yes.

Q Okay.

And among those are a seminar entitled, "How To Maximize Your Damages" on October 22, 2015; correct?

A I believe that was the title of the overall session. That is --

Q Okay, thank you. You've answered the question.

A That's correct.

Q And you also gave a seminar on March 18, 2016 about "How Economists Can Best Work With Lifecare Planners"; correct?

A Sure. Of course.

Q And did you work with a lifecare planner here?

A No. There was -- to my knowledge there was no lifecare planner, no future medical costs for me to consider.

Q Because all you know is what the plaintiff's attorney gives you -- Correct? -- when you have an assignment?

A I relied upon the information provided to me, sure, by plaintiff's counsel.

Q If he doesn't give you something, then you can't factor that into your opinions; correct?

A I suppose that's technically correct, sure.

Q And you testified that you were voted the number one economist by New York attorneys?

A Number one economic expert I think is technically the title.

Q And that's voted by the plaintiff attorneys; correct?

A No. It's actually based on rankings and votes by all the readers of the New York Law Journal. I assume defense attorneys are free to read the New York Law Journal as well.

MR. BOULÉ: Did you guys vote for her?

MR. ECKERT: Absolutely not.

MR. BOULÉ: I didn't either.

K.KUCSMA-CROSS/Boulé

THE WITNESS: That's not very nice.

Q Now, you testified you were paid $4500 for your report; correct?

A My firm was, yes.

Q $4,100 for your testimony here today; correct?

A For my time here today, yes, my firm was.

Q How much were you paid for doing this chart?

A That is reflected or that, I should say, is part of the $4,100 fee that includes preparing for my testimony today.

Q And this was done when?

A Within the last several days, within the last week or so.

Q And the report that you had done up to that point, that was based on information you were given as of October 2016; correct?

A Yes.

Q Now, let me go to...

You had talked about a questionnaire that was provided to you for this case.

A Yes.

Q And that's a questionnaire that your firm prepares for plaintiffs' attorneys and the plaintiffs to complete; correct?

A No. It is a form that is provided to any attorney when he or she retains our services, and it allows us to obtain information about the plaintiff.

That's also relevant when defense attorneys retain my services obviously.

Q It's an 11-page questionnaire?

A I believe this one is eleven pages. Yes.

Q How long have you been using this questionnaire?

A This specific one I couldn't say, but the Sobel Tinari Economics Group has been using variations of this for over ten years before I joined the group.

Q So they have a lot of business with lawsuits; correct? They have a bunch of different questionnaires all ready to go?

A We have different questionnaires for different types of cases, personal injury, wrongful death, employment and so on.

Q Now, when you did your report in this case you said you relied upon information provided by Mr. Clark and your own research; correct?

A Correct.

Q And among the research you did was into government data about rates of unemployment and growth rates and things like that; correct?

A Yes.

Q And you also relied upon union records that were given to you; correct?

A I believe most of them were, yes. Some of them were publicly available, but many of them were provided to me by plaintiff's counsel.

Q What publicly available union records did you rely upon?

A I don't recall today. Many of the summary plan descriptions are publicly available. I don't recall today whether I obtained that or it was provided to me by plaintiff's counsel.

Q Do you know where you would have gone to get that if it wasn't provided to you by plaintiff's counsel?

A Well, again, the pension plan -- pension funds, I should say, have websites, many of them do provide summary plan descriptions on their websites. I don't recall in this case whether I obtained the summary plan description myself or it was provided by plaintiff's counsel.

Q But you're certainly aware of how to do that -- Correct? -- how to get that information from the internet?

A Assuming it's publicly available, which it isn't. But if it is of course I'm aware of how to get it.

Q So the information -- For example, are you familiar with a form IRS Form 5500?

A Of course. It's the tax return, actually, that pension funds file.

Q Okay.

And you are aware that the pension fund for the carpenters union files this document as part of their obligations to the government; correct?

A Yes.

Q And, by the way, did you take a look and see if you could locate that document as part of your research for this report?

A I don't recall. I frequently do look for the Form 5500s. They frequently are not publicly available.

Q What if I told you I went out online on the internet, Google, and I was able to get the New York City Carpenters' IRS Form 5500 for the year 2016? Would that surprise you?

A No. It wouldn't surprise me at all.

(Continued on the following page.)

oOo

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Q But you didn't do that, did you?

A That form obviously would not have been available when I prepared my report in October of 2016. But as I sit here today I don't specifically recall whether I looked for it and could not find it. I don't recall.

Q Was it available when you did this a few days ago?

A Probably, yes.

Q Because I got it a week ago. Just so you know. And I'm not an economist, I just typed in "IRS Form 5500."

Now, would you agree with me that on that form the union provides information on its members; correct?

A Not always, but frequently, yes.

Q Okay, but in this case just so happens they did.

And among the information contained on that form --

MR. CLARK: Objection, your Honor.

THE COURT: Sustained.

(Continued on the following page.)

oOo

K. Kucsma - By Plaintiff - Cross/Boulé

Q Are you aware of how many -- withdrawn. Are you aware of the percentage of union carpenters that are still working at age 60?

A I think I answered that before. No, not off the top of my head.

Q Would it surprise you to learn that it's four percent --

MR. CLARK: Objection.

Q -- of the entire body of the union?

MR. CLARK: Objection.

THE COURT: Overruled.

A I could not say one way or another.

Q It would not surprise you to learn that it's only four percent of the entire carpenter union that's still employed at age 60?

MR. CLARK: Objection.

THE COURT: Sustained.

Q And you will agree with me that the IRS Form 5500 also provides the average age of retirement for the members of its union; correct?

A Not always, but frequently, yes.

Q And if they did, it would be in the IRS Form 5500; correct?

A Again, frequently that information is provided in the Form 5500, but not always.

K. Kucsma - By Plaintiff - Cross/Boulé

Q Would it surprise you to learn that the average age of retirement for carpenters in the plaintiff's union is 60?

MR. CLARK: Objection, Your Honor.

THE COURT: Overruled.

A I haven't reviewed that form, so I couldn't say one way or another.

Q Because you didn't look for it, did you?

A Again, I did look for it originally, but to be fair, whether or not I looked for it when I did at the calculations, I don't recall.

Q So if the plaintiff in this case retired at age 60, that would drastically reduce your projections that you reached and testified to earlier today; correct?

A No, not at all. His earnings would be lower, but he'd start collecting his pension benefits a lot earlier. You can't ignore the pension benefits --

Q I am not going to ignore them. We will get to all of it.

By the way, when did Mr. Lester reach the age of 60?

A He reached the age of 60 on July 23, 2016.

Q July 23, 2016. So that would be right here on page 3 of your chart, a year in which you project that he would have earned $111,792; correct?

A No. You have to look at the table on page 4 to see what I projected he in fact would have earned in 2016.

Q What page?

A Page 4.

Q Okay. I'm sorry. $98,511; is that right?

A Yes.

Q So if he retired partway through that year when he reached the age of 60, that's March. So three months he would have earned and then he would have earned none of this after that if he retired; correct?

A That is correct, yes.

Q And in the year 2017 he would have been retired. He would not have earned $100,501; correct?

A That's correct.

Q And in the year 2018 when you have 43,000 in the past and -- is this the future, $59,000 -- he would not have earned that 80 -- I can't do the math -- 82,000 or whatever it is; correct?

A Correct.

Q And in 2019 he would have been retired. He would not have earned what you projected at $106,222; correct?

A That's correct.

Q And in 2020 if he was retired, he would not have earned the $110,046 you projected; correct?

A If he wasn't working, that's correct.

Q And in 2021 if he retired, he would not have earned $114,008; correct?

A That's correct.

Q And the same for 2022, he would not have earned the $44,883 that you projected; is that correct?

A That's correct.

Q So that is a significant amount of money, is it not?

A That's approximately $500,000, perhaps.

Q More closer to six I think, $600,000 that he would not have earned had he retired just like the average age of the members of his union; correct?

A Assuming -- I mean, I haven't seen the Form 5500 yet, but yes, if he retired at age 60, yes, that's correct.

Q But you assume he was above average; correct, that he was going to work until age 66; correct?

A I certainly used the statistical retirement age for males of his age. So, for one thing, the 60 years of age represented in the Form 5500 tells me nothing about how long those people have been in the union, what their age was, what their level of education was, and so on.

Q But we know it's an average based upon all the members of the union; correct?

A It is. It is based, of course -- so looking back doesn't take into account factors that influence a person's decision to work going forward.

Q So why would the union even provide the information if, according to you, it is not relevant to anything?

K. Kucsma - By Plaintiff - Cross/Boulé

MR. CLARK: Objection.

THE COURT: Sustained.

Q Now, you projected a retirement age of 66.19 based upon government data; correct?

A Yes.

Q And that was government data for all males age 54 or 55 without or with some college; correct?

A And no degree, correct.

Q Now, there are tables that the government provides that provide that information for men in that age range who work in the construction field; correct?

A It's possible. I don't recall.

Q But you -- you don't recall. When I crossed you on this very thing in the Junior Grant case in 2014, you admitted that there are.

A I would definitely like to see my transcript from the Grant trial, because I am quite --

Q You would. You would. Now, that date --

THE COURT: Mr. Boulé, don't argue.

Q That data shows that the average age of retirement of men in that age range who work in the construction field is much lower than 66.19; yes or no?

MR. CLARK: Objection.

A I have no idea.

THE COURT: Overruled.

Q Because you didn't look for it, did you?

A Again, you're assuming that that data exists, that it's statistically sound, and it's something I would rely on.

Q But you said that part of your job as an economist is to do research to keep up to date on all the information that's relevant and available to you; correct?

A Relevant, available and reliable. There is an awful lot of data out there that's not --

MR. ECKERT: Objection, Judge.

MR. BOULÉ: Objection, Judge.

THE COURT: Sustained. Okay. Thank you. You answered the question.

Q But this is government data. In fact, you relied upon government data yourself, so why would this be unreliable whereas the government data you relied upon is reliable?

A What government data are you referencing?

Q The average age of retirement for men age 54 to 55 who are employed in the construction field, that's what I am referencing.

A I can't comment on the data until I actually see the data.

Q The rate of increase that you use for your lost earnings projection, now you testified that you relied upon some union records; correct?

A Yes. That's one of the sources I considered.

Q And based upon those records, you used certain percentages that show the actual rate of increase for years in the past; correct?

A That's correct.

Q That would be page 3.

(Indicating.)

Q So, for example, 2010 to 2011 the rate of increase was 2.92 percent?

A Yes.

Q And then it was zero percent the next year.

A Correct.

Q 2.23?

A Correct.

Q In 2014 it was 3.43.

A Correct.

Q In 2015 it was 1.85.

A Correct.

Q Then we go 2.64 in 2016; correct?

A Correct.

Q And this point, 2017 and 2018, you are using an average of 2.02 percent; correct?

A Correct.

Q That is based upon what, the average of these numbers?

A Yes, compound growth from 2011 through '16.

Q And give me a second. Shall we go back to page 5. To

K. Kucsma - By Plaintiff - Cross/Boulé

calculate or project the earning into the future, you used 3.6 percent growth rate; correct?

A Yes.

Q Now, that's not based upon the union data. That's based upon government data that you chose to rely upon as opposed to the union data; fair to say?

A No. It's based on my review of the four sources that I mentioned several times here today, one of which is the union data.

Q Well, the union data showed a growth rate average in the five years before this of 2.02 percent; is that correct?

A That's correct.

Q And then suddenly something happens in the year 2018 where the growth rate is going to skyrocket to 3.6 percent; that's what you're assuming?

A No. It is not that something happens, but obviously there are significant demand factors like Building Congress reports indicating there is strong demand for construction workers and an economic perspective.

MR. ECKERT: Judge, I am going to move to strike. It's not in evidence.

THE COURT: Sustained. It's stricken.

Q The reason you do this, use a higher growth rate is because it dramatically increases the final number you arrive at; correct?

K. Kucsma - By Plaintiff - Cross/Boulé

A No. The reason I do this is because it's statistically sound and it's based on basic economic theory that dictates that wage rates are affected by the demand and supply for labor.

Q Would it have been statistically sound to rely upon the union's own records to determine the growth rate and retirement age in reaching your conclusion? Would that have been statistically sound; yes or no?

A No. It is wholly inappropriate for an economic expert to simply assume that wages and prices going forward will have nothing to do --

MR. ECKERT: Objection. She has never been qualified as an expert, Judge. I'm sorry. She's calling herself an expert. Nobody else is.

THE COURT: Overruled.

A It would be wholly inappropriate for any economist, that I am, to simply look back and assume that future wage growth unemployment and so on would be an exact replication of what happened in the past.

My job is to take into account all factors: Demand factors, supply factors that are going to have effects on these markets and influence, in this case, these wage rates going forward.

Q Are you done?

A I am, yes.

K. Kucsma - By Plaintiff - Cross/Boulé

Q Now, you testified earlier that it's not appropriate for you to consider whether or not Mr. Lester would return to work and thus, reduce his future earnings lost; correct. That was your testimony.

A That was not specifically my testimony. My testimony very precisely was I am not the jury, I am not a medical doctor, I am not a vocational expert, and therefore, I cannot form any opinions about that.

MR. ECKERT: And Judge, that was stricken from the record before, so that wasn't her testimony.

THE COURT: Okay. It's sustained.

Q And you testified also, still, I believe that you didn't use -- withdrawn.

I asked you about a seminar that you gave relating to working between an economist and a vocational expert to prove your damages; right? You gave a seminar on that?

A You actually asked me about the seminar with respect to life care planners, but I have also taught seminars with respect to vocational experts.

Q So you do, at times, consider a vocational expert's opinion when you're rendering your reports; correct?

A Of course.

Q And you've done it before; correct?

A Yes.

Q And you didn't do it here, even though you knew the

defense had a vocational expert who was going to come in and testify that could be determined?

A I did not have any vocational report. Ultimately, the significance of the defense vocational expert opinion is something that the jury will hear and decide on, and if they feel it's appropriate --

MR. ECKERT: Objection. Move to strike.

THE COURT: Sustained. It's stricken.

Q And if you have, in cases in the past, given testimony that if a worker is able to earn income, that would reduce his overall loss; correct?

A I certainly have worked on cases in which there has been a vocational opinion that I have built into my analysis and in those cases, the result, if a person can go back to work, is a reduction in my loss calculations, of course.

Q But you didn't consider it here; fair to say?

A I am not a medical doctor. I am not a vocational --

MR. ECKERT: Objection. Move to strike.

THE COURT: Sustained.

Q The average wage that you testified to was based upon your considering plaintiff's earning from the years 2004 through 2010 until he was injured; correct?

A I reviewed earnings and hours worked for the plaintiff from 2005 to 2010; that's correct.

Q And that's where you got the average wage of 98

thousand and change; correct?

A That was based specifically on the average of what the plaintiff earned in 2007 through 2009.

Q So you didn't consider 2005 or 2006?

A Or his target earnings for 2010, that is correct.

Q But if you did consider 2005 and 2006, that would have dragged your average down, correct? Those numbers were lower.

A The average probably would have been lower. Those figures, however, would have had to be adjusted and take into account the fact that someone who worked 1,795.5 hours, which is what the plaintiff worked in 2005; someone who worked the same number of hours in 2009 would have made more money because of the higher rates.

Q What if you had considered the number of hours he worked in 2004? That was 1,204 hours; correct?

MR. CLARK: Objection.

Q You had that information and it was available to you; correct?

MR. CLARK: Objection.

THE COURT: What's the basis?

MR. CLARK: It's not in evidence.

MR. BOULÉ: She just testified to it. This is cross-examination.

THE COURT: Overruled.

Q You had the information, based upon the number of

hours that Mr. Lester worked each and every year he was in the union; correct?

A Yes.

Q And that shows that in 2004 he worked around 1,200 hours; correct?

A That is correct.

Q 2003, 1,186 hours; correct?

A Correct.

Q 2002 only 732 hours; correct?

A Correct.

Q 2001, big year: 1,991 hours.

A Yes.

Q 2000, only 778 hours?

A Correct.

Q 1998, only 561 hours?

A Correct.

Q And 1,013 for '98?

A Yes.

Q 476 for '97?

A Correct.

Q Between '88 and '96, how many hours did he work?

A There is -- there are no, I should say, union hours reported for this pension fund.

Q Fair to say that if you averaged all those years in, if you are using average, that would have dramatically

increased the average salary you used to project lost earnings here?

A Certainly if I took an average of some of those other years for the number of hours, yes. The average number of hours would be lower. In my professional opinion, it is not appropriate to go back at that time. My main focus was on what the plaintiff had been earning at or around the time of the injury affecting his longevity, his seniority and so on.

Q Now, you testified about the loss of pension benefits and you had included some additional category that wasn't in your initial report, which is employer contributions times one percent after 2011.

That wasn't in your initial report. I am referring to page 6 of your chart; correct?

A I'm looking at page 14 of my report and it says right there starting January 1, 2012 and it goes on to say one percent of the contributions to be made on participant's behalf and so on. And if you look at the bottom of page 14 of my report, you will see it looks very similar to the table on the bottom of page 7 of the demonstrative aid we had today.

Q So the information you just referred to, this one percent, where did you get that?

A That is based on -- excuse me for a second. That is based on the source in my original report as well. The source is the Empire State Carpenters Pension Fund summary plan

description effective January 1, 2012 and On The fringes, a publication of Northeast Carpenters Fund of spring 2016.

Q Where did you get those?

A Specifically do you mean who provided them to me?

Q That is exactly what I am asking.

A That I don't recall as I sit here today.

Q You could have gotten it from a search of the internet; correct?

A My answer would be the same answer I gave earlier. It would have come from one of two places. If it was publicly available, I may have obtained it myself or I would have received it from plaintiff's counsel.

THE COURT: Any redirect?

MR. CLARK: Yes. Thank you.

REDIRECT EXAMINATION

BY MR. CLARK:

Q Can you tell us at your firm how many people worked together with you in doing the analysis of reports you described for us?

A For any given report, there is typically a team of three people who works on the report. That team consists, generally, of two economists and an analyst.

Some of the research, however, that forms the basis of many of our reports as researchers, as I indicated earlier, we undertake collaboratively on a daily basis, and the "we" in

that case it would be the two other economists, the three senior analysts, the six junior analysts and so on.

Q So the case in the analysis for Mr. Lester, were there members of the team that worked together with you in preparing the analysis and the report?

A Yes.

Q And who were the members of the team?

A Ken Betz was one of the -- was the economist who worked with me on this, and then one of our senior analysts, Jeff Rella, also assisted me.

Q And when you appear in court, your firm issues a bill for the time spent on the case?

A Yes. We issue a bill for the time we spent on the original analysis, and then the $4,100 I referenced covers not only the time I spend here today, but all the preparation that goes into that; updating the calculations, providing the calculations, and so on.

Q But the money that's paid is paid to the present?

A Yes. It's used for rent, computers, salaries, rent and insurance for the full time.

Q Now, as an economist in doing loss analyses for people who have been injured or in wrongful death cases, are there records that you typically rely upon as a professional in order to evaluate the losses?

A Yes.

K. Kucsma - By Plaintiff - Redirect

Q So in the case of a carpenter who is a member of a union, have you, in your experience, evaluated losses involving carpenters who are members of a union?

A Yes, many times.

Q And in those cases, do you typically request that information be obtained or provided to you regarding the union?

A Yes.

Q And in this case regarding Mr. Lester, did you specifically request information from the union?

A We did. I specifically requested Mr. Lester's work history, documents from the pension fund to show how many credits he had accumulated in the pension fund, and I was provided with all that information.

Q So if I could just call your attention to the stack of records on the desk, could you identify for us those records that you reviewed pertaining to information from the carpenters union or related benefits from the carpenters union?

MR. ECKERT: Judge, I am going to object to her identifying records that are not in evidence, nor is she certified to do so.

MR. CLARK: Judge --

THE COURT: It's overruled.

Q Would you identify for us each of the records and documents that you reviewed as part of your analysis for the losses of Mr. Lester?

A Yes. There were many wage and benefit schedules that included hourly wage rates as well as employer contributions to welfare, pension, annuity, vacation funds, and I also had been provided with additional wage and benefits schedules. I believe that's what this whole packet is.

So, yes, a number of wage and benefit schedules. In addition to that, I also reviewed several statements related to the annuity and I reviewed a document that included transactions in and out of the annuity.

I also had a statement -- this is something I specifically relied upon in my calculation of pension benefits. This is a estimated benefit statement provided by the Empire State Carpenters and it states very clearly the total pension credits that Mr. Lester had accumulated as well as the total years of vesting service, and attached to that is a sheet that provides me with all of the pension credits that Mr. Lester earned in future years.

I also was provided with the Empire State Carpenters Pension Fund summary plan description. I had reviewed some information -- it's called an account summary and it includes information about the annuity plan. It was of no use to me. This is -- and I say that simply because this is a document that basically reports how much Mr. Lester had in his annuity any point in time, what assets were vested and what returns. I didn't consider that in my analysis, though.

Again, I have the Empire State Carpenters Pension Fund. The previous one I referenced was effective 2012. This was revised in 2009. I also had the document here I referenced a few moments ago On The Fringes, the publication of the Northeast Carpenters Fund new pension retirement benefits for 2016; another account summary for the annuity fund, additional wage and benefit schedules for the carpenters, additional information about the annuities and Prudential statements here; again, of no use to me. It looks like duplicates of the Empire State Carpenters Pension fund revised in 2009.

And I have a few more -- some of these may be copies, but I will just mention them -- similar statements, again, regarding the annuity from Prudential, another copy of the On The Fringes that I mentioned before. It looks like duplicate copies of more wage and benefit schedules; another copy of the employer contributions state carpenters' pension fund revised in 2009; another copy of the state carpenters' pension funds effective 2012, another account summary for the annuity, another copy of the estimated benefit statement that I mentioned earlier with Mr. Lester's total pension credits and total years of vesting service, and I think we are almost done; another copy of the wage and benefit schedules, another copy of the statement from the Empire State annuity, and I believe all of the other documents here are the W-2 wage and tax statements and tax returns for the plaintiff.

K. Kucsma - By Plaintiff - Redirect

Q Now, the documents that you reviewed from the union, are these documents typically used and relied upon by forensic economists that are calculating loss of wages, benefits and earnings for union members?

A Yes. This is a regular part of our practice when we are evaluating and assessing on lost compensation for union workers.

Q And do you consider that information that you reviewed from the carpenters union and the benefits to be reliable and a valuable source for you to go to in order to do your analysis?

MR. ECKERT: Objection.

THE COURT: Overruled.

A Yes.

Q And again, as a professional, do forensic economists typically use those types of documents to do their analysis?

MR. ECKERT: Objection to what other people do.

THE COURT: Overruled.

A We do regularly rely upon and consider documents like this, particularly when we are evaluating lost compensation for union workers.

Q And did you feel that you had sufficient, adequate and reliable information in order to form opinions regarding the losses suffered by Mr. Lester?

A Yes, of course.

MR. CLARK: I am going to offer those records

K. Kucsma - By Plaintiff - Redirect

from the union the witness relied upon.

MR. ECKERT: Objection, Judge.

MR. BOULÉ: Objection.

MR. ECKERT: We discussed this.

MR. CLARK: I am offering them into evidence.

THE COURT: Okay. The objection is sustained. They are not offered.

Ms. Kucsma, were those union records provided to you by plaintiff's counsel?

THE WITNESS: The union records that were unique to Mr. Lester were provided me by plaintiff's counsel, meaning any statement I had read specifically about, meaning his annuity fund and so on. The other documents, the summary plan description and the other document I don't recall, as I said here today, whether I obtained them or whether or not they were provided by plaintiff's counsel. I simply don't recall.

Q And in addition to those documents, you reviewed complete tax returns that were provided to you?

A Yes.

Q And those were for the years 2005 through 2010?

A Yes.

Q And did you consider those returns to be adequate, proper and sufficient information for you to do your analysis in this case?

K. Kucsma - By Plaintiff - Redirect

A Yes.

MR. ECKERT: Objection, Judge. It's not in evidence.

THE COURT: Overruled.

Q Were they adequate and sufficient for you to do your analysis?

A Yes, they were.

MR. CLARK: I will offer them in evidence.

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

THE COURT: The objection is sustained.

Q Was there any other information that you felt you needed prior to preparing and issuing a report for the losses suffered by Mr. Lester?

A No.

I certainly would not have signed this report nor would I have appeared today in court to testify if I felt that there was additional information that was necessary for me to render an analysis or an opinion to a reasonable degree of economic certainty.

MR. CLARK: I have nothing further, Your Honor.

MR. ECKERT: Briefly? I promise.

THE COURT: Two minutes --

MR. ECKERT: Yes.

THE COURT: -- tops.

RECROSS EXAMINATION

BY MR. ECKERT:

Q How important is the fact finding questionnaire?

A In this particular case I relied upon it for my calculation of the lost household services, which obviously --

Q It's been stricken. I know.

A -- I did not continue testifying about, yes.

Q Is that the only thing you relied upon?

A I believe so, yes, because I believe even the plaintiff's level of education was discussed in his examination before trial.

Q And the fact finding questionnaire was signed by plaintiff's attorney, not by plaintiff; correct?

A Very specifically on the first page of the fact finding questionnaire it says that the questionnaire was completed by Jeff Gralnick with Russell Lester.

Q Who signed it?

A The actual signature does appear to be the signature of Jeff Gralnick.

Q And that's one of plaintiff's attorneys; correct?

A Yes.

Q Did you find it strange that plaintiff himself wasn't providing you with any information?

A No.

MR. CLARK: Objection.

K. Kucsma - By Plaintiff - Cross/Eckert

THE COURT: Sustained.

Q You will agree that this fact finding questionnaire is not attested to being true by plaintiff, but by his attorney?

MR. CLARK: Objection.

THE COURT: Sustained.

Q There is an attestation on the bottom of Page 1; correct?

A There is a signature on the bottom of Page 1, yes.

Q Does it say "I attest that the facts and statements provided are true?"

A It does.

Q Who's that signed by?

MR. CLARK: Objection.

THE COURT: Overruled.

A I think I answered this a moment ago, but it's signed by --

Q Please answer it again.

A Jeff Gralnick.

Q Plaintiff isn't telling you these are true; yes or no?

A That is not a yes or no. I wasn't present, but again, you have to go up the line above there and it clearly says --

Q No, I don't. I am asking you a question.

A Yes, I wasn't present. It was completed by Jeff Gralnick with Russell Lester.

Q How many signatures appear?

K. Kucsma - By Plaintiff - Redirect

MR. CLARK: Objection, Your Honor.

THE COURT: Overruled.

A One.

Q Did you ever ask Mr. Lester if he agrees with this?

A No.

MR. ECKERT: Okay. Thank you.

MR. BRIDGES: Nothing.

MR. CLARK: Just one followup.

MR. ECKERT: No.

MR. BRIDGES: I have no further questions.

THE COURT: Mr. Bridges?

MR. BRIDGES: I have no further questions.

THE COURT: Do you, Mr. Boulé?

MR. BOULÉ: No.

REDIRECT EXAMINATION

BY MR. CLARK:

Q Can I just see the questionnaire?

A Yes.

(Handed.)

Q On the very first page of the questionnaire, are you familiar with this questionnaire?

A I am familiar with it, yes.

Q Does it indicate that Russell Lester was present together with one of my associates at the time the information was filled out?

K. Kucsma - By Plaintiff - Redirect

A It does indicate that, yes.

MR. CLARK: Thank you.

THE COURT: Okay. Thank you, ma'am. You may step down.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: So folks, we will break just in time for lunch. It's about to strike one o'clock. We will resume at 2:15. Please don't talk about the case, and we will see you then.

COURT OFFICER: Jury exiting.

(A luncheon recess was taken.)

(Continued on the next page.)

PROCEEDINGS

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AFTERNOON SESSION

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THE CLERK: Come to order.

THE COURT: Okay, so are we hearing from defendant's economist?

MR. BOULÉ: It's not economist. Vocational expert, Judge.

THE COURT: The vocational expert, right. Okay, let's call in the jury.

(Brief pause.)

COURT OFFICER: Court ready for the jury? All rise, jury entering.

(Jury enters courtroom.)

COURT OFFICER: Court, please be seated.

THE COURT: Folks, welcome back. Again today we will be taking a witness out of turn. By that I mean plaintiff has not finished their case. However, we will be taking a witness from this side of the room.

And so it's Mr. Boulé's witness; correct?

MR. BOULÉ: Yes, Your Honor.

THE COURT: Okay, call your witness.

MR. BOULÉ: Exterior calls Joseph Pessalano.

COURT OFFICER: Come all the way through, sir. Good afternoon. Just follow me. Allow yourself up to the

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witness stand. Please remain standing, face the clerk to be sworn in.

J O S E P H P E S S A L A N O, called as a witness on behalf of Defendant, Exterior Erecting Services, Inc., having been first duly sworn by the clerk of the court, was examined and testified as follows:

THE CLERK: Have a seat, please.

And, for the record, Mr. Pessalano, would you just give us your full name, spell out your full name and an address.

THE WITNESS: Sure. It's Joseph Pessalano. It's P-E-S-S-A-L-A-N-O. And my professional address is Archer Consultants, 1101 Stewart Avenue, Garden City, New York 11530.

THE CLERK: Thank you, sir.

THE COURT: Okay. Thank you, sir.

Mr. Boulé...?

MR. BOULÉ: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. BOULÉ:

Q Good afternoon, Mr. Pessalano.

A Good afternoon.

Q You just mentioned Archer Consultants. Is that your employer?

A Yes, it is.

Q What is the business of Archer Consultants?

A Archer Consultants is an agency that provides medical management and vocational rehabilitation services for individuals with disabilities.

Q And what is your position at Archer Consultants?

A I'm a rehabilitation specialist.

Q And what does that mean? Can you explain what it is that you do.

A Sure. Rehabilitation specialist, what I do is I work with individuals with disabilities with the goal of trying to help them reach their highest level of functioning in the community. In most instances that means trying to get them back to work in some capacity consistent with their level of physical functioning. In other instances it might involve arranging and coordinating medical services with their treating providers that could assist them in their recovery.

Q And did you have to undergo certain professional training in order to do the work that you do?

A Sure.

Q Could you tell the jury a little about your educational and professional background.

A Sure.

I have a bachelors degree in psychology from Stony Brook University and a masters degree in rehabilitation

counseling from Hofstra University. I also have three certifications. I'm a certified rehabilitation counselor. That is the sort of the general generic credential that pretty much all of us has, again qualifying us to provide rehabilitation services for individuals with disabilities.

Q Can I just ask you -- interrupt you for a second?

A Sure.

Q How did you obtain that certification?

A The CRC, the certified rehabilitation counselor certification I obtained after I obtained my masters degree. And then I have to maintain it every five years by -- I initially had to pass an exam and then I maintain it every five years with continuing education credits.

I also have two other certifications that I would describe as subspecialties in the rehabilitation field. I am a certified case manager. That is an area of the rehabilitation field specializing in knowledge and use of different resources in the community to help individuals recover from their disability. It could be the different therapeutic services, assistive technology, remedial services, things of that type. Again, I passed an exam, I maintain that certification every five years as well with continuing education credits.

The other certification I have is I am a certified disability management specialist. That is an area of the rehabilitation field specializing in individuals -- working with

individuals who have experienced work-related or industrial accidents. And, again, I passed an exam to initially get that certification and as was the case with -- as is the case with the other two, I have to demonstrate continuing education credits every five years to maintain it.

Q Could you tell the jury a little bit about your employment history.

A Sure. At this time, as I said, I'm employed as a rehabilitation specialist at Archer Consultants. I work in sort of a dual capacity there. I'm a full-time salary employee, I spend about half of my time on matters such as this where I am sometimes called upon to provide testimony regarding an individual's employability, ability to continue to work despite their injury. Again, I spend about half of my time doing that. The other half of my time I -- I am a -- a hands on rehabilitation counselor, a practitioner. I work with individuals who have been injured, I work with the employer, the doctors, the physical therapists, the occupational therapists, the rehab nurses, I work with everyone with the goal, again, of trying to get them back to work in some capacity. That could involve job readiness preparation, resume preparation, visiting the job site, making recommendations regarding job modifications that might help the person stay -- you know, stay in their job.

So, again, I've been doing that for a number of years at Archer Consultants. Before that I was hired as the first

vocational rehabilitation specialist at Amityville -- at Brunswick Hospital in Amityville on Long Island. I set up the first voc rehab program -- vocational rehabilitation program that they had there. That involved hiring staff, training staff, developing policies, procedures and protocols to set up that program.

I stayed at Brunswick for a number of years. By the time I left to come to Archer I was director of therapeutic -- director of therapeutic activities and the adult psychiatric program there, I had about thirty staff under my administrative and -- and clinical supervision, other rehabilitation counselors, creative arts therapists, art therapists, music therapists, recreation therapists and -- and occupational therapists as well.

Q I'm sorry, I didn't mean to interrupt you. You're still answering?

A I was -- there's one more job before that.

Q Okay. Go ahead.

A I'll try to be concise.

My first job in the field I worked as a rehabilitation specialist with an agency called The Rehabilitation Institute in Minneola. I ran a small sheltered workshop with the goal of teaching individuals with developmental, neurological and psychological disabilities work skills.

Q Okay, thank you.

Now, you testified that about half of your time is spent working on cases such as the one we're here about; is that correct?

A Right.

Q And your company is hired by law firms to provide consulting services in these cases?

A Yes.

Q And have you provided those consulting services for the last ten or so years -- more years?

A These -- the -- these services where I'm doing the assessments and sometimes testifying in court I've been doing that about twenty years now.

Q Now, how frequently do you testify?

A I testify on average about eight or ten times a year.

Q And in this case you were retained by the attorneys for the defendants; correct?

A Right.

Q And there's also the attorney for the plaintiff obviously; correct?

A That's correct.

Q And do you know how much of your work is on behalf of defendants as opposed to plaintiffs?

A I'm retained by defendants approximately 90 percent of the time, by plaintiff -- by plaintiffs about 10 percent of the time. Approximately.

Q Now, in connection with your appearance here today, before this when your company was retained you were given certain documents to review; correct?

A Yes.

Q And you also were then asked to prepare a report of your findings; correct?

A Right.

Q And did your company charge a fee for those services?

A Yes.

Q Do you know what that was?

A Yeah. My -- my agency charges $375 per hour for this type of review.

Q And do you know approximately how much your company charged for the work you did before coming to court, in other words the report and the review of records?

A Yeah, I -- I don't recall exactly, but typically the assessment, the review of the records, the analysis, usually about ten or twelve hours.

Q And that would include meeting with, in this case, Mr. Lester; correct?

A Yes.

Q And, in addition, is your company being paid for your time to appear here in court today?

A Yes.

Q And do you know how much that is?

A Yes. It's 3750, $3,750 plus expenses, parking, mileage, things like that.

Q Can you tell us approximately when it was that your company was retained to do an evaluation in this case?

A Sure. It was around -- around August of 2014.

Q And at that time did the firm that retained you provide you with various documentation for you to review in connection with your report?

A Yes.

Q And can you give the jury an idea of what you were provided.

A Sure. I was provided with material -- records from Mr. Lester's treating physicians at the time, some occupational and physical therapy records, some hospital records, I was provided with report of a doctor that evaluated him and I also was provided at that time with his deposition transcript as well.

Q Were you subsequently provided with additional materials before coming to testify here today?

A Yes, I was.

Q And what additional materials were you provided?

A The additional records involved a report from a physician who has consulted and evaluated him I think in September of last year. I --

Q Do you recall the name of that physician?

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A Dr. Schmidt, I believe.

Also was -- I also had opportunity to review an updated deposition transcript which I do believe was also from last year. I had a chance to look at an economist report and one -- there were one or two other medical records, too, but that's pretty much what I had opportunity to see.

Q Can you explain --

MR. CLARK: Judge, I have an objection at this point. Can we approach?

THE COURT: Sure.

(Bench conference.)

THE COURT: Okay, the objection is overruled.

Mr. Boulé...?

MR. BOULÉ: Could I have a read-back of the last question and answer? Thank you, Your Honor.

(Record read.)

MR. BOULÉ: I'll complete the question I started.

Q Can you explain the purpose of you reviewing the information you just testified about as it pertains to your opinions in this case?

A Sure. The purpose is to just see the level of functioning and history. In other words, the treatment that Mr. Lester had gotten, as well as his own subjective comments regarding his symptoms and also, more importantly, from a rehabilitation perspective, as opposed to what he can't do, the

J.PESSALANO-DIRECT/Boulé

type of things he was capable of doing. It provides me with a picture regarding his level of physical functioning. That's one part of the puzzle when it comes to determining what type of work an individual can do.

Q Now, in addition, did you have an opportunity to personally meet with and interview Mr. Lester?

A Yes, I did.

Q And did you do that sometime before you issued the report in August 2014?

A Yes, I did.

Q Where --

MR. BOULÉ: Withdrawn.

Q Where did that meeting take place, if you recall?

A That was at his attorney's office.

Q And approximately how long did you meet with and interview Mr. Lester?

A I don't recall specifically. Typically my assessments take about 45 minutes to an hour. I don't expect that it was any different.

Q And what was the purpose of your interview as it pertains to the opinions you're going to give in this case?

A All right. By the time I had met with Mr. Lester I had already reviewed the medical records that had been provided, so at that point what I'm trying to do is find out what type of treatment that he was getting at that time, if any, his --

J.PESSALANO-DIRECT/Boulé

again, his -- his functionality in the community, in other words what was he able to do, what were his pain symptoms and what was he able to do in terms of his daily functioning, activities of daily living, household activities, you know, things of that type.

The other thing I look at, of course, is to get a more detailed idea regarding his educational and work history for purposes of finding out what his transferable work skills were and how I might be able to look at those in terms of determining what type of work he still would be able to do.

Q Because ultimately what you were asked to do in this case is to give an --

MR. CLARK: Objection. I object to leading at this point, Your Honor.

THE COURT: Sustained.

Q Ultimately what were you asked to opine on as part of being retained as an expert in this case?

A Whether or not Mr. Lester was able to work, and, if he could work, how -- what type of work he was able to do.

(Continued on the following page)

oOo

Q Thank you.

Now, from your interview, what significant information did you obtain that assisted you in reaching your opinion?

A Okay, if I could refer to my report?

Q Please. If it refreshes your recollection.

A Sure.

You know, his primary complaint with regard to his symptoms was what he described as continual throbbing in his left upper extremity from the forearm through the left hand. He also indicated reduced grip strength and reduced range of motion again in the left hand, the nondominant hand. He was a righty, right hand dominant. He indicated to me that there were no functional limitations with regard to use of the right hand or upper extremity, there were no limitations with regard to walking, standing or sitting. He did indicate to me that he did not attempt to engage in any activities involving lifting with the left upper extremity. He's able to drive, he's independent with regard to activities of daily living, getting dressed, shaving, showering, personal hygiene. He did make mention of one adjustment, he used a fastener to help with buttons, he was not utilizing any other grip aids or assistive devices. He was able to perform household -- household activities such as cooking, sleeping and shopping. He did have his nieces perform -- provide some assistance in those areas.

He was not actively treating at that time, he had not seen his -- any of his treating doctors for about a year, he had not been in occupational therapy or physical therapy, was not taking any over-the-counter or prescription analgesics, pain medications. The medications he was taking -- he was taking were for -- were for hypertension and high cholesterol.

I asked him about not taking any pain medication, he said that he was just -- he was able to just deal with the pain without medication. He was following up on a home exercise program, involved squeezing a ball to maintain strength and functioning.

The only recreational activity that he was still engaging in was boating, but he had a 31--- a 31-foot boat, he was going out weekly, he had some difficulty steering and said he didn't go out by himself because of that.

Q Okay, so let me just interrupt you there for a second.

In addition to that information, did you question Mr. Lester about his past educational and work history?

A Yes, I did.

Q And what did he tell you?

A He's a high school graduate, attended regular classes, no remediation or special education services, he attended Towson College for three semesters, completed fifteen credits, he described not doing particularly well in college. He'd also got training through his union, through his employer in a number of

areas, including scaffolding safety and forklift operations, use of different other types of equipment and was also advised that he was self taught in reading blueprints.

He had been employed as a union carpenter and foreman for about 32 years at the time I saw him, he had been working at what is described as a working foreman for about fifteen years, in other words he was overseeing up to seven other carpenters but still doing hands-on carpentry functioning -- carpentry functions. He described being responsible for setting up jobs, maintaining quality control and ordering supplies.

Q So in reaching your opinion, what, if any, significance was it to you that Mr. Lester had been a union carpenter for approximately thirty years?

A Well, what you look at with that, as with any occupation, is you look at what you call the transferable skills in that area. In other words, what are the -- what skills do you demonstrate that you might be able to look at in other areas. Again, he's able to read blueprints. That demonstrates at least some level of -- of technical expertise in terms of drafting, understanding layouts, things like that. Carpentry is a skilled field -- is a skilled trade, so you have to demonstrate certain levels of mechanical and drafting functioning, some mathematical skills.

He also, again, was able to demonstrate what we call soft skills. He supervised and over--- and was overseeing other

people. So you have all of the skills that are associated with managing and overseeing other people, in terms of maintaining responsibility for the quality of their work and just making sure they're doing their job properly. Not --

Q I'm sorry, I keep interrupting you.

A That's all right.

Q Please finish your answer.

A No, again, there -- just to highlight the fact that working as a carpenter and as a carpenter foreman is a highly skilled -- is a highly skilled trade with skills that could be utilized in any number of other areas.

Q So why are those -- why were those transferable -- that's a tough word -- transferable skills important to you in reaching your opinions here?

A Because, again, one of the things I do and I did in this instance is I took at face value his complaints. He had limited use of his left hand, so in formulating an opinion regarding the type of work that I felt he would be able to do. I did not offer the opinion at that time, and I still don't, that he could still do hands-on carpentry work. However, given the mechanical aptitudes, the aptitude that a carpenter demonstrates, there are jobs, they may require some level of retraining, but there are jobs that an individual can do utilizing those skills that are more or less bench work in nature, like a civil engineering technician, drafting. I looked

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at other things that would require the knowledge typically associated by a carpenter with thirty some odd years experience in terms of real estate appraisal, real estate sales, purchasing, and I also considered that he -- while not working as a hands-on carpenter, that he could work in a supervisory role as a carpenter.

Q So you, in reaching your opinions, assumed that Mr. Lester was unable to physically use his left hand to any great degree?

MR. CLARK: I object to the leading again.

THE COURT: Overruled.

A I assumed that any job that I was of the opinion that he would be able to do would require very limited use of the nondominant left hand, yes.

Q Now, did you refer to any other sources in reaching your opinions that you are presenting here today?

A Yes. What I do in this instance is I have to do basically make a match between the individual's physical capabilities and attributes and the requirements of the job. So in doing that I consult several Department of Labor publications, and I'll briefly just outline them:

There's the Dictionary of Occupational Titles, the Guide for Occupational Exploration, the Classification of Jobs and the Occupational Outlook Handbook. Briefly what these publications do is they provide information regarding all jobs

listed by the federal government in terms of what the physical requirements are, what the educational requirements are and what the work -- what the work experience requirements are.

Finally, I want to make sure that my analysis is specific to the geographic area where the individual is living. It's -- I look at the availability of jobs specific to the Nassau Suffolk labor market area through statistics from the Bureau of Labor and Statistics which allowed me to look at which jobs were available and what the average salaries were.

(Continued on the following page.)

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Pessalano - By Defendant - Direct.

Q Now, based upon the records you reviewed, the interview with Mr. Lester, the sources that you referred to just now, do you have an opinion within a reasonable degree of vocational certainty that Mr. Lester is employable in certain positions?

A Yes.

Q And what is that opinion?

A My opinion is that he is capable of working in a number of areas on a full-time basis.

Q And do you have an opinion within a reasonable degree of vocational certainty as to when Mr. Lester was capable of fulfilling the duties of the jobs that you found?

A Yes.

Q And what is your opinion?

A It would have been essentially any time after he was injured; recognizing, of course, it's just like the rest of us. If a person may need a surgical procedure or something like that, typically a period of time off from work for recovery is permissible.

Q Now, based upon the -- withdrawn.

Based upon the research that you did, did you find certain jobs, in your opinion, Mr. Lester is capable of performing in his general geographic area?

A Yes, I did.

Q And how did you locate those jobs?

Pessalano - By Defendant - Direct.

A Again, I looked at the Department of Labor publications that I outlined briefly. I considered the possibility also that he would be eligible to get vocational training free of charge through the state agency.

Q What agency is that?

A The agency is now called Access CR. It's been called that, I guess, for about five or six years before that. Before that it was called VESID and before that, many, many years ago when I started in the field, it was called the Office of Vocational Rehabilitation. What this agency does is it provides vocational training, job placement assistance, and also assistive technology that can allow an individual to train to obtain a position if additional training is necessary, and then will assist in finding the position.

Q Can you tell the jury what jobs you identified that, in your opinion, Mr. Lester is capable of performing and what salary those jobs are offering?

A All right. Well, I do have updated salaries that are more current than when I did the analysis in 2014. Salaries change every year around March or April. So some examples --

MR. CLARK: I am going to object.

THE COURT: Let's hear the answer first. Go ahead, Mr. Pessalano.

THE WITNESS: All right.

A (Continuing) Examples of some of the jobs I am of the

Pessalano - By Defendant - Direct.

opinion that Mr. Lester can do, it could be an architectural drafter. The average salary in the Nassau-Suffolk labor market area is 56,230.

Q Can you just briefly explain when you indicate what those jobs are, what they require a person to do?

A Well, architectural drafting requires the ability to design, design structures. It could be components. It could be furniture. It requires some degree of mechanical aptitude, typically what you would see with somebody with a carpentry background and many years experience.

I also looked -- considered another job that I think is appropriate, civil engineering technician, it's 64,260, is the average salary for the Nassau-Suffolk labor market area. Again, that's another job that involves design and different components used in manufacturing and building. I looked at -- as I said earlier, I am of the opinion that if he continued to work in the carpentry field as a supervisor, not working as a foreman as he was before, I would concede there might be a time even as a supervisor that he might have to drive a nail or do something like that, that would not be an essential component of that job, but I would certainly think Mr. Lester has that capability.

Another job, construction and building inspector, the average salary for that is 69,930 for the Nassau-Suffolk labor market area. That involves -- again I considered he has no

Pessalano - By Defendant - Direct.

limitations with regard to walking, standing or sitting. He can walk around the job site. He can go up and down in the building and make sure that something's being built properly according to code. A related occupation --

Q Did you give the salary for that job? I'm sorry.

MR. CLARK: I am going to object to this, Judge. This is not in any report I have.

MR. BOULÉ: Your Honor, could we approach on this?

THE COURT: Sure.

(Whereupon, a discussion was held off the record at the bench.)

THE COURT: Okay. The objection is overruled.

Q I'm sorry. What was the salary for that construction superintendent?

A It was construction and building inspector, 69,930.

Q Any other jobs you identified?

A Another job that is typical of the type of job that I feel is very appropriate for Mr. Lester, real estate appraiser; looking at houses, buildings and offering estimates regarding the value of what these structures would be. The average salary for that would be 85,800.

Q These jobs are currently being offered in the Nassau-Suffolk region; correct?

A Yes. Again, part of my analysis is ensuring that I

only offer the opinion of jobs that exist in this area. They may not be available in other parts of the country, but in Nassau, Suffolk and New York, they are available.

Q Mr. Pessalano, is motivation a factor in someone working?

A Well, in the rehabilitation literature, the issue of motivation is addressed all the time and it is considered every bit as important as any deficits that a disability might cause somebody. So motivation, sure, is very important. It allows you to look at possibilities. It allows you also to consider the support services that are available.

Q Are all of the opinions that you gave here today within a reasonable degree of vocational certainty?

A Yes.

MR. BOULÉ: Thank you.

THE COURT: Mr. Eckert?

MR. ECKERT: Love your haircut. I have no questions.

THE WITNESS: Thank you.

THE COURT: Mr. Bridges?

MR. BRIDGES: Just one or one topic.

CROSS EXAMINATION

BY MR. BRIDGES:

Q Now, you arranged to have a personal interview with Mr. Lester in the presence of his attorney; correct?

A Yes.

Q Do you consider that important to personally meet with the subject?

A Well, I will tell you I sometimes am asked to generate reports and even on occasion testify, having not met them, and that's not necessarily a problem as long as I have the proper information which, of course, if I am going to testify in court or do a report, I make sure I have it, but certainly seeing them is helpful.

Q Okay. You can ask them questions you think are appropriate when they come up?

A The records give me a lot of good information, but I certainly like to hear it directly from the person if that opportunity does present itself, yes.

MR. BRIDGES: Thank you, Mr. Pessalano.

THE COURT: Okay. Mr. Clark?

MR. CLARK: Thank you.

CROSS EXAMINATION

BY MR. CLARK:

Q Good afternoon.

A Good afternoon.

Q Have you and I ever met before?

A You know what? I hate to offend. I don't recall, so if we did indeed meet and I forgot, I apologize.

Q No offense taken, sir. Do you have your file?

A Yes.

Q Can I see your file, please?

(Handed.)

Q Thank you. Who is the doctor Roy Kulick?

A I believe that's a doctor that evaluated him.

Q And did he evaluate Mr. Lester for the defense in this case for the firm Litchfield & Cavo?

A I may not know that -- probably. I don't have the file.

Q I am going to give it to you. Here is your file, sir. There are two reports from a Dr. Roy Kulick; right?

A Yes, and it's made out to them.

Q That doctor examined Mr. Lester on two occasions for the defense?

A Yes.

Q And you reviewed Dr. Kulick's reports?

A Right.

Q Can I see those, please?

(Handed.)

Q And in the report you reviewed from Dr. Kulick, did you note his physical examination findings, did you review those findings?

A I reviewed everything in the report, sure.

Q So did you note in the reports both from 2014 and 2017 that he found atrophy --

Pessalano - By Plaintiff - Cross

MR. ECKERT: Objection, Judge.

Q -- about the left forearm musculature?

MR. ECKERT: Objection. That's not in evidence. He is not being called.

THE COURT: Step up.

(Whereupon, a discussion was held off the record at the bench.)

Q Did you note that Dr. Kulick, in his examination, made positive findings concerning Mr. Lester's injury?

A I don't have the report in front of me, but I'm sure that was the case, yes.

Q And did that include some limitation of motion of his thumb and other fingers?

A Again, I am going to take you at your word. I don't have the report in front of me.

Q In any event -- I'm sorry.

A There was nothing in that report that was inconsistent with my opinion that he could work, I could tell you that.

Q Well, are you aware Dr. Kulick found that he had poor --

MR. ECKERT: Objection, Judge.

Q -- he had poor abduction of the thumb?

MR. BOULÉ: Objection.

MR. CLARK: Are you calling Dr. Kulick?

THE COURT: No, they are not.

Pessalano - By Plaintiff - Cross

Q Are you aware, sir, the defense is not calling Doctor --

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q Your original evaluation was in 2014; is that correct?

A Right.

Q And you issued a report to defense counsel in 2014?

A Yes.

Q And so over the last four years, have you issued any supplemental reports?

A No.

Q And the additional materials that you were given including Dr. Kulick's report for 2017, when did you get those materials?

A Within a week or two ago.

Q So the first time since August of 2014 that you were provided with any additional reports or information about Mr. Lester was about two weeks ago?

A Right. It is my understanding he hasn't treated since that time.

Q I am not asking you about -- since your report in 2014, the next time that you were provided with materials regarding this case was about two weeks ago?

A Yes.

Q So there was no communication at all that you had with

defense counsel over the past four years?

A That's correct.

Q And you were given some legal documents to review as well, a second supplemental bill of particulars?

A Yes.

Q You told us that you do about 90 percent of the reviews of claims for personal injuries on behalf of the defense; is that correct?

A Yes.

Q And you told us you testify about eight to ten times a year in those cases?

A Yes.

Q And can you tell us how long that's been going on for, was it the last ten years?

A About 20 years now.

Q And in addition to testifying in court, how many times -- how many reports have you issued per month to defense counsel involving opinions regarding injured parties who were making claims?

A I could estimate perhaps about ten.

Q So that estimate about ten reports per month, and for about how long has that been going on for?

A About 20 years.

Q So that's about 120 reports a year in which you offer opinions regarding injured persons who you say can go back to

work and do various different occupations?

A I don't necessarily say all the time that they can work, but that's --

Q They could do something?

A Excuse me?

Q That they could do something?

A No. There are some instances where I say somebody can't work. I would concede it's unusual, but most of the time I am of the opinion that people with disabilities can go back to work.

Q In those reviews that you get paid for, are they typical to what you get paid for reviews such as Mr. Lester, ten hours, $375 an hour, typically?

A I said 10 or 12 is the average. Sometimes it might just be a few hours and it could be, on occasion, be considerably more, depending on the nature of the case.

Q Do you have your billing records for this case? Did you bring them to court?

A No.

Q Why not?

MR. ECKERT: Objection.

THE COURT: Sustained.

Q Why didn't you bring your billing records for this case to court?

MR. ECKERT: Objection.

Pessalano - By Plaintiff - Cross

THE COURT: Sustained.

Q How many hours did you spend reviewing this case?

A I believe I answered that, about 10 or 12.

Q And then in the last two weeks, how many hours did you spend reviewing this case?

A An additional, maybe, five or six.

Q And did you issue any supplemental findings in writing regarding your review of these additional materials, sir?

A No, I did not.

Q Now, you're not a medical doctor, are you?

A That is correct.

Q You don't treat patients, do you?

A That is also correct.

Q You don't make a medical diagnosis and treatment plan for a patient, do you?

A No, I do not.

Q So in doing your reviews, is it important for you to rely on the medical documentation?

A Of course.

Q And it is important to you to rely on what the doctors say about their patient and their patient's loss of use?

A Of course I consider that. I also have a very different area of expertise than a doctor does, but I certainly consider what they put in their reports.

Q Certainly part of your opinion is based upon the

medical diagnosis and opinion of the doctors who were treating Mr. Lester; is that correct?

A Sure.

Q And in your report that you made in this case back in August of 2014 -- do you have your report with you, sir?

A Yes.

Q At that time you issued a report in which you described the materials you reviewed prior to giving your opinions; correct?

A Right.

Q And you relied on those opinions in giving your report?

A As well as other things, but of course.

Q But primarily in order to determine a person's disability, the extent of a medical disability would depend upon the opinion of the doctors as to what that disability is, doesn't it?

A I am not going to say I relied on that primarily. I rely on it in addition to many other things.

Q Sir, in your report from August 29, 2014 -- would you please look at that report. In the seven pages of your report, sir -- please look at it.

A I have it right in front of me, sir.

Q The only medical report that you specifically quote from in your evaluation of Mr. Lester comes from a Dr. Leon

Pessalano - By Plaintiff - Cross

Sultin, M.D, page 5 of your report; correct?

A Yes.

Q And you specifically went in and dictated the information about Dr. Sultin's opinion regarding Mr. Lester's disability; correct?

A Well, his opinion regarding his employability.

Q Well, his opinion regarding his schedule loss of use as well; correct?

A Well, that's his employability.

Q So Dr. Sultin, who you referred to, the only doctor you referred to in the report, you referred to two reports issued by Dr. Leon Sultin; correct?

A Yes.

Q And that Leon Sultin name appears also as the material reviewed, reports of Dr. Leon Sultin, the first thing you mentioned; right?

A Yes.

Q And you were aware, sir, at the time that you relied on Dr. Leon Sultin, that Dr. Sultin was a consultant for the representative of Exterior Erecting Services, aren't you?

A Specifically I don't recall who he was a consultant for, and frankly, it doesn't make a difference to me. I have looked at all of the records as I did his treating documents.

Q Sir, the only treating report you quoted from in your August 2014 report regarding scheduled loss of use and

regarding the patient's condition is Dr. Leon Sultin; correct?

A Correct.

Q And you have those reports in your folder; correct?

A Right.

Q And wasn't Dr. Leon Sultin a consultant that was hired by a representative for Exterior Erecting to give an opinion?

MR. BOULÉ: Objection.

THE COURT: Overruled.

A I don't recall.

Q Okay. Let me check the file.

You see that the report is generated by Dr. Sultin for another company?

A The heading on top?

Q Okay. Sir, you knew that when you reviewed this case, that Mr. Lester was being treated by Dr. Rho at Orlin & Cohen; correct?

A Yes.

Q And you knew that Dr. Rho was Mr. Lester's treating physician over the course of two and a half years from the date he was injured; correct?

A Right.

Q And you chose to rely in your report on the statements made by Dr. Sultin on behalf of the representative for Exterior. You didn't refer to Dr. Rho, did you?

A I don't recall Dr. Rho specifically addressing

Pessalano - By Plaintiff - Cross

employability in his reports.

Q Sir, Dr. Rho, who treated Mr. Lester through Orlin & Cohen -- you were aware he treated him for two and a half years?

A I don't remember the exact amount of time. I know it was for a long time.

Q Well, you know it was for a long time. You have been telling us Mr. Lester could have gone right back to work after he was injured and done something?

A Right. People work during medical treatment all the time.

Q So your --

MR. ECKERT: Judge, can he finish his answer?

THE COURT: Don't argue, Mr. Clark. Ask a question.

Q So your opinions in part were based upon the statements and opinions of Dr. Sultin as you refer to them in your report?

A In part, sure.

Q And you relied on those opinions; correct?

A I relied on many opinions.

Q Including Dr. Sultin; correct?

A Yes.

MR. CLARK: Well, Judge, those reports are not in evidence and I move to strike his opinion, because they

Pessalano - By Plaintiff - Cross

were based on Dr. Sultin's reports.

MR. BOULÉ: October.

MR. ECKERT: Objection.

MR. CLARK: And he was a consultant for Exterior.

THE COURT: Step up, gentlemen.

(Whereupon, a discussion was held off the record at the bench.)

THE COURT: Okay. The objection is overruled.

Q Sir, you are aware there is a difference between a 45 percent schedule loss of use and an 80 percent schedule loss of use, isn't there?

A Yes.

Q What is the difference between a 45 percent schedule loss of use and an 80 percent schedule loss of use?

A Well, I hate to appear flip, but I am going to subtract 80 percent -- I am going to subtract 45 from 80, which I think gives me 35 percent difference.

Q Your math, I guess, is correct, but in terms of the difference in schedule loss of use from a medical opinion, that is a significant difference in the loss of use, 80 percent versus 45 percent?

MR. BOULÉ: Objection. He just had him testify that he was not a medical doctor. Now he is asking him a medical opinion.

THE COURT: Overruled.

A I have conceded in my analysis that he has very limited use of his left hand. Whether 45 percent or 80 percent, I don't want to make light of it and I am not going to say it doesn't matter, of course it does, but I have conceded in my analysis that he has limited use of his left hand.

Q Yes, but you say he can go back and be a construction supervisor or carpentry supervisor with that disability and subject other workers and himself to danger. You're saying he could do that.

MR. BRIDGES: Objection.

THE COURT: Sustained.

Q You're telling us that he could back to work with that type of disability as a carpenter supervisor?

A Clearly. Of course he can.

Q Clearly? Do you know that Mr. Lester always worked as a foreman carpenter, a hands-on, working carpenter his whole career and for the last ten years for Exterior?

MR. ECKERT: Objection, Judge. It is irrelevant.

THE COURT: Sustained.

Q Do you know what Mr. Lester did for Exterior during the 10 years he worked there?

MR. ECKERT: Objection. It's irrelevant.

THE COURT: Overruled.

A He was a working foreman. I have already offered the

opinion that he could work in a supervisory capacity and not necessarily as a working foreman. There is a difference. I would recognize that.

Q And do you know that in fact when Mr. Lester was working for Exterior, that there was no such position other than being a working carpenter?

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

MR. ECKERT: Not in evidence.

THE COURT: Sustained.

Q Sir, you are aware that Mr. Lester, during his experience with Exterior, was a working carpenter foreman; correct?

A I clearly outlined that in my report, yes.

Q And you admit that there is a difference between what Dr. Rho found as a schedule loss of use and what Dr. Sultin found is a schedule loss of use; correct?

A Eighty is different from 45, yes.

Q And yet in the medical records that you reviewed show that Mr. Lester had treatments -- there were 83 therapy sessions. Did you review those?

A I don't remember how many there were. I didn't count them.

Q But you said you reviewed the records; correct?

A Right.

Pessalano - By Plaintiff - Cross

Q And you reviewed all of Dr. Rho's notes; correct?

A I don't know if I reviewed all of Dr. Rho's notes. I reviewed the ones that I was provided.

Q Well, weren't you provided with all of Dr. Rho's records?

A I don't know.

Q Well, where are the records from Dr. Rho that you have here today?

A This is not my entire file.

Q Where is the rest of your file?

A The rest of the file is in my office.

Q Well, why didn't you bring the whole file here?

MR. ECKERT: Objection.

THE COURT: Sustained.

Q You knew you were appearing in court today to give testimony in this case; correct?

A Yes.

Q And you've been in court before where lawyers have cross-examined you about your findings?

A Of course.

(Whereupon, Roberto Portas replaced Michelle Mahaffey as the official court reporter at this time.)

(Continued on the next page.)

J.PESSALANO-CROSS/Clark

Q And they've asked you for your file materials; correct?

A I've been asked that on occasion.

Q Well, sir, on this occasion why didn't you bring the rest of the records and materials that you relied upon to form an opinion?

MR. ECKERT: Same objection, Judge.

THE COURT: Overruled.

A I have never brought my entire file to testify. On a rare occasion when the attorney -- when the attorney wants to see my file they could request it informally and I would certainly bring it, or you could subpoena the file.

Q I see, sir.

So you don't bring the file that you review to show the jury all the material that you relied on in forming your opinions in a case.

A It would be cumbersome and redundant to bring the entire file.

Q I see.

So there's no way that I can cross-examine you on material you didn't bring to court that you reviewed; correct?

MR. ECKERT: Objection.

THE COURT: Sustained.

Q Sir, can I see your file again?

A Sure.

Q Were you aware, sir, that Mr. Lester in -- by January

J.PESSALANO-CROSS/Clark

of 2013 had reached something called MMI?

MR. ECKERT: Objection.

THE COURT: Step up.

(Bench conference.)

THE COURT: Overruled.

Q Are you aware that Dr. Rho, the treating doctor who was in charge of Mr. Lester's treatment, in his records notes that Mr. Lester as of the end of 2012 and 2013 had reached maximum medical improvement?

A That may very well be the case. Without looking at the record I couldn't tell you exactly when, but it wouldn't surprise me.

Q And that wouldn't be important for you to know that the patient had reached maximum medical improvement by the time you had evaluated him in August 2014?

MR. BOULÉ: Objection. He never said otherwise.

THE COURT: Sustained.

Q Was it important for you to know that Mr. Lester had reached maximum medical improvement by the time you evaluated him?

MR. ECKERT: Objection. It's the same question.

THE COURT: Overruled.

A What was important was whether or not he demonstrated the necessary physical capabilities to do the job, the jobs that I felt he was able to do. It was my opinion that he did.

Q But you're not a doctor. How can you determine what somebody physically can and can't do? You don't make a diagnosis and treatment, do you?

A I believe I said earlier, counselor, that I have a very -- you're right, I am not a doctor, I will readily concede that any time. However, I do have a different area of expertise than doctors do. My area of expertise involves getting people back to work when the doctors don't think they could work or in some instances are not sure they could work. At that point I utilize my body of knowledge to get them back to work.

Q But as to whether they can physically do a job, that determination of their physical limitation or disability is a medical determination, is it not?

A Mr. Lester told me during the course of my assessment with him what he's able to do and not able to do. And, as I said earlier, I took -- I took him at his word and considered that in formulating my opinion as to what he can do.

Q And he told you when you took him at his word that he had a throbbing in his left upper extremity emanating from his forearm and radiating down throughout his left hand; correct?

A Right.

Q And you took him at his word that he indicated that he has reduced grip strength and range of motion in his left hand; correct?

A Yes.

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Q And you took him at his word because when you interviewed him you noted that he was friendly, verbal, answered your questions readily; correct?

A Yes.

Q He cooperated with you?

A Sure.

Q He told you quite candidly, answered your questions?

A Yes.

Q He told you that he had some difficulty steering his boat so he doesn't go out without somebody with him; right?

A Right.

Q And he also told you that he used to fish but he's no longer able to do so. You documented that as well; correct?

A Yes.

Q And when you say he discontinued occupational therapy a year ago, by saying "Discontinued," you're not telling us that he stopped therapy because he didn't want to do it, are you?

A No.

Q So he discontinued it why? Why was therapy discontinued a year before?

MR. ECKERT: Objection, Judge.

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q When you say he discontinued therapy, you were not implying that he walked away from therapy prematurely, were you?

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MR. ECKERT: Objection, Judge.

THE COURT: Sustained.

Q Doesn't that sentence indicate to you that he had reached MMI?

MR. ECKERT: Judge, can we approach again?

MR. BOULÉ: Objection.

THE COURT: Mr. Clark, the objection's sustained. Move on.

Q What did you mean by he discontinued occupational therapy?

MR. BOULÉ: May we approach?

THE COURT: Yes.

MR. ECKERT: Objection.

MR. CLARK: He wrote it in the report.

THE COURT: Come up.

(Bench conference.)

THE COURT: The objection is still sustained.

Q So the report that you relied upon, the medical report that you relied upon in your report from August 29, 2014 indicated to you that Mr. Lester could not resume work as a carpenter; correct?

A As a hands-on carpenter, that is correct, yes.

Q When you say "A hands-on carpenter," it indicated to you that he had a marked partial left hand and left upper extremity disability; is that what was found?

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A I'm not sure what you're quoting from, counsel.

Q Your report, sir.

A Okay, from the doctor's report.

Q From Dr. Sultan's report.

A Gotcha.

Q You mentioned specifically that Dr. Sultan offers the opinion that he suffers from a marked partial left hand and left upper extremity disability which will prevent him from engaging in full unrestricted work activity as a carpenter.

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q Did you rely upon Dr. Sultan's findings?

A I relied on Dr. Sultan's findings as well as everything else that I've already referenced, yes.

Q Let me ask you something: Why in your report didn't you refer to Dr. Rho's findings --

MR. ECKERT: Objection.

Q -- in evidence?

MR. ECKERT: Objection, Judge.

THE COURT: Sustained.

Q Why didn't you comment on Dr. Rho's findings in your report?

MR. ECKERT: Objection.

THE COURT: Mr. Clark, the objection is sustained. Move on.

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Q By the way, when you evaluated him, you knew he worked his whole life, 32 years as a carpenter; correct?

A Carpenter and carpenter foreman, yes.

Q And you knew that as a carpenter foreman, you knew what his general activities were like on the job, physically what he had to do as a carpenter.

A Sure.

Q And now you're telling us that he could have worked as a real estate sales agent earning $90,000 a year in the Long Island community. Is that what you're telling us Mr. Lester's capable of doing?

A He certainly is capable of that. I also made reference to that he would need some retraining for that, but he is certainly capable.

Q Sir, did you ever ask Mr. Lester, "Do you like sales? Can you be trained as a salesman?" Did you ever ask him that?

MR. ECKERT: Objection, Judge. That's not --

THE COURT: Sustained.

MR. ECKERT: It's not relevant.

Q You're telling us what jobs as of August 29, 2014 Mr. Lester was capable of doing to earn money; correct?

A Yes.

Q And at that time how old was Mr. Lester, sir?

A I don't recall.

Q Well, if I tell you, look at your report, do you know

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how old he was?

A I don't think I reference his age in my report.

Q Well, isn't that important how old a person is?

MR. ECKERT: Objection, Judge. It's against the law.

THE COURT: Sustained.

Q I'll tell you Mr. Lester was 58 years old at the time you spoke to him in August of 2014.

MR. ECKERT: Objection, Judge. It's against the law.

THE COURT: Sustained.

MR. CLARK: What? As to his age?

MR. ECKERT: Yes. It's called age discrimination.

THE COURT: Sustained.

MR. CLARK: I'm talking about his ability to do certain jobs.

Q When you evaluated him, sir, did you consider his age and years on the job?

A I considered his skills. I didn't evaluate his age, I evaluated his ability to do the job.

Q Well, what skills did Mr. Lester have as a salesperson?

A You certainly demonstrate interpersonal skills, the ability to problem solve, to interact with other people as a foreman. And, as I said, he would require some retraining, but certainly if you worked as a foreman or a supervisor you could

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certainly learn to do sales.

Q Oh, I see. So that you believe that Mr. Lester -- my client, do you recognize him sitting back there (indicating)?

A Honestly, I -- I would like to say yes, but I don't. I apologize. It was four years ago.

Q You're saying that this gentlemen, my client, could have been earning $90,000 as a real estate sales agent in the Long Island community. Is that true?

A That's the average salary, yes.

Q Of somebody who knows or enjoys, wants to be working in sales, in real estate sales; right?

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q Do you know if Mr. Lester has any computer skills, whether he even uses a computer or social media of any kind?

A If it was not addressed in my report I'm -- I am going to assume that he did not have any computer skills.

Q But yet you're telling us in August of 2014 that he could have worked in computer numerically controlled machine tool programming, operator in metal and plastics; correct?

A Yeah. That's not a computer job, that's what the machinists call -- that's operating -- it's either programming or operating machinery that's used in manufacturing. It's not a computer. But he certainly has the ability to learn computer

skills.

Q Even though he's never used computers before or doesn't use them?

MR. BOULÉ: Objection.

MR. ECKERT: Objection, Judge. That's not in evidence.

THE COURT: Sustained.

Q You have him down here as a municipal clerk. Do you know what you have to go through to become a municipal clerk?

A You have to apply for the job and demonstrate the necessary skills depending on what type of clerk you're applying to be.

Q How old is Mr. Lester now?

A Again, that escapes me. If he was 58 when I -- when I saw him he would either be 61 or 62 now.

Q And you said you reviewed Dr. Schmidt's report; correct?

A Yes.

Q Why did you review Dr. Schmidt's report?

A Because it was provided to me.

Q Well, it was provided to you about two weeks ago?

A Yeah.

Q And you saw -- What did Dr. Schmidt give Mr. Lester as to his disability?

A 80 percent partial for the left upper extremity.

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Q 80 percent partial permanent disability to the left upper extremity; correct?

A Yes.

Q And permanent injury; correct?

A Yes.

Q And not able to work as a carpenter; correct?

A That's correct as well.

Q And did you accept that information from Dr. Schmidt?

A I don't think he could work as a carpenter either.

Q But you're saying somebody will hire him somewhere somehow as a supervisor of carpenters on the job.

A Based on his experience? In a minute.

Q Did you review the economist report?

A I reviewed it because it was provided to me.

Q Do you have it in your material here?

A I'm pretty sure I do.

(Brief pause.)

(Witness handing.)

Q Thank you, sir.

Did you review that report?

A Yes.

Q So do you accept the fact that Mr. Lester has a partial permanent disability of the left upper extremity?

A Yes.

Q Do you accept the fact that he has limitations and loss

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of use of his left upper extremity and hand?

A Yes.

Q Do you accept the fact that he has a partial permanent injury?

A Yes.

Q Do you accept the fact that he has atrophy?

A I don't recall. It wouldn't surprise me, but I don't recall.

Q Well, according to Dr. Kulick, the report --

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q And from your review of the medical did he have also limitations?

A Of the left upper extremity, yes. And I've conceded that in my analysis.

Q And are you aware that he also had some compensatory trouble with his right hand as a result?

A Yes.

Q And you accept that, sir?

A I -- yes.

Q And do you know what his prognosis is for his physical injury?

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

THE COURT: Sustained.

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Q Did you look at the reports to see what the prognosis is for his future as to whether or not there would be any improvement or worsening?

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q Was it important for you to look to see what the prognosis was for his injury? Yes or no?

MR. ECKERT: Objection.

MR. BOULÉ: Objection.

THE COURT: Sustained.

Q How much did he earn as a carpenter when he last worked on July 23, 2010, sir?

MR. ECKERT: Objection, Judge.

THE COURT: I didn't hear the question.

Q How much did he earn as a carpenter when he last worked on July 23, 2010?

THE COURT: Sustained.

MR. CLARK: I have nothing further.

MR. BOULÉ: Redirect, Your Honor?

THE COURT: Yes. Hang on one second.

(The Court and court officer confer.)

THE COURT: Let's take a five-minute break.

COURT OFFICER: Okay. Jury exiting.

(Jury exits courtroom.)

(Short recess taken.)

COURT OFFICER: Come to order.

THE COURT: Okay, let's bring in the jury.

(Brief pause.)

COURT OFFICER: Court, ready for the jury? All rise. Jury entering.

(Jury enters courtroom.)

COURT OFFICER: Court, please be seated.

THE COURT: Folks, welcome back.

Mr. Boulé...?

MR. BOULÉ: Thank you. A brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. BOULÉ:

Q Mr. Pessalano, on cross examination you were asked questions about medical disability. Do you recall that?

A Yes.

Q Now, is there a difference between medical disability and vocational disability?

A A huge difference, sure.

Q Can you explain what that is?

A Yeah, medical disability is just simply -- I don't want to say "Simply," I don't want to minimize it. It's a diagnosis. Vocational disability is whether or not a person can do -- perform the functions of a job. So many, many people with

disabilities, significant numbers of people with disabilities are not vocationally disabled, they can work.

Q And in your practice or your job where people come to you to seek help in vocational training, have you been able to find positions for people who were as old as 58?

A Sure.

Q Older?

A Sure. They have the benefit of experience.

Q Have you been able to find positions for people who want to return to work who have an 80 percent disability of their hand?

A I have found -- I've helped people find work who are far more significant disabled than that.

Q Such as what?

A Amputees, paraplegics, multiple -- multiple neurological impairments.

Q Now, what's the first thing that a person must do in order to obtain a job?

A Well, in my opinion the first thing that they should do is they demonstrate a willingness to want to return to work, at which point you start exploring the options.

Q And you would then apply for a job?

A Sure.

Q Okay.

Now, the Access VR you talked about because you were

questioned about computer skills. What types of skill training is provided free by Access VR?

A Access VR will pay for training for anything from a week or two word processing program to a bachelors degree or even graduate school, depending on the circumstances and the individual's abilities.

Q And, again, someone has to go to Access VR and seek out this assistance; correct?

A Actually, I don't -- you don't have to go there. You could apply online.

MR. BOULÉ: Okay. Thank you. That's all I have.

MR. BRIDGES: I have nothing, Your Honor.

MR. ECKERT: I have nothing, Your Honor. Thank you.

MR. CLARK: Nothing further, Your Honor.

THE COURT: Okay.

Thank you, sir. You may step down.

(Witness excused.)

THE COURT: Gentlemen, step up.

(Bench conference.)

THE COURT: So, folks, we will break for today. Tomorrow we will start just a bit later at 10:00 a.m. But, given that, please be on time so we can wrap things up, probably in the morning. It's looking like we will be able to finish with the evidence presentation to you tomorrow.

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But that doesn't mean Friday immediately we will be summing up and you'll be charged; before that happens the Court has to hold a charging conference with the lawyers, we anticipate that being Wednesday afternoon, it may have to be Friday, so... To be determined. But we will let you know tomorrow the schedule for the rest of the week, but, of course, Thursday remains we will not have the trial Thursday because of other court business.

So have a good evening. Don't talk about the case. We will see you tomorrow at 10:00 a.m.

COURT OFFICER: Jury exiting.

(Jury exits courtroom.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Okay, on the record. Let's go on the record. Step back.

MR. CLARK: Judge, at this time I would like to make a motion to strike the testimony of this expert insofar as it was based on hearsay and records that are not in evidence, in particular, the medical report of Dr. Leon Sultan who was a consultant for the Workers' Comp. carrier for the employer whose notes were quoted in the expert's report and were the only notes from a doctor quoted in the expert's report and he based his opinion on Dr. Rho's statements in his reports regarding his ability --

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THE COURT: Sorry. Doctor, who?

MR. CLARK: Sorry. Dr. Sultan. Dr. Sultan.

There's reference in the expert's report to two notes from Dr. Sultan that the expert relied upon in forming his opinion, and those records are not in evidence. Because of that I move to strike his testimony as based on hearsay.

MR. ECKERT: Judge, using plaintiff's logic, we similarly move to strike Dr. Kucsma -- sorry Kristen Kucsma as she relied on evidence none of which is in -- none of which is in evidence. She relied on documents, rather, none of which is in evidence. The quotation of a report interior to -- the quotation of a medical record interior to a report doesn't --

(Continued on the following page.)

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THE COURT: Before we get to -- I don't believe she has a PhD, so I think she is Ms. That is what I was looking at.

MR. ECKERT: I corrected myself, yes.

THE COURT: Before we get to that, let's deal with Mr. Pessalano first. So I should hear from Mr. Boulé. It was his witness, but I can't hear anything to over the sirens. So give me a moment.

(Pause.)

MR. BOULÉ: Thank you, Your Honor. I oppose Mr. Clark's application. Mr. Pessalano testified that he relied upon numerous documents in reaching his opinions as well as his interview of Mr. Lester. He did not testify that he gave more weight to one record than another, while he did quote from one record that was not mean and he did not testify that his entire opinion was based on Dr. Sultin's record. In addition, the type of evidence -- excuse me. The type of documentation that Mr. Pessalano relied upon is generally accepted as reliable within the vocational profession, Mr. Clark had the opportunity to fully cross-examine Mr. Pessalano with any of the records, including the records of Dr. Rho that are in evidence and instead has chosen to move to strike the testimony based upon grounds that are improper, in my view.

THE COURT: Anybody else on this side of the room

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want to add to that?

MR. BRIDGES: That unlike the economist, Mr. Pessalano's report was not marked as an exhibit or wasn't demonstrative evidence. It was just a reference. I don't know if he mentioned or it wasn't Mr. Clark cross-examined him on that brought it out. I think it is referred to all the time in medical records and medical reports. He didn't quote from it and unlike the economist, he didn't quote from that to make projections and make a solid finding. So I think it is well within the normal borders of what an expert who testifies relies upon.

THE COURT: Mr. Eckert?

MR. ECKERT: I agree.

MR. CLARK: Can I respond briefly?

THE COURT: Yes.

MR. CLARK: There are quotes in the report of Leon Sultin that the witness said he relied upon in determining that he could return to sedentary work and have vocational rehabilitation training. Those specific references were relied upon by that witness and are stated and quoted in his report, in addition to which he relied on other out-of-court material that's not in evidence.

THE COURT: Okay. He relied on sufficient records and evidence that is before the Court, and indeed he testified that he took Mr. Lester at his word as to his

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disability with his left arm.

Therefore, your motion is denied. As to Ms. Kucsma, as we discussed off the record, Mr. Clark and the defendants will submit briefs on whether or not her testimony should be stricken, because the defense side of the room is of the position that much of her testimony is based on records that are not in evidence. And so before a ruling comes on that issue, I will review what you folks submit by Thursday afternoon on that issue.

MR. CLARK: Also, judge, as we discussed off the record and maybe partly on the record, in view of the objection which I consider to be untimely made in this case about the material that Ms. Kucsma relied upon, I am endeavoring to get the certified records to court. And I have been having my office making the necessary calls to procure the certified records to court to establish a foundation for their admissibility.

As I indicated to the Court, I exchanged all those records before the witness testified in good faith and I was taken by surprise by an objection that was made after the direct testimony was entered by Ms. Kucsma. Had I known that there was going to be such an objection, I would have certainly pursued getting the certification sooner.

I had sent subpoenas out to the carpenters union.

I do believe now that the records are in the possession of the benefits fund, which is a different office. I am pursuing getting those records and I must -- I am doing my best to get them here certified for the Court.

MR. BOULÉ: Just brief response. At no time -- I want to be clear -- at no time since we have begun this trial has Mr. Clark ever indicated or asked that he intends to introduce into evidence any documentation from the union, and the only reason that we were provided any records from his economist is because I made a request to review all records that she relied upon in reaching her opinion among, maybe, a thousand pages or two or three pages of the record.

So, to indicate the objection was untimely, I believe, is inaccurate. If the evidence had ever been offered that would be the time for us to make the objection.

MR. CLARK: I indicated to counsel -- they wrote me and said, unless you provide us with the material reviewed by Ms. Kucsma, we are going to make a Daubert motion. These are in emails to me. I immediately secured all the materials. I asked for a list based on her report which goes back to 2016. I provided all of those materials to them. I never heard another word regarding an objection to any of those materials. Now, after direct examination I

am getting an objection that they are not in evidence. Nobody told me that they were going to raise that objection before.

THE COURT: Mr. Clark, you also had another basis for having Ms. Kucsma's opinion supported, and that's because it's reliable professionally.

MR. CLARK: That's correct, professional liability rule.

THE COURT: Right. So that you're not foregoing that argument?

MR. CLARK: No. Of course not.

THE COURT: Okay. Does anyone else want to say anything?

MR. ECKERT: Unfortunately, Judge, as every person who tries cases knows, discovery doesn't make things admissible nor does an email. So, unfortunately, I don't know how plaintiff could have thought we were just stip'ing it in without an agreement, because that was just never contemplated.

MR. CLARK: That's the way we have been doing it from the beginning of the trial. Unfortunately for me, I thought -- there was no objection to those records or they would have said to me, "We are going to object to those records being referred to." I do rely on the professional reliability rule, absolutely, but I also do try to secure

the certification of those records.

MR. BOULÉ: Judge, just one -- I am sorry to belabor the point, but a week ago Monday, all the lawyers came to court specifically to pre-mark records that each party intended to offer into evidence. At no time on Monday did Mr. Clark ever proffer those records or even state that he intended on offering those records. They are not here and they never were here.

MR. CLARK: Excuse me, sir, but you were here when the subpoenaed union records were here and I said I intend to rely on the carpenters union records. And when we opened the envelope, it wasn't the records that were referred to in Ms. Kucsma's report and I then said I am following up on those records. And subsequent to that you asked me for the records. I gave them to you and I didn't get any objection to those records.

MR. BOULÉ: I didn't ask you for the union records. I asked you for what your expert relied upon, but my point is to wait until a week and a half into trial to, for the first time, offer into evidence records that could have been procured and apparently were in possession of his expert for two years and could have easily been brought to court a week ago Monday, I just don't understand why counsel believes it is the defendants who have somehow done something improper here.

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THE COURT: Okay. To be continued, gentlemen. See you tomorrow.

MR. CLARK: Thank you.

(The trial was adjourned to May 16, 2018, at 10:00 a.m.)

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