

2004 WL 5669058 (S.D.Ga.) (Expert Deposition)

United States District Court, S.D. Georgia,
Brunswick Division.

Guy MAGLOIRE, Plaintiff,

v.

ROSSIGNOL TRANSPORT, LTD. and Eric Robert Lajoie, Defendants.

No. 04CV00010.

May 12, 2004.

(Deposition of Philip Rafiy, M.D.)

Name of Expert: Philip Rafiy, M.D.

Area of Expertise: Medical & Surgical >> Orthopedics

Representing: Plaintiff

Jurisdiction: S.D.Ga.

Appearances.

Stephen H. Frankel, Esq., Attorney for Plaintiff, 7600 Jericho Turnpike, Suite 406, Woodbury, New York 11797.

Wilson, Elser, Moskewitz, Edelman & Dicker LLP, Attorneys for Defendants, 3 Gannett Drive, White Plains, New York 10604, By Stephen Brown, Esq.

Savage, Turner, Pinson & Karsman, Attorneys for Defendants, P. O. Box 10600, 304 East Bay Street, Savannah, Georgia 31401, By Stanley M. Karsman, Esq, (Via Telephone).

Videotaped Deposition of Non-Party Witness PHILIP RAFIY, M D. pursuant to Notice, before Kelly A Cruz, a Notary Public of the State of New York

ALSO PRESENT

JIM WOOD, VIDEOGRAPHER.

IT IS HEREBY STIPULATED AND AGREED, by and ?? the attorneys for the respective parties herein, that filing and sealing of the within deposition be waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial

IT IS FURTHER STIPULATED AND AGREED that the within deposition pay may be sworn to and signer before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

THE VIDEOGRAPHER: Good afternoon. My name is Jim Wood from Documentaries, 1581 Route 202, Pomona, New York, in conjunction with Realtime Reporting.

The time is now 3:26 p.m. and will be displayed in hours and minutes. Today is Wednesday, May 12, 2004. Today's videotaped deposition is being taken of Dr. Philip Rafiy, at his business office in Hicksville, New York. And this deposition is being taken pursuant to notice for and in the Federal District Court of the Southern District of Georgia, Brunswick Division, In the matter of Magloire v. Rossignal, CV Number 204-10. Our court reporter is Kelly Cruz. Attorneys will identify themselves and the court reporter will swear the witness.

MR. FRANKEL: Mr. Frankel for the Plaintiff

MR. BROWN: Stephen Brown for the Defendants.

THE VIDEOGRAPHER: Mr. Karsman is on the phone from Georgia.

PHILIP RAFIY, M.D., called as a witness, having been first duly sworn by a Notary Public, was examined and testified as follows:

EXAMINATION BY

MR. FRANKEL:

Q. Good afternoon, Dr. Rafiy.

A Good afternoon.

MR. FRANKEL: This is the deposition of Philip Rafiy, pursuant to notice, regarding date, time and place. The deposition is being taken in a civil procedure, including use at trial. The parties agree that all objections will be made during the course of the deposition.

If a party wants to object to a question or the answer to a question, the objecting party will raise their hand. Once the objecting party's hand is raised, the videographer will go off the record. The stenographer will continue recording all die objections and/or responses to the objection

The objection will be noted on the transcript in the usual manner.

Once the objection has been duly noted, the videographer will continue the videotaping of the witness.

Dr Rafiy has been advised of his right to read and sign the deposition, and waived to read and sign the deposition.

Does counsel have any objections regarding these preliminary matters?

MR. BROWN: No.

BY MR. FRANKEL

Q Doctor, please state your name and address for the record.

A Philip Rafiy, 87 W. Old Country Road, Hicksville, New York 11801.

Q What is your occupation?

A I'm an orthopedic spine surgeon.

Q Please state for the jury your educational background, beginning with undergraduate school.

A I graduated from SUNY Binghamton with a bachelor of arts with honors. I completed a four-year medical school degree and received my medical doctor degree from SUNY Health Science Center at Brooklyn.

I completed a five-year orthopedic residency training program at the Albert Einstein-Bronx Lebanon, orthopedic surgery. I completed a one-year orthopedic spine internship at Tampa General Hospital. And completed an orthopedic trauma surgical internship in Switzerland.

Q. Have you had any further postgraduate training, Doctor?

A And continuing CME, continuing medical education with the open conference services.

Q Please tell the jury what is involved in the practice of orthopedic surgery?

A. The study of orthopedic surgery is the study of the musculoskeletal system, which involves the muscles, bones, joints. It involves the vertebrae between the joints extending from the spine, and the skeleton, involving the bones, muscles and nerves.

Q How long have you practiced orthopedic surgery?

A I have been practicing orthopedic surgery for the past 10 years.

Q Are you board certified?

A I am a board-certified orthopedic surgeon.

Q What does being board certified mean?

A. Board certification is a series of examinations which are administered by the American Board of Orthopedic Surgery on a national level. In order to obtain, one must complete a written examination upon successful completion of your orthopedic surgical residency training.

After completion of the written examination, an oral examination in orthopedic surgery must be successfully completed. And review and recommendations from your colleagues and training program in order to obtain complete board certification.

Q Thank you.

Are you licensed to practice orthopedic surgery in New York?

A Yes.

Q Are you licensed to practice orthopedic surgery in any other state?

A I am licensed in the State of New York to practice medicine and surgery.

Q Are you licensed to practice medicine in any other state?

A No.

Q Could you please tell the jury about the medical associations to which you belong?

A I am a member of the American Academy of Orthopedic Surgery. I also belong to the Nassau County Medical Society. And I belong to the North American Spine Conference, or Conference Spine Society.

Q Have you written articles within the specialty of orthopedic surgery?

A Yes.

Q Have these been published in medical journals?

A Yes, sir.

Q Dr. Rafiy, you have provided us with a copy of your curriculum vitae. Is it accurate and up to date?

A Yes, it is.

Q Do you need to add anything to it?

A No.

Q I would like to attach to the transcript a copy of Dr. Rafiy's curriculum vitae as Plaintiff's Exhibit 1.

THE VIDEOGRAPHER: We are going off the record. It's 3:33 p.m.

MR. FRANKEL: With defense counsel's permission, I am going to mark that.

MR. BROWN: No objection to that being marked as an exhibit.

MR. FRANKEL: Just as an exhibit. Yes.

(Plaintiff's Exhibit 1, Curriculum vitae, marked for identification.)

THE VIDEOGRAPHER- We are back on the record. It's 3:35 p.m.

Q Dr. Rafiy, I note that on your stationery that you state you are a clinical assistant professor of orthopedic surgery at Cornell University.

Would you kindly tell us about that?

A I was elected to a teaching position at the Weill Medical College at Cornell University. I have received a teaching position of clinical assistant professor in orthopedic surgery.

My duties are involved in the teaching and training of the medical students, and also of teaching and training of the orthopedic residents.

Q And, Doctor, currently you're Chief of the Division of Spine Surgery at Long Island Jewish Medical Center?

A I'm the Associate Chief at Long Island Jewish Medical Center.

Q And is that different from Cornell University?

A. Yes.

Q Could you kindly tell us about your duties at Long Island Jewish Medical Center?

A At Long Island Jewish Medical Center I am currently on active duty, active staff at the Long Island Jewish Medical Center. I am involved in the training of the orthopedic surgical residents in the field of orthopedic surgery, particularly in the field of spinal surgery.

I'm also involved in the training of medical students with lectures and afternoons at the facility.

MR. FRANKEL: I would like to offer Dr. Rafiy as an expert in the field of orthopedic surgery.

Do you have any voir dire on his qualifications at this time?

MR. BROWN: No.

Q All right. Dr. Rafiy, you are being paid for your deposition testimony today?

A Yes.

Q You are being paid for your appearance here today, correct?

A Correct.

Q What is your fee for the appearance?

A. The appearance and review of all records at \$400 per hour.

Q Were you paid approximately \$4,000 for your testimony to appear here today, sir, including the preparation, review of the records, et cetera?

A Yes.

Q And isn't it true that had you not been willing to appear and prepare for today's deposition, that you would have otherwise been tending to patients and/or performing surgery?

A Correct.

Q Thank you.

Dr. Rafiy, have you, in the course of your practice, examined and treated a patient by the name of Guy Magloire?

A Yes.

Q In connection with your care and treatment of Mr. Magloire, you kept a file of this patient?

A Yes.

Q Do you have that file with you today?

A Yes.

Q Have you kept Mr. Magloire's file in your ordinary course of your business?

A Yes, I have.

Q Does your file contain a history of Mr. Magloire?

A. Yes.

Q Does the file contain the type of information you have dictated?

A Yes.

Q Does the file involve the opinions of the various tests you have either performed on Mr. Magloire or ordered on his behalf?

A Yes.

Q Have you personally interpreted Mr. Magloire's diagnostic results?

A Yes.

MR. FRANKEL: I would like to attach Dr. Rafiy's file regarding his treatment of Mr. Magloire. This will be Plaintiff's Exhibit 2 of the deposition, if we have the file

THE VTDEOGRAPHER We are going off the record. It's 339 p m.

(Plaintiff's Exhibit 2, medical file for Mr. Magloire, marked for identification.)

MR. KARSMAN: We want a copy of the file attached, but we do not intend to introduce a copy of the file of this as evidence in the case.

MR. BROWN: And the reporter has just taken that down from Stan Karsman, local counsel for Plaintiff, over the phone.

THE VTDEOGRAPHER Back on the record. It's 3:41 p m.

Q Dr. Rafiy, you may refer to your chart to refresh your recollection regarding the specifics of your examination and treatment of Mr Magloire

A Yes.

Q Dr. Rafiy, please tell the jury when you first saw Mr. Magloire as a patient?

A. I examined Mr. Magloire on June 6, 2002.

Q. Did you take a history from Mr. Magloire as to why he came to see you?

A Yes.

Q Do you consider the history as given to you by the patient important as part of your medical evaluation and treatment?

A Yes.

Q Do you rely on the history given to you by the patient?

A. Yes.

Q Did you take a history from Mr. Magloire?

A Yes.

Q Would you kindly tell the jury about the history you took from Mr. Magloire, and what complaints he had at that time?

A. On June 6, 2002, the history I obtained was that Mr. Magloire was at that time a 61-year-old male who was involved in a motor vehicle accident on January 25, 2002.

He stated that he was the driver of a motor vehicle which was struck from behind by a

semitrailer truck. He had sustained an injury to the cervical spine, the neck, at that time. His vehicle had been thrown. He was wearing his seatbelt. And he had a period of loss of consciousness.

He was taken to the South Brunswick Medical Center in Georgia, where he was evaluated by the surgical service and spine service, and was admitted to the hospital.

Q What complaints did Mr. Magloire have to you when you initially saw him? What complaints were made to you when he initially saw you?

A At that time, he was complaining of neck pain and weakness in the left arm. And numbness in the left upper extremity.

Q Anything else?

A. That was his chief complaint at that time.

Q In your professional opinion, were these complaints consistent with the prior history given to you by Mr Magloire?

A Yes. They were consistent.

Q Following the taking of the history of Mr. Magloire, kindly tell the jury what you did as his physician?

A At the tune of his evaluation, I performed a physical examination, reviewed his medical studies, and obtained X rays of the neck.

Q By the way, Doctor, how was Mr. Magloire referred to you, if you know that?

A I believe it was his wife.

Q After your physical examination of Mr. Magloire, did you form any professional opinions about his condition?

A Yes.

Q And, Doctor, what were those opinions or impressions?

A. My impression as of June 6, 2002, was that he was status post a cervical fracture dislocation that he had, that he was status post anterior cervical fusion surgery, and status post posterior cervical fusion surgery.

Q That sounds very fancy to me. In lay terms would you say that Mr Magloire broke his neck?

A The diagnosis of a cervical fracture dislocation means that the neck was actually broken and/or separated.

Q Thank you.

You have indicated that as part of your physical examination you noted --

MR. BROWN: Objection.

THE VTDEOGRAPHER Off the record.

MR. BROWN: I just have to object to the form, but let him answer because your and/or impression, just the way it was posed, it sounds fancy.

Would you say it's a broken neck Just objecting to the way you phrased that question.

MR. FRANKEL: I understand, but I want to put it in lay terms.

MR. BROWN: I understand But I think the way you -- it's got some potential inflammatory language for a lay jury in lay language.

MR. FRANKEL: Okay. Okay.

THE VTDEOGRAPHER Back on the record at 3:46.

Q Doctor, you have indicated that as part of your physical examination you noted two incisions on Mr. Magloire's body.

Would you kindly show the jury where those incisions were located and their approximate size.

A On the physical examination, I had noted mere were two scars on Mr. Magloire neck, on the front of the neck, located in the position where I'm pointing on mine, is on the left-hand side, a transverse or horizontal incision, which measured eight centimeters, or approximately four inches.

There was a second healed scar directly in the back of the neck, where I'm pointing to, which measured 25 centimeters, or approximately 10 inches in length in the vertical direction.

Q You indicated that during your physical examination that Mr. Magloire's lateral rotation was

restricted to 45 degrees to the right and the left.

Could you explain the significance of this finding?

A The physical examination was performed, and range of motion was tested The lateral rotation, which represents the patient's ability to turn the head to the right or left direction, was measured at 45 degrees both to the right and left. Normal value is 70 to 80 degrees.

Q On your physical examination form you also indicate that Mr. Magloire had flexion of 30 and extension of 20.

What would the significance of that be?

A The range of motion in flexion where the head is bent forward, and extension, the head is brought backward, was measured. Mr. Magloire's flexion was 30 degrees. Normal is 60 to 80 degrees, approximately And the extension was measured at 20 degrees. Normal extension is 40 degrees.

Q Additionally, on your physical, and just so we have a clear record, I'm indicating, Doctor, what date do we have for the examination?

A June 6, 2002.

Q On that date, you found C5-T1 motor on the right side five over five What does that mean specifically?

A Neurological examination was performed. The strength of the upper extremities was performed. And on the right side his motor function of his entire arm was noted to be normal, otherwise stated as five over five.

Q And on die physical examination, you found the left shoulder abduction four over five.

What specifically does that mean?

A This is also a motor testing What was discovered was that on the left side his ability to bring his left arm upward and out in this position, otherwise elevating the left shoulder, there was weakness against resistance.

Q Additionally, you found decreased sensation in the left shoulder in the C5 dermatome.

Would you explain to the jury what that means?

A The sensory examination portion of the neurological examination was performed where a pin is gently placed over both arms and hands in order to determine the sensitivity.

It was noted that on the left shoulder area that there was decreased sensation compared to the right upper extremity.

Q. You also found that C5-6 and C6-7 reflexes were one-half bilaterally.

What does that mean?

A The reflexes of the upper extremities was tested with a reflex hammer. The two over two notes normal. It was noted on the two reflexes on both arms, they were at one over two, meaning that the neurologic reflexes were diminished.

Q Dr. Rafiy, did you take or examine any X rays of Mr Magloire?

A Yes.

Q Would you kindly discuss your findings. And I would just do it in chronological order.

A An X ray of the cervical spine was obtained on June 6, 2002, and it -- the films were read and interpreted by me. They demonstrated that there was a metallic radiopaque plate on me front of the neck in front of the C6 and C7 vertebral body, along with bone graft between the C6-7 level.

In addition, there were two radiopaque metallic plates in the back of the neck at the C6-7 level, along with a radiopaque spinous wire in the back of the neck

A note was of the bone that was placed was incompletely fused.

Q Doctor, did you take any other X rays of Mr. Magloire?

A. No.

Q Did you take any X rays of Mr. Magloire recently?

A. Yes.

Q When did you last take X rays of Mr. Magloire?

A. May 10, 2004.

Q I'll get back to the May 10, 2004, X rays a little bit later on.

Getting back, sir, to the June 2002 evaluation, you stated that the bone graft was not completely fused.

How did you make that determination? And kindly discuss the significance of that finding.

A If I may refer to the model of the cervical spine, this is a model, an anatomic model of the human neck. This is a side view of the neck, this being the bottom of the skull, this being the top of the neck, and this being the bottom of the neck.

I'm going to rotate the neck so we have a frontal view. The white squares here represent the vertebral bodies, which are the bones of the neck. There are a total of seven vertebral bodies. In between the bones are soft tissue, oval-shaped structures which are called the disks. This being the front part of the neck.

In the back of the neck are covered by bony landmarks, also seven of them. In the sides of this model here, this red structure represents the vertebral artery, which brings the blood to the brain. And these yellow structures coming out on both Sides represent the nerves that are coming out from the cervical spine.

And this structure, the yellow structure that I'm pointing at, is the spinal cord, which connects the brain with all the nerves to the arms and to the legs.

On the X ray evaluation -- this bone here is number 6, and this one is number 7. On Mr. Magloire's X-ray film it was noted that there was a plate in the front of here, in front of the cervical 6 and cervical 7. And in place of this disk a piece of bone graft was interplaced between the vertebral body of C6 and C7, which had not healed.

The radiograph still showed a black line which showed intrabony fusion. And I'm going to rotate the model to show the back. There were two additional plates, one plate in the back of the neck at C6 and C7 And another plate on the right side between C6 and C7.

In addition to that, there was a metallic wire -- I'm pointing now to the side view of the neck -- that was placed between the spinous processes of C6 and 7 and connected the two vertebrae together.

Q Thank you.

You also indicated in your June 6, 2002, report that there was an incomplete callus formation.

What do you mean by that?

A Incomplete callus formation, the purpose of the surgery was to realign the bones in the proper position, and fuse or, in other words, connect one spine vertebra to the next by the -- in the body's incorporation of bone.

As of June 6, 2002, there was an incomplete fusion or bony connection between the two vertebrae.

Q. I may be going over what you just stated, but I'm going to ask the questions anyway.

What are the final findings you made on June 6, 2002, that there was a posterior post lateral plate from C6-C7 with a bony fusion?

Can you explain to the jury what that means?

A. In other words, the posterior, which just means the back of the neck, had the two plates, one here, one here (indicating), along with a wire bone graft was also placed in the back of the neck, which had not completely consolidated. There was an incomplete bony union at the C6-7 level.

Q Dr. Rafiy, following the history and physical that you performed on Mr. Magloire, what were your professional impressions of his condition at that time?

A My impression was that he had sustained a C6-7 cervical fracture dislocation, and had undergone neck surgery, which included an anterior cervical fusion with instrumentation, and a posterior cervical fusion with instrumentation.

Q. Would you kindly tell the jury what your initial plan of treatment was on your evaluation?

A The patient's activities were restricted mainly in the area of the neck. He was to avoid lateral rotation.

In addition to avoiding lateral rotation, which is excessive turning of the neck to one side or the other, he was also started on a physical therapy program for strengthening of the upper extremities, and of the muscles around the cervical spine, with both isometric and aerobic conditioning.

In addition, an external bone stimulator was ordered to be placed on him at a future visit.

Q Was Mr. Magloire ever fitted for an external bone stimulator?

A Yes.

Q What specifically is the function of the external bone stimulator?

A The external bone stimulator is an electrical external device which is actually applied on the outside part of the skin of the neck. It generates a low-level electromagnetic field and electric current which is then brought to the area where the fusion and surgery was performed.

The purpose of die external electrical bone stimulator is to assist, ameliorate and improve the cervical fusion in order to obtain a solid fusion of the bone graft material.

Q What instructions did you give Mr. Magloire following the first visit?

A In summary, two recommendations were restriction of range of motion of his neck, physical therapy, reevaluation, and bone stimulator to be ordered.

Q And when did you next see Mr Magloire as a patient? And please tell the jury what occurred on that visit?

A. I next evaluated Mr. Magloire on June 10, 2002. I obtained a history and performed a physical examination.

Again, at that time, he was complaining of neck pain and upper shoulder weakness. The physical examination findings were similar to those of June 6, 2002. He was advised of the restricted range of motion He was placed and continued on the cervical collar, to continue with the physical therapy. No manipulation of the neck was permitted. And he was to be fitted for and measured for the external bone stimulator.

Q When did you next see Mr. Magloire after June 10th?

A July 2, 2002

Q What occurred during that visit, Doctor?

A On July 2, 2002, I obtained again the history, performed a physical examination, and obtained X rays of the neck.

Q And the next visit, Doctor?

A On July 2, 2002, he was fitted with an external cervical bone stimulator. He was trained and instructed on the application of the bone stimulator, on the incisions of the skin of the neck, and again reinstructed on continuing physical therapy.

Q When did you see Mr. Magloire after that?

A. The next day, July 3, 2002.

Q What occurred at that visit?

A. The patient was reinstructed on the application of the external bone stimulator, again, the exercises to perform for his strengthening, and also further workup was to be ordered for electrodiagnostic studies due to the neurological irregularities.

Q And the next visit?

A August 5, 2002.

Q What occurred on that visit, Doctor?

A On August 5, 2002, I obtained, again, history, physical examination performed, and upper diagnostic nerve testing performed.

Q What were the results of those?

A The nerve conduction study of the nerves, of the median nerve and ulnar nerve did not show any carpal tunnel or any nerve entrapment of the wrist.

Q What were your recommendations or treatment for the patient then?

A To continue the external bone stimulator, to assist with the cervical fusion, continue with the physical therapy and have follow-up X ray.

Q Where was Mr Magloire sent for physical therapy?

A He had undergone physical therapy at Long Island Spine and Orthopedic Surgery, at 807 W. Old Country Road in Hicksville.

Q What was the purpose of the physical therapy?

A. The physical therapy served several purposes The main purpose is to retrain the neck muscles after they have been deconditioned and atrophied. Therefore, to strengthen the neck muscles supporting the bones and spinal column.

Also, to strengthen the upper motor of the arms. And also to obtain range of motion within the neck.

Q Did you receive copies of the progress notes from his physical therapy?

A Yes.

Q And how was Mr. Magloire progressing in the physical therapy between the various visits?

A The progression was steady, but restricted and guarded.

Q After August 2002, when did you next see Mr. Magloire?

A According to my records, I think I saw Mr. Magloire on August 7th, August 7, 2002

Q Could you kindly tell the jury what Mr. Magloire's condition was on that date?

A His condition remained similar. He was complaining of neck pain, sensory changes in his left upper arm, and an X ray was obtained of the neck, which showed the plates on both the front and back of the neck were well aligned. And the bone graft was in good position.

There was some starting moderate calculus formation of the bone graft at that time. He was then, again, reinstructed to use of the bone stimulator to assist with the fusion I advised him to continue with the physical therapy program And I had gone over the electrodiagnostic studies, recommending the conservative treatment and physical therapy program

Q Thank you.

Doctor, after August 7, 2002, when was the next time that you saw Mr. Magloire for treatment?

A September 19, 2002.

Q And on September 19, 2002, what were your observations with respect to Mr. Magloire?

A. He was complaining of neck pain and low back pain.

Q And after September 19, 2002, when did you next see him?

A January 8, 2003.

Q And on January 8, 2003, would you kindly tell the jury what Mr. Magloire's condition was on that date?

A His condition remains static, similar to his previous evaluations. Again, complaining of neck pain and low back pain. He had well-healed scars on the neck, both front and back, along with

the restricted range of motion of the neck in all planes.

He was advised to continue with the physical therapy and stretching program, and continued anti-inflammatory medications.

Q After January 8, 2003, when did you next see Mr. Magloire?

A January 22, 2003.

THE VTDEOGRAPHER We are going off the record.

MR. BROWN: We didn't have authorizations.

Mil FRANKEL I can give you new authorizations or whatever you require.

MR. BROWN: Off the record.

(Discussion off the record)

MR. FRANKEL: Plaintiff's counsel is consenting to provide an updated authorization to obtain a copy of Dr. Rafiy's records.

If you remember, defense counsel is, at least Wilson Elser is going to get a copy of Dr. Rafiy's file which has been marked as an exhibit at today's deposition, to be used at trial

THE VIDEOGRAPHER: Back on the record. It's 4:11 p m. Mr. Frankel

Q. Dr. Rafiy, would you kindly state for the jury the next time that you saw Mr. Magloire?

A January 22, 2003.

Q Dr. Rafiy, on January 22, 2003, what were your observations with respect to how Mr. Magloire was progressing?

A He was progressing with the full course of physical therapy, along with the stretching and strengthening modalities with some improvement. He did not have any improvement with the neck pain, with the Naprosyn. He continued to complain of neck pain and low back pain.

The therapy was continued and recommended new trial of different anti-inflammatory analgesic medications were started.

Q. What specifically were those analgesic medicines?

A Relafen.

Q What is Relafen?

A Anti-inflammatory medication which helps to take away pain, inflammation, and improve range of motion.

Q On January 22, 2003, was Mr. Magloire expressing to you that he was in pain?

A. Yes, sir.

Q. Was he expressing that he was having restriction in his motion?

A Yes.

Q Was he expressing the third symptom that Relafen could help was an issue?

A. Yes.

Q. After January 22, 2003 --

MR. BROWN: Objection.

THE VTDEOGRAPHER Off the record at 4.13 p.m.

MR. BROWN. I don't know what you mean. For clarification, what's the "third symptom"? I need you to clarify it.

MR. FRANKEL: Okay. Fine. We'll go back on.

THE VTDEOGRAPHER Back on the record at 4:13 p.m.

Q Dr. Rafiy, what were the three symptoms that required you prescribing Relafen?

A For the pain, inflammation and to improve the range of motion.

Q And on January 22, 2003, did Mr. Magloire have any inflammation?

A The inflammation could not be determined, but on an examination finding the restriction in range of motion was worse at that period of examination.

Q. When, the January 8, '03, exam?

A. Worse than his January 8, '03, examination.

Q Thank you.

Subsequent to January 22, 2003, when did you next see Mr. Magloire?

A May 10, 2004.

Q Doctor, what is your prognosis currently for Mr. Magloire?

A The prognosis for Mr. Magloire is guarded.

MR. BROWN: Objection.

THE VIDEOGRAPHER: Going off the record 4:14.

MR. BROWN: He didn't answer for May. You said, you saw him in May, and I think you left it open.

MR. FRANKEL: The problem is that you said, "objection," on the tape, so now it needs editing.

THE VIDEOGRAPHER: We're not going to. We can't do that.

MR. FRANKEL: Well, it's obvious we can't back it up now. We'll notify you when we are.

Just state what your objection is for her, then I'll respond to it.

MR. BROWN: I think there was a question pending. You said, what was done on May 10th. Then you went to his prognosis.

MR. FRANKEL: I'm going to get to the May 10th exam, so if you have an objection to the question, I'll rephrase it.

MR. BROWN: I do.

THE VIDEOGRAPHER: Back on the record. Continuing the deposition, it's 4:16 p.m

Q Dr. Rafiy, based upon your May 10, 2004, examination of Mr. Magloire, would you kindly tell the jury what your prognosis is for Mr. Magloire?

A The current prognosis, May 10, 2004, in reference to his cervical spine, is guarded.

Q Did you memorialize your findings from the May 10, 2004, examination?

A Yes.

MR. FRANKEL: I'm going to mark as an exhibit Dr. Rafiy's May 10, 2004, report as Plaintiff's Exhibit 3 for identification.

THE VIDEOGRAPHER: Off the record at 4:17.

(Plaintiff's Exhibit 3, 5/10/04 report, marked for identification.)

THE VIDEOGRAPHER: We are back on the record, continuing the deposition of Dr. Rafiy. It's 4:21 p.m.

Mr. Frankel, please continue.

Q Thank you.

Dr. Rafiy, on May 10, 2004, you observed Mr. Magloire once again; correct?

A Yes.

Q And would you kindly tell the jury what occurred during that visit?

A I performed a physical examination, history, obtained his current complaints, and obtained an up-to-date cervical spine X ray.

Q Okay. Would you kindly tell the jury, looking at Plaintiff's Exhibit 3 --

A Yes.

Q -- starting at the physical examination portion of the report, would you kindly tell the jury what your observations were?

A On physical examination of Mr. Magloire, the neck exam was performed, and visual inspection demonstrated there was a well-healed scar in front of the neck, and a well-healed scar in the back of the neck, each measuring four inches and 10 inches, respectively.

Range of motion was performed of the neck Again, there was noted restricted range of motion in the cervical spine in all planes. Lateral rotation was restricted to 45 degrees to the right and left.

Flexion restricted at 30 degrees. Extension 20 degrees lateral. Bending restricted 30 degrees to the right and left.

The neurological was performed on the right upper extremity. It was noted to be normal. The left arm demonstrated four over plus five motor in his shoulder abduction, in his ability to elevate his left shoulder. There was also noted decreased sensation in the left shoulder skin patch.

The reflexes were diminished bilaterally at one over two

Q Dr Rafiy, how do your May 10th observations differ, if at all, from the June 6, 2002, initial observations, or are they the same?

A The clinical findings and physical exam findings are similar, if not almost the same.

Q Now, Doctor, you indicated that you took X rays on May 10, 2004; correct?

A Yes.

Q How many X rays did you take?

A One series of cervical X ray films were obtained.

Q Could you explain to the jury what the word "series" means?

A Two separate views of the neck was obtained, a front view and a side view of the cervical spine were taken.

MR. FRANKEL: And I'm going to want to mark as Plaintiff's Exhibits 4 and the two X rays for identification.

THE VIDEOGRAPHER: Going off the record. It's 4:24 p.m.

(Plaintiff's Exhibits 4 and 5, X rays, marked for identification.)

THE VIDEOGRAPHER: Back on the record. It's 4:27.

MR. FRANKEL: These exhibits, Plaintiff's Exhibits 4 and 5, are going to be introduced at the trial of this matter.

MR. BROWN Counsel for the Defendants would just state at this time, it is agreed they are marked for identification purposes today.

They can take issues of if they are introduced at the time of trial, subject to disclosure rules between counsel at the time of trial.

MR. FRANKEL: That's fair, but they are going to be introduced at trial.

MR. BROWN: And at this point, we take it that they are ID'd.

MR. FRANKEL: Correct.

Q. So we have a clear record, Plaintiff's Exhibits 4 and 5 are, again, a series of cervical spine X rays of Mr. Magloire conducted on May 10, 2004; correct?

A Yes.

Q And Dr. Rafiy, would you kindly explain to the jury what Plaintiff's Exhibit 4 is.

MR. BROWN: If I can, just before we begin, if you could just give us what you would call what Exhibits 4 and 5, the views are?

MR. FRANKEL: I think he was going to explain what that is.

Q But, Doctor, can you explain for the jury what Plaintiff's Exhibit 4 is, specifically?

A Plaintiff's Exhibit 4, which is marked "Guy Magloire, May 10, 2004," is a radiograph or otherwise known as an X ray. This is a side view, otherwise known as a lateral view, of the cervical spine.

Prior to my showing of this Exhibit 4, I'm going to go back to the exhibit model, the model of the neck. In the way this radiograph X ray was taken, it was taken from the side, so we are looking at the bony structures of the neck starting from the top of the head to the bottom of the neck.

And looking at it from a side view, the X ray, starting from the top here, represents the skull. This is the upper cervical vertebra represented in white. They appear as white boxes. In between the white boxes are black spaces. Those are the cervical disks. In between the vertebral bodies located here, here, here (indicating) I'm going to show you a normal level.

If you look at this level at C3-C4, you see a vertebral body which is rectangular or square in shape, with a black space representing a normal hydrated disk. As I get down to the level of C6 and C7, from the side view one can see that there is the vertebral body marked above and one below, there is a very radiopaque, otherwise showing up as a very bright white image.

From the side, this represents a metallic plate on the front of the neck. And there are a series of screws which are placed into the cervical bone, five, and another set -- I'm sorry, into the number 6 body and into the number 7 vertebra] body.

The screws, a set of four screws, are attached to the plate in the front of the neck. In addition now to these constructed in the back of the neck, there are another series of two screws placed and another two screws placed in the C6-C7 set joints which are, basically, the bony structures in the back of the neck Attached to another series of two plates. These are metallic plates, two that are placed with a set of four screws in the back of the neck.

In addition, you will see this small loop that's appearing in white. This is an additional metallic wire which is placed between the back of the bone of C6 connected to C7.

Lastly, I would like to make a comparison. You could see the space here as black, but between here it's white. The reason that it's white, there was a piece of bone graft placed between this bone and this bone (indicating) to fuse this cervical vertebra together. This is the bone graft, what was placed and incorporated into the neck.

Q Are you aware where that bone graft came from?

A The bone graft is a piece of iliac crest pelvic bone graft.

Q And how do they obtain the pelvic bone graft?

A I would have to review the record, if I may, to obtain that information.

Q Without reviewing the record, in general, how do you obtain a piece of bone from the pelvis?

A. The bone graft is obtained by making a separate incision in the area of the pelvis, in order to harvest a piece of bone graft The other way is by obtaining the bone graft from the bone bank.

Q And, Doctor, referring to Plaintiff's Exhibit 5, would you kindly explain to the jury what that is?

A Exhibit 5 is labeled "Guy Magloire, date of service, May 10th."

THE VIDEOGRAPHER: Going off the record.

(Discussion off the record.)

A May 10, 2004, again, I'm going to refer to the neck model. These X rays are obtained by

taking a view from the front to the back So in contrast to this radiograph, this is looking at the neck from the front view.

Looking at it from the front view, this is the skull, this is the bottom of the neck, these are the ribs coming off of the upper torso. We can see the bony structures which appear white. And again, we see these white metallic objects This H-shaped object with four points in it represents the plate that was placed in the front of the neck with four attached screws in between here.

This is a piece of bone graft, The other view shows two additional round objects which represent two screws, along with the plates on the left side and on the right side.

Q Thank you, Doctor.

Doctor, from looking at Plaintiff's Exhibits 4 and 5, can you make a determination as to whether or not there is any sort of degenerative condition that has - is there any sort of degenerative condition since the initial set of X rays were taken by your office in June of 2002?

A Going back to Exhibit Number 4, on the lateral or side view of the neck, one can observe that the space between the disk at the C5-C6 level is starting to diminish in height, resulting the degenerative changes into -- in the level, the area where the surgery was performed.

Q Can you explain what that means, the degenerative changes, and the impact on Mr Magloire's life?

A The degenerative changes are a process which are being accelerated by a place where there has been a fusion, causing acceleration of the degenerative changes. It is a progressive deteriorative process which appears over the extent of a lifetime.

Q Can you also determine whether or not there is any arthritic condition from looking at the X rays?

A There is slight arthritic condition up at the C3 level, with an osteophyte.

Q Is mat arthritic condition related to the January 25, 2002, motor vehicle accident, in your opinion?

A Anyplace, no. Not at the C3 level.

Q Okay.

THE VIDEOGRAPHER: Going off the record, it's 4:38 p.m.

(Discussion off the record)

THE VIDEOGRAPHER: Back on the record. Continuing the deposition of Dr Rafiy. It is now 4:52 p.m.

Mr. Frankel, please continue.

Q Thank you.

Dr Rafiy, when you examined Mr. Magloire on May 10, 2004, you conducted a physical examination; correct?

A Yes.

Q Would you kindly tell the jury the condition of Mr Magloire's bone graft on May 10, 2004?

A There was evidence of callus infusion at the C6-7 level

Q Could you again kindly explain to the jury what that means?

A At that point, the two vertebral bones of the neck at C6 and C7 were connected and fused together.

Q What impact, if any, does that have on Mr Magloire?

A The impact is that there is the two vertebral segments which normally bend and extend on each other, and rotate from side to side, are now unified as one unit Therefore, there is no associated motion between those two segments of bone.

Q At this time, do you recommend any surgery for Mr. Magloire?

A At the present time, no surgical procedure is currently recommended.

Q What, if any, surgical procedure could be recommended in the future, and when would it be recommended?

A The potential for a future cervical surgery includes the subsequent removal of the hardware, and the associated degenerative changes that develop at the level requiring subsequent treatment.

Q Could you explain to the jury whether or not Mr. Magloire suffers any pain or discomfort as a result of those degenerative changes?

A Yes. As a result of the resulting cervical fusion and degenerative changes, the patient will experience neck pain and restricted range of motion.

Q And over time, Dr. Rafiy, will that condition continue progressively to get worse?

A. That condition is a degenerative and deteriorative process which worsens over an extended period of time.

Q Dr Rafiy, what treatment do you recommend for Mr. Magloire in the future?

A. The treatment recommendations in the future include continued strengthening exercises for the upper extremities, chiropractor treatments and adjustments, continued use of anti-inflammatory medications, and analgesic medicines, and periodic follow-up with his treating orthopedic surgeon.

Q. Dr. Rafiy, would you also recommend X rays and MRIS in the future?

A The follow-up studies include with the treating physician diagnostic X rays and MRIS.

Q Would you recommend physical therapy for Mr Magloire on any specific basis?

A The recommendation is for physical therapy at two to three times per week.

Q. And, Doctor, what would be the approximate cost for each physical therapy visit?

A Physical therapy visits on average is \$75 per visit.

Q And as far as an orthopedic surgeon, approximately how often should Mr. Magloire consult your type of specialty in the future?

A In the future, once every three to four months.

Q. What's the approximate cost for that examination?

A Examination, a visit, a hundred and fifty dollars.

Q Not including any diagnostic tests; correct?

A Correct.

Q That would include X rays?

A Correct.

Q And what's the approximate cost of a series of X rays?

A Approximately \$90.

Q And for the MRI of the cervical spine?

A \$900.

Q How often would you recommend chiropractic care in the future?

A Chiropractic care recommended at approximately two times per week.

Q What's the approximate cost for each chiropractic visit, approximately?

A Approximately \$50 for evaluation.

Q Doctor, at this time do you have any opinion as to whether the scarring on Mr. Magloire's body from the surgical intervention in January 2002 is permanent or not?

A Yes.

Q Is Mr. Magloire's scarring permanent?

A. Yes, it is.

Q Do you have any opinion with regard to whether Mr. Magloire will suffer pain and discomfort in the future?

A. Yes.

Q What is your opinion, sir, and explain why?

A My opinion is that Mr. Magloire will continue to experience neck pain, which will be exacerbated and aggravated depending on the activity level, represented by the amount of activity, lifting, pulling that is performed.

It will also -- the neck pain will be aggravated and worsen depending on the changes in the temperature. If it's a cold damp day, with changes in the barometric pressure, the neck pain will be worsened and aggravated. Also affected by the amount of pain medication that is utilized or

not utilized during that time.

Q In your professional opinion, will Mr Magloire have to restrict his activities in the future as a result of his injuries?

A Yes.

Q For example, would you recommend Mr Magloire play football?

A No.

Q Would you recommend Mr. Magloire play soccer?

A No.

Q What restrictions would you have for Mr Magloire in general?

A. The current restrictions for Mr. Magloire include his ability to push, pull, lift or carry over 40 pounds, 30 to 40 pounds.

He is restricted in the type of sporting activities, including any type of contact or sports that require excessive rotation of the cervical spine would be restricted.

Q In your professional opinion, Dr. Rafiy, within a reasonable degree of medical certainty, will Mr. Magloire continue to suffer pain and discomfort for the balance of his life expectancy?

A Yes.

Q And specifically, will Mr Magloire suffer permanent pain and suffering in his neck?

A Yes.

Q Will he suffer pain and suffering in any other parts of his body due to the injuries he sustained in his cervical spine?

A Yes.

Q What other parts of his body would be affected by him sustaining the cervical spine injury?

A He has sustained motor and sensory abnormality in the left upper arm.

Q. In your professional opinion, Doctor, with a reasonable degree of medical certainty, does Mr.

Magloire have a permanent impairment you can rate as a percentage according to the American Medical Association guidelines on permanent impairment?

A. Yes.

Q What percentage of permanent impairment can you attribute to Mr. Magloire?

A. The percentage of permanent impairment for Mr. Magloire would be 60 percent.

Q And. Doctor, why 60 percent? Can you explain to the jury?

THE VIDEOGRAPHER: Going off the record It's 5:01 p.m.

MR. BROWN: I want a noted objection to that based upon the 26 F disclosure. At this time, there's been no associated rating. We can fight about it later, whether you supplement it or not. If this was at trial, I would not allow it.

But, we are not at trial, and on the line of questions of his permanency, that I will object to at this tune. If it's resolved in the future, so be it.

MR. FRANKEL: Obviously, we respectfully disagree with your objection. We are taking Dr. Rafiy's deposition. He saw Mr. Magloire on May 10, 2004, and I'm asking him based upon his May 10, 2004, evaluation as a treating physician, whether or not he has an impairment rating that he arrived at. And he is saying he has.

Your objection is noted, but there is absolutely no prejudice. You are entitled to have your doctor opine. Obviously, I mean, your doctor may have opined. I don't have the records in front of me.

Your objection is noted for the record.

MR. BROWN: As to Saying that's related to his visit of May 10, 2004, I don't know what the question was specific to that. Second, it seems rudimentary that we sit here only two days from that visit.

But, what would occur between this and the time of trial and adding discovery to the claimant, I have to preserve the objection. And your continued duty to disclose to the Defendants the permanent injury.

THE VTDEOGRAPHER We are back on the record. Continuing the deposition. It's 5:03 p.m.

Q Once again, Dr. Rafiy, would you kindly explain to the jury what your 60 percent impairment

is based on. And just so we have a clear record, is the 60 percent based upon your evaluation of Mr. Magloire on May 10, 2004?

A Yes.

Q Could you kindly explain what the percent rating is based on?

A The 60 percent rating is based on several factors. One is the evaluation of the physical exam findings on the range of motion in multiple planes, both on flexion, extension, rotation, lateral bending.

Also based on the neurologic examination that is present on both a motor sensory finding and reflex finding. Along with radiographic evaluations.

Q. Thank you. Doctor, now turning to your May 10, 2004, report, you indicated that Mr. Magloire has sustained a permanent and partial orthopedic disability secondary to the spinal cord injury, with weakness in the upper left extremity.

Can you explain to the jury what that means?

A In essence, the injury that had occurred to the cervical spine, resulting in the fracture and dislocation where the bone was broken and separated, there was a resulting injury to the nerves at the level of the lower neck at the C6-7 level, which injured the left-sided nerve root between C6-7, resulting in motor, meaning the strength, and also sensation, neurologic abnormalities in the left upper extremity. These injuries are permanent, and as a result, partial orthopedic disability has occurred.

Q Thank you, Doctor

Doctor, additionally, on the May 10, 2004, examination you stated that Mr. Magloire had sustained a C6-7 subluxation with tearing of the interspinous ligaments at C6-7 with cord deformation.

Could you kindly tell the jurors what that means?

A Again, a C6-7 subluxation represents that the neck has actually shifted in its normal anatomic alignment. The C6 vertebra subluxed, meaning it has shifted forward at the time of the accident, and tore the interspinous ligaments. Those are the soft inter structures connecting bone to bone.

The cord deformation represents the spinal cord which was deformed on the imaging studies at the time of the accident.

Q Thank you, Doctor.

Additionally, you stated in your May 10, 2004, evaluation that Mr. Magloire experiences weakness, paresthesias in the left upper extremity. He has sustained permanent paresthesias in the left upper arm.

Would you explain to the jurors specifically what that means?

A That represents there is numbness in the left upper arm area, as based on the sensory examination.

Q. And you also stated that Mr. Magloire had difficulty with daily living, with cleaning, and operating a motor vehicle. You are stating he has difficulty with them?

A Correct.

Q Additionally, you stated in your May 10, 2004, report that the patient, Mr. Magloire, sustained significant cervical instability due to the three-column injury to the cervical spine.

What is a three-column injury?

A Again looking at the model, the front of the neck, the middle of the neck and the back of the neck represent the three bony columns of the spine.

In order for there to be a subluxation or shifting of the neck forward, the actual columns, the three columns have to have been disrupted for there to have been a shift or subluxation.

Q Thank you.

You also stated in your May 10, 2004, report that Mr. Magloire is a candidate for steroid injections due to the degenerative disk changes.

Can you explain what that means?

A. The cervical degenerative changes are the degenerative processes that occur to the soft tissues. The treatment for that would include the steroid injections which reduce inflammation and pain.

Q Thank you.

Dr. Rafiy, are these injuries that Mr Magloire sustained to the cervical spine permanent?

A Yes.

Q Are they the direct result of the motor vehicle accident of January 25, 2002?

A Yes.

Q Dr. Rafiy., do you have a copy with you today of the bill for services rendered that you have submitted to the patient?

A Yes.

Q In your opinion, are these charges normal and customary in this area in accordance with your specialty in orthopedic surgery?

A Yes, they are.

MR. FRANKEL: I'm going to want to mark as an exhibit, the statement of services as Plaintiff's Exhibit 6 for identification, reflecting a total due \$8,994.35, broken down as \$6,889 medical services, \$2,104.84 for physical therapy.

THE VTDEOGRAPHER Going off the record It's 5:10 p.m.

(Plaintiff's Exhibit 6, Statement of services, marked for identification.)

THE VTDEOGRAPHER We are back on the record, continuing the deposition.

It's 5:14 p.m.

Q Dr Rafiy, the outstanding medical bills have been marked as Plaintiff's Exhibit for identification I just merely want to confirm for the record that the numbers that were stated previously are the accurate amounts that are currently outstanding?

A Correct.

Q Thank you.

Just going back to two brief issues, are the range of motion restrictions that you have discussed during your testimony today permanent?

A Yes.

Q And finally, what is an impairment rating? You indicated to the jurors before that Mr.

Magloire was 60 percent impaired What does that mean?

A Impairment rating represents the amount of disability compared to a normal individual of that age group, without the concomitant injury and comparative examination determining the amount of functional loss as a result of a subsequent injury.

Q So, is it fair to state, within a reasonable degree of medical certainty, that Mr. Magloire can do only 40 percent of what a person his age can do that does not have his injury?

A. Yes, approximately.

THE VTDEOGRAPHER: Going off the record. It's 5 16 p.m.

Going off the record. This is the end of Tape No. 1, deposition of Dr. Rafiy.

(Brief recess taken.)

MR. KARSMAN: The Plaintiff noticed the deposition for trial purposes, and I'm sorry he doesn't have the X rays. But, if the Defendant wanted them they should have subpoenaed them before the deposition.

MR. FRANKEL: All other records are here other than June 2002 X rays, and if your June 2000 records are here just in storage, why don't we put all this on the record so it's on the record.

If there is some kind of - I don't know what else to say. Your objection is noted for the record.

MR. BROWN: But here nor there. The question is, he took X rays on Monday by comparison. It wasn't noticed, of your Plaintiff's, to be used at trial, if necessary. And even though the doctor has testified the whole file is here, a subpoena wasn't put out.

So, if we can move the court date forward, maybe we can do that.

MR. KARSMAN: Well, whatever references he has available he can discuss the prior X rays and the present X rays, he can do that. But, for purposes of what this video is going to be used, I want them up in the shadow box to have the comparison of, like the Plaintiff had the comparison of those two dates, are wanted by defense.

I don't know. I don't want to subpoena them, but if that's the case, we'll do it all over again.

MR. KARSMAN: I can't help you because I'm not there, Steve.

MR. FRANKEL: Why don't you ask all the questions that you have for the exception of the

June 2002 X-ray exams.

MR. BROWN: I'll conduct it how I want to. Let me go off the record about this.

(Discussion off the record)

THE VTDEOGRAPHER: We are back on the record, continuing the deposition of Dr. Rafiy. Our deposition will be continued by Mr. Brown of Wilson Elser.

EXAMINATION BY

MR. BROWN:

Q Doctor, I'm going to ask you some questions regarding your CV and work that way, and then get into the treatment of Mr. Magloire.

A Yes.

Q You're a treating physician of Mr. Magloire; correct, Doctor?

A Correct.

Q Have you been retained, however, in other cases as an expert, in medical cases?

A Yes.

Q Were they personal injury, medical malpractice, something else?

A For patients that I was treating in injury cases.

Q Have you ever testified as an outside expert, were you retained strictly for a plaintiff or defendant only to review the file and testify for purposes of trial?

A. On occasion.

Q How many is "on occasion" in a calendar year, would you say?

THE VTDEOGRAPHER Going off the record It's 5:43 p.m

MR. FRANKEL: I would just like to object to this whole line of questioning. It's palpably improper. He has been determined an expert in the field. But he has indicated that he has testified previously.

To what end are we going here again? It just seems irrelevant, palpably improper.

MR. KARSMAN: It's not also discussing the number of patients which a physician sees. I have had one of the top neurologists tell me he derived over \$600,000 of income in only testifying as an expert. And it may be an issue of whether you are only an expert as opposed to a practicing physician.

MR. FRANKEL: Okay. My objection stands This entire line is scandalous.

THE VTDEOGRAPHER Back on the record at 5:44 p.m.

Q How about outside where you have been retained for the purposes of litigation?

A On occasion.

Q And I believe on a calendar year you were trying to figure that out?

A. Three times, approximately, per calendar year

Q When you testified in 2003, those testimonies were for plaintiffs, defendants, something else?

A. For the plaintiff

Q And we have gotten through your fees for today. Is it fair to say that your fees are somewhere consistent with that when you testify as an expert?

A. Correct.

Q Doctor, the board certification, I have one question. Does that require renewal, if you will, for lack of a better word?

A Correct.

Q And when is the renewal for your certification?

A 2006

Q And what is required of you to apply for that renewal? Is it a certain number of surgeries you have to do, or publications?

A The requirement for board recertification is attendance of continued medical education of

approximately 150 credit hours two years prior to the recertification exam.

There is also a recertification examination which must be successfully completed.

Q And of the 150 hours, do you have those completed of the academic area. I don't know what you called it?

A They are continuing medical education units that - they are requirements by the year 2006, 150 credit hours must be completed.

Q And so what's the time period of the certification that's valid?

A It's a 10-year certification.

Q So in those 10 years, you have to do 150 hours of academic credits?

A No. It's within an approximately three-year period, completion of 150 credit hours.

Q Prior to the recertification?

A. Correct.

Q How many do you have of those? You are currently in that three-year window; correct?

A Yes.

Q How many of those do you have now?

A I would have approximately 60 percent of them.

Q Doctor, you have what's in front of you. what you have told us is the medical chart for Guy Magloire?

A. Correct.

Q And there's been some discussion that is your complete note chart. Is that the complete chart as it pertains to the radiological films?

A No.

Q Which films are not present with regard to that chart?

A The radiographic X rays of June 6, 2002.

THE VIDEOPHOTOGRAPHER Off the record. It's 5:48 p.m.

MR. BROWN. Now, Stan, do you want to take an opportunity to put a two-line statement with regards to that, or would you prefer it be to put an end to it? I'm open for suggestions.

MR. KARSMAN: Well, you established he doesn't have the X rays with him. I would want to, if we can get into it, I would just want to ask him if the presence or the lack of those X rays in any way affects or changes his testimony here today.

But, Steve can do that on redirect, I guess, if he has to.

MR. BROWN: Let me get this straight. I'm not calling into question his opinion of the treatment or course, I'm not getting into that. I wanted to establish prognosis through those with your client, and I'm not going to be able to do that, so I'm not looking to take the credibility on his treatment of your client.

I just want some issues to define the scope of the damage.

MR. KARSMAN: I was thinking maybe we can stipulate that. Why don't we agree on a stipulation on the transcript that through no fault of the doctors or the lawyers, those X rays are not available at this time. And that Dr. Rafiy will agree to make those X rays available.

And I guess, if you want, to provide you with a copy of them. And should you elect at a future date to redetermine him on those X rays, that we would stipulate and agree that you have a right to do that.

MR. BROWN: We could state that they will be made available for review and questioning and discussions with the doctor and issues relative to the Plaintiff and the claims in this case.

MR. KARSMAN: Right. I would add to that that you will have to make the arrangements and be financially responsible for any additional deposition of Dr. Rafiy.

MR. BROWN: So noted. Okay. Now, that's all been on the written record. We'll go back on to the videotape.

MR. FRANKEL: Could we just go off the record for a second.

(Discussion off the record.)

THE VIDEOPHOTOGRAPHER: Back on the record. It's 5:52.

Mr. Brown, please continue.

Q Doctor, so other than our June 2002 X rays, that's the complete file in front of you that you have maintained in your course of business of Plaintiff, Guy Magloire?

A There are X rays on July 2, 2002.

Q That are also not with you today?

A Correct.

MR. BROWN And as to the stipulation prior, I would just reiterate here it applies to the June 2002 X rays.

MR. KARSMAN: That's agreeable.

MR. BROWN: And the file associated with that.

MR. KARSMAN: Okay.

Q Doctor, in any patient, not so much Mr. Magloire, in any patient that you see, what's the common practice of your initial visit with respect to what you do in obtaining the history, and just what would be an initial visit, if you could go through that?

A On initial evaluation of a patient I would obtain past medical history, past surgical history, any prior injuries to the affected part, the medications, allergies, the work status of the individual.

I would perform a physical examination and review any prior medical records, and obtain any diagnostic studies.

Q In your review, if you want to look to refresh your recollection of the initial visit with Guy Magloire, what, if any, significance is noted in the past history of Mr. Magloire?

A There was no past medical history.

Q Of significance?

A Of significance.

Q And he presents, I think, what were his chief complaints on that visit?

A Neck pain and weakness in the left shoulder with numbness.

Q And he doesn't mention to you in history that he had at one point a dislocated shoulder in his -- during his work life, but before this accident happened or related to this accident?

A I don't believe so.

Q In your course of the treatment of Mr. Magloire, would it be --

MR. FRANKEL: Excuse me.

THE VIDEOGRAPHER: Going off the record. It's 5:54 p.m

MR. FRANKEL: I object to the characterization of the prior left shoulder injury.

MR. BROWN: I didn't say "left shoulder." I just said that he had a prior shoulder injury. I didn't note left or right.

MR. FRANKEL: I'm objecting to the characterization that that's what it was, because you are saying that's the injury that he sustained, and I object to that characterization.

I respectfully request that you ask --

MR. BROWN: The problem would be that in this situation this would be on his direct testimony, because it came out in his deposition. It's known, and the significance is for the one information which is related which is -- you know what, just leave it on.

MR. FRANKEL: If we have his EBT transcript and it's noted left shoulder dislocation --

MR. BROWN I didn't say left shoulder

MR. FRANKEL: But, if that's what it is, that's what it is. I'm just objecting, because I don't know if that's accurate, and it was a shoulder dislocation as opposed to a shoulder sprain or shoulder something else.

He said his shoulder was dislocated. That's my question.

MR. BROWN: Yeah. But, I mean, to bring the whole file is utterly absurd. And if the limitation is going to be so limited it's going to be problematic, I'll ask a couple different questions.

MR. FRANKEL: I mean, if you asked, did Mr. Magloire mention that he broke his neck ever.

MR. BROWN: Yes. But talk about lightning striking twice. Okay. Okay. Let's go back on the record.

THE VIDEOGRAPHER: Back on the record Continuing the deposition, it's 5.56 p m.

Q We discussed the chief complaints that Mr. Magloire presented with. In his case, if on the initial visit, if there had been a prior left or right or anything shoulder injury to Mr. Magloire, would that be past history that may or may not be significant for you to want to know about in beginning to treat with this patient?

A Yes, it may.

Q And your record doesn't reflect that he discussed that with you?

A Correct.

Q Do you take any other past history? Do you ask about diabetes, obesity, any other issues like that when you intake?

A. Yes.

Q What was -- from review and refreshing your recollection with your file, what does your file say as to any of those issues of some past history of diabetes or obesity of Mr. Magloire?

A In terms of past medical history, there were no prior medical issues or any prior injuries to the neck.

Q You also said something that was interesting The referral of Mr. Magloire was by his wife?

A I believe so, but I'm not a hundred percent sure.

Q Your record wouldn't reflect how he was referred here?

A The record does have a note for "referred by," but it was not completed.

Q Do you think that it was possible -- do you know his wife, or is there some reason why that sticks out in your mind?

A I believe I had treated the wife in the past, or had some contact.

Q And after the initial visit, in fact, at any time of your treatment of Mr. Magloire, have you

reviewed the records that were generated by Dr. McAllister during the January 2002 accident?

A Yes.

Q And you have a complete copy of these in your file?

A I have records reflecting the treatment from Dr McAllister.

Q Do you have any radiologic films from Dr McAllister that were taken on the night of the accident?

A No, I do not.

Q And we discussed a number of numbers regarding range of motion, and I would like to just go through them a little bit more, and probably referring to the most recent visit to you, Doctor, of May 11, 2000, or 10th?

A Yes, 10th.

Q Let's start with the lateral rotation. That restriction at his initial intake was what?

A Lateral rotation was 45 degrees to the right and left.

Q And has that changed at this time?

A No.

Q How about the extension?

A Extension was 20 degrees, which is the same.

Q And the lateral rotation we covered, correct, lateral bending?

A Was 30 degrees to the right and left.

Q And did you, in the recent visit of the Plaintiff, test the left arm for the weaknesses or restrictions?

A. Yes.

Q. What, if anything, were the changes from the visit in 2002 to 2004?

A They were similar.

Q Actually, the visit of May 10, 2004, how is it that Mr. Magloire came to see you at that visit?

A. He was brought back to the office for evaluation. And I generated a narrative report to Mr. Frankel

Q And that was -- so the visit was for the purposes of this litigation?

MR. FRANKEL: Wait.

THE VTDEOGRAPHER Going off the record. It's now 6.03 p.m.

MR. FRANKEL: I object to that question. I object to any reference to litigation. I object to the characterization, and respectfully request that you rephrase that scandalous inflammatory remark in the administration of justice.

THE VTDEOGRAPHER Back on the record at 6:03 p.m.

Q I'll withdraw that question that was just asked.

Prior to May 10, 2004, when was the last time you saw Mr. Magloire?

A January 22, 2003

Q So, you hadn't seen Mr. Magloire in some 14 months?

A Correct.

Q And when he presented on May 10, 2004, was it for any chief complaints, or is there any reason he came in, saying he had difficulties or some medical problem to you?

A He stated that he was complaining of neck pain, weakness in his left shoulder, and numbness.

Q Upon your review of your file, how, if any, is that complaint different than June '02, July '02 and even January '03, basically, his chief complaints as he commented to you for his treatment?

A The complaints were the same.

Q Doctor, does your record note when, if at all, Mr. Magloire was to return to see you after his last visit 14 months prior to May 10, 2004?

A No, I don't know.

Q Would the chart note if you had a scheduled appointment that was missed, or would it be reflected somewhere in your notes?

A I have a note January 22, 2003, but it does not reflect the follow-up visit.

Q Does it reflect that maybe at this time he was discharged from care, and to see on an as-needed basis?

A He was still continued on physical therapy at that time, but I did not discontinue him from treatment.

Q. And in the case such as Mr. Magloire, after your initial visit with him, is there any sort of frequency that's associated with the visits that you would schedule with this type of patient?

A. During the acute phase of the injury, the visits are more frequent. As the injuries are more chronic and stabilized, the office visits are subsequently sequentially followed on a larger, longer period of time

Q And on the June 6, 2002, if you could just restate for me, say what your findings were on that visit?

A. On my physical?

Q After you physically examined him.

A My physical findings, I had noted on the neck that there was a scar, well-healed scar on the front of the neck, measuring 4 inches. There was a well-healed scar on the back of the neck, measuring approximately 10 inches.

The range of motion was restricted in lateral rotation 45 degrees. There was flexion 30 degrees, extension 20 degrees. The arm strength on the right side was normal The left side showed a four plus over five weakness of his ability to bring his left arm up.

There was some decreased sensation in the left shoulder area. The reflexes were diminished. The other provocative tests were normal

Q Is that a notation in that record at this time we are finding an incomplete callus formation?

A Correct.

Q There is a notation or no?

A The notation is an incomplete callus formation.

Q With regard to the callus formation that you told us earlier would be around the bone that was placed in between the disks?

A This is a radiographic -- a finding where the bone graft is inserted between the two vertebral bodies, and one would see a callus formation seen on the radiographs And at that time there was an incomplete bone callus formation.

Q Was there a radiograph completed on the May 10, 2004, visit?

A Yes.

Q And what was the result, if any, of a callus formation at that time?

A There was callus formation at that time.

Q Would your records note in between the June 6, 2002, and the May 10, 2004, when that occurred?

A. It occurred between August 7, 2002, and May 10,2004.

Q August 7th to May 2004, did you take any X rays of the Plaintiff?

A. No.

Q How about any MRIs of the Plaintiff in that time period?

A No.

Q Actually, in the course of your treatment of Mr. Magloire, have you ever ordered an MRI of the Plaintiff?

A No, I have not.

Q You did tell us, when Plaintiff's counsel was asking you questions, there might be a need for future MRIs.

Why would it be in the future and not in the past treatment?

A. MRIs require further deterioration, worsening neck pain, further degenerative changes on the spine noted on a plain film, progressive sensory or motor abnormalities, or incomplete fusion of a cervical procedure, or any changes on a radiograph.

Q I think on direct testimony you discussed some of those issues were present in Mr Magloire?

A Some of the findings I discussed are present, correct.

Q And those findings might be better determined or shown through an MRI Would that be fair to say?

A Again, the indications for an MRI, as I mentioned, if there was progressive deterioration of a neurologic examination, if there were clinical findings of worsening neck pain, or further changes in the plate alignment.

Q Well, you did tell us that there was -- you did say there were some degenerative changes in May 2004?

A Correct.

Q And I do think you did discuss some plate changes; is that correct?

A No.

Q The plates stayed the same?

A Correct.

Q What about the alignment?

A The same.

Q It's stable, as well?

A Yes.

MR. FRANKEL: Off the record.

THE VIDEOGRAPHER: Going off the record. It's now 6.12 p.m.

MR. FRANKEL: I just object to the characterization of his testimony. said it stays the same in June '02, but he says there's subluxation There is not normal anatomical alignment.

MR. BROWN: Off the record.

(Discussion off the record)

THE VTDEOGRAPHER We are back the record, continuing the deposition at 6:13 p.m.

Mr. Brown.

Q. Doctor, after the May 10, 2004, visit, did you recommend an MRI of Mr Magloire?

A No.

Q Have you had any discussions with Mr Magloire about having an MRI taken?

A The possibility of ordering one was discussed.

Q When was that, if you recall?

A During his early treatment period.

Q But to date, there has not been an MRI completed?

A Correct.

Q Doctor, we haven't discussed too much in detail, but if you are able to, we don't have the films here, I would like to look at them, but in the July 2, 2002, X rays, what do your notes at least reflect about what those X rays revealed?

A July 2, 2002, cervical X rays demonstrated the alignment of the cervical plate at C6-7 anteriorly and posteriorly at C6-7, with the wires to be in excellent alignment.

There was incomplete cervical fusion. The bone graft remains in line and incomplete across, at the interbody fusion site.

Q In August, did you see Mr Magloire?

A. Yes.

Q What do your notes reflect, if anything, regarding the fusion at that time?

A On August 7, 2002, there was some development of root callus formation on the bone graft.

Q And as we talked before, what would the minimum or minor callus formations mean?

A. It represents the incorporation of bone graft across the vertebral bodies.

Q To me as the average layperson, what would that mean?

A This was the purpose of the intended procedure, in order to develop bone fusion and callus across that site

Q So that site is beginning to heal?

A It's beginning to fuse.

Q And actually you talked about how the surgery was conducted. We don't need to go through all that. And that the fusion is in the area, is fused. But when you say, "fused" -- you know what. Strike that. I'm going to go back

I do need the model. We'll go on to that one and put the X rays back up. I'm going to use the X rays at the same time.

THE VTDEOGRAPHER: Going off the record. It's now 6:16 p.m.

MR. FRANKEL: Forgive me. It's the question before it Your characterization saying the callus is healing.

MR. BROWN: He corrected me.

MR. FRANKEL: But the thing is, you are getting the statements out to your targeted audience. The fusion is healing The fusion is not healing. And the doctor will testify to that.

MR. BROWN You have your opportunity to redirect. That's not what the note said. He said, it's beginning to fuse Your objection is noted.

MR. FRANKEL: Thank you very much.

THE VTDEOGRAPHER Back on the record. It's 6-18 p.m.

Mr. Brown.

Q In August 2002, is the Plaintiff still using the bone fusion -- I'm sorry, bone stimulator to assist with the fusion?

A What date? I'm sorry.

Q August 5, 2002.

A On August 7, 2002, he is continuing to use the external bone stimulator.

Q Does he have it on the 5th, though?

A On August 5, 2002, yes, he is using an external bone stimulator

Q Do you know how long, approximately, he used that external bone stimulator? Do your records reflect that?

A. It does not reflect when it was discontinued.

Q How about does the record reflect the use of a cervical collar through this time period, let's say, the summer of 2002?

A Yes.

Q How long did Mr. Magloire use the cervical collar, as well?

A The cervical collar was utilized until July 2, 2002.

Q And just for clarification, for the record, since July 2, 2002, to today's date, has the Plaintiff used a cervical collar?

A. No.

Q Do you anticipate that there will be a need for a cervical collar in the future?

A No.

Q What about the use of a stimulator on an ongoing basis?

A No.

Q After January 22, 2003, did you see Mr. Magloire in 2003 any other period?

A No.

Q Okay. What's your visit before January 22, 2003?

A January 8, 2003.

Q And on the January 8th visit, were any X rays taken on that date?

A No.

Q And before that you saw the patient in September 2002?

A Correct.

Q Is there any other visit from August 7, 2002, through January 2003, other than those two?

A August 7, 2002, September 19, 2002, January 8, 2003, January 22, 2003.

Q And the -

MR. BROWN: At this point off.

THE VTDEOGRAPHER Going off at 6.22 p.m.

MR. BROWN: Those are the records I don't have, so I just want to look at these quick

THE VTDEOGRAPHER Back on the record. Continuing the deposition, it's 25 p.m.

Mr. Brown.

Q Doctor, through the course of the treatment with Mr. Magloire, do you prescribe any sort of prescription medications?

A Yes.

Q What are those?

A Anti-inflammatories, Naprosyn and Relafen.

Q And the Naprosyn didn't work, for lack of better words, for relief and inflammation?

A Correct.

Q How about the Relafen?

A I believe he had better relief with the Relafen.

Q How about today, do you know if Mr Magloire is still using Relafen?

A Tylenol and occasional Relafen.

Q Is Relafen a prescription medication?

A Yes.

Q If you know, would you be the one that wrote the prescription for Mr. Magloire?

A I had prescribed it one time.

Q To your knowledge, did he ever tell you any other physician was prescribing the Relafen for him?

A I'm not aware.

Q And the one time you prescribed the Relafen, do you recall which visit that was?

MR. FRANKEL: By counsel, that's January 22, 2003.

A Okay. Okay. January 22, 2003.

Q Would that sent you wrote on January 22, '03, have been enough medication to be that Mr. Magloire would still be on it in May 2004 when you saw him?

A Unlikely.

Q The Relafen, you discussed it has the ability to improve the range of motion. Is that what I heard?

Could you explain that to me.

A Indirectly by reducing inflammation and pain, range of motion could be improved.

Q We talked about the May] 0, 2004, visit and your prognosis was guarded. What indicators in the appointment or examination of Mr. Magloire led you to that prognosis?

A Based on the radiographic findings, physical examination, of the range of motion and

neurologic exam.

Q When you say, "guarded," is that guarded as to the fusion that was performed prior, or guarded for the potential of other things in the future?

A Guarded in terms of any future clinical changes in his range of motion or neurological improvement.

Q. And in the 2004 radiologic review, what was the status of the calcium formation, if your records note that?

A That there was evidence of callus infusion.

Q What would that mean in lay terms?

A Basically, that the two vertebral beds at C6-C7 which were fused, and bone graft have now consolidated as one unit structure.

Q And is it fair to say that was the intended purpose of the surgery in 2002?

A Correct.

Q And if you could, could you show where that fusion on the model you have in front of you would occur?

A There were two fusions performed. The first fusion was performed between the C6 and C7 body. There are the bone here, and the bone here, the bone here, and bone here have now been connected together with a piece of bridging bone, and are consolidated.

The fusion was also performed in the back of the neck between the C6-C7 aforesaid joints here, and also fused here and here with bone grafts. So, it was fused in the back of the neck and it was fused in the front of the neck (indicating).

Q. What, if anything, does the May 10, 2004, report note from the patient about neck pain at that visit?

A. That he was complaining of neck pain.

Q Was it anything different from the prior visits, if you recall?

A. Similar complaints from the previous visits, intermittent neck pain which was exacerbated by the changes in weather, barometric pressure, activity level.

Q Did he specifically note any activity that would cause problems with the pain in the neck?

A Particularly if in a vehicle, rotating the head, or if he were pushing or pulling, then he would have neck pain Or standing for extended periods of time.

Q And in the course of your treatment, you have placed restrictions as to activities I believe that Mr Magloire should not engage in. Is there anything you have told him he should not do as a result of the injuries he has?

A The current restrictions are no pushing, pulling, lifting or carrying over 30 to 40 pounds No contact sports. And avoiding any excessive rotation at the cervical spine.

Q How about general, I guess, things around the home, yard work. Would yard work have a restriction?

A There can be some general yard work, as long as there are those restrictions engaged during that time

Q What about activities, chores around the home, assisting with laundry or shopping. Would he be able to do those?

A That would be permitted.

Q And you had a discussion there about future surgery with Plaintiff's counsel. What was your medical opinion as of today, your thoughts with regard to future surgery?

A As of today, May 12, 2004, there is no surgical indication. However, the future potential for cervical surgery includes the possibility of removal of the cervical instrumentation and/or addressing any further deterioration or degeneration of the cervical spine.

Q Well, let's take that one at a time, the cervical instrumentation, the instrumentation being surgically removed, what would be the necessity of that at this time? Is there a problem in your medical opinion with the hardware in Mr. Magloire's neck?

A The current indications for removal of hardware or instrumentation in the spine are several factors. One, if it is causing any abutment of any of the neural structures, if there is soft tissue obstruction, personal indications for some patients who prefer not to have any foreign implants in their body, cold sensitivity, their sensitivity from changes in temperature related to metallic objects within the body.

Q Is there any of those points you've just discussed apparent in Mr. Magloire as of May

12,2004?

A Unable to fully comment on it as I don't know what his wishes are or what his status is of having foreign implants in his body.

Q Has he discussed with you that he would like them removed?

A No.

Q In your medical opinion, would removal of the hardware or subsequent or future surgery, would that in any way improve Mr. Magloire's medical condition?

A Removal of hardware in cases where there is cold sensitivity or cold intolerance can be of benefit.

Q But specifically in this patient's condition, do you see that there would be a benefit to removing hardware at this time as of this date?

A At this time, I have not made any recommendations for removal of hardware.

Q And what about we talked about the degenerative changes, is there any noted in the radiological films of 5/10/04, which indicate there might be the necessity for further surgery?

A On the May 10, 2004, plain X rays the cervical 6-7 level is fused However, there is a degenerative disk with changes of that C5-6 disk, which is the level which is starting to show some degeneration and some collapse.

Q Is it possible that based upon the past work history of Mr. Magloire, and Mr. Magloire's age, that that degeneration could occur regardless of the fusion?

THE VIDEOGRAPHER: Going off the record. It's 6:38 p.m

MR. FRANKEL: I object to the question, to the form. It's totally speculative.

MR. BROWN: I said, in his medical opinion. There's no speculation.

MR. FRANKEL: I object to the question. I respectfully request it be rephrased I think it's total speculation.

Are you asking him whether or not C5-6 collapsed disk is caused or related to the accident? Well, you don't want to ask that question.

MR. BROWN: You can note your objection Are you telling him not to answer it?

MR. FRANKEL: I'm objecting to the last question you asked, not any subsequent question. But yes, I object to that question I ask you to rephrase it.

THE VIDEOGRAPHER: We are back on the record It's 6:39 p.m.

Mr. Brown.

Q Is it possible, Doctor, that the degenerative changes in your medical opinion that you are seeing in that cervical disk are related at C --

A C5-6.

Q -- are related to other factors including possibly Mr. Magloire's work history and his age, and not related to the cervical fusion?

MR. FRANKEL: It's the same question.

THE VIDEOGRAPHER: Going off the record. It's 6:40 p.m.

MR. BROWN: We can go round and round.

MR. FRANKEL: Well, you asked the same question You didn't ask it with the right wording.

MR. BROWN: You want reasonable degree of medical.

MR. FRANKEL: You have to ask within a reasonable degree of medical certainty, can you state that the degeneration you found...

MR. BROWN: We'll short circuit the question. I'll do it one more time.

THE VIDEOGRAPHER: Back on the record It's 6 40 p.m.

Mr. Brown.

Q Doctor, with regard to degeneration of disks, what are some of the factors which in any person, not specifically this patient, cause degeneration?

A Degenerative factors of disk disease include progressive physiological aging, repetitive axle loading, injuries to the cervical spine, repetitive work stress injuries, compression type injuries to the disk, repetitive action loading from lifting, other concomitant medical conditions,

diabetes, rheumatoid arthritis.

Q And with respect to Mr. Magloire, in your medical opinion is there any other reason for why that disk is showing degeneration as of May 10, 2004, knowing the medical history of the patient, knowing the history of the patient and having treated him?

A Can I have that question reread.

Q Let me rephrase it.

Is there another reason other than what he has presented for the cervical fusion that could be the reason for the degeneration, knowing Mr. Magloire's medical history and past history from being a treating physician?

A Yes. There may be some overlap with his age group.

Q How about, do you know what his profession was?

A Yes.

Q What was that?

A He was a driver for UPS for 25 years and 10 months.

Q And the activities associated and duties associated with a UPS driver, could that be a factor in what you are describing as repetitive work? I don't want to try to rephrase. How did you phrase it about the repetitive? I don't know what you said when you discussed reasons for degeneration?

MR. FRANKEL: Excuse me.

THE VTDEOGRAPHER Going off the record. It's 6:43 pm.

MR. FRANKEL: I object to the characterization of what a UPS driver does How does he know what a UPS driver does?

MR. BROWN: General knowledge.

It's the duties.

MR. FRANKEL: I'm just saying, if you want to establish what a UPS driver does.

MR. BROWN: Well, I can't. But do you know what a FedEx man does?

MR. FRANKEL: Are you implying that he delivers packages? The question is, what does Dr. Rafiy know that a UPS driver does. So you are framing your question of foundation based on factors that are not in evidence. We don't know specifically what a UPS driver does.

Maybe you should have asked him to establish that foundation.

MR. BROWN: I actually don't have to, but we'll go back on.

THE VTDEOGRAPHER Back on at 6:44 p.m

Q Your records note Mr. Magloire's past employment, is that correct?

A. Yes.

Q Does it note or did you have discussion in your treatment with him what his duties were during that employment?

A Yes.

Q What, if anything, do you know about the duties Mr. Magloire did on a daily basis working for UPS?

A The duties as a driver for UPS included the operation and driving of the motor vehicle, and the delivery of parcels to different destinations.

Q Would that be some of the work-related activities that can cause degeneration of disks that you mentioned earlier when I asked you what are some factors that cause degeneration of disks?

A It may contribute.

Q And you discussed his age group as one factor Is there a particular -- more likely when you are 40 in the medical community as opposed to 50, something else that you could explain a little more about what his age factor has to do with the degeneration?

A Typically, after the age of 40 years all the degenerative changes may start to occur.

Q That's in the population at large?

A Correct.

Q Doctor, we discussed the ongoing forward treatment for Mr. Magloire, potential for chiropractic treatment?

A Correct.

Q And why is it that's a potential in the future and hasn't been part of his treatment at this time?

A It's a current modality that can be utilized with patients with neck pain.

Q Even patients who have had a fusion, you would recommend chiropractic care for that patient?

A Subsequent to the fusion, yes.

Q That manipulation after the fusion is completed, is that a word that you could use?

A Correct.

Q Manipulation is then okay?

A It's an accepted treatment modality.

Q And to your knowledge, has Mr Magloire had any chiropractic treatment?

A Not that I'm aware of.

Q And what's the indication as to future orthopedic visits that are going to be needed by Mr. Magloire for his care going forward?

A Future orthopedic treatments include periodic neurologic examination and evaluation for analgesics of meds.

Q What would that periodic spectrum be? Is there something you could say, quarterly or bimonthly, something else?

A Once every three to four months.

Q And there have been only two visits, though, since January 22, 2003, to yourself; is that correct?

A Correct.

Q So, there has been no frequency of visits to you on this number that you have just given us of once every three months?

THE VTDEOGRAPHER: Going off the record, 6:48 p.m.

MR. FRANKEL: I object to the question. It was asked and answered.

MR. BROWN: He just gave me a period the guy should see him and he hasn't.

MR. FRANKEL: You are repeating it. I consider it semihostile, and no facts. You are restating the facts. I'm just saying -- I don't disagree with what you said, I'm just saying it's already been established. You don't have to ask it times.

MR. BROWN: All right.

THE VTDEOGRAPHER: Back on the record. It's 6.49 p.m.

Q. Doctor, do you have a plan to have a future schedule of appointments with Mr. Magloire on this once-every-three-month period?

A Approximately.

Q. Does he have an appointment which would be for August of 2004?

A I recommended a follow-up in four months.

Q Do you know if he made that follow-up?

A I don't know.

Q And what about the records reflecting physical therapy that Mr. Magloire is engaging in at this time, meaning in May of 2004, is there anything in your record that would indicate that he is currently actively engaging in physical therapy?

A No.

Q When was the last time, according to your records, that Mr. Magloire had physical therapy?

A I don't have - I don't know.

Q I would bring it to you, but I don't have the chart in front of me

A I don't have the last therapy visit.

Q Was he in physical therapy, does it reflect in your May 2004 report?

A No. It's not stated.

Q How about the visit before that, which would be January 22, 2003?

A On January 22, 2003, physical therapy was continued.

Q What was the frequency and the time periods they were being continued, once a week, every six weeks?

A Three times a week per six-week intervals.

Q So let's say he starts the beginning of the six-week period January 22, 2003. That brings him to March 2003 for his physical therapy.

From that time period is there any way you could know if he had any physical therapy from March to your last time you saw him?

A I'm not aware if he has.

Q Would it be necessary for you to have written a prescription for him to continue physical therapy after the last session he was engaged in expired?

A Yes.

Q Do you recall the last time you wrote a physical therapy prescription for him?

A January of 2003.

Q Doctor, with regards to the radiological films, do you send them to a radiologist in regards to reading them?

A No.

Q Is that true for all your films or --

A All the films are read by me.

Q All your films are read by you?

A Correct.

Q And in your note, I believe it is November of 2002, you write a script for Viagra for Mr Magloire. Does your record reflect that?

A I'm sorry? What date?

Q November 6, 2002.

A No.

Q Do you have any indication in your file that --

A I did not indicate it.

Q Well, I can ask you questions while we look through the records. Do you recall prescribing Viagra for Mr. Magloire?

A I don't have an independent recollection.

Q Let me ask you some general questions. In your practice, do certain, some patients, obviously male patients, take Viagra?

A Yes.

Q. How about would a patient with, let's say, the same fusion as Mr. Magloire who's prescribed Viagra, is the Viagra and the need for it, erectile dysfunction, necessarily related to the cervical injury?

A. They may be.

Q And what are some of the factors that --

A. Patients with cervical cord injuries can get sexual dysfunction.

Q How about from your recollection of this particular patient ever complaining to you about erectile dysfunction issues?

A Yes.

Q Do you have a recollection of whether or not you related those deficiencies to his injuries

associated with the January 2002 accident?

A I did not determine a cause or relationship.

Q How about any recollection that a urological consult was recommended by yourself?

A On my last evaluation I recommended a urological follow-up.

Q. And that's meaning May 10, 2004?

A Correct.

Q Other than that, had you ever recommended a urological consult?

A No.

Q And although you can't find the note, just to clarify for the record and myself, you don't have an independent recollection of prescribing the prescription for Mr Magloire?

A I don't recall whether I did or did not.

THE VIDEOGRAPHER: We're going off the record, it's 6:57 p.m.

(Discussion off the record.)

MR. FRANKEL: The Plaintiff will consent to a request to -- if the Defendant requires -- a deposition of Dr. Rafiy subject to them paying Dr. Rafiy's fee and obtaining the services of a court reporter and videographer. That's all.

MR. BROWN: I think we discussed that agreement. And obviously, we would have to get the videographer and court reporter. And we would discuss the reasonable expert fee.

Is it fair to say versus \$4,000 and we can work with the doctor?

MR. FRANKEL: Yes, that's fair. In the event the magistrate judge requires a continuance, we'll help in any way possible so that you can conduct a further deposition.

MR. KARSMAN: We'll work that out. Yes.

MR. BROWN: Just before I do allow you redirect, it's been agreed, and if there are additional questions, the Defendants want some of which the records are not present, so the questioning cannot be conducted.

Obviously, in the future, if the deposition of Dr. Rafiy comes around again to the issue, the issues are covered, the Defendant will not attempt to belabor points encumbered by this deposition.

MR. FRANKEL: Yes. I would say we would object strenuously.

MR. BROWN: Yes. However, you cannot put limitations at this time on what the scope is based upon the answers of the doctor I am not going to ask him C V background, history, you are right.

MR. FRANKEL: But, the purpose of the further deposition is to discuss the June 6, 2002, the July 2, 2002, and the May 10, 2004, X rays, and any other tangible issues.

MR. BROWN: Associated with those X rays and treatment of Mr. Magloire.

MR. FRANKEL: Yes. And the Plaintiff's consent.

I just have a couple brief follow-up questions. We have to go back on.

MR. KARSMAN: Let the record show that this is redirect.

THE VIDEOGRAPHER: We are back on the record. It's 7:08 p m., continuing the deposition of Dr. Rafiy.

Mr. Frankel will begin his redirect.

MR. FRANKEL: Thank you very much.

REDIRECT EXAMINATION

BY MR. FRANKEL

Q Dr. Rafiy, just a couple of brief follow-up questions in redirect.

Does the failure to have the June 6, 2002, and July 2, 2002, X rays in your file right now change your opinion on any issue that has been discussed today?

A No.

Q And if Mr. Magloire sustained a left shoulder injury, including a left shoulder dislocation many years before the January 22, 2002, accident, but was asymptomatic completely prior to this January 22, 2002, accident, would this left shoulder injury from years before be relevant from his sustaining a broken neck in the January 2002 accident?

A Based on the scenario being asymptomatic, no.

MR. FRANKEL: I have nothing further at this tune

THE VIDEOGRAPHER: Mr, Brown, do you have anything further?

MR. BROWN: I do The last answer, you know what, though, you know what...

THE VIDEOGRAPHER: Going off the record. It's 7:11.

MR. FRANKEL: Just so we have a clear record, again, the Defendant will conduct a further deposition. The Plaintiff will redirect at that time, at the further deposition. That's it.

I think at this point we are going to conclude the deposition, and Defendants will again discuss with Plaintiff's counsel when they want to conduct a further deposition.

We thank everyone for appearing today.

MR. BROWN: Just on that question, based on your reflect and the redirect today, counsel would like to reserve for our subsequent deposition time.

MR. FRANKEL: Stan, do you have anything to add?

MR. KARSMAN: No.

THE VIDEOGRAPHER: This concludes the portion of today's deposition of Dr. Rafiy. It is now 7:13 p m., May 12, 2004.

This is the end of Tape 2 of 2 of today's portion of the deposition.

(Time noted: 7:30 p.m.)