COMPUTERIZED TRANSCRIPTION

COLOR VIDEO TAPING

STATE OF OHIO,)
) SS:
COUNTY OF LAKE.)

IN THE COURT OF COMMON PLEAS

Linda L. Omersa, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 85-CIV-0166
Santo L. Pappalardo,	)	
Defendant.	)	

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Videotaped deposition of MALCOLM A. BRAHMS, M.D., taken as if under cross-examination before Angelika P. Veres, a Notary Public within and for the State of Ohio, at the offices of Dr. Malcolm Brahms, 26900 Cedar Road, Beachwood, Ohio, at 6:00 p.m., Tuesday, the 15th day of April, 1986, pursuant to stipulations of counsel, on behalf of the Defendant.

APPEARANCES:

Kube & Weinberger, by
Mr. Michael R. Kube,

on behalf of the Plaintiffs;

Baker, Hackenberg, Haskell & Collins, by
Mr. Richard L. Collins, Jr.,

on behalf of the Defendant.

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S T I P U L A T I O N S

It was stipulated by and between counsel for Plaintiffs and Defendant that this deposition may be taken in stenotypy by Angelika P. Veres, that said stenotype notes may be subsequently transcribed into typewriting in the absence of the witness; that the reading and signing of the deposition by the witness are waived; and that all requirements of the Ohio Rules of Civil Procedure with regard to notice of time and place of taking this deposition are waived.

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MALCOLM A. BRAHMS, M.D., of lawful age, a witness herein, called by the Defendant for the purpose of direct examination, as provided by the Ohio Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

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DIRECT EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. COLLINS:

Q Doctor, would you state your full name for us, please?

A Dr. Malcolm A. Brahms.

Q And what profession are you engaged in?

A Physician, orthopedic surgeon.

Q And what is your practice located?

A 26900 Cedar Road, Beachwood, Ohio.

a And is that where this deposition is being taken today?

A That's correct.

Q Would you tell the jury, please, about your premedical education?

A Yes. I'm a graduate of -- attended school, undergraduate school, at Ohio State and University of Dayton, and medical school at

Case Western Reserve University, then known as Western Reserve University.

a And would you tell the jury, also, about your medical education and training, please?

A Yes. A graduate of Western Reserve University and an internship at Cleveland City Hospital, now known as Cleveland Metropolitan General Hospital; a year of intern -- of surgical residency at that same institution, followed by three years of orthopedic surgical training, one at Mt. Sinai Medical Center and two, at Indiana University Medical Center in Indianapolis, Indiana.

Q And are you licensed to practice medicine in the State of Ohio?

A I am.

Q And how long have you been licensed to do so?

A Since 1950.

Q And are you presently board certified?

A I am.

Q And how long have you been board certified?

A Since 1958.

Q And would you tell the jury, please, what is board certification?

A Board certification is an examination which is

carried out following the completion of residency training, an oral and a written examination; two years after the practice of orthopedic surgery, a written and an oral examination is repeated.

Q Are you associated with any hospitals, Doctor?

A I am.

Q And would you tell the members of the jury what hospitals?

A Yes. Principally with Mt. Sinai Medical Center in Cleveland and privileges at Suburban Community Hospital.

Q Are you a member of any professional associations?

A Yes, I am.

Q And would you tell the jury what those are, please?

A Yes. I'm a member of the Cleveland Academy of Medicine, the Ohio State Medical Association, I'm a member of the American Academy of Orthopedic Surgeons, I'm a fellow of the American College of Surgeons, I'm a member of the American Academy of Orthopedic Surgeons for Sports Medicine, I'm a founding member of the American Academy of Orthopedic Foot and

Ankle Surgeons, I'm a member of the International Society of Orthopedists and Traumatologists, a member of the Clinic Orthopedic Society, a member of the Mid-America Orthopedic Society and some other minor groups.

Q Have you written or published any articles concerning medicine?

a Yes.

Q Would you tell the jury about those, please?

A Yes. I've written articles concerning orthopedic surgery. I've had articles in all the major journals and I've authored chapters in two of the most recent orthopedic textbooks on the market.

Q And what is the nature of your private practice or specialty?

A Orthopedic surgery.

Q And would you tell members of the jury what orthopedic surgery is, please?

A Orthopedic surgery is that branch of medicine that deals with the investigation, the preservation and the restoration of the form and function of the musculoskeletal system by medical, surgical or rehabilitative means.

Q How long have you been engaged in private practice?
A Since 1955.
Q I also understand you've been involved in sports medicine to some extent. Could you tell the jury about that, please?
A Yes. I was team physician for Cleveland Bulldogs, Cleveland Indians and the Cleveland Browns.
Q Doctor, did you have occasion to examine Linda Omersa, who is the plaintiff in this particular lawsuit?
A Yes, I did.
Q And do you recall when you examined her?
A Yes. I examined her on the 16th of December, 1985.
Q And did you obtain a history from Mrs. Omersa at that time?
A Yes, I did.
Q And do you recall what that history consisted of?
A Yes. I recall it by virtue of some of my notes that I've written.
Q All right. You may refer to those to refresh your recollection. What history did she

provide you with?

A She told me that on the 15th of February of 1984, she was the driver of her automobile involved in a collision. This occurred on -- at French Boulevard and Lake Shore Boulevard. She told me that she was stopped.

She said that her automobile was struck by a pickup truck on the driver's side and the front side of her car.

She told me that she anticipated the impact and, accordingly, was able to brace herself. She said that her chest struck the steering wheel.

She was not taken to a hospital because she experienced no immediate effects.

She reported, however, that approximately one week later, she saw her doctor on a routine visit; she was unable to tell me the name of that doctor that was examined.

She had low back pain and was referred to another doctor. She did not, however, follow the advice of seeking the other doctor's treatment.

Four days later, she was unable to get out of bed. Her husband took her to a

chiropractor, who treated her with physical therapy, manipulations, X-rays and she stated that she experienced severe pain in her back and difficulty moving her head.

She told me that subsequently, she was referred to an orthopedist, Dr. Zaas, in April of 1984. He -- I think that that should be April of 1985, if the dates are correct.

I found that she told me that her accident occurred in February of '84, and maybe that was April, but I had some -- I had some interpretations that I put down her accident occurred in '85 and it really occurred in '84. It was a mistake in my transcription, because my notes were accurate, but my transcription was not.

But, at any rate, Dr. Zaas saw her in April and she said that ehe patient -- she told me that she experienced difficulty remembering much of the details of his examination.

However, that was because the time of my examination and his examination was a long period of time between.

She said no specific treatment was

recommended by Dr. Zaas after his examination. At the time of my examination --

Q Before we get to your examination, did you have occasion to review the records, the reports and any of the documents relating to her medical treatment that she provided you by hiseory?

A Yes; yes, I did. I saw the examination of Dr. Zaas, I saw the examination reports of her chiropractic treatment.

Q Now, with respect to your examination on December the 16th of 1985, would you tell the jury what the nature and extent of that examination was, please?

A Yeah. She told me that when I examined her, that she was still having some trouble with her back, that she had pain in her chest and she pointed to an area just below her breast level.

She said that her back pain is more severe at her menstrual period time. She said that she has right shoulder pain, which is relatively constant in nature.

She told me that she owns a printing shop and that her work aggravates her symptoms.

She's able to dress herself, button her blouse, reach her bra, care for her hair.

She says that sitting in an automobile aggravates her symptoms, which causes her to experience stiffness in her back, difficulty getting up. Coughing and sneezing, bowel movements and intercourse, walking, none of these aggravate her symptoms. Bending and stooping, however, does.

She does no lifting, she has no trouble lying in bed, she does all her own housework, but does no lifting.

She told me that as far as sports activities are concerned, she had returned to doing some exercising.

Q Now, these things that you just testified to were things that Mrs. Omersa told you on December the 16th of 1985; is that correct?

A That's correct.

Q Now, subsequent to that, did you conduct a physical examination to determine what objective findings you could find?

A Yes, I did.

Q And would you tell the members of the jury, please, what your examination consisted of at

that time?

A Yes. My examination revealed that we were examining a 42 year old patient, weighing 93 pounds, who was five foot tall.

She demonstrated no difficulty moving about the examining room or on the examining table.

She was able to bend forward to a point where her fingertips were able to reach the ground, which represents what we designate as hypermobility.

There -- she has a lordosis of her lumbar spine. Lordosis means exaggeration, an increased curvature of the back, beginning from the buttocks, going upward towards the neck region.

That waist area is called the lumbar area and she did have an increased lordosis in that area. There was no evidence of any muscle spasm.

I examined her cervical spine and it revealed that she had a normal range of putting her head forward on her chest, which is called flexion, looking up towards the ceiling, which is called extension, turning

her head from one side to the other and bending the ear towards the shoulder on either side.

Q Now, she could perform those movements without difficulty?

A All of those movements were within normal limits. Her shoulder motions were normal. She was able to elevate and rotate her shoulders without any limitation.

Reflexes in her upper extremities were normal. The motor power in her upper extremities were normal. Sensory perception to pin prick was within normal limits.

We checked her muscle strength in her upper extremities by the use of what is known as a dynamometer, and she was able to compress six pounds per square inch in both hands.

Q What is the significance of that?

A It means that she had normal power of grip.

Q Now, based upon those findings, with respect to the cervical area, the neck and the shoulder, what did that indicate to you, with respect to any injuries sustained in this accident?

A At the time that I examined her, she

demonstrates no abnormal findings, a normal examination.

Q Okay. Fine. Did you also have occasion, then, to examine her low back or her lumbar spine area?

A Yes, I did.

Q And would you tell the jury, please, what your findings consisted of?

A Yes. With this patient lying on the examining table, she was able to raise her leg up to seventy degrees without any evidence of muscle spasm.

Q What is the significance of that?

A That's a normal range of motion. We checked her sensation with the pin prick and that was normal.

She was able to stand on her heels and toes, indicating her motor power was normal.

Her reflexes were judged to be physiological or normal. We measured the calves of her legs and thighs and found no atrophy.

Q What's the significance of that?

A That there's no evidence of a neurological lesion to decrease the muscle size or strength

in her lower extremities.

The pulses in her feet were palpable, normal, indicating good circulation.

The length of her legs measured from her pelvis down were both equal.

Her hip joint motions were within normal limits. And that consisted of my examination.

Q All right. Now, with respect to the objective findings in the low back area, what was your conclusion as to her condition on December 16th of 1985, when you examined her?

A Yes. She's a hypermobile individual with an increased lordosis, with no positive physical findings.

Q All right. Now, this lordosis that you've referred to, what's the significance of that?

A There are a lot of people who by virtue of their make-up, their congenital make-up, some people have more lordosis than others.

We find a lot of heavy set people who walk with their feet turned out have an increased lordosis. We find a lot of young people with poor postures who have an increased lordosis, and there are in the black race, with the heavy set people, they have an increased

lordosis, which is a congenital kind of a thing.

Q Was the increased lordosis in the case of Mrs. Omersa the result of this particular accident?

A No, no, absolutely not. This is her. This is how you can identify her.

Q Now, did you have any X-rays taken of Mrs. Omersa?

A Yes; yes, I did.

Q And what areas of the body were X-rayed?

A Both her cervical and her lumbar spine. Her X-rays in her cervical and lumbar spine were relatively normal. She does have intercervical spine, one area of narrowing in the lower cervical region without any evidence of any interforaminal encroachment, and that's a finding that's not unusual in a patient of this age group.

Q All right. With respect to any arthritic changes, were any detected in the X-ray results?

A Nothing significant. If there is, it's a minimal amount.

If one can state, I think, categorically,

if there's a little bit of narrowing, there may well be associated a mild degree of arthritis, but this is not a significant problem in this patient.

Q Is it something that would be normal in a patient of this age?

A Normal when one finds a narrowing of the cervical spine and it's not an uncommon finding. It may be absolutely asymptomatic.

Q Now, based upon your findings from this particular examination, did you find any objective evidence that Mrs. Omersa was experiencing any pain in her neck or shoulder at the time you saw her?

A Subjectively, she complained of pain. Objectively, I could find no findings that suggest any significant residual musculoskeletal abnormality.

Q Does that also apply to the low back or the lumbar area?

A That's correct, both.

Q Now, based upon your examination of her on December the 16th of 1985 and your review of the treatment, records and X-rays, were you able to determine what injury, if any,

Mrs. Omersa sustained in the accident that she had on February 15th of 1984?

A Yes. I think that initially she had an injury to her cervical spine, which was consistent with the diagnosis of a muscle strain or sprain, what may be commonly called myofascitis, indicating some trauma to the soft tissues of the area of her neck.

I think that by the treatment she obtained, with the natural recuperative powers possessed by her, that these symptoms would improve.

Q Is a soft tissue injury of this nature a serious one?

MR. KUBE: Objection.

A The degree that is manifested by the time of my examination, the answer to that is no.

Q Do soft tissue injuries of the nature sustained by Mrs. Omersa generally heal within a short period of time?

A Generally. However, she can have recurring symptoms with trauma, falls, repeat accidents, overuse.

If she were to go to her exercise program and spend more than the usual time that she

does, she could wake up with a neck ache or a back ache.

Q What would the normal period of time of disability be to prevent one from working?

MR. KUBE: Objection.

A There is no reason to believe, as a result of my examination, that she wouldn't be able to do her normal work, if she was employed, or her job as a housewife, if she does that.

Q Would there have been any period of time that she would have been disabled or prevented from doing her employment as a secretary, for example?

MR. KUBE: Objection.

A Yes. I think that it's fair to believe that initially, for a period of perhaps a month or six weeks, she may have had enough symptoms to prevent her from going to work.

However, if she owned a business, I'm sure it wouldn't have taken that long to return to that job.

Q Doctor, to a reasonable degree of medical certainty and based upon your examination and findings and your experience and training, did Mrs. Omersa suffer a permanent injury as a

result of the accident?

A It's my opinion that she does not have a permanent problem the result of this accident.

Q And to a reasonable degree of medical certainty, and once again, based upon your examination of her, your findings, your training and experience, did she suffer any residual or permanent disability as a result of this accident?

A I have an opinion that she does not have any significant permanent residual problems referable to this injury.

Q And to a reasonable degree of medical certainty, will Mrs. Omersa likely require any future surgery or hospitalization as a result of the injuries she sustained in this accident?

A It's my opinion that there's no reason to believe that she is a candidate for any surgical intervention the result of these injuries.

Q And to a reasonable degree of medical certainty, is it probable that Mrs. Omersa will continue to be able to perform her normal daily activities in the future?

A It's my opinion that she will be.
Q And how would you describe the severity of the result of this accident?
A Initially, mild to moderate and now minimal.

MR. COLLINS: I have no further questions. Thank you, Doctor.

MR. KUBE: Thank you. Good evening, Dr. Brahms.

THE WITNESS: Hi. How are you?

MR. KUBE: We met before, but my name, for the record, is Mike Kube and I represent the Omersas in this case.

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CROSS-EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. KUBE:

Q First, so we all understand, the examination which you performed of Mrs. Omersa on February -- I guess it was not on February -- it was on December --
A 16th of December.
Q -- December 16th, 1985, was at the request of Mr. Collins?
A That's correct.
Q Correct? And therefore, it wasn't certainly

for the purposes of caring or treating Mrs. Omersa?

A That's correct.

Q In other words, it wasn't your responsibility to care for or treat or recommend treatment of her injuries, was it?

A That's correct.

Q Whatever problems she may have related to you, Mr. Collins, at least, when he hired you, didn't instruct you that you were supposed to render her any treatment for those problems?

A Yes, that's correct.

Q And I take it as a result of the examination and a report, which I think you have indicated you've been refreshing your recollection from, you rendered a bill to Mr. Collins for that service?

A Yes, I did.

Q Do you recall from your memory or from your records that you have in front of you what the amount of that bill was?

A Yes. The amount is the same for every attorney, and it's a hundred and fifty dollars for that report.

Q And when you say for every attorney, I take

it, and I know that you do this -- do medical examinations for attorneys on occasion in medical-legal cases; do you not?

A I do. When people want a good report, they refer them to me.

Q All right. And so, you you've conducted exams for attorneys before?

A Yes; yes, I have.

Q And for Mr. Collins and his office before; have you not?

a I have recalled seeing Mr. Collins in the past, yes.

Q All right. Now, you started off your testimony by reading from your report and indicating appropriately in response to Mr. Collins' questions that when she first came in and was scheduled to see you at Mr. Collins' request, you asked her some questions relative to how this incident occurred and what problems she had been having as a result of it, correct?

A That's correct.

Q And that's what's known as a history, basically?

a That's correct.

Q And at least in response to your questioning, was she cooperative?
A Oh, yes.
Q And she answered the questions, as far as you were concerned, in a straight-forward and candid manner?
A Yes.
Q And I take it that when she told you how this particular incident happened; that is to say, a car made a left-hand turn, I believe, and collided with the front driver's side of her car, you believed her?
A Oh, yes.
Q And when she related to you what problems she had and what problems were experienced by her following this particular collision, you believed her?
A Absolutely.
Q She indicated that she struck the steering wheel of her vehicle, you believed her?
A With her chest, yes.
Q And she indicated that at least in the days, at some point following the collision, there was a time when she could not get out of bed?
A Yes.

Q And you believed her?
A Oh, yes.
Q And she indicated to you that following the collision, for some period of time, she experienced, I believe you said, severe pain in her back and then also some difficulty in moving her neck?
A Yes, that's correct.
Q And you believed her?
A Yes.
Q And over the course of, then, some ten months or so, she was treated regularly with, as you've related, therapy and massage and manipulations to her back?
A Yes.
Q And you believe that?
A I believe she had the treatments, yes.
Q Yes. All right.
A I don't know that I believe they were necessary, but I believe she had the treatments.
Q All right. And then she indicated to you, at least when she was seeing you, she still had some pain in her back and her shoulder, which was aggravated by certain duties at her job

and riding in an automobile?

A Yes, that's right.

Q And you believed her?

A Yes.

Q Now, I don't know if the camera will be able to get this very well, but I wonder if we could just look at these and ask you first to give the jury -- can you pick these up on -- to give the jury some idea of the particular area of the body we're talking about.

When we talk about the spine and you were talking about -- and can you see this -- the lordotic curve and everything, is that really demonstrated by the spinal column shown on this exhibit?

A Yes. This is a normal lordosis, we all have a certain degree of lordosis in the lumbar spine, and she has an exaggerated lordosis, but that's known as lordosis and that's common, normal.

Q What is shown here, Dr. Brahms, running from the head down to the lower part of our body, what is this called that I'm indicating here, what is that?

A That's the entire spinal column.

Q And it is made up of what?
A The first part up here is called the cervical spine, this part where the ribs are is called the thoracic or the dorsal spine, and this part at the waist down to the pelvis is known as the lumbar spine.
Q And actually what is it composed of? That is to say, hard or soft tissue?
A Well --
Q Anatomically, what is it?
A Well, there are seven bones comprising the cervical spine; twelve the dorsal spine; five the lumbar spine. Those are vertebra, bones.
Q Twenty-four of these? Did I add right?
A Seven and twelve and five, twenty-four.
Q All right. And how are these held together?
A Between each two vertebra, you have a demonstration here, between each two vertebra is a disc and each vertebra is connected by ligaments, muscles, nerves, blood vessels.
Q All right. And maybe this will help a little bit. This is at least a diagram of the cervical vertebra; is it not, or a representation anyway?
A Yes, that's right.

Q And these blue areas in between these vertebra, those are the discs about which you have spoken?
A That's correct.
Q And then these vertebra really are just kind of stacked one on top another?
A Yes, but they're held together by ligaments, muscles and they are joined, they are in a stacked arrangement, but there are little facet joints between, which help to maintain that stability.
Q And by joints, I get the impression that these vertebra actually move about when we use our neck and back in a normal fashion in everyday activity?
A Yes, that's correct.
Q And then this particular representation, the blue in this Exhibit 3 indicates the ligaments of the spine that we've been making reference to, at least in the cervical area?
A Well --
Q In a rough fashion?
A It's very rough. This is very rough. These are not as rough, but this is absurd.
Q All right. What I want to just make clear,

for my purposes, is that in fact, as you've represented, the ligaments do hold these --

A Help.

Q Help hold these bony vertebrae together?

A That's correct.

Q And also assist in their normal functioning, I take it?

A That's correct.

Q Al right. And then on top of those things, we have the muscles of the neck and back shown on Exhibit 4?

A Yes, that's correct.

Q All right. Now, as I understand it, it's the parts of the neck and back other than the bony vertebra which comprise the soft tissues --

A Yes.

Q -- about which we've been speaking in this case, correct?

A That's correct.

Q All right. And I believe that your X-rays, at least, indicated that, and I would certainly agree, that Mrs. Omersa suffered no injury to the hard tissues or the vertebra of her back, did they?

A No, that's right.

Q In other words, the X-rays have demonstrated that?

A Well, the X-rays can only demonstrate that she doesn't have a fracture and the X-rays can demonstrate that there is no subluxation or dislocation, and the X-rays do not demonstrate soft tissues, these X-rays don't.

There are X-rays that do, but these don't.

Q And what would those X-rays be that do?

A Called a CT or what is known as a, in common lay language, as a CAT scan. There's also the magnetic resistant kind of X-rays today, which also can show soft tissues as well as bone.

Q All right. And I take it you did not order any of those X-ray tests performed on Mrs. Omersa?

A No. They weren't indicated.

Q All right. Now, relative to the soft tissue structures of her neck and back, and, in fact, even chest, we can agree that as a result of the crash of December 16th, 1984, she suffered injuries to those?

A Yes.

Q All right. And because of that condition, she experienced symptoms as a result of those

injuries?

A Yes, that's correct.

Q And because of her condition, there is certain activity which in the future may cause her to experience problems with her neck and back?

A Perhaps.

MR. KUBE: I have no further questions.

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REDIRECT EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. COLLINS:

Q Doctor, the history that you took from Mrs. Omersa as well as the records you examined indicate that she was treated on a regular basis for about ten months or so; isn't that true?

a Yes, that's correct.

Q And do you have an opinion as to whether or not that degree of treatment was reasonable and necessary under these circumstances?

A There is no question in my mind that that's an excess amount of treatment in a patient in this age group. The numbers of beneficial treatments of manipulative therapy and physical therapy, and so forth, aren't

necessary after, perhaps, three months.

On the other hand, if she had a recurrence of her symptoms, by whatever reason, and the symptoms increased, another series of treatments might be beneficial, but a continuous, unrelenting series of treatments of this nature is excessive.

Q Now, Mr. Kube spoke to you about the increased lordosis?

A Yes.

Q And once again, this increased lordosis, was that caused by or was the result of the accident in February of '84?

A No. Her lordosis is like somebody who's born with a hook in their nose. It's hers.

Q And we also talked about discs. There's no evidence or any indication of any disc injury here in the case of Mrs. Omersa, is there?

MR. KUBE: Objection.

A No evidence of any disc injury in the cervical or the lumbar region.

Q And your review of the records that were made available to you regarding her treatment, is there any indication of any disc injury or disc problem?

A None.

MR. COLLINS: I have no further questions. Thank you.

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RECROSS-EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. KUBE:

Q Doctor, I understand you saw Mrs. Omersa one time, correct?

A That's correct.

Q That was in December of 1985?

A '85, that's correct.

Q We have a problem with these dates?

A Yeah. It's only because of my failure, and in my first paragraph, stating the accurate date that I had in my records, but dictated incorrectly.

Q In other words, in your report, you acknowledge that you had a date of December 15th, 1985, which should have been December 15th, '84?

A That's correct.

Q That was your mistake?

A That's my mistake.

Q All right. But at least you saw her, let me get the dates straight again, in --

A December of '85.
Q In December of 1985?
A Right.
Q Prior to that time, you had never seen this woman?
A That's correct.
Q You had never had an opportunity to examine her before December 18th, 1985? Is that the right day?
A That's right.
Q Never had an opportunity to hear on an earlier date before December 18th, 1985 what problems she was having as of that day?
A She didn't even bother to go to see her own doctor for a week after the injury, so mine was as a result of seeing her probably as much as a year or so later.
Q All right. But at least during the course she visited doctors during this ten month period and they had an opportunity to see her and examine and treat her, did you not have that opportunity?
A That's correct, I did not.

MR. KUBE: Fine. I have no further questions.

MR. COLLINS: Dr. Brahms, by law, you have the right to read a transcript of your deposition before it can be used at trial.

You may not change any of the testimony you have given, but you may check it for accuracy to make sure that your answers have been recorded properly. If you do not wish to read your transcript, you may also waive it, waive your signature by telling the court reporter that you choose to do so.

THE WITNESS: Yes. I waive that privilege.

MR. COLLINS: Thank you very much, Dr. Brahms.

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(Signature waived.)

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STATE OF OHIO,)
) SS: CERTIFICATE
COUNTY OF CUYAHOGA.)

I, Angelika P. Veres, a Notary Public within and for the State aforesaid, duly commissioned and qualified, do hereby certify that the above-named DR. MALCOLM A. BRAHMS was by me before the giving of his deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that the reading and signing of the deposition by the witness were expressly waived by stipulation of counsel and the witness; that the said deposition was taken pursuant to stipulations of counsel herein contained, and was completed without adjournment; that I am not a relative or attorney of either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I hereunto set my hand and seal of office, at Cleveland, Ohio, this 17th day of April, A.D. 1986.

Angelika P. Veres, Notary Public
My commission expires: 7/9/90.

LAWYER'S NOTES

#494

State of Ohio,)
County of Cuyahoga.) SS:

IN THE COURT OF COMMON PLEAS

Patricia Whearty, et al.,)
Plaintiffs,)
) Case No.
Sue Pawlak, et al.,) 94339
Defendants.

- - -

Deposition of Malcolm A. Brahms, M.D., the Witness herein, called by the Plaintiffs as if upon examination, and taken before Deborah L. Baer, RPR, a Notary Public within and for the State of Ohio,, on Friday, the 18th day of April, 1986 at 4:22 p.m., at the Mt. Sinai Suburban Medical Building, 26900 Cedar Road, City of Beachwood, County of Cuyahoga and the State of Ohio.

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APPEARANCES:

On behalf of the Plaintiffs:

Howard Schulman, Esq.

On behalf of the Defendant

Lee Mesenhimer:

Meyers, Hentemann,

Schneider & Rea, by

Reginald P. Trubey, Jr., Esq.

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P R O C E E D I N G S

(Plaintiff's Exhibits 1 and 2 marked for identification.)

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MALCOLM A BRAHMS, M.D., of lawful age the Witness herein3 having been first duiy sworn, as hereinafter certified, deposes and says as tollows:

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EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. SCHULMAN:

Q Wouid you state your full name tor the record, please.

A It's Dr. Malcolm A. Brahms.

Q At what address do you practice from?

A *26900* Cedar Road, Beachwood, Ohio.

Q And what is your specialty3 Doctor?

A Orthopedic surgeon. Physician, orthepedic surgeon.

Q You have testified at depositions before; is that correrrt?

A That is correct.

Q Approximately how many times?

A Many.

Q Can you put a number on that?

A No.

Q More than a hundred?

A No, I don't even want to go into those gymnastics.

Q Well, you're familiar with the procedure in a deposition --

A I am.

Q -- correct? Okay.

I want to make certain *you* understand my questions, so if I ask you any question that you feel is vague or ambiguous --

A Yes.

-- or you don't understand it for any reason --

I understand.

Q -- please tell me.

A Yeah.

More importantly, I want to make certain that I understand your answer5 --

A Okay.

-- so I would appreciate it very much if you wauld try to explain everything as much as possible in layman's term5 rather

than medical terms --

A Fine.

Q -- whenever *you* can testify that way accurateiy.

A Okay.

Q In fact, I think a lot of the questions I may be asking *you to* translate into layman's terms, some of the things that *you've* stated in your report --

A Okay.

Q -- in this matter.

You examined Patricia Whearty; is that correct?

A That's right.

Q And that was on December 27, 1985?

A That's right.

Q Approximately how long did that deposition take?

A That was an exam. You mean an examination.

Q I'm sorry, the examination. I'm sorry.

A The history began at 2:30 and ended at 3:05.

Q Does that include the examination?

A No, it does not. That's the history.

Q And how long did the examination take?

A I don't have a recorded time on the examination, hut I wouid imagine a minimum of 15 minutes, probably in the neighborhood of IS to 20 minutes.

Q And you subsequently prepared a

corrert?

A That's correct.

that?

A The patient told me that in her past history she had a cholecystectomy in 1975, which is a gallbladder removal. She gave birth to four children. She uses medicines called Serax, Rufen, aspirins, and it was *my* -- for the benefit of this

report, that didn't add or subtract from the nature of this injury. Therefore, the past history, as far as the relationship of this injury to her past history, was noncontributory.

Q Let me make sure I still understand. Are you saying that the medicai history that she reported to you as it existed prior to the date of her accidents December 24, 1983, did not contain any information that was relevant to your examination or your opinions?

A No, that's not what I said.

Q Okay.

A I said that the past history referable *to* the fact that she had a gallbladder operation, that she gave birth to four children and that the medicines that she takes doe5 not add or subtract anything to the information that I reported on.

Q Is that all that she related to you as far as her past history?

A That's correct.

Q So she didn't relate to ***you*** any neck

pain in her past history; is that correct?

A No. Well, if -- she didn't really.

Q Pri -- I'm sorry.

A That's probably not part of the information. Anything historically reiated to her musculoskeletal system would have been obtainea in the history that I obtained from her referable to the injury and its effect on any part of her body.

Q I see. Let me try to clarify *my* question.

Am I correct that *you* aid not obtain from her any information that prior to December 24, 1983 she had any neck pain?

A Yes. That's correct.

Q Is it also correct with respect to any back pain?

A Yes. That's correct.

Q And is it also correct with respect to any pain in her knees?

A Yes. That's correct.

Q Is that also correct with respect to any pain in her buttocks?

A Yes.

Q And is it also correct with respect

She told me that in her history that she was involved in an accident on the 24th of December and that this accident caused her to be bumped around in the automobile. I'm not reading the report as I've rendered it hut I'm sort of skimming through it. She told me that the nature of her injuries were such that they involved her head, that they involved her back, they involved her buttocks, and that's why I ordered the *x-rays* of her

The cervical area is essentially the neck area; is that correct?

That's correct.

And you state in the next sentence that) "There is evidence for arthritic changes in the cervical region."

What do you mean *by* that?

She had -- that's not an opinion. That's an objective finding by x-rays that she has x-ray changes consistent with arthritis in her neck, cervical region.

And what were those changes? What was the evidence that you saw in the ?

If you refer to the x-ray report that was rendered there, the cervical spine x-rays identified as Case No. 85-028181 of Patricia Whearty taken on the 27th of December, 1985 reveals that the -- there is intervertebral disc spaces which appear to be maintained, except for slight narrowing at the C5-6 level. There is osteoarthritic spurring in -- present at the C5-6 and C6-7 levels. These are the two lowest levels in the neck region. The vertebral bodies and the appendages otherwise appear to be intact, meaning that there's no evidence of a fracture.

Q Okay.

A So she has some changes in her neck which are in the cervical vertebrae consistent with the x-ray diagnosis of arthritis.

You're reviewing a document that's been marked as Plaintiff's Exhibit 2 to this deposition, Doctor?

A Yes. Okay.

Q Is your reference or was your reference in your December 30, 1985 report that there is evidence for arthritic changes in the cervical region based upon Plaintiff's Exhibit 2 or had you looked at the x-rays yourself at the time?

A Oh, not no, no. I review my own x-rays. I review the reports that are written to me, but I depend upon my own interpretation; and if there's a difference between the radiologist and myself, I will point it out to him and we will go over it.

Q In this case, was there any difference between --

A No. We both --

Q your evaluation?

A No. We both agreed.

Q Please7 Doctor, for the sake of the reporter, can you wait 'til I finish my question --

A

Q -- before *you* give your answer?' The court reporter cannot take down what two

of us are saying at the same time.

A Fine.

Q For the sake of the record.

Would you explain what You mean by the intervertebral disc spaces?

A Yes. It's probably best that -- if we exhibit the x-rays and demonstrate that, but I'll explain it to you, since this is a discovery deposition and not one that's been on video, I'll explain it to you.

Q Let me just ciarify that there is no difference in the rules of procedure between --

A Well) I'm not talking about the rules.

Q -- this deposition and any other deposition.

A I'm not talking about the rules.

Q Okay.

A I'm talking about tho demonstration, the clarity of demonstrating. You know, seeing something is better than hearing it a hundred times.

Q I understand.

A Just seeing it once is better than hearing it, and so I will tell it to you, but it would be best demonstrated by an x-ray.

Q Would you like to show us the x-ray?

A I'll be very happy to, yes.

Q Can yau do it without any machine?

A Yeah. Sure.

Q Well, why don't you do that) but I'd also like you to explain it while you're showing it.

A You can hold it up. I know where it's at.

These are the cervical vertebrae, one, two, three, four, five, six, and seven.

In the last three vertebrael the spaces between these vertebrae and these two vertebrae are smaller, are less of a space there than it is between the other vertebrae, which means that part of that narrowing is a degeneration which occurs in the intervertebral discs which reside between each two vertebrae, and it means that the vertebrae bodies are closer to

each other in -- when there is -- when these changes occur. That little tiny spurring on the fr t, that little beak the front of the ertebra, you can ee the beaks on the front of the vertebrae.

Q Can you show me them7

A Yeah. Those little projections are arthritic spurs.

Q And that's what you were referring to when you say osteoarthritic spurring present at CS-6 ana C6-7?

A That's riqht.

Q Anteriorly, what do *you* mean by that?

A Front.

Q And when you say C5-6, you mean the space between C5 and C6?

A That's right.

Q The fifth vertebra and the sixth vertebra?

A That's correct.

Q In the cervical area?

A That's correct.

Q In the next sentence on page five of your repart you refer to radicular sensations What are you referring to?

What do you mean by that?

A The term radicular means radiation of pain? and that's a subjective symptom of pain which is radiating into her right upper extremity.

nerves which are part of the cervical plexus, part of the nerves which go down into the upper extremity.

Q You go on to state in your December 30, 1985 letter that this represents an aggravation of that preexisting condition.

A That's right.

Q What do you mean by an aggravation?

A Something which enhances the discomfort.

Q What is the preexisting condition

A

Q

A

Q

development of this condition?

A Not in the development of the arthritis but an aggravation of the arthritis.

Q Am I correct then that what you're saying in the first sentence of the second paragraph is that she had a preexisting arthritic condition in the cervical area of her spine?

A That's correct.

Q And that the December 24, 1983 accident aggravated that preexisting condition?

A That's correct.

Q Had it not been for the December 24, 1983 accident? would she have experienced at some time the radicular sensations in her right upper extremity that you referred to?

A Yes, more than likely.

Q And is there any period of time when you think she might have begun to experience those radicular sensations?

A Only if the arthritis became much more severe, the impingement became more

severe, if it was a progressive problem or if she partakes in any kind of activities, even work duties7 which result in an overuse phenomenal then she could have symptoms.

Q When *you* say an overuse phenomena7 are you saying a strain of some kind?

A Yes.

Q Am I correct, Doctor7 that if there had not been any strain or any traumatic event, that the development of this condition would have been slow and gradual over time?

A I can't say that at all. It could have been slow and gradual in the face of an accident or it can be progressive without **an** accident.

Q Am I correct, Doctor, that -- well, strike that.

Do you have an opinion whether Mrs. Whearty would have been experiencing these radicular sensations at the present time if she had not experienced the December 24, 1983 accident or some other strain or traumatic event?

MR. TRUBEY: Separate from the accident?

MR. SCHULMAN: That's right.

A If she had gone out to play volleyball, she could come home and have similar pains. If she decided to paint the ceiling of her house, she could have those same symptoms without the accident.

Q Would they be immediate symptom5 that would go away or would they be symptoms that would last a long time under those circumstances?

A Usually those symptoms come on several hours, more likely the next day, and last for three days, ten days. One can't tell exactly.

Q And have these radicular sensations lasted as long as they have -- approximately two years when you examined her -- because of the nature of the traumatic event that she suffered on December 24, 1983?

A I don't know that she has them, but those are subjective symptoms. We have -- I believe what she says~but I can't tell

you that she really has those symptoms

Q is this a condition similar to the condition of her neck, Doctor, where she did not experience pain prior to the accident but that the accident an December 24, 1983 aggravated her condition and brought on the symptoms?

A I'd like to say yes.

Q I'd iike you to say yes.

A I will say -- I will say yes, but it's a qualified yes.

I don't believe that the accident brought on the symptoms of her knee. I think that this patient has had degenerative changes in her knee which antedated her injury and is, in all likelihood, something that she's been troubled with for several years.

Q Do you have any information that these degenerative changes had caused her any problems prior to December 24, 1983?

A Only from experience.

Q Do you believe that the accident on December 24, 1983 aggravated her knee problems?

a No, I don't.

Q Not at all?

A I don't think so.

Q Ana what do you say -- what do you mean when you say that if the patient develops increasing symptoms of pain and swelling she's a candidate for arthroscopic examination?

A Well, I think that I'd like to give her all the benefit that she can accrue from this particular injury, that if her

symptoms in her knees progress to the point where she develops swelling and has pain which is more constant7 then she should be benefited by an examination; and if one performs the arthroscopic examination, they could clean UP a degenerated meniscus if she has one. If she has articular changes, if they're bone changes, she may not be majorly benefited over a long period of time *by* the arthroscopic examination, but for a short period of time she would be benefited.

Q Would you explain what you mean by degenerated medial meniscus?

A Yes. In the inside of the knee there are structures which we call menisci? that which you commonly read in the sports pages a5 torn cartilages. When there are degenerative changes in the knee, we know that the menisci undergo these degenerative changes. They become softer, they become thinner and occasionally or frequently fragment and add to the degree af discomfort in the knee. When those findings **are** seen at an arthroscapic

examination, thase portions of the menisci which are involved in this process are removed.

Q Can you explain what you mean by an arthroscopic examination?

A I just -- arthroscopic exam is an examination that orthopedists perform which alludes to the insertion into the knee of an instrument which has a lens, a light source and a water flow mechanism which Permits one tu look around inside, the knee.

Q And is there also a mechanism for performing surgical procedures?

A Yes. We make other little portals into the knee to facilitate the insertion of instruments that can remove or alter the mechanics of the menisci.

Q Am I correct., Doctor; that an arthroscopic examination would determine whether or nat her problems were caused by degenerated medial meniscus?

A The arthroscopic examination would only prove that she indeed has degenerative changes. It wouldn't do

anything else except to clarify and to support, or to remove the diagnosis if it was incorrect. The -- it's a means of looking, and if one looks and sees, you either concur or you change your opinion.

Q But the arthroscopic examination is a way of determining whether an external diagnosis is accurate?

A That's correct, yes.

Q You stated in the last sentence of this paragraph that at the time of the examination this was not yet a positive indication for that treatment.

What would be a positive indication for arthroscopic examination?

A Yeah. She didn't have enough symptoms to warrant that examination at the time that I saw her. She would have to have more swelling and more indications, such as a knee that locks, a knee that gives way, difficulty climbing stairs, things of that nature which would push the doctor to go ahead with that indication.

Q What do you mean by difficulty

climbing stair57

a Well, a lot of time5 people who have degenerative changes in their knees have difficulty either going up or coming down the steps, depending upon the reasons tor their pain.

Q When *you* say difficulty, do you mean that they have pain going up or dawn stairs or that they can't *go* up or down stairs?

A Oh, they can go. They can *go* up. They may have pain and that pain may alter the smoothness of their ability to climb up or down steps.

Q And if someone has pain going up or down steps, then that person is a candidate for arthroscopic examination?

A If it bothers them enough9 yes.

Q In the last paragraph, Doctor, the first sentence, you say the prognosis tor Mrs. Whearty's pelvic fracture is good. What do you mean by that?

A Well, she's -- the site of her pelvic fractures did not interfere with the hip joints9 sacroiliac joints, the vital

structures which are found in and around the pelvis) and the site of her fractures were those that heal favorably without too much sequela.

Q In the last sentence, Doctor, you state that the degenerative changes in the lumbar spine were noted at the time of her injury and bespeaks a preexisting condition.

A Yeah.

Q What are the degenerative changes in the lumbar spine that you're --

A The same as we saw in her neck, arthritic changes.

Q is there a narrnwing of any of the vertebrae of the lumbar spine?

A The examination of her lumbar spine as interpreted by the radiologist shows that she has narrowing of the L4-5 interspace to a moderate degree, and she has what is known as a grade one spondylolisthesis of L4 on 5. This occurs only as the result of arthritic changes in those areas.

Q What is a spondylolisthesis?

A That's forward slipping of one vertebra on the other.

Q And that only occurs as a result of arthritic changes?

A At that level. At that level.

Q And why is that, at that level?

A We're gonna make an orthopedist aut of you in a hurry.

Q I'm trying as hard as I can, Doctor.

A I see It's -- we know that people who develop articular changes in the facet joints can have a malalignment, a forward positioning of the one bone on the other, and that's because of the loss in the articular contact of the small facet joints. When the cartilage has disappeared> the facet joints take a different position, and when they do, the different position is a forward slip.

Q But what I was asking, Doctor, is: Why is that only a result of arthritic changes at this level, at L4 or L5?

A There's a difference in spondylolisthesis when it occurs at the L4 or 5 level) when it occurs at the L5-S1

level) and at this level these are the result of arthritic changes.

Q All right. Are you saying it's not possible that this narrowing could be a result of the accident that occurred on December 24, 1983?

A It's not only not possible, it's highly improbable.

Q Do you believe that this condition was aggravated as a result of the accident on December 24, 1983?

A

Q

A

Q

accident on December 24, 1983?

A There is no question in my mind that she was a candidate for low back pain with or without this accident.

Q Would that be a similar situation to the situation in her cervical area, that it would have gradually progressed --

A No. The cervicai area -- the cervical area is not as -- a -- it's not exactly -- the biomechanics are entirely different. It is likely that she will have some symptoms, but it wauld take a lot more to produce the pain in her neck than it would in her back.

Q Do I understand you then ta say that it wouid require a -- less of a trauma or less of a strain to bring on pain from her preexisting condition in her back than it would to bring on pain from the preexisting condition in her neck?

A No. It take5 more -- it takes less of a -- I'm -- you're right. I'm sorry. I thought that you were grading it differently7 but you're right. You're exactly right.

means that it take -- tor this age group to break a pelvis takes a pretty good force.

Q Do you have any opinion as to the --

A No, I don't have any opinion of force.

Q Okay.

A But I can just tell you it takes a fair amount in this age group. It takes a good amount of torce in a person 52 who is not osteoporotic, who's nat been ill all her life, it takes a pretty good impact to break the pelvis.

Q Okay.

A But she didn't injure the hip joints or the sacroiliac joints, and the two major areas which were not involved, so she had a significant injury but it was -- did not interfere with the major portions of her pelvis.

Q Is the force necessary to cause this kind of fracture greater if there is nothing on the other side of the hip to exert an opposing force? Do you understand my question?

A No, I don't.

Q I want you to assume two situations: One, that when this force was exerted upon Mrs. Whearty there was nothing restraining her on the side, no force exerted on her left side; and the second situation, that when this force was exerted cpon Mrs. Whearty's pelvis, that her left side was fixated in some way, either by a solid object or something else that kept her from moving with the force exerted on her right side.

Am 1 correct that it would take a greater force to cause this fracture in

the situation where she was unrestrained?

A Yes. I think that that's accurate, depending upon some other factors,, but I think in general that statement's riqht.

Q Can you explain what other factors might he involved?

A Yeah. I think that if the patient was sitting, standing,, it make5 a difference. It would make a difference if she was hit front to back} or if she has hit side to side, the forces would have to be different.

Q Well, for the purpose of *my* example, I'm asking *you* to assume she was seated at the time and she wa5 in the car at the time of this accident.

A Yeah.

Q Ana that she was hit from the side.

A Yes.

Q The force to cause this fracture would be greater; the force necessary to cause this fracture would be greater if there was **nothing** on her left side keeping her from moving with the forces isn't that correct?

A I don't really know. I'm not a biomechanical expert to know? but I would have to assume that that's probably right,

Q When you say that the fractures represent fractures at the pelvic ring without displacement, do ynu mean that there was a fracture but that the pieces were not moved?

A That's correct.

Q As they were before?

A That's correct.

Q Now, where is the superior pubic ramus?

A Again, if you'd like to hold --

Q Sure.

A -- the x-rays.

You're looking at the pelvis and these are the pubic rami, the top one and the bottom one. That's the superior and that's the inferior. And we're talking about the superior ramus, which is the one at the top.

Q And can you explain? Doctor, what acetabulum is?

A Acetabulum.

Q Excuse me. I've always done that.

A Is the -- the acetabulum is the hip socket.

Q Can *you* explain, Doctor, what a fracture of the transverse process *is?*

A Yes. In the vertebra7 a part of the -- of any one vertebra9 principally in the iumbar spinel there is a spinous process which you can feel in your own back by rubbing your hand up and down your back. That's a spinous process. And deep in the back, which you can't feel, are two similar processes that come out almost iike a -- in the shape of a triangle, and she fractured one of those transverse processes.

Q What is a process exactly7 Doctor'?

A It's a piece of bone.

Q That in this case sticks out from the vertebrae?

A Yes.

Q Okay.

A Deep, deep inside, surrounded by a lot of muscles.

Q Now, you say that the fracture of the

transverse process of the fifth lumbar vertebra that Mrs. Whearty sustained is; quote, "rather symptomatic but of no significance in a short period of time) as much as ten days past injury to the functional aspect of a fracture of that portion of the vertebral unit."

A Yes.

matter of a few days his symptoms are all gone.

Q 50 when you say in your letter? "rather symptomatic," you're referring to very, very painful?

A Yes.

Q Or severely painful?

A Right.

Q And when you say that the fracture is of no significance in a short period of time --

A Yes.

Q -- are you saying that within the ten-day period or, in Mrs. Whearty's case, two weeks, three weeks, the pain would go away?

A Yes. And if it never healed, it wouldn't make any difference.

Q Can you explain why it wouldn't make any ditference?

A Yes, because it's of no real importance. The muscles that attach ta that are small, they're deep, but they're very small muscles and the fracture really isn't a very important fracture.

Q What causes the very severe pain from this kind of fracture in the early stages of healing?

A Yeah, the bleeding that occurs initially.

Q I see. You say in the next sentence7 Doctor, the fractures of the pelvis,

fortunately, without displacement heal favorably.

A Yes.

Q Is this the kind of fracture, Doctor, that I've read about causing fatalities in about 25 percent of the cases from complications to the fracture?

MR. TRUBEY: Objection.

A That's too difficult to handle because a patient need not have a fracture and have *a* mortality from a pelvic injury, so I won't handle that. But your percentage is way off. It's too high in any realm, whether it's soft tissue or boney, that percentage is way too high.

Q Is this different from the kind of pelvic injuries that 1 have read about in those contexts?

A Well, pelvic injuries that involve bone fractures are different from pelvic injuries that involve soft tissues or blood vessels.

Q I think we've covered the information in the rest of the last paragraph on page four, Doctor.

Let me call your attention to the first two pages of your December 30, 1985 letter that's Plaintiff's Exhibit Na. 1. The third paragraph on the first page --

A Yeah.

Q -- the entire second page and the third page, down to the sentence, "The past history is noncontributory."

A Yes.

Q Am I correct, Doctor? that all of the information contained in those paragraphs is information that you obtained from Patricia Whearty during the course of your history tram her?

A Yes. That's correct.

Q Now, maybe 1 can shorten this deposition substantialiy by asking you one introductory question.

Is there anything that you observed in your examination or in reviewing any of the x-rays or any of the other medical records of Mrs. Whearty that is inconsistent with any of the statements that she related to *you* in the history that you've recorded on these three pages?

A No.

Q Am I correct then? Doctor, that everything that she related *to* you as far as her symptoms7 as far as her paint as far as her difficulties is consistent with the injuries she suffered, the x-rays you've observed and the medical records you've reviewed?

A Yes.

Q Would you expect a patient who had undergone the accident that Mrs. Whearty underwent on December 24, 1983 and who had the injuries that she suffered on that date to experience the difficulties that she related to you on December 27, 1985?

A Yes.

Q I'd like to just briefly go through the one remaining page of your report> beginning about the middle of page three, Doctor, and ending about, just below the middle of page four.

You state that, in your cervical spine examination) that Mrs. Whearty was able to flex forward 55 degrees, to extend 50 degrees. What is the significance of

that

Those are normai ranges.

You said that the right and left lateral flexion is 45 degrees and the right and left rotation is 80 deqrees. What are the signiticance of those two observations?

Those are normai.

And what is a cervicai cervigram?

It's a machine7 a tool that we use to register those ranges.

Would you explain what you mean by scapular angle pain?

Yes. On the back we generally rotate their arm around to make the wing bone prominent in the back and we -- we palpate that area known as the superior scapular angle? and she had tenderness more so on the left than on the right.

What is the Adson sign, A-d-s-o-n?

Yes. The Adson is -- sign is a test that we do to place the arm and the neck in a certain position to see whether or not there is any evidence for compression of the brachial plexus.

Q And the significance of the Adson siqn being absent is --

A Plea~t-hat she doesn't have any njury to the nerves in that area.

Q What is the hyperextension test?

A That's a test to determine whether or not there is any interruption or decrease in the blood supply to the upper extremity by again placing the arm and the neck in certain positions.

Q You recite that she was able to flex forward 60 degrees at which point she experiences discomfort.

A Yes.

Q Is there any significance to that abservation?

A Well, in the standing position, when we ask her to bend forward as far as she can, she was able to do so 60 degrees. In a -- in certain individuals that would be a normal range. In other individuals it's the -- about the upper limit of normal; or going the other way~maybe the first sign of limited movement. And people with low back pain, when they bend a certain degree

and start to experience pain? we know that that's the limit where they're -- we increase the range of motion in those smaller facet joints to cause discomfort.

Q You recite that she was able to side bend 20 degrees. What's the significance of that observation?

A That's normal.

Q You recite that there is no evidence of paravertebral muscle spasm in the cervical region. What do you mean *by* that?

A That the muscles which go from the head, the **back** of the head, the occiput, tu the shoulder region were not in any increased tone. They were normal.

Q And you recited that there wa5 a mild degree of trapezius muscle soreness an the left.

A Yes.

Q Haw did you observe that?

A Yeah. There are muscles which win9 out from the base of the neck to the ends of the shoulder and those muscles are called trapezius muscles. And **people** who

have pain in their neck may have some soreness in those muscles, and we squeeze those muscles to see whether we can produce any symptoms of pain.

Q Ana what would cause soreness in the trapezius muscles?

A People can have soreness in their trapezius muscle if they attempt to maintain a position of their neck so that it doesn't move, the muscles are in spasm, or if people have arthritis in the neck they can have trapezius muscle soreness, or if peopie have fractures they can have those kind. It's the muscles which help to support the neck.

Q You testified about a question or two earlier that people who have pain in their neck often have pain in their trapezius muscles.

A Not often. They can have it.

Q They can have it. Okay.

A Yeah.

Q Is this --

A If I said often, it's people who have-pains in their neck do have -- may well

have muscle spasms, and people who have muscle spasms may have pain in their neck.

- - -

(Short Recess.)

- - -

Q Is the observation you made with respect to her trapezius muscles and the soreness there a method of objectively confirming whether or not subjective symptoms of neck Pain are --

A Yes.

Q -- accurate?

A Yes. That's right.

Q You recite that the straight leg raising sign was reveaied as 70 degrees bilaterally with pain on the left at the extremes. What do you mean by that?

A She does -- the straight leg raising sign at 70 degrees is normal. The fact that she has pain on the left side refers to the tact that the mechanism, that movement alters the mechanics of her back and causes her same pain.

Q You observed a decreased sensory perceptian in the lateral side of the left

lower extremity. What do *you* mean by that?

A We check people with pinpricks to determine whether or not there is any disturbance in their sensation, and she stated that she was unable to perceive the pinprick on her !eft lower extremity as well as she couid on the right.

Q What does that indicate?

A It may indicate that the patient has a herniated disc, it may indicate that she has a radicular component of paint that she had previous nerve injuries with resultant loss of perception of pain.

Q You recite that the patient, that Mrs. Whearty was able to stand on her heels and toes. What's the significance of that observation?

A She has normal muscle control.

Q And when you say her reflexes are physiological, what do you mean by that?

A Normal.

Q On the top of page four, Doctor, you recite that Mrs. **Whearty** has bilateral hallux valgus deformities. Can you

explain that you mean by that?

A Yeah. She ha5 bunion5 on her feet.

Q And the Faber sign) what is the Faber sign which you recite as being negative?

A Faber sign is -- F stands for flexion, AB stands tor abduction, ER stand5 for external rotation. It's a mechanism to determine whether or not there's any limitation of motion on the hip joints.

Q And does this mean that your observation was that there was no limitation --

A That's right.

Q -- in the hip joints?

A It means that the test is perfectly normal.

Q First sentence of the second Paragraph, Doctor, you say that the examination of her knee5 reveals no evidence of effusion bilaterally. What do you mean by that?

A She doesn't have any water in her knees.

Q In the next sentence you say there is

no medial or lateral joint line pain bilaterally. What do *you* mean hy that?

A Which means that when we palpate the knee Joints on the inside and on the outside, she didn't have any significant discomtort.

Q What is the grinding test?

a The grinding test is a test done -- we do the grinding test, we put the patient on her abdomen. We flex their knee5 up to a 90 degree angle, push down. on their foot and then turn them inward and turn them outward. it's a test that we frequently use when we want to confirm the presence of a torn cartilage.

MR. SCHULMAN: Off the record.

- - -

(A discussion was had off the record.)

Q Why was the grinding test nat performed on the right?

A I didn't think it was necessary to da.

Q And why is that?

A I didn't think that there was anything to be learned from it. If she didn't have any effusion, she didn't have any medial joint line tenderness3 there was no reason to put her on her stomach and grind her.

Q Was it performed on the left leg?

A It wasn't performed on either side.

Q I don't understand then why *you* wrote that it wasn't performed on the right.

A Well, if 1 said right3 it should have been both. If I did it on one, I'd do it on both.

Q What is the drawer sign?

A It's an examination to determine whether or not the cruciate ligament is tarn or not.

Q And the Lachman test?

A Same thing.

Q When you *say* there is patello femoral tenderness on the right, absent on the left, what do *you* mean?

A Well, we push down on her kneecap and squeeze it backward, forward, which compresses the kneecap against the thigh

bone, and she had tenderness on one side and not the other.

Q And what is the significance of that?

A It may mean that the patient has some injury, chondromalacia, arthritis, cyst, defect on the -- either the kneecap or the bone of the femur to cause that pain.

Q In the last sentence of that paragraph) Doctort you recite that full extension of the right knee causes pain on the right but absent on the left.

A Yes.

Q What is the significance of that?

A That sometimes indicates that the patient may have a derangement in one of the menisci of their knee which blocks the full extension of the knee.

Q It appears, from what you've written in this paragraph? Doctor, that her right knee causes her more trouble than her left knee.

A Yes.

Q Is that accurate?

A That's right.

Q You recite in the fourth paragraph on page four, Doctor, that she was treated for a pulmonary embolism with anticoagulants in the hospital. Can you explain what a pulmonary embolism is?

A Yes. She had a fracture of her pelvis and in the hospital 5he developed same respiratory problems. A diagnosis of an involvement of the lungs by blood ciots wa5 made in the hospital and she wa5 treated by medication which dissolves those clots.

Q Am I correct, Doctor, that the pulmonary embolism was a result of the accident on December 24, 1983?

A Oh, yes. More than likely? yes.

Q And is that also true at the distortion of the urinary bladder, that it wa5 a result of the accident on --

A Yes.

Q -- December 24 --

A Oh, yes.

Q -- 1983?

A Yes.

Q What do you mean by a distortion of

the urinary bladder?

A Well, the -- there's a hematoma in the pelvis which takes up space, and it's that space that the urinary biadder occupies, and so the space-occupying problem was a bleeding episode which displaced the bladder.

Q Now, you testified earlier? Doctort that it would take a considerable force to have caused the fracture to her pelvis?

A Yes.

Q Would that kina of force from the side be capable of causing severe back injury to either the cervical or the lumbar region of the spine?

A It could aggravate the preexisting arthritis.

Q Could it cause a back injury to the cervical or lumbar area in the absence of any preexisting condition?

A It would have to be demonstrated. It's unlikely7 but there's no evidence that she had a fracture, except for that transverse process fracture.

Q The radiology report that's been

marked Plaintiff's Exhibit 2 --

A Yes.

Q -- who is the author of that report?

A Let's see if I can tell you. That's Dr. West. Doctor -- I forgot what hi5 first name is. I think it's Phil -- no, it's Phil Weiss. I'm sorry, Phil Weiss.

Q And did you speak with Dr. Weiss prior to his reviewing the x-rays of Patricia Whearty?

A No, I did not.

Q Did you speak to Dr. Weiss priar to his preparing Plaintiff's Exhibit No. 2?

A I did not.

Q Am 1 correct then that he knew nothing about Patricia Whearty prior to preparing Plaintiff's Exhibit 2?

A I'm sure he didn't.

Q You're sure he did not?

A I'm sure he did not know her.

Q So he did not know at the time he prepared this report that Mrs. Whearty had been involved in an automobile accident?

A Only if he were to call and find out who was gonna pay for it and I told him.

Q Did *you* review any documents prior to your examination of Mrs. Whearty?

A I reviewed documents concerning this patient. Usually I don't review them before my examination.

I can't -- I can't honestly tell you that I did or did not before that, but I certainly reviewed them after.

Q Okay.

A But I make - 1 make it a habit to not to look at the reports until I *see* the patients.

Q Did you review any documents prior to preparing your December 30, 1985 letter?

A Oh, *yes.* I reviewed all those that I have and I have a whole stackfull.

Q Can I look at them?

A Sure. Absolutely.

MR. TRUBEY: Just so the record's correct, that's what you provided us, Howard.

MR. SCHULMAN: I just want to look and *see* what he has, and it may take me less than five or ten seconds.

- - -

(A discussion was had off the record.)

- - -

MR. SCHULMAN: Can I mark this Plaintiff's Exhibit 3 and have you send me a copy?

THE WITNESS: I'll be glad to send you a copy, but I won't let you mark that one.

MR. TRUBEY: I'll stipulate that it's that.

MR. SCHULMAN: Then let's, just tor the record, you've stipulated that Plaintiff's Exhibit 3, when copies are sent to counsel and the reporter, will be the two sides --

Are these your notes, Doctor --

THE WITNESS: That's right.

MR. SCHULMAN: -- of your examination of Mrs. Whearty?

THE WITNESS: Yes. That -- there shouldn't be any question about that because you had a

young lady watching me take -- doing the history and writing my notes. She was here.

MR. SCHULMAN: I'm not raising any question right now.

THE WITNESS: No, there shouldn't be any question about that.

MR. SCHULMAN: I'm just identifying it for the record.

THE WITNESS: Because there was somebody from your office here at the time and she watched me do this.

MR. SCHULMAN: And --

MR. TRUBEY: Just send it to both of [redacted]

MR. SCHULMAN: This is just a document that has no heading, but at the top it says referred by Attorney Rex Trubey, and Dr. Brahms; is that correct?

THE WITNESS: That's right. That's right.

MR. SCHULMAN: Would you send

me a copy of both sides of this then?

THE WITNESS: Sure.

MR. SCHULMAN: And we'll have it marked at that time.

MR. TRUBEY: He'll send it to me. I'll send it to you.

MR. SCHULMAN: That's fine, as Plaintiff's Exhibit 3.

BY MR. SCHULMAN:

Q Between your December 30, 1985 letter and today, have *you* reviewed any documents that relate to Mrs. Whearty other than the x-rays that were taken on December 27, 1985 and Plaintiff's Exhibit 2, the radiologist's report?

A No. Nothing else.

Q Now, the document that we are going to have marked as Plaintiff's Exhibit 3 indicates that the -- Mrs. Whearty was referred to You by Attorney Rex Trubey.

Is Mr. Trubey the first person who contacted you with respect to Patricia Whearty?

A As far as I know, yes.

Q Do you know when Mr. Trubey first

contacted you?

A I do not.

Q And what did he explain that he

A Mr. Trubey doesn't taik to me. Infrequently any attorney talks ta me. They talk to my secretary. And if they are sent in for an examination) it's usually marked examination, defense insurance or something, Workman's Compensationt whatever it's -- the girls mark that an the top of the chart.

Q Anti did you, In fact, talk tu Mr. Trubey at any time prior to examining Mrs. Whearty?

A I did not.

Q What was your understanding as to what you were being requested to do in examining Mrs. Whearty?

A it's routine when I receive folders with information that a patient's been involved in an accident, Workman's Compensation claim, an insurance policyt piaintiff's attorney7 anything, that a patient comes in and tells me they were

Q And did you understand that you would be sending the report to Mr. Trubey?

A Absolutely.

Q And did you understand that at some time you subsequently might have to give a deposition in this action?

A Yes. That's not infrequent.

Q And did you understand at some time you might have to testify at the trial of this action?

A Yes. That's true.

Q Have you ever been retained by Mr. Trubey before to examine any patient?

A Yes.

Q On approximately haw many occasions?

A I don't know.

Q When was the first occasion?

A I don't know.

Q Has it been more than several years?

A I don't know.

Q Have you ever been retained by any one else at the firm of Meyers --

A Yes.

Q -- Hentemann, Schneider & Rea?

A Yes.

Q And can *you* name some of the other lawyers who have retained *you* for this purpose?

A If you show me his letterhead, I'll show you -- I can tell you the names.

Q I don't think I have a *copy* of his letterhead.

MR. TRUBEY: Just for the record, every litigation attorney.

A If I know -- if you show me -- I don't know -- I've see you before and I don't know where you come from.

MR. SCHULMAN: Can I just ask you, Rex, when you say every litigation attorney, how many attorneys is that?

MR. TRUBEY: Well, not counting the new ones, I'd *say* about seven or eight.

MR. SCHULMAN: And when you say every litigation attorney, you're saying that --

MR. TRUBEY: Of the --

MR. SCHULMAN: All of the seven or eight litigation attorneys who have experience?

MR. TRUBEY: Who have experience, other than the young associates, yes.

MR. SCHULMAN: Have retained Dr. Brahms' services in a manner similar to his examination of Mrs. Whearty?

MR. TRUBEY: Whether it be for a plaintiff or defense) both.

Q Am I correct, Doctor, that *you* have written letters about patients you have examined comparable to your December 30 1985 letter?

A Yes, to many attorneys in the city.

Q Do you have a standard charge for examining a patient --

MR. TRUBEY: Objection.

Q -- for this purpose?

A Yes, I do.

Q And what is that charge?

A It's $150 for the report.

Q And do you have a standard charge for testifying, whether at deposition or trial?

A Oh, no. it's different. if I go downtown it's much more expensive. In my office it's $500 for the first hour.

Q And what is the charge if you go downtown?

A It depends on how much time it takes.

Q If it takes a half a day, what is the charge?

A When I get back. to my office --

MR. TRUBEY: Just a continuing objection.

A -- I would fiqure it out.

I'm not -- I don't really think that this line of questioning is really -- really adds or subtracts from the case. I obviously am not working for nothing and neither are you, and I would rather not spend the time going downtown because it does take away from my time in the office, from the operating room, and I'm not in it for the money that's involved. I'm in it -- I just don't want *to* spend that much

time away from the office.

Q I understand that.

A So I charge for my time as you do.

Q Let me just explain, Doctor, these are perfectly standard questions --

A I'm not -- I know they are.

Q -- in questioning any witness.

A And it just doesn't add or subtract from the information referable to this patient. You and the opposing attorney can decide how much money has to be spent on the thing. 1 don't really think that's an important issue.

Q I understand, Doctor. I'm entitled to an answer to the question, though.

A I won't answer it --

Q It's a standard question.

A -- except to tell you that I charge my time similar to you.

Q And am I correct, Doctor, that your charge for testifying at trials of an action would be greater than $500 for the first hour?

A Yes, because it takes more time.,

Q I understand.

A On the first page of your report, Doctor, you recite that attorney Carla Tricharichi was present during the history portion of the examination; is that correct?

A That's correct.

Q And she was not present during the physical examination portion; is that correct?

A That's correct.

Q Isn't it carrect that she asked to be present during that portion --

A Yes.

Q -- of the examination?

A That's right.

Q And am I correct that you refused to allow her to be present --

A That's correct.

Q -- during that portion?

MR. SCHULMAN: I don't have any more questions, Doctor. Thank you very much.

MR. TRUBEY: Thank you, Doctor.

THE WITNESS: You're welcome.

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C E R T I F I C A T E

State of Ohio,)
County of Cuyahoga.) SS:

I, Deborah L. Baer, RPR, a Notary Public within and for the State ot Ohio, duly commissioned and qualified? do hereby certify that the within-named witness, MALCOLM A BRAHMS, M.D., was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid; that the testimony then given by the above-referenced witness was by me reduced to stenotypy in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

1 do further certify that I am not a relative? counsel or attorney tor either party? or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Cleveland, Ohio, this 26th day of May A.D., 1986.

Deborah L. Baer

Deborah L. Baer, RPR, Notary Public
In and for the State of Ohio
My commission expires 12/18/88

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

- - -

PHYLLIS DAHN,)
Plaintiff;)
vs.) Case No. 129676
BRIAN TEEPLE,)
Defendant.)

- - -

Deposition of Malcolm A. Brahms, M.D., taken by Plaintiff as upon cross-examination under the Statute, as provided by the Ghio Rules of Civil Procedure, pursuant to notice, before Jeniffer L. Tokar, a Registered Professional Reporter and Notary Public within and for the State of Ohio, on 'Wednesday, August 10, 1988, at the offices of Malcolm A. Brahms, M.D., 26900 Cedar Road, Beachwood, Ohio.

- - -

APPEARANCES:

David I. Pomerantz, Esq.
Pomerantz and Cichocki Co., L.P.A.
910 Statler Office Tower
Cleveland, Ohio 44115
On behalf of the Plaintiff;

David G. Borland, Esq.
Meyers, Hentemann, Schneider & Rea Co., L.P.A.
2121 Superior Building
Cleveland, Ohio 44114
On behalf of the Defendant.

- - -

ALSO PRESENT:

Kathleen Hopkins

- - -

MR. POMERANTZ: Let the record reflect that this is the deposition of Dr. Malcolm Brahms in the case styled Phyllis Dahn versus Brian Teeple, T-e-e-p-1-e, Case Number 129676 in the Court of Common Pleas, Cuyahcga County, Ohio.

Mr. Borland, I take it that any defects as to notice are waived?

MR. BORLAND: That's correct.

FIR. POMERANTZ: This is a deposition of Dr. Brahms being taker. by agreement.

Doctor Brahms, I know you've had your deposition taken in the past. The general ground rules apply. If you don't understand any question that I ask you or you don't hear any question, please stop me and I'll restate the question.

If you do respond to it, I'll assume that the answer is responsive to the question. Fair enough?

THE WITNESS: Right.

CROSS-EXAMINATION OF MALCOLM A. BRAHMS, M.D.

By Mr. Pomerantz:

Q. First of all, could you state your full name?

A. Doctor Malcolm A. Brahms.

Q. What's your office address?

A. 26900 Cedar Road, Beachwood, Ohio.

Q Doctor, we're here regarding my client, Phyllis Dahn, who I represent regarding an automobile accident which occurred on November 25, 1985. First of all, do you have office notes in reference to Miss Dahn?

A I do.

Q Can I have an opportunity to take a look at those?

A Sure

M POMERANTZ: Mr Borland and Doctor, if you don't have any objections, I'll ask at a later date if I could just get a copy of his office notes. Would that be okay?

MR. BORLAND: Sure.

Q Can I ask you what records you've had an opportunity to review regarding Miss Dahn?

A Yes. I saw the report of emergency room. I saw the report from the Poma Hospital, referable to the x-rays; a report from Dr Diogracias, a report from Dr Farner and from Dr Ortega And, I had the opportunity to review Dr. Gabelman's report, the CT scan reports and Dr Mars' report

Q. Did you have an opportunity to examine Mrs Dahn?

A. I did

Q. And when was that?

A. I saw her on the 10th of August of 1987.

Q. A year ago today?

A. Correct.

Q. And that exemination was in your office, I take it?

A. That's correct,

Q. Had you ever examined her before that day?

A. I had not.

Q. Have you ever seen her since then?

A. No I've not.

Q. Do you have any plans to see her again?

A. Not unless she likes me, wants to come back.

Q. Fair enough. Can you tell me the history with which she presented?

A. Yes, sure. She told me that on the 25th of November of 1985, that she was a driver of her automobile. She was involved in a motor vehicle accident on Snow Road near Broadview in Parma, Ohio.

She said that as a result of this impact, her head struck the windshield. She was thrown against the passenger door. She said the car crossed the road, striking in the embankment. She denied unconsciousness. She was not wearing a seat belt?

MR. POMERANTZ: Motion to strike that comment. Go ahead, Doctor.

A. She was taken to Parma Community Hospital by her husband. In the emergency room, she was examined, x-rays were taken, medication prescribed and she was referred to her family doctor.

Doctor Deogracias examined her on the second of December of 1985. He obtained x-rays; he prescribed some medicine and physical therapy and she was subsequently referred to Doctor Farner who saw her in consultation and by Doctor Ortega who is a neurosurgeon and who, in so many words, told her, "learn to live with it".

She told me that when she talked to her attorney stating, "nobody tells me what is wrong, only possibilities, probabilities and could be's", he referred her to Doctor Gabelman who examined her on the 24th of July of 1987.

CT scan was obtained on the 4th of August, 1987. She reports that she's not yet had a myelogram, which has been discussed. She'd been told that an MRI examination might be necessary but that it was toe expensive and these tests were deferred.

"Do it when you can't stand it any longer."

Doctor Goldman, after his examination, referred her to Doctor Mars, who prescribed medication which was beneficial for her headaches.

Patient also related that her knees struck the dash of the car and that they were "black and blue."

She's no longer symptomatic referable to her knees or her neck.

Q. Now Doctor, I have a copy of your report. You made a report supplement to examining her, correct?

A. That's correct.

Q. I have a copy of that. Would you agree with me that the report -- I'll tell you, why don't we mark the report as Plaintiff's Exhibit 1.

Doctor, I'm showing you what has been marked as Plaintiff's Exhibit 1. Just for the record, is that a true and accurate copy of your report?

A. Yes, it is.

Q. Fair enough. I see at the bottom of the first page, continuing on the second page, those are the, you've listed therein what her complaints were at the time of her examination; would that be correct?

A. That's correct.

Q. Were there any other complaints that were not put into that report?

A. No, all the complaints she told me about are in the report.

Q. Did you have an opportunity to examine her?

A. Yes, I did.

Q. Can you tell me what tests were conducted?

A. General physical examination, an orthopedic examination.

Q. All right. And what were your findings upon examination?

A. Well, you want me to read my examination report?

Q. Are your findings set forth on the second page of your report?

A. They are.

Q. Were there any other findings other than the ones you've listed there?

A. My examination is reported in this report.

Q. Were there x-rays taken?

A. No, didn't need to because she's already had the appropriate number of x-rays to include CT scans.

Q. Were there any other diagnostic tests taken, cat scan, anything like that?

A. No.

Q. Now, did you have an opportunity to review any x-ray films or anything like that, prior to writing your report?

A. No, just the x-ray reports.

Q. All right. I had a couple questions regarding your report. In the second paragraph you noted that she was examined by Doctor Ceogracias on December 2nd. The delay in the examination was because of Thanksgiving. In your opinion did that have any impact upon her treatment or her recovery?

A. None at all.

Q. On the second page you mentioned that the patient has, excuse my pronunciation, genu varum deformity?

A. Un-hmm.

Q. Can you tell me what that is?

A. Yes, that's a bowlegged type of deformity. It's a mild deformity in this particular woman.

Q. In that same paragraph you mentioned that her glenohumeral motions are within normal limits. What are those?

A. Those are shoulder motions.

Q. Were there any positive findings, whatsoever, regarding her shoulders?

A. Nothing in her neck or her shoolders.

Q. Now, you also mentioned that, apparently there is evidence of reversal of the curve. I assume you mean the lordotic curve?

A. That was a report made by Ooctor Farner.

Q. So, in other words, when you say in your report there was evidence of reversal of the curve, is that suggestive of a muscle spasm at the time those x-rays were taken?

A. Yes, sir.

Q. That would be at the time of the ER x-rays?

A. That's correct.

Q. So to you, then, that reversal of the curve was indicative that she was experiencing muscle spasm at that time?

A. Certainly, that's correct.

Q. All right. Based on seeing that reversed curve, can you give an opinion as to how long she was experiencing muscle spasm prior to the taking of the x-rays? Could that have happened over a short period of time or would it necessarily have been a longer period of time?

A. No, that's an acute entity, usually follows trauma and probably in a person of this age, could last anywhere from one to six weeks.

Q. You also noted that the neurological examination performed by Doctor Crtega was non-specific. What did thet mean?

A. He found nothing wrong.

Q. No positive findings?

A. Not according to his report.

Q. In the final paragraph you mentioned that a cat scan which was recently obtained without the benefit of dye -- I'm a little ignorant as to exactly what the difference is between a cat scan with dye or without dye. Could you explain that to me?

A. CT scans of the cervical spine are not as, don't have the same diagnostic value as a CT scan of the lumbar spine. The diagnostic acumen of that test is improved with the injection of dye into subarachnoid space.

Most radiologists who perforiii and read CT scans of the cervical spine find that this is an enhanced method of interpreting those x-rays,

Q. And, you say that that is specific to the cat scan of the cervical spine as opposed to the lumbosacral area?

A. That's correct.

Q. In your own practice you order cat scans, I

take it?

A. Everyday.

Q. And, are they performed in your office or elsewhere?

A. No, we don't have a radiology department in this office. We send our x-ray requests to the radiology concern in this building or in the hospital, to perform those x-rays.

Q. And, do you order all your cervical spine x-rays to be done with dye or is that left to the discretion of the radiologist?

A. Not infrequently. If we were concerned about a significant injury of the cervical spine, an x-ray of the cervical spine, plain x-ray would be our recommendation. And, if we thought that we needed a more specific, sophisticated test, we would ask for an MRI rather than a CT scan of the cervical spine.

Q. So, your answer would be that you do not necessarily order it with a dye for the cervical spine?

A. We would rather have an MRI examination than a CT scan of the cervical spine.

Q. Do you have any idea what a cat scan costs, what the cost of the cat scans are?

A No, I don't

Q So then you could not give an opinion as to the reasonableness of a charge for a cat scan

A Since we don't do them in our office, I have no idea what the charges are

Q Based on your examination and the history taken of Mrs Dahn, what are your opinions as to your diagnoses as to what injuries she suffered as a result of the motor vehicle accident of November 25, 1985?

A. I think that she had some soft tissue injuries and I suggested that it may well have been in the realm of a cervical sprain. And, in my opinion, patients of this age group who have injuries of this nature, respond favorably in a period of time, plus the help of medications prescribed by the doctors, along with the physical therapy that was prescribe .

Q. Now, you mentioned diagnosis of the cervical sprain In your opinion was the cervical strain proximately caused by the motor vehicle accident of November 25, 1985?

A. Yes, I would think so.

Q. Now, you said you had the opportunity to look over Doctor Deogracias' report You did have the

opportunity to review that prior?

A. I read it; I didn't study it, I did read it.

Q All right Was there anything in that report that you disagreed with?

A Doctor Deogracias examined her shortly after the accident and many of his findings allude to acute findings. My examination was done in August of 1987 and my findings are referable to the examination that I made And, there is no reason for my questioning Doctor Deogracias' report

Q. Now, you mentioned, I think what you were referring to was several diagnoses which she was experiencing acutely which have since resolved themselves; would that be correct?

A es.

Q. e mentioned a contusion of the head, a contusion of the nose and anterior chest ll Setting aside the cervical sprain, he s mentioned dorsal lumbosacral bilateral myofascitis and contusion with ecchymosis of the right and left knees

You have, am I correct in saying that you have no reason to disagree with those diagnoses that Doctor Deogracias --

A No, I don't.

Q Did you feel that the treatment that Doctor Rogracias rendered was proper treatment in lieu of the problems she was having at that time?

A. Certainly.

Q And that the services he recommended were necessary services?

A I don't know that -- if he examined her with relative frequency, they weren't I don't know how frequently he examined her I don't disagree with his initial examination

Q o if I understand, you may have some question with how frequently he saw her?

A Doctor Farner and Doctor Ortega, who were both consultants, didn't find much in the way of their physical findings, from an orthopedic or neurologic standpoint And, I doubt that she really required much treatment after the first six weeks.

Q. Why don't we talk about Doctor Ortega's report for a second. You also had the opportunity to read his report?

A. Yes.

Q Was there anything in his report that you did not agree with?

A. No, I agree with him, but I don't -- he made

a diagnosis of, question of a possible ruptured disk at C5-6 which proved to be not a diagnosis established by the CT scans.

Q. So in other words, in this instance you are relying on the CT scans even though they were not done with the benefit of the dye; would that be correct?

A. His neurological examination was normal. I rely more on his physical examination than the CT scan. One would guess that the CT scan would be normal in view of the fact that both Doctor Farner and Doctor Ortega found her to be within normal limits.

Q. Based on tne complaints that she was having at that time, do you think it was, in your opinion, was it proper for her to be referred to a neurologist, neurosurgeon?

A. Sure.

MR. BORLAND: I'm sorry, based on her complaints at what time?

MR. POMERANTZ: At the time that she was referred by Dr. Deogracias.

Q. Now, if I can turn your attention to Doctor Gabelman's report. Had you had the benefit of reviewing Doctor Gabelman's report at the time that

you wrote your report.

A. I had not.

Q. You've had a chance to read it now?

A. Yes.

Q. Have your opinions changed?

A, Not one bit.

Q. Is there anything in Doctor Gabelman's report that you disagree with, in terms of his findings?

A. Certainly I disagree with them. I disagree with his diagnosis.

Q. How so?

A. Because I don't think that at the time that he saw her, which was the 24th of July of 1987, that her physical findings dictated any diagnosis other than the fact that the patient was normal.

Q. So then you disagree with the diagnosis of sprain at the cervicothoracic and lumbosacral spine?

A. Absolutely.

Q. In terms of his prognosis, he stated, on the second page of his report, her prognosis must remain guarded. You disagree with that also?

A. I totally disagree with that. You can put exclamation marks behind it.

Q. Did you feel that cat scans were indicated at

that tine?

A. In 1987?

Q. When they were taken, correct, which I believe was August of 1987.

A. I didn't think that they were necessary.

Q. Why is that?

A. Physical examination was within normal limits.

Q. What about, would your opinions be altered at all on the fact that she had continued pain at the base, the chronicity of the complaints of her pain?

A. I think they were subjective and I thought that it was somewhat of an overreaction.

Q. An overreaction in terms of the doctor or --

A. No, the patient's subjective. The patient's the one complaining, not the doctor.

Q. Do you agree with me that she did, according to Doctor Gabelman's report, she did complain of pain in the neck and back at the time that she was examined by the doctor; is that correct?

A. I agree with that: yes,

Q. Do you believe her?

A. I believe anybody who gives me a history that they have pain, because pain is subjective and pain is not an objective finding. So, if the patient

comes to a doctors' office, says she has pain, one would have tc believe they have pain.

I don't think the significance of the pain is of great interest. But, I think that she might continue to complain.

Q. And, if she continued to complain of pain at present, for example, you would still believe her?

A. I believe her, but I don't think I would treat her.

Q. Now, Doctor Mars also examined Mrs. Dahn and conducted an electroencephalogram. Do you believe that test was indicated, based on her complaints and medical picture at that time?

A. Doctor Mars is a neurologist and that's out of my field. If he thought it was indicated; I wouldn't disagree with it. Doctor Crtega didn't think it was necessary and I wondered why Doctor Ortega didn't think about it and Doctor Mars did a year later.

So, I don't know. That's something for Doctor Grtega to defend, not me.

Q. Do you think that the chronicity of her pain or complaints of pain at that time may have indicated that an electroencephalogram was necessary?

A. Sometimes exams are done for reasons to rule out complaints. Sometimes they're done for pecuniary reasons. And so, I don't really know why an EEG was necessary at this point in time.

Again, if Ooctor Ortega who saw her shortly after the accident didn't think it was necessary, I wonder why it was necessary a year later.

Q. Now, you mentioned that tests such as an electroencephalogram must be necessary to rule out certain problems. Would that also be the same case as a cat scan?

A. I don't think the cat scan is in the same category at that point in time.

Q. In your practice, when somebody presents with pain of long-standing nature, is that one indication to perform a cat scan?

A. No, that's not the only reason to do a cat scan.

Q. Is it a reason, though?

A. I don't believe the cat scans are as good as MRI's. I couldn't use cat scans in the cervical spine.

Q. What advantages does an MRI have over a cat scan in the spinal area?

A. Great many reasons. It delineates soft

tissues as well as the bony structures. One has the ability to spectroscopically see things in perspective, in a clearer fashion than a CT scan does.

Q. Now, I noticed in Doctor Deogracias' report, apparently, Mrs. Dahn was involved in a 1975 fall and had an injury of her left shoulder. Are you of the opinion that that injury, in any way, was a cause of her current complaints or complaints from the time of her accident, onward?

A. None whatsoever.

Q. Would you agree, from the history that was given arid the materials that you've hac! an opportunity to review, that Mrs. Dahn suffered from post-traumatic headaches following the accident of 1985.

A. Sure.

Q. Did she complain of these when you examined her?

A. She did.

Q. I notice in your report that you mention the headaches may be "postural and job related". Can you tell me what kind of work she does?

A. She's a secretary.

Q. And on what do you base your opinion that

these headaches might be postural or fob related?

A. Pecple who sit at a desk -- this court reporter now, in this particular position, with her arms always in front cf her, working, head bent forward, it's not uncommon for people of that occupation, of those occupaticns, to have postural headaches.

Q. Now, would you also agree that by history and in light of the materials that you reviewed, that Mrs. Dahn has had muscle spasms as a result of this accident, in the cervical spine area?

A. Not any longer, no.

Q. But, she did at one time?

A. She did initially in the acute phase, absolutely.

Q. And, this would be supported by the reverse of the lordotic curve that she experienced?

A. Yes, that's correct.

Q. Did the types of neck and back injuries that Mrs. Dahn has had, do they normally go through periods of remissions and exacerbations?

A. If it's associated with an overuse phenomena, no. If she went cut to change a tire or a lot of gardening, she may have had an exacerbation of those muscle spasms. But, just not on an everyday

basis. It would have to be incited by some kind of activity.

Q. What about changes in the weather, that sort of thing; could that also?

A. Not in this age group, no.

Q. So then you would agree, though, that if her activities changed or she sat in a different position or something of that nature, that she may experience exacerbations *of* types of problems she' had in her neck and back?

A. Only with overuse or in posture in her job-related work.

Q. Are you of the opinion that Mrs. Dahn would have suffered neck pain while at work or doing daily activities, considering her age group and other facts, if she had not been involved in this accident?

A. I think that if one has any kind of trauma, be it an accident, be it a fall or be it a shove or anything, anyone who has had an insult is more likely to have reasons for neckache. But ordinarily, without trauma, the answer is no.

Q. Now, you stated in your report that when you examined her on that day, she had no muscle spasm?

A. That's correct.

Q. Is that correct?
A. Yes.
Q. Are you of the opinion that she know longer has any muscle spasms as a result of this accident?
A. I am.
Q. I take it that you don't know whether she's had any muscle spasms subsequent to your examination one year ago?
A. I don't know.
Q. So, it's certainly possible that she walked out of your door and experienced muscle spasms shortly thereafter?
A. Highly unlikely.
Q. Eow do you know that?
A. Because I know that can't happen without some incident to incite that kind of reaction,
Q. All right. Could you explain, physiologically, what happens to the body to cause a muscle spasm?
A. Sure. In the, if we just relate ourselves to the cervical spine, the reason for muscle spasms is that there must be injuries *to* the soft tissues, the ligaments, the facet joints in the neck. And, with time, this revolves itself, goes back in a normal homeostatic state.

Any incident which aggravates or reproduces those factors can cause muscle spasm. No other reason for muscle spasms.

Q. Can a person experience pain in tho cervical area without a muscle spasm?

A. Certainly.

Q. And, you'd agree with me, Doctor, that different people recover from similar injuries at different rates?

A. Depends upon their age.

Q. All right. Can two people in the same age group that suffer similar injuries, recover at different speeds?

A. Certainly. Depends on whether they have metabolic diseases or the state of their obesity, their problems, their work, things of that nature.

Q. Are you of the opinion that Mrs. Dahn no longer is having any pain as a result of this accident?

A. I am of that opinion, yes.

Q. And, why is that?

A. Because I think she's recovered to her normal state.

Q. Based -- I mean, she still complains of pain, you agree with that?

A Again, I say that's subjective And, her pains might really be something of significance, they might be rather insignificant, they might be transient, I don't really know. But, on the basis of my examination, on the basis of her x-rays, on the basis of the CT scan, on the basis of a neurological examination by Doctor Ortega shortly after the accident, the answer is, I don't think she has any residual manifestations of injury now.

Q Where is the pain coming from?

A. I don't know.

Q. Is it possible for someone to continue to have pain from this type of neck injury, two and a half years post-accident?

A. Highly unlikely, again, with exclamation marks and exclamation points

Q. But, it is possible?

A. Very unlikely

Q. Well --

A. I won't answer it possible because I don't really think so But, the word possible is such an effervescent kind of adjective, I don't ot to use it. I'm just saying it's highly unlikely in a person of this age group to have any persistent problems, other than with re injury, overuse.

Q When you examined Mrs Dahl, did she give you any history of any other injuries subsequent to any other trauma whatsoever, subsequent?

A. After the automobile accident?

Q Correct

A She couldn't have given me any She gave me all the history about herself, but in her past history, let's see what she said in her past history Absolutely non-contributory

Q. And, you know of no other injuries?

A. That's correct, right, I know of nothing else about the lady.

Q. And as far as you know, she's not been involved in any trauma subsequent to the time that you examined her?

A. I don't know that. She doesn't live with me. I don't know that.

Q. To your knowledge, there have been no subsequent injuries?

A. I wouldn't know. I only examined her one time in August of 1987. I haven't heard from her since.

Q. I'm trying to put this together, Doctor. You said that she suffered trauma. She did have injuries as a result of that. She had muscle

spasm -- she continues. Was complaining of pain. At the time you examined her, you believe that in fact she was in pain and --

A. I believe what she told me. I didn't think she was in pain. I believe what she told me but I don't believe she was in pain.

Q. In other words, you don't believe her?

A. I believe what she told me, but I don't believe she was in pain.

Q. But, did she tell you she was in pain?

A. She told me she was in pain.

Q. And either you believe that or you don't.

A. I believe what she told me. I don't believe she was in pain.

Q. It doesn't make sense, Doctor.

A. It doesn't make sense to me either because I really believe what she said. But, I have no reason on the basis of my physical examination, to believe that there is any neurological or orthopedic reason for discomfort.

Q. All right. If I understand you correctly, you're, in a polite way, saying you really don't believe that she was experiencing pain.

A. If you want to say it that way, we'll accept it. I didn't say it, you did.

Q. Do you agree with that or not?
A. I don't agree with it. I'm going to say it again, Mr. Pomerantz. She told me she has pain. I see no prudent reason for her discomfort, based on my examination.
Q. If you do believe that there is pain, can you tell ne where this pain is coming from?
A. I said I don't think she has pain.
Q. You don't believe her when she said she's in pain?
A. I believe what she told me. I find know reason for her pain.
Q. In examining your own patients, have you ever given a patient a guarded prognosis?
A. If they were seriously injured, absolutely.
Q. What does the term guarded mean?
A. Guarded means that one doesn't know if they're going to get better or worse.
Q. Speaking hypothetically, when you are giving a patient a guarded prognosis, that means there's a possibility that that person will never recover from those injuries, fully recover from those injuries; is that correct?
A. No, it doesn't mean that at all. It doesn't mean never. It means we continue to observe them

over a period of time, for a length of time that we think they should recover. And, if they don't, then we should find other reasons that they haven't recovered.

Q. Any other meaning that guarded can have?

A. It may be to other people. That's my definition.

Q. Now several of her treating doctors have found her prognosis to be a guarded one. Do you have any reason -- you apparently disagree with that?

A. I do, yes.

Q. And, why is that?

A. Because I don't believe that she has anything to have a guarded prognosis for.

Q. Do you feel that there are any other tests that could be or should be performed on Mrs. Dahn to find out the source of the pain that she claims that she's experiencing?

A. The insurance company and everybody else has spent more money than they should have to investigate her injuries. And, the answer is absolutely no.

MR. BORLAND: Move to strike reference to insurance.

Q. Car? you tell me what a TENS unit is, how it works?

A. Sure. A TENS unit is a device which sends impulses to the areas in which the Electrodes are placed, in order to bombard the sensory impulses with a confusing discharge to attempt to decrease the discomfort that the patient's experiencing.

Q. Would you agree with me that a TENS unit then either interrupts or confuses the signal from the area of pain, to the brain, would that be fair?

A. I think that's what I said.

Q. Gkay. If a patient is treated with a TENS unit and does not experience any relief of the pain that they're experiencing, what does that suggest to you from a diagnostic standpoint?

A. I'm not much of a favorite for the use of TENS units. It doesn't mean anything to me. I don't think TENS units are much value at any time.

Q. In your own practice, you do not --

A. I do not use them.

Q. Why don't you like them as a method of treatment?

A. Because I don't find them to be of any value. I don't think that it's a good unit. It's a waste of money and doesn't do anything that a good warm

shower wouldn't benefit.

Q. So then if a patient were to use a TENS unit to find relief frcm that, you don't put any stock in that, from a diagnostic point?

A. I think on a percentage basis, like anything else, it follows a curve. Some people get better; some people don't get better; some people are worse with it. So, you say your prayers and you find out what happens. I just think it's a waste of money.

Q. Do you feel that there's a psychclogical aspect to Mrs. Dahn's symptoms?

A. Yes, I do.

Q. And, would you explain that a little more fufly?

A. I think both of us know what we're talking about. I just think there's a somatic overreaction to her symptoms which mean a lot more to her than to the treating physicians.

Q. Can you medically give me a diagnosis for this?

A. No I'm not a psychologist.

Q. Would you agree with me that, would it be your opinion that she believes she's in p in but you don't think she really is in pain?

A. I wouldn't say that, but I'll say yes to

that. But, I don't agree with it in total,

Q. What don't you agree with?

A. i just think there are a lot of people who continue tc have some symptoms which mean a great deal to them until there is someone, as she said, who can give her an answer and not probabilities and possibilities and that business.

That's what she told me. And, until she finds that this whole matter is over, then her symptoms may then be less significant to her.

Q. When you say this whole matter is over, are you suggesting --

A. I think that she's gone through this, it's lingering, it's hovering over her head, Until this whole thing is cleared up, satisfactorily, then I think she -- some of those symptoms might not have the same degree of discomfort that she is experiencing.

Q. Doctor, I think you may be, you're being polite again. Are you saying you feel once the lawsuit is over, she will experience relief from her pain?

A. I think once she gets this matter settled in one way or another -- and I have nothing to do with lawsuits -- once this matter is out, when she's no

longer compounded by a lot of extraneous things and physical examinations, that her sympt s, as doctor Ortega said, she's going to have to learn to live with it.

Q So, you do not feel then that her symptoms have been prolonged by the lawsuit?

A. Are you asking me or telling me?

Q. I'm asking I just want to know your opinions, Doctor.

A. Yes, I do think her symptoms are partly a product of the length in which this matter has dragged on.

Q. So there is no confusion, when you say matter, you mean the lawsuit?

A. The fact that she has not completely been satisfied by her doctors, by her lawyers, by her lawsuit, by everything She's not completely satisfied with everything yet.

Q So now feel that this condition that she suffers from now, the pain or discomfort, from whatever the cause, the psychological aspect, that was caused by the automobile accident, you would agree with that?

A. I think that's part of it. I think she had some before the accident, too

Q. Some what?

A. Psychological aspects before the accident.

Q. But, you don't have any history of her complaining of any pair, or discomfort?

A. I don't know anything about the woman before the 10th of August, 1987.

Q. But, you did take a history from her?

A. I did.

Q. The history that you got, you did not, there was no indication that she was experiencing any pain, whatsoever, in her neck or back areas prior to the automobile accident; is that correct?

A. That's what she told me.

Q. You're familiar with Doctor Edward Gabelman; are you not?

A. I am.

Q. To your knowledge, is he a competent orthopedic doctor?

A. Yes.

Q. He enjoys a good reputation in the medical community?

A. Pes.

Q. Doctor, in regards to this matter with Phyllis Dahn, is there anything else which you wish to add, concerning your examination or diagnoses or

your opinions?

A. Nothing else.

MR. POMERANTZ: I have no further questions, Doctor. Do you want to read over your deposition; do you want to waive signature?

THE WITNESS: No, I waive it.

MR. POMERANTZ: Okay, thank you, very much.

MR. BORLAND: Thank you, Doctor.

- - -

(Signature waived.)

State of Ohio,) SS:
County of Cuyahoga.)

C E R T I F I C A T E

I, Jeniffer L. Tokar, a Registered Professional Reporter and Notary Public within ana for the State of Ohio, duly commissioned and qualified, do hereby certify that the above-named witness, MALCOLM A. BRAHMS, M.D., was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that the deposition as above set forth was taken at the tine and place specified and that the deposition was reduced tc stenotypy by me in the presence of the witness and counsel and afterwards transcribed into typewritten manuscript hereto attached.

I do further certify that I am not a relative nor an attorney of either party, nor otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand this [illegible] day of [illegible], 1988.

Jeniffer L. Tokar, RPR,
Notary Public. My commission expires 2-9-93.

#496

The State of Ohio,)
) SS:
COUNTY OF CUYAI-IOGA.)

IN THE COURT OF COMMON PLEAS

JOI-IN R. VALENTINE?)
Plaintiff7) Case No.
-vs-) 096,071
CONSOLIDATED RAIL CORP.,)
Defendant.)

- - - 000 - - -

Deposition of DR. MALCOLM A. BRAHMS, a witness herein, called by the plaintiff a5 if on cross-examination under the statute, and taken before Ronald Stahl, a Notary Public within and for the State of Ohio, pursuant to the agreement of counsel, and pursuant to the further stipulation5 of counsel herein rontained, on Thursday, the 10th day of September, 1987, at 5:30 o'clock p.m., at Mt. Sinai Suburban Medical Building, 26900 Cedar. Roadt City of Beachwood, County of Cuyahoga and the State of Ohio.

- - - 000 - - -

APPEARANCES:

On behalf of the Plaintiff:

Gaines & Stern? by:

Michael Michelson, Esq.

On behalf of the Defendant:

Gallagher, Sharp, Fulton & Norman, by:

Thomas Dover? Esq.

ALSO PRESENT:

Richard Perrone

- - - 000 - - -

COMPUTER-AIDED TRANSCRIPTION

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(216) 241-3918-9

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

DR. MALCOLM A. BRAHMS, of lawful age, a witness herein, called by the plaintiff as if on cross-examination under the statute, having teen first duly sworn, as hereinafter certified, deposes and says as follows:

CROSS-EXAMINATION OF DR. MALCOLM A. BRAHMS

BY MR. MICI-IELSON:

Q Would you give us your full name, please?

A Dr. Malcolm A. Brahms.

MR. MICHELSON: Dr. Brahms, we have just met, and my name is Michelson, and I am an attorney representing the claimant, Mr. John Valentine, in this case, arid for the record, this is a deposition being taken by agreement between counsel and Dr. Brahms, at a time sort of convenient far all parties.

I assume that I can have the normal stipulations, that any

defects in notice and things are waived.

MR. DOVER: Yes.

MR. MICI-IELSON: Thank you.

Q Doctort your office is where?

A 26900 Cedar Roadt Beachwood, Ohio.

Q And, doctor, You are an orthopedic surgeon, is that correct?

A That is correct.

Q Do you have a curriculum vitae or C.V. avaitable?

A No, but I can mail one to You.

MR. MICI-IELSON: Okay. Could you do that? That wil1 avoid a lot of the --

THE WITNESS: Sure.

MR. MICHELSON: -- time that we have here. I would appreciate that or, maybe, Tom, if you get one --

MR. DOVER: That is no problem.

MR. MICHELSON: Doctor, before we begin, I notice you have *your* file, and it is perfectly

appropriate for you to refer to your tile if you need to, but I would like to take a look at it first.

Q Doctor:, what 1 guess we have got here is your handwritten notes of the history arid your physical examination. I presume that is what these green sheets are.

A That is correct.

Q And the rest is a patient registration form and a series of documents thatt I assume, were provided to you by Mr. Dover.

A That is correct.

Q These include reports of uaried physicians, hospital records, injury or accident records from Consolidated Rail Corporation?

A That is correct.

Q Are there any other- forms or materials that you have, that relate to Mr. Valentine?

A No.

Q When were you first sontasted to arrange *tor* his examination?

A Probably several weeks prior to my

examination time. Those appointment5 are made with my secretary, and they are of no importance to me.

Q Did you have any communication with Mr. Dover or anybody from Conrail Corporation or Mr. Dover's office prior to your examination of Mr. Valentine?

A Mr. Dover or his secretary called my secretary and set up the appointment, and I may have spoken with Mr. Dover by phone. I have no recollection of whether I did or didn't, but all the preliminaries are set up between our offices in that manner.

Q Is that material transmitted or submitted to you with a cover letter or a sheet relating to the case?

A Usually, and when I write my report? that letter is thrown away.

Q You disposed of that letter?

A Right.

Q Do *you* remember what that letter contained?

A The information, all the information that is in my report? and if there are any specific questions, they are answered in

my report.

Q And then the letter is discarded?

A That is correct.

Q And that is the standard procedure with Mr. Dover's office?

A With any office.

Q With any office?

A Right.

Q Doctor, other than the physical examination and history that you have taken of Mr. Valentine, and your own observations and the medical information and reports and material that has been provided to you, did you use any other material, at all, to base any of the opinions that You have drawn on?

A No. There were some reports that were given to me today, those which were not previously sent to me or accompanied the file, and I reviewed those todar.

Q Which ones were those?

A It would have been there records.

MR. MICHELSON: Tom, these record5 that we have, haue these been provided to us?

MR. **DOVER:** Yes. I received those record5 by Federal Express. 1 think it was Tuesday. I will even state on the record, a5 I wa5 going through in preparation for Dr. Zaas' deposition? 1 noticed that we only had a couple records prior to this accident? so I made some telephone calls and 1 learned that in the Conway office of ConRail, there was another mediral file.

I got that by Federal Express, and I had them hand delivered to your office either Tuesday afternoon or yesterday morning. I don't recall which. That would have been with the request for production of documents.

MR. MICI-IELSON: Okay.

Q Doctor, the use of these records that you have looked at here today7 have they *in* any way ai-fected any of the opinions you have, either supported them or contradicted them or added any informatian that *you* think is relevant to the case?

A Yes.

Q What is that?

A There is information referable ta this man's past history, that wa5 not given to me when I examined him, indicating that he bad an X-ray of his lumbar spine in 1972, and no information referable to an injury at that time? to his back) was related to me.

Q I am sorry, I apologize. I don't quite understand. There was a lumbar X-ray?

A Yes.

Q In 1972?

A That is correct.

Q And do *you* know where that was taken?

A It is in the records there.

Q It is in the records here?

A Yes.

Q Is it one of these things that you haue noted?

A It is in that. There is a reference to an X-ray in 1972, of his lumbar spine.

Q But *you* ray there was no reference to an injury?

A He did not tell me about any inury to his back in 1972, and I assume that if he had an X-ray to his back in 1972, he had pain or some injury to his back to require that X-ray to be taken.

There is also in that record some reference to low back problem5, that he alluded to, which occurred to him in 1974, because there is reference to an injury, there is reference to something in his records of 1975, stating that he had a backache one year prior to that examination.

Q And what about that is significant?

A Well, I think it is significant that he had -- In his past history he didn't relate to me that he had any trouble with his back in 1972 or '74. Me did tell me he was involved in a motor vehicle accident in 1970, but I know nothing about those other two injuries.

Q What about that is significant, that you are assuming that he had back pain in '72 because the lumbar X-ray was taken, and that in 1975 he said he had back pain

a year before that?

Why is that significant?

A That he had back pain for a year.

Q For a year?

A Yes.

Q Why is that significant?

A Well, 1 think it is significant in alluding to the fact that the man has had low back discornfort.

Q Before?

A That is correct.

Q 1 don't mean to be thick. What I guess I am asking is as a physician or an orthopedist what did that information that you now know -- How doer that affect your opinions or consideration of Mr. Valentine?

A Well, this injury that occurred in 1982 is not the sole injury to his back.

Q Therefore? I am trying to find a conclusion from that information.

A I don't think that it takes much to understand if a man had an injury to his back in '72, or pain in hi5 back in 1972, and he had pain in his back in 1975 tor

one year prior to that, that the man had problems with his back prior to 1982 when he injured himself at wort;.

Q Is it your view, then) that that indicates that he is susceptible to back pain?

A No. It doesn't indicate that at all.

Q That is what I am trying to find out, what it indicates.

A All I am alluding to in that information is that the injury in 1982 is not the first time he had a backache.

Q What affect) if any, and if not, tell me, does that have, that new information have on the opinions you have expressed in your report?

A Well, the man has X-ray evidence of a degenerative disc in his back at age *44*. That in itself is not -- May not be an uncommon finding, but the fact that the patient had symptoms in 1972, *'74* and *'75* may explain why he ha5 degenerative disc disease.

Q As opposed to the origin of any degenerative disc disease being solely in

1982, is that the distinction you are trying to draw?

A Yes, that is correct.

Q Other than the information you described and there two new pieces of information that you have got, is there any other information that you relied on to form your opinions?

A Yes. I relied upon all the information that was -- The examinations by the various doctor's priar to my examination, and the CT scan, EMG. All these sophisticated tests that were taken of his back prior to the time I saw him were used in helping to summarize in my mind the problems of his back.

a So, your opinions are based in part on your physical examination and the history that he gave you, your review of the medical records that were provided to you, which include the reports of several doctors, including Dr. Krohn, Dr. Laubaugh or Lalbaugh, Drs. Cunningham, Yashon, Larrick and Boyle, is that correct?

A Yes, that is correct.

Q Now, the physical examination that you did of Mr. Valentine, I assume that that was a normal arthopedic exam?

A Yes, that is correct.

Q And how long did that examination take, approximately?

A Let's see if I recorded it. The examination began at 3:15, his history was -- Ended at 3:50. The physical examination -- I didn't record the end of his physical examination, but I would judge it to be anywhere in the neighborhood of 10 to 15 minutes.

Q And how long was it that you reviewed the records for?

A I don't know how long it took me to review the records. How long does it take to read some 50 or 60 pages of notes? However long that takes. I don't know.

Q Now, from what I understand from your report, the physical examination of his neck provided to you the information that he had a normal range of motion passively, is that correct?

A Yes, that is right.

Q And by passive that means when you do the manipulatinn yourself --

A May I suggest that we read the entire physical examination? Let me read it7 and stop me and ask me anything to amplify, and I think it will help to keep this in order so that you and I can answer question5 in a logical manner.

Q If you would like to read it, go ahead.

A I think it is better that way. I think it helps both of us to get all the information without taking something out of context.

Q Sure. Go ahead.

A The examination was a 44 year old, 212 pound, five foot,11 inch male. He was wearing a sneaker on his right foot and he was using a cane. We had no evidence of a limp when he was asked to walk in the examining room. Me was wearing a mismated shoe, a difference in the size and the length, inequality. He had --

Q Excuse me. You said mismated shoe size?

A Well, what that mean5 is that the height of the 5hoe differs. A normal shoe -- A5 I recall, he wa5 wearing a boot on one side and a sneaker on the other side, which mean5 that the height of hi5 extremities would be different because of the difference in the thickness of the sneaker a5 compared to the shoe. That i5 all I wa5 saying there.

Q All right.

A He had a tatoo on his left forearm and a tatoo on hi5 right hand, and the examination of his neck was done in a sitting position, demonstrating a normal range of neck motion, which included flexion., meaning bringing his head forward; extension> asking him to look up toward5 the ceiling; lateral flexion, turning his head from side to side and bending his ear to one shoulder or the other. Those motions were within normal limits. Those were not done passively, those were done by the patient.

His glenohumeral motions, which mean5 the shoulder motions, were

within normal limits. There was no evidence of any spasm in his neck. His reflexes were physiological, meaning they reacted normally.

We checked his grip strengths with a Dynometer. On the right he was able to compress it nine pounds and six pounds per square inch, and on the left 13 and 16 pounds per square inch respectively.

Q What does that mean?

A It means that he was able to compress it more with his left hand than with his right hand.

Q But when you say he is able to compress it nine pounds and six pounds, what does that mean?

A Two different times, one time nine pounds and one time six pounds, one time 13 pounds on the left and another time 16 pounds.

Q Is he right or left hand dominant?

A Right handed.

Q What significance is that to you?

A I don't think there is any

significance, because if he compresses it once nine pounds, he should be able to compress it a second time nine pounds, and if he did it once at 16 pounds on the left, he should be able to do it again at 16 pounds, and the difference between the nine and the 13 and the six and 13 or six and 16, in my estimation, represents the failure of complete cooperation.

Q That is your view?

A That is right.

Q Did *you* ask him anything at that time about why there was a difference?

A No.

Q Or if he was having any trouble with one hand or the other?

A No.

Q Under normal circumstances you would expect a right hand dominant person to be at least a5 strong or stronger on this side?

A That is correct.

Q Go ahead.

A The range of motion of hi5 neck was less with active movement5 and more with

passive.

Q That is my question. Let's go to that now. Passively you found a normal range of motion?

A Actively a normal range of motion.

Q I am sorry.

A Actively a normal range of motion7 and passively he could even *go* better than that.

Q So, passively the range of motion was greater than actively?

A That is exactly right.

Q Because the letter doesn't quite read that way, and I just want to make sure I understand.

A If he had less than normal range of motion actively, 1 would have recorded it. I am saying he could even do better when I moved his neck without forcing him than he did on his own.

Q Were there any complaints of pain or discomfort or guarding at the outer limits of the range of motion?

A No. That would have been recorded. That had to do with his neck. Do you want

out that one of the reasons and a principal reason for his inability to go

any higher than 60 is because he had some hamstring muscle contracture.

Q Where is the hamstring?

A In the back of the leg. The hamstrings begin at the posterior aspect of the leg from the pelvis down to the knee.

Q And what happened?

A A big person who has tight hamstring muscles can't go any better than that.

Q And this was on both sides?

A Yes.

Q Is that a limited range?

A It is limited because the muscle won't go any further than that. If we bent his knee, we could take his -- Flex up to a greater degree3 but that doesn't measure straight leg raising sign. The straight leg raising sign stops at 60 degrees not because of pain, but because of his hamstring muscles being tight.

Q And there was no complaint of pain or discomfort at the 60 degree level?

A If there was, I didn't record it.

Q Go ahead.

A He had no evidence for muscle spasm.

Q You say paravertebral muscle spasm.

A Yes. That is the muscles around the area of the low back region.

Q The hamstring muscle contractures as you put it, that is non spasm?

A No.

Q Why not? What is the difference?

A The difference between spasm and contracture is in spasm the muscle has an increased amount of tone. Contracture means that the muscle is shortened, and that is not spasm. If I ask you to bend over to touch your toes, and you can bend 50 degrees and you can't bend any further, it is because your muscles dan't permit you to bend any further.

If a person is very flexible and they can bend with their palms reaching the bottom, reaching the floor, those people are very flexible and dan't have hamstring muscle contractures.

Q Is there a difference in the feel of a muscle that is in spasm or where the tone is taken up, and one where the muscle

is tight because it is extended as far as it can go easily?

A Yes, a big difference, a big difference. A person who has muscle spasm in his back would be twisted to one side and would be in pain. A person who has a contracture just has a shortened muscle.

Q Is there a difference in the feel when you palpate?

A A big difference.

Q Go on, please.

A He had a glove-type hypesthesia on the right.

Q Tell me what that means.

A Which means checking him with a pinprick for sensation, the entire right lower extremity was less sensitive than his left lower extremity) and when we speak of glove-type hypesthesia, that is an anatomically impossible situation, which means that there is then an aspect of a -- A problem of a psychophysiological deficit, which makes one a glove-type hypesthesia, which is not likely to be -- To follow an anatomical pattern of nerve

root innervation,

Q And from what I understand, and you correct me if I am wrong, the hypesthesia is a numbness or a lessening in the reaction to the pinprick? Is that the idea?

A Yes. The hypesthesia means a decrease in the degree of pain perception.

Q And that is in the leg, in this case the entire --

A Right lower extremity.

Q Right lower extremity?

A Right.

Q Beginning at what level?

A We check the pinprick beginning at about the mid thigh region down, because there are anatomical patterns of nerve root involvement, and we follow those patterns generally from the L-2 lumbar innervation down to the first sacral segment.

Q So that the purpose of that is to see whether or not there is interference with any of the nerve roots when you talk about the dermatomes and the patterns?

A Right.

Q Is that what you mean by that?

A That is correct.

Q So, if the entire leg seems to he hypethesial, to use the word, therefores that indicates to you there is a psychophysiological deficit?

A Exactly.

Q By psychophysiological what do you mean?

A We mean there is a certain amount of inference that the patient attempt5 to demonstrate that he has an abnormal feeling in that lower extremity? which doesn't follow a true neurological and orthopedic pattern of nerve root innervation.

Q When you say attempts to demonstrate, do you mean that that is volitional or simply some sort of an overlay?

A It could he an hysterical situation.

Q In his case did you have an opinion, one way or the other, as to what was happening there?

A I don't attempt to make that

every chronic pain phenomena, as I think

each case has to be handled on its own merits.

Q I don't think my question was whether or not it is true in every chronic patient. I say if you have patients with chronic pain problem5 and it is either difficult and/or impossible to anatomically describe what is causing that pain, does that also cause you to think of these psychophysiological deficits?

A No, not unless there are 5ome reasons to believe that there is an hysterical or anxiety component, but that doesn't occur in everybody who has chronic pain.

Q I understand. What other things would you look for to see if there was indications of that component?

A Well, the man come5 in with one shoe an and one shoe off, so to speak. He is wearing a sneaker on one foot and a boot an the other foot. He is using a cane but doesn't limp.

Q Did you ask him why he does that?

A No, no, because my examination is objective as far as 1 am concerned and,

again? it is not a psychiatric examination9 so 1 don't have to know that.

Q Well, it would be interesting to note whether or not he does it because he thinks or feels that it relieves his pain or ease5 his pain.

A Or if he was a patient that I was treating? perhaps, I would go into that.

Q I understand.

A But I am examining him only on the basis of making an orthopedic examination and reporting my findings.

Q Please go on. I don't want to interrupt and 1 don't want to prolong it.

A I measured his legs at various level59 12 inches below his spine. I measured his calf measurements, and the measurements all revealed that he ha5 a quarter of an inch difference in his right leg as compared to his left, a quarter of an inch of lesser circumference on the right than on the left at both of those levels.

Q Now, you used the word -- I am sorry, go ahead.

A Ga ahead.

doe5 that mean?

A Atrophy mean5 a decrease in the size of a muscle.

Q And in your view there is no significance to the quarter of an inch atrophy?

A A quarter of an inch doesn't mean anything.

Q The fact that it i5 on the right side and the same at the thigh and calf level doesn't mean anything either?

A 1t doesn't mean anything.

Q Go ahead.

A His pulses were palpable? meaning he had good circulation. His leg5 were equal, meaning there was no inequalitr of hi5 legs. Hi5 hip joint motion5 were normal, and we did what is knawn a5 a flip test.

Q You are going to have to tell me what a flip test is.

A A flip test is a certain test that we do to determine whether or not the patient

has pain, by poritioning hi5 back and legs in a position to see whether or not it produces pain in the low back region, and when he was placed in that position that test was positive.

Q That means he elicited a pain response?

A That is exactly right.

Q What is the test supposed to describe?

A The test will describe several things. It may indicate nerve root irritation. It could demonstrate muscle spasm, it could demonstrate a muscle contracture.

Q Is there another name for this flip test or something? 1 have not heard of it. I don't know if there is another reference name for it or --

A I don't know if there is a proper namet but I don't like proper names, so I don't use proper names.

Q Could you describe to met then, what you do for this test?

A Sure. We set the patient on the

examining table. We bend them forward in a forward flexed position. We then do the straight leg raising sign in that position. That is the flip test.

Q The person sits with his legs hanging aver the side of the examining table?

A That is right.

Q Is that correct?

A That is correct.

Q Bent forward at the waist?

A That is right.

a How far forward?

A As far forward as he can go.

a And you do a straight leg raising test on each side?

A Right.

Q And in this case it was positive for low bark pain?

A It was positive. I am not denoting whether it is low back pain. If a patient complains of pain, then I mark it as positive.

Q Where were his complaints here?

A He just said it hurts, and that is positive. In a standing position he was

able to bend 30 degrees, stating at this point that he had pain, but he was able to increase that range to 40 degrees. This is done in a standing position.

Q This is in flexion?

A We ask him to bend forward as if he is going to touch his toes with his hands, and he went 30 degrees, but he was able to go 40 degrees.

He said at 30 degrees that is as fat as he was able to go because he had pain, and we asked him to go as far as he could even though he had pain, and he went 40 degrees.

Q After that what happened?

A We stopped. We just measured that. We examined his right knee, and suffice it to say that all the tests of hi5 right leg were totally within normal limits.

Q He had the complaint of his knee, did he not?

A Right.

Q And his complaint had to do with increased difficulty in his knee from squatting, is that basically what it is?

A Well) let's see what I said. In the history portion here, if we go ta page number. 2, his knee pains are aggravated by squatting. I-lis knee does not buckle nor does it lock. I-le has an equal amount of difficulty getting up or down stairs.

I-le does no household duties and does not care tot. the lawn or doe5 nu 5now removal. Those are it as far a5 -- And to finish that paragraph~his sports activities now are nill. Formerly he was able to play softball and golf, and he was once upon a time a manager of a little league team. That was the history referable to his knee.

Q I notice at the tap there it talks about pain occasionally awakens him:, but that relate5 to the back pain?

A That is right.

a And that essentially was the physical examination?

A Except for his knee, that is right.

Q Well, I am --

A I didn't read his knee examination, because all the tests, sophisticated or

otherwise, are all normal.
Q When you say sophisticated, what do you mean?
A Meaning that other than just looking at his knee and pumping it up and down, the tests that were done? the Lachman test, the instatility, the pivot shift and all the rest af them were all normal.
Q What opinions have you drawn as a result of or based upon your examination, the history and the medical reports that you have read and told us about?
A I thought that the man, at the time that he injured himself in December of 1982, had some soft tissue injuries to his back; that a man of 44 years of age is likely to respond favorably to resolution of those symptoms within a period of six, perhaps even as long as eight or 10 weeks.
Q That is what you would expect normally?
A Yes, and I thought that his -- That the pain -- The injury that he sustained was principally soft tissue in nature.
Q And what about his knee?

A I didn't find anything wrong.

Q So, you made no findings in regards to whether or not he had previously suffered a knee injury?

A I don't know of any history of a knee injury.

Q Well, I think he told *you* that he fell, he banged his knee and his knee was swollen.

A I-lis past history doesn't give any history of that.

Q I am sorry, did I misread it?

A At the time that he fell in December of '82?

Q Yes.

A I have no argument with the fact that he may have contused his knee as well as the soft tissues in his back. I have no argument.

Q You found evidence of a bulging disc, although you did not find evidence of a herniated disc?

A I didn't find anything. That is a repart of the CT scan that was rendered elsewhere. I didn't find it at all. I

didn't do his CT scan.
Q The CT scan showed a bulging disc?
A To my recollection; that is right. The CT scan showed a bulging disc, but no nerve root compromise.
Q Okay, and you say, and I just want to use your language so I understand what it means, "While there is evidence for a bulge of the disc," which *you* are telling us is the report of the CT scan or some scan showing a bulging disc --
A Right.
Q -- "there is no nerve root encroachment to support a discogenic matter of concern."
A Right.
Q What does that mean?
A That means that even though a patient has a bulge in a disc, and lots of us normally do, that there is no evidence that this bulge compromises the pathway of the nerve in the lumbar spine, therefore, does not cause any impingment or encroachment on the pathway of that nerve root.

Q And that is when you examined him, you found nothing?

A I didn't find anything in his back when I examined him. I am reporting on the fact that a bulging disc was discovered on one of his tests, for example, the CT scan, and that the CT scan -- The bulge in this instance is of no significance unless it compromises the nerve root.

Q And you said there is no nerve root encroachment.

Is that your opinion or is that --

A That is the opinion of the CT Scanner.

Q That is what I want to know, and was his opinion also, or yours, that that doesn't support any discogenic matter of concern? is that your language or his or what?

A That is my language.

Q Tell me what that means.

A That means if a patient has a CT scan which shows no nerve root encroachment or

impingment, that it doesn't explain pain to support the diagnosis of a herniated disc.

Q Got you. You also note that there is an X-ray report suggesting narrowing of the L4-L5 disc space with spurring.

A Right.

Q That is an X-ray report in the past at some point, that you reviewed, is that correct?

A It is a report that I reviewed, that is correct.

Q Does that repart discus5 at all any of the other disc spaces that were covered in the examination?

A Obviously that was the only abnormal disc space that he referred to.

Q You say in a sentence "That report was dated February of '84," and you refer there to either the X-ray report or the CT scan or Dr. Krohn's report or both.

What does that mean?

A Yes. I think that that is the report of Dr. Krohn and his impression at that particular point in time when he examined

him.

If I may stand corrected, I think the date of his examination was February of '84, which was two years after his injury.

Q You say degenerative disc disease is not uncommon> "Degenerative disc disease is not uncommon in a patient of thi5 age and size."

I assume by that you mean somebody who is a 44 year old man of the size of Mr. Valentine?

A Yes, Mr. Valentine.

Q And particularly somebody who doe5 the work; that he did?

A Yes.

Q Which is heavy work?

Yes.

MR. DOVER: Objection.

MR. MICNELSON: To what?

MR. DOVER: I don't know if the work that he did was heavy work.

Q Do you know if it was heavy work?

A I know his job description, and I

wouldn't classify it as heavy work. I would call it medium work.

Q Somebody of Mr. Valentine's age and size, who did the kind of work that you understood him to dot YOU expect that they mislit have some disc degeneration?

A Disc degeneration in this age group is not an uncommon finding.

Q And as I understand disc degeneration, that is to say the disc material itself hardens, or when you say degeneration, what do you mean by that?

A It doesn't mean that it hardens at all.

Q What do YOU mean?

A It means that the space that is normally occupied by the disc, the nucleous and the annulus, which are the components of the disc) usually are the same rize at 3-4 and at 4-5.

It means that the disc is narrower. That disc space is less in height, meaning that the disc itself is showing some changes of aging and, therefore, reduced in space size that it

occupie5 by that X-ray finding.

Q There is some degeneration to that disc?

A Right.

Q Now, the degeneration can be caused either by some disease process9 is that fair to say?

A It doesn't have to be a disease process at all.

Q It could be just aging?

A Yes.

Q And it could be trauma?

A Right.

Q It could be what else?

A Principally those two reasons.

Q And this observation wa5 made two years after his injury! is that correct?

A Yes.

Q And the X-rays that you referred to in 1972, did they show any of that degeneration?

A The X-rays that were recorded in 1972 were normal lumbosacral X-rays.

Q The spurring, a5 I understand it, and you will correct me if I am wrong, I

am sure, is an arthritic type process?

A Yes, that is correct.

Q On the vertebral bodies?

A Yes, that is correct.

Q That occurs over a period of time) I presume?

A Yes, that is right.

Q Is there any opinion that you have, or is there any general consensus a5 to how long it takes for spurs to develop?

A Yes. I think that we don't see spurs in young people unless there is trauma, unless there is reasons for that. An arthritic process would take a minimum of 18 months to develop.

Q When somebody has spurring or this arthritic development, that certainly can be aggravated or accelerated by a trauma, can it not?

A Yes, that is right> it can.

Q Now~if somebody ha5 spurring or this arthritic development, do you expect to see it a5 people age and wear? Is it unusual that it is in a particular' disc space, or would *you* expect to see it in

more than one, more than one level in the spine?

A Because of the degenerative changes that are occurring in this back, it is limited to the L 4-5 level. Degenerative changes -- Osteoarthritic changes, which occur in the body of the vertebra, are really not very significant.

Q I don't know what you mean.

A Osteoarthritic changes, the spurring which occurs in the body of the vertebra, are not -- Don't produce very many symptoms, don't produce symptoms at all. It is just a -- It is a sign that there is an increased wear and tear at the level that the degenerative change occurs.

Q Would you expect to see them in more than one level if it is the natural consequence of aging and working and walking?

A Traction spurs, that we see frequently on the body of the vertebra; usually occur at more than one level.

Q Am I correct that the sum and substance of your report) generally, is

that in your view there are a few objective signs that would explain pain or discomfort or disability that he complained of?

A At the time 1 examined him?

Q Yes, at the time you examined him.

A That is right.

Q And that is generally the sum of the report?

A That is correct.

Q Are there some objective signs or findings that you, yourself, made other than the CT scan and any other reports?

Did you yourself --

A My examination on the date that I examined was totally within normal limits.

Q That includes the flip test?

A I didn't think that the flip test, in and of itself, without other objective findings supported by the balance of that examination is of significance.

If the patient had other manifestations, the flip test would be indicative of another objective sign to support the problem. I think that the

flip test in this instance, in my opinion, wasn't very important.

Q Your opinion is that he is not, certainly2 totally disabled?

A That is exactly right.

Q That is clear?

A That is clear.

Q And yau do think that he can return to some gainful employment) certainly?

A Without question.

Q You also say in the report that there are some functional limitations, which including lifting more than 50 pounds below waist level.

When you 5ay functional limitations, tell me what that phrase means?

A It mean5 that the person in his work duties, his functional level of work, I would recommend as a doctor) with a person who has symptoms that he complained about, that it he is going to go back to work, that they limit his liftins below waist level, and that it should be limited to 50 pounds;,

Q So I understand, you mean by the 50 pounds and below waist level, he should not lift above the waist?

A No. He shouldn't begin to lift anything below waist level, bend over to lift something up.

Q Of more than 50 pounds?

A Right.

Q Anything up to 50 pounds is okay?

A I would recommend that his lifting anything over 50 pounds not be done at all; that if he was to lift, that it would be better if he lifted from waist level above and not below waist level.

Q And that would be for lesser weights than 50 pounds.

Now, these functional limitations or these limitations on his facilities to work, to do physical work, they are based on what? Why would you place these upon him?

A Well, I examined a lot of people in the 32 some years I am in practice, and I use those same indications for people with backaches, who perform work of this type.

If h
to lift, steadily,
so forth; I would
lift 100 pounds a
form those opinir
Q And these a
chronically com
A Only that
he has pain in
probability that in a wo
order to keep him on the job, that some
functional limitation be placed.
Q Now, there is no question that there
are many people who suffer from chronic
back pain problems, some very significant
back pain problems, which cannot be
identified or specifically described
anatomically by orthopedists or
neurologists or others2 is that true? Is
that a fair statement?
A No. I think it is a fair statement,
but 1 don't think it is true.
Q Tell me why. Why is it unfair or why
is it not true?
A Because I think that to categorize in

a general statements that anybody with back pain -- That the doctors can't make a diagnosis of such, I don't think that is what the case is at all.

Q That is my fault. I don't want to say anything that is misinterpreted. I am not saying that.

A I would like to --

Q But you go ahead and you tell me what you mean.

A There are a lot of people who have pain in their backs whose pain is intermittent, and there are a lot of people who have a back problem which, with overuse, can be symptomatic, but that is intermittent. The pain will came and the pain will go.

Those same individuals can carry on their normal activities of daily living, their sports activities. They mays at the end of a weekends or a long weekend, have low back pain and get over' it.

A person who has chronic pain differs from this kind of an

individual, and I would like to consider that this patient is not the 50-called chronic pain sufferer.

Q Why not?

A Because he doesn't follow -- He doesn't have any objective finding5 to support a reason for chronic back pain.

Q So that I understand it, then? your opinion is that anybody who is to be properly considered a chronic back pain patient must have some objective signs of that, other than hi5 own complaints?

A This is very easy, because not only does he not haue any objective findings, but he has had some pretty good sophisticated tests, which don't support his contention5 as well.

Q Doctort can you tell me, please, if I was to look for some authorities and/or descriptions in the literature concerning chronic pain? chronic back paint chronic back problems, where would I look for some authority?

A The library is full of orthopedic and neurosurgical textbooks which would --

Q Could you give me some that I might refer to?

A Sure. There is a book called Diseases of the Musculoskeletal System. There is any number of basic textbooks. There must be five or six that are -- That deal with low back pain.

The neurological texts, which I am not familiar with, are loaded with that information. There is Nachman, which is a famous orthopedic surgeon of Sweden, who has a Look out on law back pain; Hoppenfield is an author who has a book out on low back pain, so I think the library is loaded with problem5 referable to the back.

Q Doctor, do you do many of these evaluations and examinations?

A Yes, I do.

Q About how many of them?

A Probably one or two a day.

Q And is this over the work year, you do it on a fairly regular basis?

A Yes, that is right.

Q Is it fair, then, to say that you do,

perhaps, as many as 10 a week average?

A No. I am not in the office.

Q I am just looking --

A One or two a day when I am here in the office and when I am in the city. I am not always here. As a matter of fact, next week you will find me in Boston if you are looking for me. When I am here, one or two a day is not an unusual number.

Q Is there a way to estimate how often you do that in a month or in a year?

A No. I swore to tell the truth, nothing but the truth.

Q Of course.

A So, if you want that information, it would have to be obtained through my secretaries. I really don't know.

Q You have done them before, I assume, for Mr. Dover or his office at their request?

A I have known Mr. Dover and I have examined for him in the past.

Q And for the other attorneys in his office?

A I don't know that I know everybody in

his office.

Q Some of the others?

A If you mentioned some names? I would probably --

Q Forrest Norman?

A Yes. I have examined for Mr. Norman.

Q The name of the firm is Gallagher, Sharp, Fulton & Norman.

A I do know Mr. Dover. I know the name of Mr. Norman. Frankly, I don't frequent their office and have never been to lunch with them? and I don't know much more about it, except that I see their name on a letterhead.

Q And I assume, also, you do these examinations far or on behalf of other attorneys or insurance carriers or employers.

A I also testify for my own patient5 on their' behalf? on the plaintift's side.

Q Of course, I am only talking now about the examination and evaluation processes.

A I evaluate my own patients a5 well, yes. The answer to your question is yes,

that is true, but I want it to be known that I see patients and I testify not only for offices in their defense work, but also for plaintiffs as well.

Q Plaintiffs who are your patients?

A Plaintiffs who are sent to me in consultation.

Q To do evaluations?

A In consultation for evaluation.

Q Are there some attorneys who you do that for more often than others, plaintiffs?

A No. Principally whoever that patient uses as their attorney.

Q Is it fair to say, then, that the greatest percentage of the evaluation work you do, just pure evaluation, not treatment, is for defendants' firms, either attorneys or insurance carriers or employer's?

A Yes, that is right.

Q Do you do any evaluation work for claimants other than people who are your patients or who you treat?

A Yes.

a Pure evaluation?

A Yes. I examine for the federal government.

Q As an independent examiner?

A I do work for the federal government, hearing af appeals. I see patient5 for the Department of Labor, 1 see people for disability evaluations from the State of Ohio. All those are done for --

Q Claimants?

A Consultation, claimant work and so forth.

Q But it would be fair to say that the great majority of the pure evaluation work is done, a5 I asked5 for either defendants' counsel, insurance carriers or employers?

A Yes, that is correct.

Q Doctor, you charge for your time, I presume.

A I do.

Q Could you tell me what the rate is far. your time?

A Yes. It is $500 for the first hour and $150 for every half hour thereafter.

Q And I assume that that is for time spent not only at depositions or in testifying, but for evaluation and reviews and examination? Is it the same rate all the time?

A That is the time spent here for this deposition or for any other deposition.

Q I-low about for testimony in court?

A Principally in the last several years, most of that has been done under video depositions, and so the necessity to go downtown has been infrequent.

Q And your fees for the examinations that you do, how much are those?

A $100.

Q Does that include the report?

A It does not.

Q I-low much is the report?

A The report is $150.

Q And you charge for time for preparation for these depositions and for your consultation time?

basis, dan't we?

Q 1 agree, I agree, but 1 just want to

know what it is.

A As long as it takes time.

Q You charge at the $500 an hour rate?

A No. The $500 rate is for the deposition.

Q Tell me what reviewing and preparation time is.

A If I review a record and it takes an houri I charge $150. If it takes less, I charge less. If it is mores 1 charge mare.

Q It is $150 an hour for the reviewing of documents?

A That is correct.

MR. MICHELSON: Do you wish to waive your signature on this?

THE WITNESS: I do.

- - - oOo - - -

CERTIFICATE

The State of Ohio;)
)SS:
COUNTY OF CUYAHOGA.)

I, Ronald Stahl, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named witness, DR. MALCOLM A. BRAHMS, was by me first duly sworn to testify to the truths the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the aboue-referenced Witness was by me reduced to stenotype in the presence of said witness; afterwards transcribed, and that the foregoing is a true and correct transcription of the testimony so given by the above-referenced witness.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relativer counsel or attorney for either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, 1 have hereunto set my hand and affixed my seal of office at Cleveland, Ohia, this 16th day of Sept., A.D., 1987.

Ronald Stahl

Ronald Stahl, Notary Public
Within and for the State of Ohio
My commission expires 7/26/91

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#497

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

JOHN R. VALENTINE,

Plaintiff,

-vs-

JUDGE DAVID MATIA
CASE NO. 96071

CONSOLIDATED RAIL CORPORATION,

Defendant.

- - - -

Deposition of MALCOLM A. BRAHMS, M.D., taken as if upon direct examination before Susan M. Cebron, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Malcolm A. Brahms, M.D., 26900 Cedar Road, Beachwood, Ohio, at 5:40 p.m. on Monday, September 28, 1987, pursuant to notice and/or stipulations of counsel, on behalf of the Defendant in this cause.

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APPEARANCES:

Michael J. Rogan, Esq.
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On behalf of the Plaintiff;

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On behalf of the Defendant.

ALSO PRESENT:

Richard Perrone, Conrail
Stephen J. Smith, Multivideo

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MALCOLM A. BRAHMS, M.D., of lawful age, called by the Defendant for the purpose of direct examination, as provided by the Rules of Civil Procedure, being by me first duly sworn, as hereinafter certified, deposed and said as follows:

DIRECT EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. DOVER:

VIDEOTAPE OPERATOR: Stand by. We are on the record.

Doctor, my name is Tom Dover, and I represent Conrail in a lawsuit that has been instituted against it by John Valentine.

We are now taking your testimony to preserve it for use at trial to show to the jury. Do you understand that?

I do.

Would you please state your full name for the jury?

Dr. Malcolm A. Brahms.

What is your occupation, doctor?

I am a physician, an orthopedic surgeon.

Where are your offices located at?

26900 Cedar Road, Beachwood, Ohio.

Is that where we presently are taking your

deposi Lion'?

A. Yes, that's correct.

Q. Doctor, will you inform the jury what your educational background has consisted of?

A. Yes. I am a graduate of Western Reserve University Medical School, and served an internship at the Cleveland City Hospital, now known as Cleveland Metropolitan General Hospital, followed by another year of general surgical training at that same institution, followed by three years of orthopedic surgery, one at Mount Sinai Medical Center in Cleveland, Ohio, and two at the Indiana University Medical Center in Indianapolis, Indiana.

Q. Arc you licensed Lo practice medicine in the state of Ohio?

A. I am.

Q. How long have you been licensed to practice medicine?

A. Since 1950.

Q. Are you engaged in any specialities in medicine?

A. I am.

Q. And is that orthopedic surgery?

A. That is correct.

Q. Would you inform the jury, what does the field

of orthopedic surgery involve?

A. Orthopedic surgery is that branch of medicine that deals with the investigation, the preservation, and the restoration of the musculoskeletal system by medical, surgical and rehabilitative means.

Q. Does Dr. Reid of orthopedic surgery encompass the diagnosis, treatment and care of such things as the neck, the back, the legs and the right knee'.'

A. That's correct.

Q. Are you Board certified in the field of orthopedics, doctor?

A. I am.

Q. What does it mean to be board certified?

A. Board certification includes a completion of an approved residency in orthopedic surgery, followed by a written and an oral examination, and then practicing for two years, and, again, an oral and a written examination. With a successful completion of those requirements, one can become Board certified.

Q. Are you presently on any hospital staffs?

A. I am.

Q. Which hospitals are you on, doctor?

A. Mount Sinai Medical Center, and I have privileges at Suburban Community Hospital.

Q. Are you a member of any medical associations?

A. I am.

Q. Would you briefly tell the jury which medical associations you belong to?

A. Yes. I am a member of the Cleveland Academy of Medicine, of the Ohio State Medical Association, of the American Medical Association.

I am a fellow of the American College of Surgeons, I am a fellow of the American Academy of Orthopedic Surgeons, I am a member of the American Academy of Orthopedic Surgeons for Sports Medicine.

I am one of the founding members of the American Academy of Orthopedic Surgeons of the Foot and the Ankle. I belong to the Cleveland Orthopedic Club, to the Clinical Orthopedic Society, to the Midamerica Orthopedic Society, the Southern Medical Association, and some other minor groups as well.

Q. Now, you mentioned sports medicine. Are you involved with any type of sports medicine, doctor?

MR. ROGAN: Objection to the

question.

A. Yes, I am, and have been.

Q. Now, you are a medical doctor?

A. I am.

Q. What is the difference between a medical doctor and an osteopath?

A. Well, that has to be answered in terms of time. Years ago, many years ago, perhaps as many as 25 years ago and longer, the school of osteopathy was one which was principally interested in the reasons of diseases and problems, general problems were all associated with malalignment of the spine, the spinal cord.

In today's world, the graduates of osteopathy are almost on equal footing with the boys who graduate from recognized medical schools.

Since not only do they have a residency program in their hospitals, but are now accepted in the AMA approved hospitals. So that those who graduate and are successful enough to get into the AMA approved hospitals, their basic training, clinical experience, is very similar to the boys who graduate from the recognized so-called medical schools.

Q. Doctor, at my request, did you review certain medical records and perform an examination on an individual by the name of John Valentine?

A. I did.

Q. Did you have an opportunity to meet Mr. Valentine?

A. I did.

Q. And when was that?

A. I saw him for the first time on the 11th of August of 1987.

Q. At that time, doctor, did you take a history from Mr. Valentine?

A. I did.

Q. And what did that history consist of?

A. The history was that on the 1st of December of 1982 he was working for the Conrail Railroad Company as a signal maintainer, and he said that he was injured. He reported that he was working on some signals on Bryce Road in Columbus, Ohio. It was late in the evening, and it was raining.

He stated that his right foot tripped over some railroad tie stubs, causing him to fall over an embankment, and he landed on these ties. He said that he was dazed. He injured

his neck, his back, and his right kncc.

Subsequently made his way back tu a truck, called in io his supervisor about his injury, arid then drove home. And hc told me, quotes, I suffered all night, end of quotes.

The next day he had difficulty moving about, but went Lo see the company physician, a Dr. Doyle, in Cambridge, Ohio. Ilc received treatment in the dispensary facility for the next 18 months, which consisted of traction, physical therapy, and medica Lions.

The records that I received suggested that he returned to work on Llic 22nd of June of 1984, worked for one week, but was subsequently discharged on the /th of October, 1985.

Ilc said that he was initially out of work Lor 18 months, and when he returned Lo work he was assigned light duty, which hc performed for nine more months before his discharge on the /th of October, 1985.

Q. The injuries -- I am sorry.

A. The injuries that he sustained were allegedly to iiis low back region and his right kncc, and he said that that knee began Lo swell, and hc also had pain in his neck. Subsequently his neck

pain improved, but his knee and his back did not.

At the time that I examined him, he reported that his neck is symptomatic manifested by an occasional stiffness. Insofar as his back was concerned, he has a constant pain which waxes and wanes, and occasionally the pain radiates into his right leg.

He reports that he is, quotes, mobility is limited, end of quotes. Bending aggravates his symptoms. He has difficulty bending over the sink in the morning. Long standing aggravates his symptoms. He has been told that he should not lift more than 25 pounds. Walking aggravates his symptoms, but coughing and sneezing only occasionally cause pain. He is not troubled with bile movements, and intercourse as far as his back pain is concerned.

Occasionally he experiences numbness. He is able to dress himself. The pain occasionally awakens him. He has morning stiffness. If he stands for long periods of time, his knee and his foot swell.

He does not wear a regular shoe on his

right foot, wearing a sneaker. He uses a cane. He does not believe he could do his former work. His knee pain is aggravated by squatting. His knee does not buckle nor does it lock. He has an equal amount of difficulty going up or down stairs. He does no household duties, does not care for the lawn or the snow removal.

His sports activities are nill. Formerly he said he was able to play softball and golf, and was a manager of a little league team.

Q. Are those items, doctor, that Mr. Valentine told you about?

A. That is correct.

Q. Now, doctor, did Mr. Valentine inform you at the time that you examined him in August of 1987 whether he had ever had previous injuries or previous problems with his neck, his back or his right knee?

MR. ROGAN: Objection.

A. The past history that he told me when I asked him about his injuries prior to this, he told me that he had no previous injuries to his neck or to his back. That he did have a partial amputation of his left thumb in 1968. That he

was involved in a motor vehicle accident in 1970, injuring his stomach as he struck the steering wheel. He said that this necessitated an exploratory operation because of the hemorrhage.

He said that medications that he takes now include antidepressant drugs, medicines for high blood pressure. Some of the drugs, which have been discontinued, include Percodan. Percodan being a rather good analgesic drug. However, with the potentials for addiction.

Doctor, did Mr. Valentine inform you that he had been a paratrooper in the United States Army?

MR. ROGAN: Objection to the question.

He did not.

Did you perform an examination on Mr. Valentine?

I did.

And what type of examination was performed, doctor?

Physical examination.

Was it both an orthopedic and a neurological examination?

Yes, that is correct.

And could you explain to the jury, what does an

orthopedic and neurological examination entail?
A. An orthopedic examination always includes an evaluation of the nerves, peripheral nerves, which are involved in those areas of an examination which include the neck, the arms, the back, the legs, et cetera. So that there is always a concomitant evaluation of the peripheral nerve associated with those sites of examination.

An orthopedic examination is, as I stated before, an evaluation of the musculoskeletal system, the bones, the joints, and all the soft tissues associated with those bones and joints.
Q. Doctor, what did your initial examination consist of?
A. We examined his back and his neck and his upper extremities and his knees, and he told us that he was 44 years of age, that he weighed 212 pounds, that he was five foot 11 inches tall. It was noted that he was wearing a sneaker on his right foot and was using a cane. There was no evidence of a limp when he was asked to walk in the examining room. There is, of course, a mismated shoe, which he was wearing because of his -- and because of this there was some gait

inequality as far as the height of the shoes were concerned.

In a sitting position, the the motions of his neck, the range of motion of his neck, which included flexion, meaning bringing his head forward where his chin approximates his chest, and extension, meaning looking with his head tilted backward as if he is looking up in the ceiling, twisting his head from one side to the other, and bending the head and neck to one side and the other, these were all done and showed a normal range of motion of all of those ranges referable to the neck movements.

Q. All right. We are now talking about your examination that you performed on Mr. Valentine's neck?

A. That is correct.

Q. All right. What other types of examination did you perform in regards to Mr. Valentine's neck, doctor?

A. We examined him for sensation for motor power, for reflexes. All of that was part of the examination, as well as the motions of his shoulders.

Q. And what did you find in those examinations?

The movements of his shoulders were totally within normal limits. He was able to raise his arm to twist it inward and outward, and these were all within normal limits. He did not demonstrate any evidence of any muscle spasm in the area of the neck.

His reflexes which were checked were found to be physiological, meaning that there was a normal response to the reflex hammer at the sites of the alleged -- a reflects hammer points of reflexes that we generally and usually examine.

We checked his grip strength with a Dynometer. On the right he was able to compress that Dynometer on one occasion nine pounds, and on the other occasion six pounds.

On the left he was able to compress 13 pounds, and then on a second attempt 16 pounds. What was the significance of that finding, doctor?

Frankly speaking, no significance, because if he was able to compress it once at nine pounds, he should be able to compress it again nine pounds. And if the difference between the 13 and the 16 on the left as compared to the right,

in my opinioii, was just a failure of complete cooperation.

All right:. Doctor, from your examination of Mr. Valentine's neck, did you reach any medical conclusion, based upon a reasonable degree of medical certainty, as Lo tile physical condition of Mr. Valentine's neck and upper spine at that time?

Yes, I did reach an opinion.

And what was that opinion, doctor?

I could find no cvidcnce of any manifestations of significant injuries to his neck.

All right. Was your examination basically from an objective point of view normal?

MR. ROGAN: Objection.

Yes, that's correct.

Now, doctor, when we talk -- in your examination, did you find both objective and are you looking for both objective and subjcctive symptoms?

MR. ROGAN: Objection.

Yes. The history is the subjective portion of the examination. It is what the patient tells us.

The objective portion are the signs which

we find on the physical examination. Those things that we can measure, things that we can see, things that we can feel, and sometimes even what we can smell.

So that the physical examination includes the subjective aspect as well as the objective aspect.

Q. What were your findings in regards to Mr. Valentine's neck, doctor?

A. I found that he had no evidence of any problems referable to his neck.

Q. In your examination of Mr. Valentine's upper spine and neck, doctor, did you notice if the cervical spine was twisted or was out of line?

MR. ROGAN: Objection.

A. No. There is no evidence whatsoever of any twisting, which we would call torticollis, or in the dorsal spine, which we would call scoliosis or kyphosis, none of those were present.

Q. Doctor, after you performed an examination on Mr. Valentine's neck, did you perform a further examination on the rest of his body?

A. Yes. I examined his low back region.

Q. What did your examinaiton of the low back consist of and what were your finding'?

A. Straight leg raising sign was permissible Lo 60 degrees with cvidcncc Lor hamstriny muscle contracture.

Q. First of all, would you tell the jury what straight leg raising is, and what was Llic significance of that finding?

A. Yes. Straight leg raising test is done with the patient laying in a supine position on his brick on the examination table and raising his icy straight without permitting him to bend his knee.

We measure that angle from zero to a point where we are or can go no further. That angle with him measured 60 degrees both on the right and on Lhe left.

We found that the reason Lor the limitation at 60 degrees was due Lo tlte hamstring muscles, which are those muscles in tlic back of tlic leg, in Llie back of the thigh, which did not permit any greater dcyrcc of movement than the 60 degrees.

Q. Did you perform further examination of his low back, doctor?

A. ¥cs. He had no evidence of any muscle spasms in the lumbar region. And we checked his

sensation, we found that he has what is known as a glove-type hypesthesia, a decrease in the perception of pain in a circumferential manner which we call glove-type on the right side, not on the left side.

Q. What was the significance of that finding, doctor?

A. Well, glove-type hypethesia gives us some concern of whether or not the patient has a psycho-physiological aspect of sometimes an hysterical type of component, a psycho, or what we call a psychogenic aspect to perceive that he has unable to feel pain.

And, of course, when it is glove type, it means that more than the level of involvement is being examined. That is to say, there is a geographic pattern of the sensory innervation in the lower extremity, which corresponds to that segment of the nerve which comes out of the spinal cord. And if a patient has an area of concern, which is limited to one nerve, then the other nerves ought not be involved.

When it involves all the nerves and it's on one side of the body and not on both sides of the body, we become skeptical about the reasons

for this kind of a finding, and it's basically on the area of psychogenic or an abnormal realization of the symptoms of which he is complaining.

Q. Did you continue with your examination, doctor?

A. Yes.

Q. And what else did you find?

A. We found that he had no evidence of any motor weakness,

Q. What do you mean by that?

A. Meaning that he had no weakness in the extremity muscles. And, of course, we put that together with the glove-type hypesthesia, which also reinforces our concern about the glove type hypesthesia.

We found that his reflexes were physiological, meaning that they responded normally to the tapping of the knee in the back of the heel area.

We measured his -- the girth of his right lower extremity, and we found that he had a quarter of an inch difference in the size. In the right lower extremity it was a quarter of an inch smaller than the left.

We measured him 12 inches below the level

of the pelvis, and we measured him at the calf level as well.

Q. What was the significance of that finding, doctor?

A. A quarter of an inch is of no significance. We don't consider a quarter of an inch of any significance. A person can have that much difference depending upon his vocation, his occupation, things of that nature. A quarter of an inch is not significant at all..

We found that he had good circulation, his pulses were palpable. We measured his leg lengths and they were equal. We examined his hip joint motions, we found them to be normal. We did a flip test.

Q. What is a flip test,'?

A. A flip test is another method of doing almost the same thing that we do with a straight leg raising sign, with a patient in a sitting position. If the patient complains of pain, we consider that to be a positive examination. And when we did the flip test, he complained of discomfart with that test.

Q. What was the significance of that finding to you, doctor'?

A. It did not -.- it is an individual test, which in comparison with the balance of the examination, really is of no concern. If it was in agreement, if all other objective signs pointed to a reason for a positive flip test, it would have great significance, but it has no significance in view of the fact that the straight leg raising sign, the sensory perception, the motor power, and the girth of his legs, none of which goes along with that single finding.

Q. All right.

A. He was able in a standing position to bend 30 degrees. He stopped at a point where he said he had pain. And he was able to increase that 40 degrees, meaning when I told him, okay, we know that it hurts, but how much further can you go, then he went 40 degrees.

And when we put that together with the straight leg raising sign, that's not - that is not inconsistent with the straight leg raising sign. In other words, it. is another test done in different levels tu see whether or not these findings are consistent. When they are inconsistent, it- raises a question of doubt in

tlic mind oL the examiner, as it did with me. Doctor, in your examination of Mr. Valentine's low back, did you find his lumbosacral spine to be twisted or out oL line?

MR. ROGAN: ObjecLion.

No evidence Lor any such abnormality. In your examination of Mr. Valentine's low back, did you find his sacrum to be twisted oL out vi. 1ine?

MR. ROGAN: Objection.

That's the lingo of chiropractors and osteopaths to explain problems, and it is unreal, because malalignments of that nature would have Lo be associated with things such as spasm, differences in the objective findings. Not only that, hut it is unlikely that anyone could have a malalignment in the neck or in Llic upper back and be -- that is tramatically induced, arid bc camp&tible with living. That would compromise the spinal cord, and the patient would bc dead. DocLor, from your physical examination, did you reach any medical cvnclusion based upon a reasonable degree of medical certainty as Lo the physical condition of Mr. Valentine's low back when you saw him'?

MR. ROGAN: Objection.

A. I have an opinion.

Q. And what was that?

MR. ROGAN: Objection.

A. It is my opinion that the affects of his injury that he sustained in December of 1982 wcrc not present at this point in time, that his back examination was virtually within normal limits, together with the knowledge that I am aware of what he has in his x-ray Lindinys that can account tor a transient episode of discomfort.

Q. Doctor, did you then perform an examination of his right knee?

A. I did.

Q. And what did the right knee examination consist of, and what were your findings, doctor?

A. The examination of his right knee was totally within normal limits. He did not have any effusion, meaning any water on the knee. He did not have any instability in the medial or in the lateral direction. He did not have a positive Lachman sign. He did not have a positive drawer sign.

Q. Let me stop you there, doctor. Could you explain what a Lachman and a drawer sign is?

A. Ye::. The Lachman test is a very traumatic test which would indicate that there is injury to the anterior crucial ligament of the knee.

If. the Lachman test is positive, that's proof positive of such an injury. A negative Lachman test means that the anterior crucial ligament is intact and is functional.

The drawer test is another form of a similar test for the integrity of the anterior crucial ligaments. The collateral ligaments, when I said there is no evidence of instability in the medial or lateral direction, that means that the collateral ligaments are intact, and this makes Lor a stable knee.

Q. What other examination did you find or what other findings did you make in your examination of the right knee, doctor?

A. We examined him to determine whether or not he had what we call a positive grab test. That is to determine whether or not thcrc is any evidences for involvement of the under surface of the kneecap.

People who have softening on the underside of the kneecap would have a positive grab test. People who have evidences for ligament

instability, not only the primary ligaments, but the secondary ligaments, would have what is known as a pivot shift test, and he did not, his was normal.

Q. How was his grab sign?

A. Grab sign was negative.

Q. How was his range of motion in his right knee, doctor?

A. Normal range of motion.

Q. Doctor, in your examination of Mr. Valentine's right knee, did you find any evidence of synovitis?

MR. ROGAN: Objection.

A. I found no evidence of synovitis. This would be a finding which would be consistent if the patient had what is known as effusion or water on the knee. No evidence of any swelling of his knee when I examined him.

Q. Doctor, if the patient had swelling on Llie knee or a condition such as synovitis, how could that be determined and how could it be taken care of?

A. Well, synovitis can come about by a number of reasons. If a person gets a bump on the knee, he can have an effusion and have an acute episode of synovitis, which would last only a

few days.

If a person had a rheumatoid arthritis, this would be a chronic condition which would never get better. The synovia is proliferative, it grows wildly, so to speak, and damages the interior of the knee. Those people have a chronic form. The synovitis is there all the time. It doesn't disappear. It is not transient as traumatic synovitis is.

And synovitis can occur as a result of a ligament injury. Bleeding can lead to synovitis, and the synovitis will clear up only when there is a restoration of the normal physiological aspects of the inside of the knee.

Q. Doctor, from your examination or from your physical examination, did you reach any medical conclusion based upon a reasonable degree of medical certainty as to the physical condition of Mr. Valentine's right knee when you saw him?

MR. ROGAN: Objection.

A. Yes, I reached an opinion.

Q. And what was that opinion:'

MR. ROGAN: Objection.

A. I did not think that there was any objective evidence of any problems with this right knee.

The -- I think that I supplemented my report in saying that the doubt concerning his knee could be easily erased by subjecting him or the man accepting what is known as an arthroscopic examination, where one would have the abiliLy Lo look inside the knee with a scope Lo evaluatc not only the synovia, but the ligaments and the menisci and the articular surfaces of the kncc Lo determine whether there is any objective evidences for any reason Lor the man tu have any problems with his kncc.

It's to be reckoned as wcll, that anyone in this age group weighing 212 pounds may have some degenerative changes in the knec, as a lot of us have, which may be asymptomatic, and in some people symptomatic cnough Lo produce swelling, effusion, and some derangement.

Q. Doctor, in your examination of Mr. Valentine, did he make any complaints Lo you or did you find any evidence of any type of neuritis or pain in the sight hip'?

A. No,

MR. ROGAN: Objection to the question.

A. None.

Q. Doctor, at my request did you have an opportunity to review certain medical records regarding the prior treatment of Mr. Valentine?

A. Yes, I did.

Doctor, let me show you what has been previously marked as Plaintiff's Exhibit 1, and it is the office records of Dr. Doyle. Have you had the opportunity to review the office records of Dr. Doyle?

Yes, I did.

And were there any significant findings in those records, doctor?

I think that as I reviewed them, he thought that the man sustained a sprain of his neck and his back.

Doctor, let me show you what has been previously marked, I believe, as Plaintiff's Exhibit Number 2, and it is the St. Anthony Hospital records, which includes the results of various tests that were performed on Mr. Valentine in February of 1986. Have you had an opportunity to review those records?

I did review these records.

Doctor, did you have an opportunity to review the tests that were performed on Mr. Valentine

in February of 1986?

. Yes. The x-rays, I believe the CT scan and a myelogram was performed. At some point in time he also had an EMG examination done.

. Do you recall what the results of those tests?

. All of them, everyone of those tests were negative.

. By "negative", what do you mean?

. No positive findings.

. All right. Doctor, did you have an opportunity to review certain x-rays that were taken of Mr. Valentine's right knee, neck and low back?

. Yes, I did.

MR. DOVER: And -- I don't know, if I mark the whole package, do you have any objection to that, Mr. Rogan?

MR. ROGAN: No, go ahead.

. Rather than having them show on the screen, we will mark this whole packet as Defendant's Exhibit 1, and, doctor, from your review of those x-rays, what significant findings did you make?

MR. ROGAN: Objection.

. I reviewed the x-rays taken of his lumbar spine on the second day of December, 1982, and they

revealed some narrowing of the L-4, 5 innerspace, also some arthritic changes limited to that innerspace as well.

I reviewed some x-rays taken, I believe, three years --

Q. First of all, doctor, those x-rays were taken on December 2, 1982?

A. That's correct.

Q. That would be one day after the incident of December 1, 1982?

A. That is correct.

Q. The degenerative changes that you saw in those x-rays, do you have an opinion based upon a reasonable degree of medical certainty as to whether those were caused by the incident of December 1, 1982?

A. Absolutely not. Changes of that nature would have to occur at a minimum, a minimum of 18 months prior to that.

Q. You saw degenerative changes in Mr. Valentine's low back?

A. That's correct.

Q. In December 2nd of 1982?

A. That's correct.

Q. Would those changes be consistent with an

individual who may have been a paratrooper in the Army?

MR. ROGAN: Objection.

It is quite likely that injuries to the back such as the biomechanical impact of hitting the ground when one parachutes could be responsible. It's a very, very distinct possibility that this could be one of the factors in the degenerative changes that one sees in the L-4, 5 innerspace of that lumbar spine.

Now, doctor, you were going to say you reviewed other x-rays regarding his lower back?

I reviewed some x-rays taken, I don't recall the date, I think it was something like three years later, and similar changes were seen. If one were to evaluate them in degrees, there is a minimum amount of increase in the widening of the vertebra, and perhaps an insignificant but a slight degree in the increase of the narrowing of that innerspace.

But, in general, I would say they are very, very similar.

Doctor, let me show you what has been marked as Defendant's Exhibit 2, which is a total bone

scan, which I believe was taken at the St. Anthony Hospital?

A. Yes.

Q. Have you had an opportunity to review that record?

A. Yes, I did.

Q. And what significant findings did you find in that record, doctor?

A. This bone scan shows that he has an increase in the uptake in the areas of his body where he has arthritic changes. This is a normal bone scan.

Q. And, doctor, let me show you records that are marked as Defendant's Exhibit 3, which are records pertaining to Mr. Valentine's prior to this incident of December 1, 1982.

MR. ROGAN: May I see those, first?

VIDEOTAPE OPERATOR: We are off the record.

- - - -

(Thereupon, a discussion was had off the record.)

- - - -

VIDEOTAPE OPERATOR: Stand by. We are on the record.

Q. Doctor, have you had an opportunity to review those records?
A. Yes.
Q. And what do those records indicate, doctor?
A. Everything that we have said before. Namely, that this is a medical report of the injury, and the examination referable to the problems of his knee.
Q. Well, doctor, would you look on the date of those records?
A. Sure.
Q. Are those records of injuries prior to December 1, 1982?

MR. ROGAN: Objection. I think the records speak for themselves.

A. The date of the examination was the 12th of May of 1975, and it is a report of an automobile accident that he had a year prior to that, that he had at that particular time problems with his knee, and this one is dated the 6th of July of 1970, and he then had problems again with his knee, and I don't see anything referable to his back, and there is another examination -
Q. The first record there that you have in front of you, doctor, from the examination of May of

1975 --

A. Yes.

Q. -- does that report refer to his back?

MR. ROGAN: I would like to object to this continuing testimony reading off the records and any questions regarding those records.

A. The examination here dated the 12th of May, 1975, is an injury referable to his neck and to his back, and the x-rays that were taken at that point in time.

Q. All right. Now, doctor, would you explain to the jury what a lumbosacral or cervical sprain is?

A. Yes. Any injury, the use of the word strain and sprain is, for the most part, limited to joints.

A sprain represents an injury to the soft tissues about those joints, which includes the tendons, the ligaments, and the components of the joint, itself. So that the diagnosis of a sprain represents a degree of injury, which is greater than that of a strain, which would be a minor kind of an injury.

A sprain is regarded as a more significant

kind of an injury to the soft tissues.

Q. Have you treated many individuals with sprains to their lower back and to their neck area, doctor?

A. All over.

Q. Doctor, in your treatment of such patients, do you generally find that their symptoms clear up or heal?

MR. ROGAN: Objection.

A. The soft tissue injuries that occur around joints, perhaps except to a major joint like the knee, especially to the smaller joints such as the neck and the back, we anticipate that within a reasonable period of time, in a patient of this age group, would relatively clear up in a period of six to eight weeks.

In a younger person, a shorter period of time. In an older person, perhaps as long as 12 weeks.

Q. Doctor, based on your physical examination of Mr. Valentine, the review of the medical records which we have marked as exhibits, and your experience in orthopedic surgery, do you have an opinion based upon a reasonable degree of medical certainty as to what Mr. Valentine's

physical condition was in August of 1987, when you saw him?

MR. ROGAN: Objection.

Yes.

And what is that opinion?

MR. ROGAN: Objection.

It is my opinion that he did not have any significant residual manifestations of injury to his neck, to his back, or to his knee.

Doctor, in your examination of Mr. Valentine in August of 1987, did you discover any objective findings that would account for Mr. Valentine's complaints of pain?

MR. ROGAN: Objection.

It was my opinion that when I examined him that his physical examination was within normal limits, and I did not find any reason other than a psycho-physiological aspect to explain the continuance of his symptoms referable to discomfort.

And what do you mean by a psycho-physiological aspect?

I think that there is a tendency for a patient of this nature to hold on to a group of symptoms which to him may be very important, to the

doctor are of minimal importance, and would not deter him from returning tu his normal activitics.

Doctor, based on your physical examination of Mr. Valentine, your rcvicw of the medical questions or the medical rccords, excuse me, which we have marked as exhibits, and your experience in orthopedic surgery, do you have an opinion based upon a reason degree of medical certainty as to whether Mr. Valentine is employa**b1**e'?

MB. ROGAN: Objection.

Yes, I have an opinion.

And what is that opinion?

Yes, I think the man is employable, and I think that I stated in my report that thcrc **should** be some functional **limi**tations as Lo the amount that he is to lift in his work.

And, doctor, that leads me Lo my next question, and Lhat is, based on your physical examination of Mr. Valentine, your review of the medical records which we have marked as exhibits, arid your experience in orthopedic surgery, do you have an opinion based upon a reasonable degree of medical certainty as Lo whether Mr. Valentine

has any physical restrictions in his normal work life os in his daily life?

A. Yes. Based on my examination and the x rays which I observed, I thought that functionally he should be capable of working, lifting a maximum of 50 pounds and, if possible, to limit his lifting from waist level up.

Q. What would be the reasons for those physical limitations?

A. Because of the arthritic changes in his back, the overuse phenomena of repeated bendings and lifting heavy loads would tend to aggravate the pre-existing axthritis.

Q. Doctor, based on your physical examination of Mr. Valentine, your review of the medical records which we have marked as exhibits, and your experience in orthopedic surgery, do you have an opinion based upon a reasonable degree of medical certainty as Lo what injuries Mr. Valcntinc sustained in his incident of December 1, 1982?

MR. ROGAN: Objection.

A. Yes.

Q. What is that opinion?

A. Yes. I would concur with the treating

physicians that he had a sprain to the areas of his neck and his back, and a contusion to his right knee.

Q. Doctor, based on your physical examination of Mr. Valentine, your review of Llic medical records which we have marked as exhibits, and your experience in orthopedic surgery, do you have an opinion bascd upon a reasonable degree of medical certainty as Lo when the sprains that you have just dcscribcd should have cleared up in Mr. Valentine's low back and neck area?

MR. ROGAN: Objection.

A. It is my opinion that a man of this age should have been able to return to work in that time frame that I alluded Lo previously, namely six to eight weeks.

Q. Doctor, based on your physical examination of Mr. Valentine, your review of the medical records which we have marked as exhibits, and your experience in orthopedic surgery, do you have an opinion based upon a reasonable degree of medical certainty as to whether Mr. Valentine's present complaints are rclated in whole or in part Lo the incident of Decembei 1, 1982?

MR. ROGAN: Objection.

A. I have an opinion.

Q. And what is that opinion?

MR. ROGAN: Objection.

A. They are not at all related to the injury of 1, December, 1982.

Q. What is the basis for that opinion, doctor?

A. Again, soft tissue injuries should clear in a reasonable period of time, which I have indicated to be in the neighborhood of six to eight weeks.

MR. DOVER: Thank you very much, doctor. I have no further questions at this time.

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CROSS-EXAMINATION OF MALCOLM A. BRAHMS, M.D.

BY MR. ROGAN:

Q. Doctor, my name is Michael Rogan, and I represent Mr. Valentine in his lawsuit against Consolidated Rail Corporation.

Doctor, do you have your file with you? Could we go off the record?

VIDEOTAPE OPERATOR: We are off the record.

- - - -

(Off the record.)

- - - -

MR. ROCAN: Back on the record.

VIDEOTAPE OPERATOR: Stand by. We are on the record.

Q. Doctor, I am correct in that you only saw Mr. Valentine on one occasion':'

A. That is correct.

Q. And that was on August 11th of 1987?

A. That is correct.

Q. And Mr. Dover requested that you do a physical examination of Mr. Valentine?

A. Yes, that's right.

Q. And he asked you Lo review numerous medical records regarding Mr. Valentinc?

A. That's right.

Q. And, in fact, he sent you a six page letter detailing the different medical records that refer to Mr. Valentine?

A. Yes, that's right.

Q. And in response to that physical examination and the medical records, you prepared and sent a letter to Mr. Valentine detailing your opinions regarding Mr. Valentine's condi Lion?

A. That is correct.

symptoms?
A. That is what he told me.
Q. And walking creates pain?
A. Right.
Q. Now, doctor, you then did a physical examination of Mr. Valentine?
A. That's right.
Q. And in that physical examination you had Mr. Valentine basically you Lure himself in different positions to see whether or not anything he did created any pain that he could tell you or elicited any pain, is LhaL basically correct?
A. Well, that is only in a Ecw maneuvers that are carried out. Of course the patient can complain of discomfort throughout the examination if he so desires.
Q. And when you are doing a physical examination, you have to rely on the patient Lo tell you when he is feeling pain and when hc isn't feeling pain, when you are doing maneuvers?
A. No, we don't have to do that. Wc -
Q. You don't relay on the patient telling you?
A. We know if a patient complains, and we arc ready to accept that, but we are aware if the patient complains whether or not those complaints are

real or not.

Q. Okay. Mow, during that examination you did do a flip test, I believe it is called?

A. That's right.

Q. And a flip test is done to determine whether or not a patient is experiencing pain?

A. Yes.

Q. Now, the test that you did was positive, correct?

A. Yes, that's right.

Q. And that means you elicited pain in response to the movement?

A. He experienced the pain during the maneuvers that I did with Llie patient.

Q. All right. And a positive flip test, that may indicate such things as nerve root irritation or muscle spasm?

A. Not muscle spasm, more likely nerve root irritation.

Q. Okay. By the way, doctor, muscle spasm, what exactly is muscle spasm?

A. It is an increased tone of the muscle.

Q. And, basically, isn't that an indication or a sign from the body saying that there is something wrong in the back and it is reacting

to it, so the muscle Lenses up?

Yes, that is -- in a colloquial manner, that is true, yes.

Okay. Doctor, you also did a test Lor straight leg raising'?

Yes.

And you indicated it went Lo 60 degrees?

That's correct.

What's normal for straight leg raising?

Sixty degrees is a lower point of normal. Some people who are flexible can go as much as 90 degrees.

Okay. And I also -- you also indicated that when he was standing, you asked him Lo bend, he went over to 30 degrees. What is considered to be normal Cor that test?

Well, it depends on the patient's size, and height. A patient this man's height and weight we would expect that he should be able Lo go without any problcms to 70 degrees.

And he only went to 30 when he first started Lu elicit pain, and Lhen you asked him Lo continue going down and he only went to 40 degrees, is thaL correct?

That's correct.

And then he went down until he said it hurts?

He just didn't yo any further.

He just didn't yo any further.

He had pain at 30 degrees, but he went to 40 and continued to complain of pain.

I am saying, when he had the straight leg raising, he went Lo 60, he complained of pain when he got to 60?

No, I didn't say that he complained of pain. I said that he didn't go any further because he had hamstring muscle contracture, which didn't permit him Lo yo any further than 60 degrees. And we would anticipate that in the standing position, if the hamstring muscle contracture was the basic reason for not being able Lo yo any further, that he would yo at least Lo 60 degrees in a standing position.

Some of us can't yo more than 60 or 70 degrees if we have significant hamstring muscle that are tight and that are contracted.

Okay. Doctor, now, just so I am sure, you are not a neurologist, is that correct?

I am not a neurologist.

And you are not a psychologist?

I am not a psychologist.

You are a board certified orthopedic surgeon?
That is correct.
Now, doctor, you indicated something about his walking, that you figure that he came in that he was walking normally, except For a gait caused by his shoes that you thought were uneven?
Yes, that's right.
Did you ask him to take off his shoes to see if he walked normally without Llic shoes on?
He did take his shoes off, and he did walk along the examining table without a limp and without the use of his cane.
So he did walk without his shoes off 01' -
Yes, I have them take their shoes off so that I can examine them.
All right. Doctor, I notice that you did not ask him, though, why lie was wearing his shoe oi why he was using a cane, isn't that correct?
I did not ask him.
You did not ask him that?
I did not ask him.
Okay. And as I understand it, you did not find anything wrong with his righL knee?
That's correct.
His right knee, basically, then was -- well,

strike the question.

Doctor, you have reviewed the x rays, also, of his sight knee?

A. Yes, I have.

Q. And it is your opinion as far as you can see that his right knee is normal?

A. His right knee is normal, and I would like to explain what I saw in his knees further to complete that aspect.

Q. I am sure my opposing counsel will ask you on cross-examination.

A. No. I think it is proper for me to tell you at this point in time, that when I reviewed his x-rays, he has no evidence of any arthritis. He has a slight degree, a minimal degree of medial joint line narrowing, which in my opinion is consistent with his age and his size.

And he has also what is known as a Pellegrini-Stieda disease, which is an area of calcification in the area of the attachment of the medial collateral ligament, which has nothing to do with his intra-articular problems of his knee.

Q. Doctor, what is synovial fluid?

A. Synovial fluid is a dialysate of the blood mixed

with a special mucinous substance produced by the synovia in the knee which provides the knee with a lubrication Lo permit the joints to move in a normal manner.

Q. And synovial thickening, what is synovial thickening?

A. Well, synovial fluid has a certain osmatic quality. In many instances Liic synovial fluid can become more liquid in character or thicker in character, depending upun on what is wrong on the inside of the knee.

The good lord is a very, very good engineer, and when one has some little things floating around in the knec, little loose bodies Floating around in the knee, the synovial fluid becomes thicker. It is like adding thick oil Lo an old automobile. Arid if the fluid is thin in character, it's because of yet a different kind of a disease entity.

Normally the synovial fluid in the knee, if it is there by virtue of trauma, docsn't havc much of a difference in the osmatic quality of the knee joint. We can test that by depending upon the Lurbidity when we do a special test on the synovial fluid to determine whether it is

diseased or not.

Gut synovial fluid or synovial thickening can be caused by trauma'?

Oh, yes. On a transient basis, yes.

Mow, doctor, you did review the x rays that you indicated of Mr. Valentine from the date of the accident from two years later?

That's correct.

And you also reviewed the X-ray reports from St. Anthony's hospital?

That's correct.

And in all those x-ray reports, they all indicate that he does, and in the x rays, themselves, it does indicate that he does have L-4 L-5 disc disease at that space, is that correct?

I don't know that he has disc disease at the space. He has a degenerated disc and arthritis.

Degenerative arthritis at that lcvcl?

Yes, right.

And that is causing or there is a narrowing at that space?

That's correct.

And a narrowing means, basically, that the spaces between the vertebra are, at that level,

anyway, are more narrow than when it is at the other levels or more narrower than they should be?

Yes. That's right.

And, doctor, isn't it correct that when that docs narrow down, that that diseases tile space through which the nerve roots, themselves, come out of?

Yes, that can happen very, very -- for a different reason than what you stated, but you are right, it can compromise the space occupied by the nerve root.

All right. And, doctor, in those x-ray reports they also indicate that there is spurring at that space?

That has nothing to do with the nerve roots. That is way out of tlic position of Llic nerve roots.

I understand that doctor, but --

The answer is yes, thcrc is spurring. That is what the arthritis is, it is the spurring.

And, doclor, that degenerative arthritis he has, that is permanent in nature?

Oh, yes.

Now, degenerative arthritis in and of itself,

that is not uncommon for a man that is 44 years old and of the age of Mr. Valentine, that is not too uncommon to find degenerative arthritis in a man his age?

A. I think that your answer is that's correct. However, it is more likely that the degenerative changes would occur at the lumbosacral joint space than at tlic L-4, 5 level in a man of Iiis age, and for the general run of arthritic changes that we see in the lumbar spine.

VIDEOTAPE OPERATOR: We are off the record.

- - - -

(Off the record.)

- - - -

VIDEOTAPE OPERATOR: Stand by. We are on the record.

Q. And, doctor, it isn't uncommon particularly for an individual to have degenerative arthriLis in the back who is involved in a heavy labor type of. work'?

A. Are you asking me whether it is common for them *to* develop arthriLis?

Q. It is not uncommon to find degenerative arthritis in the back of a man who is 43 years

old who has a history of doing heavy work throughout his lifetime?

MR. DOVER: Objection.

A. I don't think it is proper to characterize that because of his work. There is some people who never did a heavy day's work in their life who have arthritis worse than I have seen in his back.

Q. And, doctor, there are some people who do go through life with degenerative arthritis in their back who never have any problems with their back?

A. That is correct, except when they do something over the ordinary things that they do everyday.

Q. So a person who does have degenerative arthritis in their back and does do something that is out of the ordinary will then have problems in his back?

A. Yes. Transiently, that is right.

Q. Well, doctor, isn't it also possible for those problems for that person to be experiencing, isn't it possible that they could have some type of permanent character to the problems that they are experiencing?

That should be proven by objective findings or

sophisticated tcsts, which have been done in this particular patient, and found to be negative.

Q. But there are some individuals where it is possible that when they do something out of the norm, that they can develop permanent problems?

A. Not permanent. Overuse or transient things, not permanent. It in very unlikely that even a person with severe arthritis who may be very, very symptomatic for a short period of time, he usually reaches his steady state again in a reasonable period of time, six, eight, 10, 12 weeks.

Q. Doctor, it's your opinioii at Lhio time that Mr. Valentine can physically return Lo some Lypc of gainful employment, is that correct?

A. That is my opinion.

Q. All right. And I believe you stated earlier, you are not a trained psychologist?

A. That is correct.

Q. And you arc not a trained vocational analyst?

A. I am not.

Q. So that you, therefore, isn't it Lair to say, that you don't know what job Mr. Valentine is capable of doing at this point from an emotional

or an educational basis?

. I think I know that I am not a vocational expert to tell him what is available in Liic vocational pool, but I think I know what kind of work he can do.

. Doctor, in your report you further - wcll, you do state that in addition Lo Mi-. Valentine being physically able to return Lo work, that Mr. Valentine could return. However, he has Lo have some limitations on his ability to return to work?

. Yes, I stated that, that I thought that the limit should be in the amount he lifts and how he lifts it.

. And you stated that the functional limitations that you find is that he should not lift more than 50 pounds':'

. Yes.

. And that he should not lift below his waist level?

. It's not that he shouldn't. I would recommend that he doesn't do that, in order Lo keep him viable on his job.

. Doctor, I would like you Lo assume that Mr. Valentine's normal job with the railroad as a

signal maintainer is a job Lhat involves a lot of walking over long distances over uneven ground, it requires him to constantly climb telephone poles, to string wires across those telephone poles, that as part of his job duties he has to lift and manhandle weights of up Lo and over hundred pounds on a frequent basis. That in addition to that, hc has to pull, push and twist in very awkward positions.

It is a fair statement that if you were to assume that job statement I just gave you, it is your opinion that Mr. Valentine is not physically capable of performing that job that i just listed to you?

MR. DOVER: Objection.

A. I think that he is capable of doing parts of that job. I would wish that some of the aspects of that job be limited with the functional limits that 1 have already suggested.

Q. Doctor, there was some questions regarding Iiis time as a paratrooper in the Army. Were you supplied any records that indicated Mr. Valentine suffered any kind of a problem as a paratrooper, any medical records that said hc suffered an injury as a paratrooper?

I didn't even know he was a paratrooper, so I can't do that.

Now, doctor, you indicated that you took a look at Dr. Boyle's records and you agreed with his statement that -- strike the question.

You did take a look and review Dr. Boyle's records?

Go ahead.

And you gave us what that was?

Yes.

And you gave us a definition of what strain and sprain was. Did you say, and just correct me, you said that a strain was more severe than a sprain?

No, no, no. Just the opposite.

That a sprain is more severe than a strain?

Yes, that's correct.

And when a strain does occur, that's some type of injury to the ligaments surrounding the vertebra and the nerves in a person's spine'?

Are you talking about a strain or a sprain? IL we are talking about the more significant, the more serious injury is a sprain, and a sprain does include all the soft tissues, which includes the ligaments.

. And a strain?

. A strain may not include the ligaments. It may include muscle fibers, soft tissues to a lesser degree. The ligaments are usually not -

. Okay.

-- involved,

. And the soft tissues and the muscles around the back, isn't it fair to say that they act as protective barrier against the nerves in the back and to maintain the bones and the vertebrae in the back?

. No, I don't like the idea that you are using them as protective cerclages around the nerves. No, that is not true at all.

It is true that the muscles, and perhaps even if I may include the ligaments in the soft tissues, even in a strain, let's include that as what we call a first degree injury, that the nerves would not likely to be involved, unless there was a major, major disruption of the bony architecture of the neck or the back.

So the muscles go into a protective spasm because of irritation, direct trauma to the muscles, direct trauma to the soft tissues, and the muscles would react in a secondary fashion

if the nerves were involved. The muscles would go into spasm if the nerves were involved.

But most of the time the reason for the spasm is not related to the nerves directly. It is due to the facets in the neck and in the back, the articular facets that produce the stiffness and the spasm.

Q. Okay. Now, doctor, you did have the opportunity to review Dr. Yashon's records, I believe that was contained in your report?

A. Yes.

Q. Did you know that Dr. Yashon is a neurologist?

A. Yes.

Q. Now, doctor, if I were to tell you that in a deposition that we took a couple weeks ago in which Dr. Yashon stated that it is more probable than not that the pain that Mr. Valentine is suffering now is related -- it is more probable than not that the pain he is suffering now is related in whole or in part to the accident of December 1, 1982, would you disagree with that statement then?

MR. DOVER: Objection.

A. Yes, I would.

Q. All right. Now, doctor, these evaluations that

you do, you do about one or two of these evaluations a day, is that correct?

. Sometimes as many as one or two a day. Sometimes they are less frequent than that. But that's a pretty good average.

. And you did this examine at the request of Mr. Dover':'

. Yes.

. And you have done this type of evaluation before for Mr. Dover?

Oh, yes.

In fact, you have also done evaluations Pur other people in his office, such as Forrest Norman?

It is likely he did. I don't know Mr. Norman. I don't think I met Mr. Norman.

Do you remember in your deposiLion being asked whether you knew Mr. Forrest Norman and answering that, in fact, you do know Mr. Forrest Norman?

If Mr. Norman were here, and I saw him, and if I did recognize him and I saw him, I would say I would. But that is not unusual. Sometimes I don't recognize names of even close relatives.

And, doctor, you charge for the time that you do

spend on these matters for the evaluations, that is correct?

A. We all do, don't we?

Q. And, in fact, what you charge is, you are going to charge $500.00 for the first hour, and $150.00 for every half hour of the deposition?

A. That is correct.

Q. And you are going to charge Mr. Dover $500.00, at least $500.00, I don't believe we have gone over an hour yet. Maybe we have gone over an hour,

A. Oh, we have gone over an hour. So he is going to pay more than $500.00.

Q. He is going to pay more than $500.00 for this deposition?

A. Yes. Yes, he is.

Q. And our firm, through Mr. Mike Michelson, took your discovery deposition at an earlier time, is that correct?

A. That's correct.

Q. And you charged our office $650.00 for that deposition?

A. Anything over an hour, anything over an hour and less than hour and a half, it is $150.00 for every half hour after the first hour, and so

that's the charge that I make, and that is the standard fee for everyone.

. And on Lop of that, you charge $100.00 for the examinations, themselves?

. Oh, absolutely.

. And in addition to the $100.00, you will charge $150.00 for the reports, which would have included the report that you sent tu Mr. Dover?

. That is correct.

. And then in addition, you did review a lot of medical records?

. Yea, that's right.

.. How many hours did you spend reviewing medical records?

.. I can't even begin to tell you that, I don't know. But I charge on the basis of time as well tor reviewing those records.

:. And the time you charged for that is, you charge $150.00 per hour in preparation for the depositions, themselves, such as the one we are doing here today, and for the deposition we took, for our firm?

.. That's correct.

). And for the review of those documents?

.. Yes, that's correct.

MR. ROGAN: I have no other questions.

- - - -

FURTHER CROSS-EXAMINATION OF

MALCOLM A. BRAHMS, M.D.

BY MR. DOVER:

Q. Doctor, just to follow up very quickly, Mr. Valentine's attorney, Mr. Rogan, has asked you in regards, he has asked you questions in regards to nerve roots being compromised.

In your physical examination arid in your review of the records, did you find any evidence that any nerve roots in Mr. Valentine's body, cither in the cervical spine, the lumbosacral spinc were in any way compromised.

MR. ROGAN: Objection.

A. I did not, and neither were they found in the sophisticated tests, which included the CT scan, the myelogram and the EMG.

Q. And, doctor, you also indicated, I bclicvc?, that you thought Mr. Valentine should have a functional limitation, I think you described it of lifting 50 pounds, is it below the waist level?

A. Not below the waist level.

Q. Not below the waist level. And once again, what was the reason that you believe that that functional limitation should be placed on Mr. Valentine?

MR. ROGAN: Objection. Asked and answered.

A. Because the degenerative changes in the lumbar spine Lire likely Lo be aggravated by repeated bending below the waist and lifting weights of 50 pounds or more.

Q. Doctor, based upon your review of the x rays, the medical rccords, and your physical examination of Mr. Valcntinc, do you have an opinion within a reasonable degree of medical certainty as to whether or not that degenerative arthritis that you have just described is in any way related to the incident of December 1, 1982?

MR. ROGAN: Objection.

A. There is no question in my mind that this was present prior to the 1st of December, 1982, tis verified by the x-rays taken on the 2nd of December, 1982, and I have alrcady suggested that arthritic changes would not; be evident in any joint of this nature in less than 18 months

prior to any one insult.

Q. Are there any other functional limitations that you feel that Mr. Valentine should have?

A. I don't really think that there is much in iiis job capacity that much else has Lo be suggested to be eliminated.

MR. DOVER: Thank you, doctor. Nothing further.

MR. ROGAN: I have nothing further.

VIDEOTAPE OPERATOR: Doctor, you have the right to review this tape for its accuracy or you may waive that right.

THE WITNESS: I waive it.

VIDEOTAPE OPERATOR: Will counsel allow Multivideo Service to remain the custodian of this tape until the time of trial?

MR. DOVER: I will.

MR. ROGAN: I will let you burn it if you like.

VIDEOTAPE OPERATOR: We arc off the record.

MALCOLM A. BRAHMS, M.D.

CERTIFICATE

The State of Ohio,) SS:
County of Cuyahoga.)

I, Susan M. Ccbron, a Notary Public within and for the Statc of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named MALCOLM A. DRAHMS, M.D., was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness, and was subscribed by said witness in my presence; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this _____ day of _____, A.D. 19 ___.

_____

Susan M. Cebron, Notary Public, State of Ohio
650 Engineers Building, Cleveland, Ohio 44114
My commission expires August 16, 1988

LAWYER'S NOTES

PAGE	LINE	

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STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. 94339

PATRICIA WHEARTY, ET AL,

PLAINTIFFS,

VS.

SUE PAWLAK, ET AL,

DEFENDANTS.

VIDEOTAPE DEPOSITION

OF

DR. MALCOLM BRAHMS

JUDGE GORMAN

VIDEOTAPE DEPOSITION taken before Jon Jastromb, a Notary Public within and for the State of Ohio, pursuant to Notice ina as taken on October 15, 1986 in the office of Dr. Malcolm Brahms, 26900 Cedar Road, Beachwood, Ohio. Said deposition taken of Dr. Malcolm Brahms is to be used as evidence on behalf of the Defendant in the aforesaid cause of action, pending in the Court of Common Pleas, within and for the County of Cuyahoga, for the State of Ohio.

APPEARANCES:

MR. HOWARD SCHULMAN,

On Behalf of the Plaintiffs,

MR. REGINALD TRUBEY,

On Behalf of the Defendant, Lee Messenheimer,

MR. FRED VERGON,

On Behalf of the Defendant, Sue Pawlak.

OPERATOR: We're on the record. Doctor, would you raise your right hand please. Do you solemly swear the testimony you are about to give in this matter to be the truth, the whole truth, and nothing but the truth, so help you God?

DR. BRAHMS: I do.

DURING DIRECT EXAMINATION BY MR. REGINALD TRCJBEY:

Q Doctor, my name is Reginald Porter Trubey, Junior. I represent Lee Messenheimer. For the record, sir, would you state your full name please?

A Dr. Malcolm A. Brahms.

Q Are you a duly licensed physician in the State of Ohio, sir?

A I am.

Q And when did you obtain your license?

A 1950.

Q Do you maintain an office in this city?

A I do.

Q And how long have you been practicing your profession

A Since 1955.

Q All right, sir. And where did you receive your medical training?

A Western Reserve University.

Q All right, sir. And when did you graduate from there, sir?

A 1950.

Q All right, sir. Did you take any further studies?

A Yes. I took an internship and residency in orthopaedic surgery.

Q And where was that, sir?

A My internship was at Cleveland City Hospital now known as Cleveland Metropolitan General Hospital and a year of general surgical training at that same institution.

Q All right, sir.

A Followed by 3 years of orthopaedic surgery; one at Mt. Sinai Medical Center, and two at the Indiana University Medical Center in Indianapolis, Indiana.

Q All right, sir. I take it then that you do specialize in orthopaedic surgery?

A That is correct.

Q Would you please tell the jury what the specialty of orthopaedic surgery is?

A Orthopaedic surgery is that branch of medicine that deals with the investigation, the preservation, and the restoration of the form and function of the musculo-skeletal system by medical, surgical, or rehabilitative means.

Q All right, sir. Are you on the staff of any

hospitals here in the area?

A I am.

Q And what are those hospitals, sir?

A Mt. Sinai Medical Center and Suburban Commu ity Hospital.

Q All right, sir. Do you presently teach at any medical schools?

A I do.

Q And what medical school or schools is that, sir?

A Case Western Reserve University.

Q And I take it that you teach orthopaedic surgery?

A That is correct.

Q All right, sir. Do you belong to any professional societies or medical associations?

A Yes, I do.

Q And what are they, sir?

A I am a member of The Cleveland Academy of Medicine, The Ohio State Medical Association, The American Medical Association. I am a fellow of The American College of Surgeons, a fellow of The American College of Ortho.... American Academy of Orthopaedic Surgeons. I am a member of The American Academy of Orthopaedic Surgeons for Sports Medicine, one of the founding members of The American Academy of Orthopaedic Surgeons of the Foot and Ankle. I am a member of The Clinical Orthopaedic Society, The International

Society of Orthopaedists and Traumatologists, The Mid America Association, and The Southern Medical Association.

Q All right, sir. What are the requirements before a physician can be certified as a fellow or a diplomat?

A It requires completion of residency training in orthopaedic surgery followed by an examination, both oral and written, and after two years in practice a repeat oral and written examination.

Q All right, Doctor. Is this certification something on a national basis versus a state basis?

A Yes. It is on a national basis and there are international members of the society as well.

Q I see. Doctor, have you written any papers that have been published in the various medical and or surgical journals?

A Yes, I have.

Q Could you for the jury, sir, give us some of those articles or papers?

A Well, I have written articles in many of the orthopaedic journals and the author of a chapter in two of the most recent orthoapedic textbooks on the market.

Q All right, Doctor. At my request, sir, did you examine the plaintiff in this case, Patricia Whearty?

A I did.

Q And who is paying for that examination, sir?

A You.

Q Thank you. When did you examine the plaintiff, sir?

A I saw her for the first time on the 27th of December, 1985

Q All right, sir. And did you keep a record of that examination?

A I did.

Q Do you have that record with you today?

A Yes, I do.

Q Was that record made at that time or shortly after the examination of the plaintiff?

A My history and physical examination was done in long hand at the time and a report rendered and typed and sent on the 30th of December which was 3 days later.

Q And that was to me, sir, was it not?

A That is correct.

Q All right. Thank you, Doctor. Would that report that you sent to me refresh your recollection as to the examination of the plaintiff and taking the history of the plaintiff?

A Yes, I have it in front of me.

Q All right, sir. Doctor, what history did the Plaintiff give to you on the date of her examination?

A She told me that on the 24th of December, 1983 that she was involved in a motor vehicle accident which occurred

on 1-90 and West 40th Street. She was a front seat passenger in the automobile and was not certain whether or not she was wearing a seatbelt. She was enroute to Church after dinner and an automobile on the right of their automobile bumped the right front fender of their car causing their car to go into a-skid. They were perpendicular to the traffic when they were hit on the passenger side. The patient reports that she was not knocked unconscious, but on impact felt as if, quotes, "My rectum turned inside out." There was a major impact and the car causing....in the car causing the windows to be broken. The patient was asked and was able to move her fingers and toes. She was taken by an ambulance to St. John's Hospital and was hospitalized there for approximately one month. No surgery was done. She was seen in the hospital by Drs. Cobert, Corrigan, Nadar, and Kilroy. She was aware that she had a fracture of her ribs, of her pelvis, and a laceration of her right leg. She reported that she had an injury to her left knee, but said that this was, quotes, "Never X-rayed." Her right knee was examined. There was an injury to her neck. NO tubes were inserted in the emergency room. A catheter was placed in her bladder, Prior to her discharge she was able to use a walker in the hospital. She continued to use assistance in her gait for 3½ months. The patient reported pain in her back, in her spinal column especially

to the left of the mid line, numbness in her left leg and her buttocks. She noted continuing pain for the following year with pain radiating into her riqht lower extremity. There was an also experience of tingling in her riqht arm which was benefited cervical traction. She had two episodes of treatment in physical therapy in the summer of 1984 and the summer of 1985, At the time that I examined her in December of 1985 she reported that she had back pain manifested by some spasms, pain in her left buttocks, and occasionally in her right buttocks as well. She said she sleeps on her side with her legs drawn up because of the pain in her back. She said that the pain awakens her intermittently. She is unable to stand for long periods of time. She has difficulty bending. Pushing, pulling, and shoveling...and shoving....shoveling aggravate her symptpms. She is unable to give the proper attention to her 8 year old child; that is bending to lift her or play which are the usual attentions that a child demands at this age. She said she tires easily. She is unable to enjoy gardening as she did prior to her injury. She is unable to dance. She has difficulty, quotes, "Getting around." Shopping for groceries is done by her son. She told me that her work is that of a coorindator for a billing service of an insurance company. She was able to return to work on the 26th of March, 1984. She had changed her work duties as

a coorindator in the insurance company to the family group instead of the individual insurance. She has experienced tingling with her work duties principally in her right arm and accordingly cervical traction has been recommended and used. The pain in her neck is on the right side with radicular pain into the right arm. The symptoms in her neck have improved with exercises and traction. The injury to her knees she reports that the right was worse than the left. She had medial thigh pain manifested by an ache. There is pain in her right leg as well. She has increasing symptoms when there is weather changes. Standing aggravates her symptoms. She had equal difficulty going up or down stairs. She does not do the laundry because of the stairs. Stairs do cause pain in her groin. Coughing and sneezing intermittently cause pain and intermittently she is awakened from her sleep. Bowel movements do not cause any difficulty while intercourse causes pain in her back. She does have some stiffness in the morning. Kneeling and stooping equally cause pain and spasm and knee pain. She is able to walk 20 minutes without difficulty. Standing aggravates her symptoms. Sitting and driving especially long distances aggravates the pain. She is able to cross her legs and to dress herself. Her household duties; she says that she does no heavy cleaning duties which are done by other members of her family. She is able to cook on

weekends, but standing causes her major difficulties. She is unable to lift below her waist and she is able to estimate approximately how much.... she was unable to estimate how much she was able to lift and states, for example, lifting a grocery bag would be impossible. Her sports include walking and swimming and she is now unable to dance. That represented the history.

Q All right. Doctor, after taking the history of the plaintiff, Miss Whearty, did you conduct an examination?

A I did.

Q And what were the findings of that examination, Doctor?

A The physical examination revealed that we were dealing with a 52 year old, 145 pound, 5'6" female. The examination of her cervical spine revealed that she was. able to put her chin towards her chest, which is known as flexion, 55 degrees. She was able to extend 50 degrees. The right and the left lateral flexion, that is turning her head from one side to the other, was 45 degrees. The rotation both to the right and the left was 80 degrees. These measurements were made with a cervical cervogram which is a device to measure these motions. She did have scapular angle pain; the left was worse than the right. The Adson sign is absent. The hyperabduction test is normal. She was able to stand and flex forward 60 degrees

at: which point she said that she experienced pain and discomfort in her back. She was able to bend....side bend 20 degrees. Her shoulder motions in abduction elevation, internal, and external rotation were all within normal limits. Elbow joint motions were normal. There was no evidence of muscle spasm in the region of the cervical spine. She had a mild degree of trapezius muscle soreness on the left. Her reflexes were physiological. No evidence for any motor weakness or sensory loss and her pulses were palpable. The low back examination was done and the straight leg raising sign was permissible to 70 degrees bilaterally with pain on the left at the extreme. There is no evidence for muscle spasm. There was decreased sensory perception in the lateral thigh of her left lower extremity. There was no evidence of motor weakness. The patient was able to stand on her heels and her toes. Her reflexes were judged to be physiological. There was a quarter inch difference in the circumference of her calves; the left being smaller than the right. Her pulses were palpable, her leg lengths were equal, and her hip joint motions were normal. It was noted that she had bilateral hallux valgus deformities. The Fabere sign for her hips was negative. The examination of her knees revealed no evidence of any effusion; that is water on the knee on either side. She had no evidence of any medial or lateral,

inward or outward, joint line pain. The grinding test was no performed on the right side. There is no evidence of medial or iateral instability indicating that the collateral ligaments were intact. The Drawer sign and Lockman Test was also negative. There was patellofemoral tenderness on the right which means in pushing the kneecap downward and moving it about that she experienced pain on the right and none on the left. Full extension of her right knee caused pain on the right, but was absent on the left.

All right. Doctor, just so the jury can better understand some of the tests that you did and the findings I am just going to briefly go over some of the tests that you did and if you could possibly explain it in layman's terms to the jury.

Sure.

Concerning the cervical spine, what is meant by flexion and extension of the cervical spine?

That means bending the head forward and backward. The ranges of motion that were recorded were within normal limits. That is normal range.

All right, Doctor. Also you showed a negative Adson's sign. What is a Adson's sign?

The Adson sign is a test done to determine whether or not there is any impingement of the brachial plexus by

holding the arms in a certain position and then moving the head from side to side.

Q All right, Doctor. And what is the significance of not finding a positive Adson sign?

A Well, it means that there is no evidence of any impingement of the major nerves which come from the brain, through the neck, and into the arms.

Q All right, Doctor. Also you mentioned that the plaintiff underwent a hyperextension test of the cervical spine. What type of test is that?

A I didn't say anything about hyperextension text of the cervical spine.

Q I'm sorry. I thought you did.

A Hyperabduction.

Q I'm sorry.

A A hyperabduction test is a test to determine whether or not there is any evidence of any impingement of the blood vessels which go from the arm....from the region of the neck into the arm and out to the hands.

All right. Doctor, what is the significance of finding that the plaintiff had no paravertebral muscle spasm in the cervical region?

A Well, there was no evidence of any present reason for the muscles to be taut or painful because there was no evidence for, at that point in time, any reason

for the muscles to be taut.

Q All right, Doctor. Also concerning the cervical spine you mentioned that you found no motor weakness or sensory change?

A Yes. That means that her hands, her grip, her movements were within normal limits.

Q All right, Doctor. You also mentioned that the plaintiff had palpable pulses, is that correct?

A Yes.

Q What does that mean?

A Well, there is no interruption of the blood supply coming through the major vessels from the heart, into the region of the chest, and out into the arms.

Q Okay. Going now to the lumbar spine and some of the tests that you did, again, what is the significance. of finding no paravertebral muscle spasm in the plaintiff's lumbar spine?

A Again, there is no evidence of any reasons at the time that I examined her for any limitation of motion. Spasm would limit the movements of her spine so that there was no evidence of any acute nature of irritation to the muscles or to the nerves which could cause spasm.

Q Okay. Again, I think, Doctor, you found that there was no motor weakness in the low back or extremities?

A No, there was .....there was no evidence of any

motor weakness.

Q Okay. And also, Doctor, what is the significance of the plaintiff having normal reflexes; that being physiological? What does that mean?

A That means when we tap them with a reflex hammer at the knees and at the ankles that the response is normal. If a person has an injury or a deficit in the nerve it would interrupt that reflex arc meaning that there may be a reason for a reflex arc change. She had none. She was within normal limits.

Q All right, Doctor. You found in your examination that the plaintiff had a bilateral...and I hope I pronounce this correctly....hallux valgus deformity?

A Yes. Those are just bunions and not an uncommon thing in woman.

Q All right, Doctor. What is meant by having a negative Fabere sign?

A The Fabere sign is a test done....The word Fabere, "F" stands for flexion, "A-B" stands for abduction, and the "E-R" for external rotation meaning that her hips could be placed in that position which would indicate whether or not there was any damage to the sacroiliac joint and or whether there was any limited motion of the hip joint itself. This test was within normal limits.

Q All right, Doctor. Now to the examination of the

plaintiff's knees. What is the significance of the plaintiff having no effusion bilaterally?

A Well, if one has an effusion in the knee it would indicate that there is something inside the knee which is causing the knee to tier to an increased amount of fluid. Normally all of us have a very minute amount of fluid just enough to keep the joints lubricated. When someone has an irritation in the knee, cartilage damage, an injury to a meniscus, that can evoke a response of irritation producing more fluid in the knee. There was no evidence of that in this particular instance.

Q All right, Doctor. Again I believe that you found that there was no medial or lateral instability of the knees?

A Yes.

Q What does that mean? Can you explain that to the jury?

A Yes. On either side of the knee there is a major ligament that makes for stability of the medial collateral ligament and the lateral collateral ligament, as well as all of her cruciate ligaments were totally within normal limits, meaning that there was no evidence of any reasons for her knee to be sloppy.

Q All right, Doctor. Also I believe that you found that the plaintiff had a negative Drawer sign and Lockman: Test?

A Yes.

Q Could you explain that to the jury?

A The Drawer sign and the Lockman Test are done to indicate whether or not there is any evidence for a cruciate ligament injury. She didn't have that.

Q All right. Doctor, you mentioned in your report that you did not perform the grinding test?

A Yes.

Q Why was that, sir?

A I didn't really think it was necessary in view of all the other tests being normal. It would indicate a tear of...a flank tear of a medial meniscus, a bucket handle tear, and obviously I didn't think it was necessary to do.

Q All right, Doctor. Were any X-rays ordered by you, sir?

A Yes.

Q And did you receive a report from the radiologist?

A Yes, I did.

Q All right, Doctor. Could we possibly *go* over each one of the findings as to each area that was X-rayed: that being the cervical spine, the lumbar spine, the knees, and the hip?

A Let me locate my X-ray report.

OPERATOR: We're off the record.

OPERATOR: We're on the record.

Q Doctor, did you have a chance to review the X-rays of let's first start with the plaintiff's cervical spine?

A Yes. I did. I concur with the findings reported by the radiologist who sent a report, Dr. Wyse. She had X-rays of her neck, cervical.,..

6:25:17 - MR. SCHULMAN: Just for the record, let the record indicate an objection to his reading from the X-ray report of what someone else has observed.

Q Okay.

A Well, we did have a discovery deposition and I showe these X-rays at that time. The X-rays are not available to demonstrate at this point in time since they are in somebody else's hands. They are not in the office and they are not in the X-ray office. I think that at that point in time I personally interpreted those X-rays for you, Mr. Schulman, right here in this office.

6:25:50 - MR. SCHULMAN: For the record I would move to strike everything the witness has just said as not being responsive to any question. There is no substitute for going through the appropriate

procedures....

DR. BRAHMS: Fine.

MR. SCHULMAN: ....for putting forth the witnesses' testimony.

A Fine. There is no way that I can read the X-rays without their being here without reading this report. I will glad to read it if you want me to.

Q All right. Yes please, Doctor.

A The X-rays....(VO)

6:26:10 - MR. SCHULMAN: (VO) Objection.

n The X-rays of the cervical spine, films, and multiple projections show no loss of height of the vertebral bodies. The interspace disc spaces....the intervertebral disc spaces appear maintained except for some slight narrowing at the C5-6. Osteoarthritic spurring is present at C5-6 and C6-7 anteriorally. The vertebral bodies and the appendages otherwise visualized appear intact.

3 All right. Doctor, if we could just stop for a minute. What is meant by the phrase intervertebral disc spaces appear maintained except for slight narrowing at C5-C6?

6:26:56 - MR. SCHULMAN: For the record, let the record indicate a continuing objection to any question:

asked about the report and the doctor's....any information contained in the doctors reading of the report. I don't want to interrupt your examination any further.

MR. TRUBEY: Fine.

MR. SCHULMAN: So I just want to have a continuing objection.

MR. TRUBEY: No problem.

A From between each two vertebraethere is what is knowr as a disc which is a fibrocartilaginous structure that separates each vertebrae....each two vertebrae. The interpretation that the intervertebral disc spaces are maintained means that there is no loss in the height of those intervertebral discs. The narrowing at the two levels, C5-6 and C6-7, indicates that there is some degenerative changes, The spaces are narrower and there is an association of some arthritic changes seen at the same levels, again, indicating arthritic degenerative changes in the disc spaces and in the vertebral bodies.

Q All right. Also Doctor, there is noted an osteoarthritic spurring present at C5-C6 and C6-C7 anteriorally. What does that mean, sir?

A That means on the front portion of the vertebrae when the films are viewed that there are little projections

which point out from the bodies of the vertebrae. These are degenerative arthritic hypertrophic spurs.

Q All right, Doctor. Again, just *to* emphasize, **I** take it that you did review the X-rays of the plaintiff's cervical spine, did you not?

A I did. (VO)

6:28:45 - MR. SCHULMAN: (VO) Objection.

A I did. I reviewed them and I reported them without the necessity of reading the report from Dr. Wyse.

6:28:53 - MK. SCHULMAN: And move to strike all of the witnesses' answer after I did.

Q Doctor, what were your findings after reviewing the plaintiff's lumbar spine; the X-rays of her spine? (VO)

6:29:07 - MR. SCHULMAN: (VO) Object.

A The lumbar spine, the films andmultiple projections show a slight scoliosis with **a** convexity to the left. Scoliosis is a side curvature; a curvature from one side to the other. There is no loss of the height of the vertebral bodies that are demonstrated. The intervertebral disc spaces appear maintained except for narrowing of the L4-5 space to a moderate degree. A grade 1 spondylolisthesis of L4 and L5 is demonstrated probably on a degenerative basis.

There is some degenerative changes involving the small joints posteriorally in the mid and lower lumbar spine. Moderate osteoarthritic change is present anteriorally in the mid and the lower lumbar spine. The vertebral bodies and the appendages otherwise as visualized appear intact. The sacroiliac and the hip joints are maintained.

Q Just so the jury understands, Doctor, could you tell us what scoliosis means?

A Yes'. Scoliosis is a curvature of the spine. It indicates a deviation. The spine is straight and any deviation to the side is scoliosis.

Q All right. Doctor, again what does a grade 1 spondylolisthesis mean?

A This is a forward slipping of the vertebrae; all of the lumbar vertebrae above 4, 3, 2, and 1 which are all the lumbar vertebrae. It is a forward slipping of those vertebrae on the 5th lumbar vertebrae, the one below, and that results because of arthritic changes which occur in the facet joints; the little joints behind. With the loss of the articular cartilage on those little facets the body of all of the vertebrae slides forward making a decreasing intervertebral foramina at that level.

Q All right. Doctor, and finally what is meant by a moderate osteoarthritic change?

A Well, that indicates that there is more than just a minimal amount of arthritis and that this is a rather significant amount of arthritis seen in that area.

Q Okay, Doctor. Did you have an occasion to review the X-rays of Patricia Whearty's knees?

A I did.

Q All right. And what do you recall from reviewing those X-rays?

A The X-rays of her knees were totally within normal limits.

Q Okay, Doctor. Doctor, did you have an opportunity to review the X-ray results of the plaintiff taken at St. John's Hospital on the date of the accident?

A I don't remember reviewing her X-rays. I reviewed the files from those hospitals.

Q Okay, Doctor. Did you have an occasion to review the St. John Hospital records of the plaintiff, Patricia Whearty?

A I did.

Q Okay. Did you have an occasion to be able to review two reports from Dr. Elwood Nader who treated Patricia Whearty?

A Yes, I did.

All right. Doctor, having obtained a history from the plaintiff, after reviewing her hospital records and the

records of Dr. Elwood Nader and his reports, and after examining the plaintiff, do you have an opinion based upon a reasonable degree of medical certainty as to the plaintiff's medical condition today?

A Yes.

Q And what is that opinion, sir?

A Yes. In so far as her neck is concerned the patient has some degenerative changes in her neck which account for her discomfort. In so far as her low back is concerned she has enough arthritis as manifested by the arthritic changes seen on the X-ray as well as spondylisthesis to indicate that she has some arthritic changes in her lumbar spine. It is my opinion that she has a degenerated meniscus in her knee which accounts for the symptoms in her knees.

Q Okay. Again, Doctor, based upon taking a history of the plaintiff, after reviewing her hospital records, and the doctor reports of Dr. Elwood Nader, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not the automobile accident in question proximately caused any injury to the plaintiff's knees?

A I think that in the injury that she....if she did sustain an injury, and likely she did, that that was a short experience of discomfort and that there was no significant

injury as a result of that accident. If she has a degenerated meniscus it could have aggravated her symptoms, but didn't increase the degenerative changes that are there.

Q If you would for the jury would you please tell them what a degenerative meniscus is?

A Yes. In the knee there are two little menisci. They are like washers. One is on the inside and one is on the outside of the knee. These little structures are fibrocartilaginous structures. They are not seen on an X-ray. They are triangular in shape. The free edge, the edge closest to the inside to the middle of the knee, is a very thin....almost like a fish's tail. These menisci. with age may become friable and they are....may become soft, friable, and show change as tears with minor fraying at the distal....at the free edge. It is not an uncommon condition. It is something that we see frequently. It is a condition that can occur as a natural process and be cared for today with arthroscopic surgery.

Q All right, Doctor. I take it arthroscopic surgery is done on an out patient basis?

A Yes.

Q All right. Again, after taking the history from the plaintiff, after reviewing her hospital records, and the records of Dr. Elwood Nader and his reports, and after examining the plaintiff, do you have an opinion based upon

a reasonable degree of medical certainty as to the plaintiff's present low back condition?

A Yes. I think that.....I do have an opinion.

Q What is that opinion, sir, and the basis for your opinion?

A This patient has enough arthritis in her back that she can have intermittent low back problems. This is an arthritic condition. It is a condition which is likely to progressively become....more arthritis is likely to occur with time. The articular spondolylisthesis is not likely to increase, but with extra activities of lifting, bending, and so forth she can have symptoms of discomfort as she said she does.

Q Okay. Doctor, again based upon having taken a history from the plaintiff, after reviewing her hospital records and the records and reports of Dr. Elwood, and after examining the plaintiff, do you have an opinion based upon a reasonable degree of medical certainty as to the plaintiff's hip condition and injury she sustained?

A Well, she had a fractured pelvis. This pelvic ring that was fractured was such that it was fractured without any displacemen . There was no injury to her hip joint per se. There was no injury to the sacroiliac Joint. The fracture, as she stated, was troublesome for at least 3½ months. After that heals she is likely not to

have very much discomfort based on the pelvis itself, but certainly on the arthritic changes in her back.

Q All right, Doctor. You stated that the plaintiff had a fracture of the pelvis or fractures of the pelvis without displacement. What does that mean?

A Well, it means that she had a crack, but that the bones did not become malaliqned. It was broken and they remained in place with no disturbance in the symmetry of of pelvis.

Q And why is that important, sir?

A It is important because it....while she had a fracture she didn't sustain a disc ruption of the pelvis ring; a very important kind of a fracture.

Q Okay. And again, Doctor, based upon the history that you took from the plaintiff, after reviewing the hospital records of the plaintiff, and after reviewing Dr. Elwood's records and his reports, and after examining the plaintiff, do you have an opinion based upon a reasonable degree of medical certainty as to the condition of the plaintiff today relative to the 5th....the fracture of her 5th transverse process of her 5th lumbar vertebrae?

A Yes. She had fractures of her rib, the fracture of her pelvis, and the fracture of her transverse process as reported by the doctors who treated her after the accident. The transverse process fracture is a very, very

acutely painful condition. The pain is likely to disappear within three weeks time. It is not a....it doesn't remain a functionally disturbing problem even if that bone fails to heal.

Q All right, Doctor. You mentioned in your report that the plaintiff experienced some trapezius muscle soreness.

A Yes.

Q What is that?

A That is the muscles which go from the nape of the neck out to the shoulders. I think that her symptoms can.... or her trapezius muscle soreness can all be explained on the arthritic condition of her neck.

Q All right. Thank you, Doctor. I have no further questions.

DURING CROSS EXAMINATION BY MR. HOWARD SCHULMAN:

Q Doctor, my name is Howard Schulman. I represent Pat Whearty who is the plaintiff in this action, you realize that, don't you, Doctor?

A Yes.

Q Okay. I would just like to ask you a few questions to try to clarify it if I can. First, let me ask you, Doctor, when a patient visits you for treatment what is the first thing that you do?

A Take a history.

Q Okay. And what do you do after you have completed the history?

A Do a physical examination.

Q What do you do after you have completed the physical examination?

A Get X-rays if necessary.

Q Okay. And after the history, the physical examination, and the X-rays, what is your next step?

A Well, if the patient is one that I am going to treat I will recommend the treatment that is necessary.

Q Okay. And that is medications perhaps?

A It may be medication, it may be physical therapy, it may be an operative procedure; it can any one of those or more.

Q Okay. And would you then schedule another appointment for the patient?

A Depending upon what the problem was, yes.

Q Okay. To determine whether or not the treatment that you had prescribed was working?

A Most of the time, yes.

Q And at the second appointment with the patient, would you then take a history?

A Oh, sure. To find out if there is any improvement, if the condition remains the same, better, or worse, and. if other things have to be done.

Q Okay. And that is to determine whether or not the condition has improved, or worsened, or not changed?

A That is right.

Q Then you would conduct another physical examination of the patient?

A Yes, uh-huh. A more limited exam this time than the first time.

Q I understand. But also to determine whethe or not the patient's condition had improved, worsened, or stayed the same?

A Yes.

Q Would you take X-rays of the patient again?

A Not if the X-rays that were taken previously were adequate. If more X-rays were necessary or if the symptoms suggested that there was another reason then other X-rays could be requested.

Q And if the patient's symptoms were continuing would you then prescribe treatment for the patient?

A I would prescribe treatment if I thought more treatment was indicated, if I thought that the patient had.. ..we had to alter our course, had to change our medication; any one of those reasons, yes.

Q When you say alter your course or change medication, are you saying you might change the treatment if you thought the treatment that you had prescribed was not working?

A Yes, certainly.

Q And would you then have the patient come back for another appointment to determine whether or not the new treatment that you prescribed was working?

A It depends on what we are treating, yes.

Q Well, I am just asking whether these things are appropriate.

A Well.. ..

Q Obviously if the patient is totally free of symptoms when he or she visits you the second time no additional treatment is necessary?

A It is different than treating a fracture and . treating a person with a backache. The numbers of times that they come back and the frequency of their repeat examinations differs.

Q Okay. I am not speaking about patients with fractures.

A I am an orthopaedic surgeon and I see a lot of those.

Q I understand that. Let's say patients who were in Pat Whearty's situation where they were experiencing some pain after an automobile accident and the patient returned the second time still relating symptoms to you, you would then prescribe new treatment, different treatment, or continue the treatment as you thought appropriate?

A That is correct.

Q And ask her to come back for another appointment to see whether or not the treatment was helping her symptoms?

A Yes, that is correct.

Q And over the course of several appointments you would observe whether the patient was making any progress or the progress that she was making?

A Yes, that is right.

Q Okay. And have you had experiences, Doctor, where this process went on for years of observing the patient's progress or lack of progress in prescribing various treatment?

A No.....(VO)

6:44:41 - MR. TRUBEY: Objection to that. (VO)

A ....not unless the patient has a metastatic disease or some reason that we expect changes to occur and last forever.

Q After a number of visits with the patient, assuming that you had been the only treating physician involved, would you feel that you as the treating physician were the person in the best position to render an opinion as to the condition of the patient?

A Well, if I thought I needed consultation I would. get it.

Q And if you didn't think you needed consultation would you as the treating physician think that you were the person in the best position to evaluate the patient's condition and the patient's prognosis?

A Well, there is sometimes, you know, that patients benefit from getting second opinions. If our opinions are the same then the patient can come back and seek more treatment from me. If on the other hand she finds that the other physician is more to her liking or has told her something that she enjoys hearing better she may choose to go to him.

Q Okay. I am not talking though about the patient's choice in which doctor she sees.

A Yes.

Q I just want you to assume that you have been treating a patient for a period of time and periodically evaluating the treatment and the progress the patient was making.

A Yes. It is very infrequent that patients would have to come back over a long period of time for the same problem. If they have intermittent re-injury, falls, and things of that nature which cause recurrence of their symptoms then they come back. But we don't see patients with low back pain week after week, after week, and year. after year; usually they clear up pretty quickly.

Q But listen to my question, Doctor.

A Yes.

Q I am not asking about that. What I am asking you is after seeing the patient a number of times, are not you as the treating physician the person in the best position to evaluate the patient's condition and the patient's prognosis?

MR. TRUBEY: You mean versus another doctor to review that patient?

Q Versus anyone else who hasn't had that kind of repeat experience with a patient.

A If the patient, as in this case, had a fractured pelvis obviously I would be the better one to relate to than someone who had never seen her before.

Q As the treating physician?

A Sure.

Q Okay. Now you examined Pat Whearty on December 27th 1985, is that correct?

A That is correct, yes.

Q How long did that examination take? How long did the history take first of all?

A We began our examination at 3:30....2:30 and the history portion lasted until 3:05.

Q Approximately 35 minutes?

A That is right.

Q Okay. And the exam lasted how long after the history was taken?

A I did not record the time on my examination and I can't tell you why I didn't, but I would say somewhere in the neighborhood of 15 or 20 minutes.

Q Okay. So a total of approximately 50 to 55 minutes that you saw Pat Whearty?

A Yes, that is right.

Q And that was all on December 27th, 1985, correct?

A That is correct.

Q You haven't seen Pat Whearty since December 27th, 1985?

A I have not.

Q Now as far as you are aware, Doctor, Pat Whearty didn't have any neck pain prior to December 24, 1983; the date of the accident, is that correct?

A Yes, that is correct.

Q And as far as you are aware Pat didn't have any back pain prior to December 24, 1983; the date of the accident, correct?

A Yes, that is correct.

Q And as far as you are aware Pat didn't have any pain in her knees before December 24, 1983, correct?

A A qualified yes.

Q Okay. And as far as you are aware Pat didn't have any pain in her buttocks before December 24th, 1983, correct:

A *Yes*, that is right, yes.

Q And as far as you are aware Pat didn't have any pain in her extremities on December 24, 1983?

A Yds, that is right.

Q Now you took a medical history from Pat when you saw her on December 27th, 1985?

A Right.

Q And as you have related she told you what her physical problems on that date, correct?

A Right.

Q You took notes of what she told you?

Yes.

And you have related to us what you have dictated into your report?

That is correct.

Q Okay, Now you also had X-rays taken of her?

A Yes.

And the medical history that you took from Pat is on the first three pages of' the report that you have on your lap?

Yes, that is right.

Okay. By the way, do you remember her telling you that sometimes she had to crawl to get up steps when you

took a history from her?

No, I don't recall that. It is not in my history. I don't have any information of that and any stairs. Going up was equal to'going down and does not do the laundry because of stairs. That she had groin pain, that is what she told me.

Okay. Do you recall her telling you that she constantly was taking aspirin or Advil for the pain she was experiencing?

No, I don't have that recorded. She may have said that. If all of those....all of those small things that are said may well have been said, but I don't record those things.

Okay, I see. So she may have said to you....

Oh, absolutely she could have said that.

That she takes aspirin or Advil constantly?

Yes.

And she may have said to you that she crawls up the steps because of the pain?

I think I would have recorded tha : because it is

A

in but I don't think ...I don't have that in my

Okay. Do you remember her saying to you that she had to change jobs?

Yes, yes.

Q Because of the problems?

A Yes, I related that. I related that.

Q Well, I am just asking you because you related that in your report that you wrote for Mr. Trubey that she had changed jobs.

A Yes, She told me that she changed from a billing problem and taking care of groups rather than individuals or vice versa. She did tell me that she changed her.....

Q Did she tell you that she did that because of the pain she experienced trying to do some of the tasks that were required?

A I assume she did it because she was uncomfortable doing what she did.

Q Okay, fine. Wow with respect to al of the things that you were told by Pat in your examination, all the things you reviewed....well, strike that. Let me rephrase the question. Is there anything that you observed in your examination or in reviewing any of the X-rays or any of the other medical records of Pat's that is inconsistent with anything that Pat related to you in your history and that you have recorded on the first three pages of your report?

A No, except that if you were to ask me if I believe that she didn't have pain in her knees or her neck or her back prior to this that I would have to say that I

would think that that is not a consistent reason.

Q Okay. Do you recall that we were here in your office for a deposition?

A Yes.

Q On the 18th of April, 1986?

A I know about that.

Q And do you recall that I asked you that same question at that time?

A No. I don't have that kind of recall, but if you said it I'll be glad to....

Well, I don't want you to take anything I say, Doctor, as an assumption unless I can show it to you. So I am going to hand you page 39 of the transcript of your deposition.

Yes, sir.

You were sworn under oath at that time, were you not, Doctor?

That is correct.

And do you recall at the bottom of page 39 on line 20 that I asked you, "Is there anything you observed in your examination, or in reviewing any of the X-rays, or any of the other medical records of Mrs. Whearty that is inconsistent with any of the statements that she related to you in the history that you have recorded on these three pages?" And, you answered, "No."

A Yes.

Q And that was a true answer at the time you gave it, Doctor?

A Yes, I said the same thing tonight.

Q Now am I correct, Doctor, that everything that she related to you as far as her symptoms, as far as her pain, as far as her difficulties is consistent with the injuries she suffered, the X-rays that you have observed, and the medical records that you have reviewed?

A Yes.

Q And would you expect a patient who had undergone the accident that Mrs. Whearty underwent on December 24, 1983 and who had the injuries that she suffered on that date to experience the difficulties that she related to you on December 27th, 1985?

A Yes. No different than what I said tonight.

Q Am I correct, Doctor, that you believe what she said about her symptoms that she related to you on December 27th?

A Yes. I have no reason to believe that she was telling me anything except the truth. I qualify to you and say that a person with the degree of arthritis in her cervical spine and in her lumbar spine and the problems in her knees is not likely to be totally asymptomatic.

Q Now just so we understand what the symptoms were that

Pat related to you that you have testified both this evening and at your previous deposition are consistent with the accident..,

A Yes.

Q ...that she suffered?

A Right.

Q Okay. And I am speaking of the automobile accident on December 23....

A Yes.

Q December 24, 1983.

A Yes.

Q Okay. She told you that she had back pain manifeste by some spasms?

A Yes.

2 And that is an injury you would expect; that is a symptom you would expect after the accident that she experienced?

Oh, absolutely.

She told you that she had pain in the left buttocks and occasionally in the right buttocks?

Yes.

And that is a symptom you would expect h ving gone through an accident like she went through on December 24th 1983?

Plus the arthritis and the spondolylisthesis which

she has in her bac .

Q I am only asking, Doctor, whether these are consistent.

A I know, but in order for me to relate to the Judge and the jury I think that a qualified answer has to be made and I wili make it.

Q Okay. Well, just so you understand, Doctor....

A I understand.

Q Your attorney, Mr. Trubey, will have an opportunity to ask you any questions he deems necessary to clarify anything that you said.

A Fine.

Q That is his function. Your function at this time is to answer my questions.

A I will answer your questions, Mr. Schulman.

MR. TRUBEY: But you have to let him respond to your questions.

A And I will qualify them not for you, but for the benefit of those people who are not here to understand what my qualified answers are. I think it is important that it be done that way.

a Okay. But you are answering a different question from the one I am asking you, Doctor.

4 I am not answering a different question. I am answering the question....

Q Listen to me, Doctor, and I'll explain to you the difference.. ..

A Go right ahead.

Q ....so you can understand in your future answers, okay?

A Yes, sir.

Q What I am asking you is whether the symptoms that she related to you are consistent with someone who has gone through the type of accident that she went through. I am not asking you what your opinion now is as to the cause of those symptoms; that is for Mr. Trubey to ask as he did on direct examination. He can ask the same thing. on redirect examination.

A Yes.

Q Okay. I am just trying to ask you now whether these symptoms....and you have essentially answered all of this in general. I just want to go over them one by one.

A Sure.

Q Whether they are consistent with the type of accident that she went through and whether you would expect a patient who had gone through this type of accident to experience these symptoms regardless of whether you have said in your opinion she has any underlying arthriti condition or not?

A Yes, yes.

Q Oka . Nc ' she related to you hat She sleeps on her side and that her legs...with her legs drawn up because of the pain in her back?

A That is right.

Q Is that a symptom you would expect from someone who had gone through this type of accident?

A It is a symptom I expect with anyone who has arthritis.

Q Okay. And is it also a syrnptom you would expect from anyone who has gone through this type of accident?

A Early after the accident and not 2 years later.

Q She told you that her pain awakens her intermittentl

A Yes.

Q Okay. Is that a symptom you would expect with someone who had gone through this type of accident?

A Early and not this late.

Q She testified to you that she is unable to stand for long periods of time, is that a symptom that you would expect?

A A symptom with anyone who has spondolylisthesis and arthritis, yes.

2 And not a symptom you would expect from someone who had gone through this type of accident?

A Not 2 years later when I examined her.

Q Okay. She testified....or sorry....she related to

you that she has difficu ty ben ing?

A Yes.

Q Is that a symptom you would expect in someone who had gone through this type of accident?

A Someone who has arthritis and spondolylisthesis and not solely the result of the accident.

Q Let me ask you a question with respect to this, Doctor. Isn't it your opinion that the accident aggravated the underlying arthritic condition that you believe to have existed in Mrs. Whearty's back?

A Yes, that is true. That is right.

Q And you have no information that she had any prior symptomatic problems with her arthritis, correct?

A I have no information.

Q Okay.

MR. TRUBEY: You mean from Mrs. Whearty?

A That is right.

MR. SCHULMAN: Once again, Mr. Trubey, you have an opportunity to ask questions on redirect examination. You know it is improper to ask questions while I am cross examining the witness and I would appreciate it if you would follow the

appropriate procedures.

MR. TRUBEY: I wasn't clear as to your question.

MR. SCHULMAN: This deposition is supposed to be conducted as it would be a trial. You know very well that you wouldn't be allowed to say any of those of things if there were a Judge present. I would appreciate it if you would behave as if this were being conducted at the trial because you are going to be asking the court to allow it to be used at the trial. You Know your opportunity is on redirect examination.

Q Okay. Just so I can clarify it, it is your opinion that the accident on December 24th, 1983 caused an aggravatio of the arthritic condition in Pat Whearty's neck?

A Yes, that is right.

Q And it is your opinion that the accident on December 24, 1983 caused an aggravation of what you believe to be the arthritic condition in Pat Whearty's back, is that correct?

A That is right.

Q And she suffered a significant injury to her pelvis on that day?

A Yes, she did.

Q Did she not?

A Yes.

Q And that was the result of the accident, correct?

A That is correct.

Q And it takes a pretty good impact, doesn't it, to break the pelvis of a woman like Pat Whearty?

A Yes, it does.

Q Okay. She also suffered a fracture of her transverse process, correct?

A Yes.

Q And that was as a result of this accident?

A Yes,

Q Okay. Can you explain once again what a transverse process is?

A Sure. Each vertebrae has what is known as a body and has three processes; the spinous process....a spinous process which is what you feel in your back when you run your hand up and down your spine and there are two transverse processes on either side. These are little projections out from the vertebrae which serve to connect small muscles in the deep portion of the back. She did sustain a fracture of the transverse process.

Q And that is a very, very acutely painful injury?

A Yes, it is.

Q And in your opinion it i likely to disappear within three weeks time?

A Oh, yes.

Q But the pain could continue for three weeks time?

A It is very painful and progressively less painful and probably in 10 days to three weeks that pain is gone.

Q By the way, Doctor, why are they....a fracture of the transverse process, why is it so very, very painful?

A Because it is surrounded by a large mass of muscle and there is a fair amount of bleeding which occurs and which causes the pain.

Q Pat also suffered a pulmonary embolism, is that correct?

A Yes.

Q And that was also as a result of the accident on December 24, 1983?

A Oh yes, that is a complication.

Q Okay. Can you explain what a pulmonary embolism is?

A Yes. That is a blood clot that goes from the pelvis or from the lower extremities to the lungs and forms a clot in the lungs.

Q Is that a potentially life threatening type of

injury?

A Yes, it is.

Q Can you explain why?

A Yes, sure. They get a loss of breathing. It may cause a certain reflex which causes the heart to stop beating.

OPERATOR: Excuse me. We're off the record.

END OF TAPE ONE.

START OF TAPE TWO.

OPERATOR: We're on the record.

DURING CROSS EXAMINATION BY MR. HOWARD SCHULMAN CONTINUED:

Q Am I correct, Doctor, that Pat Whearty also suffered a distortion of her urinary bladder?

A Oh, yes.

Q Can you explain what that is?

A Yes. When she had a fracture of her pelvis that of course caused. ...that also causes some bleeding and the hematoma which occurs, blood that accumulates in the pelvis, pushes the bladder over and it can be seen as a distortion when a cystogram is done.

Q And was that distortion of her urinary bladder a result of the accident on December 24, 1983?

A Oh, yes. Yes.

Q Okay. Doctor, you testified that in your opinion

Pat "hearty's knee problems were caused by a degenerative meniscus in her knee?

A Right.

Q And you testified that you can't see the meniscus on an X-ray?

A That is right.

Q Well, how can you tell if it degenerated if you can't see it on the X-ray?

A We look in the knee with a scope and we see it.

Q Okay. Am I correct that you didn't look in the knee of Pat Whearty with a scope?

A That is right.

Q Okay. So am I correct that there is no way for your to know whether or not the meniscus in her knee was degenerated?

A No, but I have been in practice long enough to know that that is probably the reason for her discomfort.

Q But with no objective signs that you could see that would indicate that?

A That is right.

Q Okay. It was an assumption that you made....

A That is correct.

Q ....based upon your experience?

A That is correct.

Q Are you familiar with Dr. Nader, Doctor?

A Yes, I know Dr. Nader.

Q You are aware that he was the treating physician of Pat Whearty?

A Yes, yes.

Q And still is the treating physician?

A Ye's.

Q Is he a competent orthopaedic surgeon?

A Yes. A fine orthopaedic surgeon.

Q Well respected in the community?

A Absolutely.

Q Is there anything about the treatment that she has rendered to Pat Whearty that you question in any way?

A Not a bit.

Q Nothing at all improper at all?

A Nothing at all.

Q Now the examination. ...well, strike that. The arthritic condition that you have testified to that you believe exists in Pat Whearty's back and in her cervical spine, is that arthritic condition something that develops gradually over time?

A Yes.

Q Is it part of the natural process of aging?

A It can be. It doesn't have to be, but it can be.

Q Is that process something that occurs to a certain extent in all of us?

A It depends on the kind of work we do and the kind of activities that we are into. A football player when he is 20 years of age, 23 years of age, might have a lot mor than I do right now and I am a lot older than that. But, at the same token minor arthritic changes after the age of 39 is not uncommon in a lot of vertebrae.

Q So most people have some arthritic changes after the age of 39?

A Yes. And it depends....as I said, it depends upon one's vocation or avocation whether or not that is more or less.

Q I am 41, Doctor, would you expect that I have some of these minor arthritic changes?

A Not very many yet.

Q And.. ..

A Unless you have played football or soccer or lacrosse or some such thing as that.

Q Okay. And without asking you what your age is, Doctor, you are obviously older than I am, would you expect that you have greater arthritic changes in your spine?

A I have a lot in my lumbar spine, but not in my cervical spine.

Q Am I correct that the older we get the more likely it is that we have some of this process developing inside of us?

A Again, it depends upon the manner in which we live that makes it worse more or less.

Q And can this kind of condition be aggravated and become symptomatic and painful by some traumatic event?

A Yes, but for a certain segment of time.

Q Can you explain what you mean a certain segment of time?

A Yes. A person who has a traumatic injury to an arthritic condition, his symptoms may be three weeks, four weeks, six weeks, and then he gets better again.

Q Well, are you saying, Doctor, that someone who had a traumatic incident that aggravated an arthritic condition would cease to experience symptoms under all circumstances within a period of time?

A Yes, unless he has another injury.

Q And it wouldn't continue on after that?

A No. Not unless there is an overuse phenomenon or another injury.

Q Now you examined Mrs. Whearty for approximately 50 to 55 minutes?

A That is correct.

Q The first part of the examination was a medical history, is that correct?

A That is right.

Q And am I correct that Carla Tricarchi (phonic) who is

co-counsel for Pat Whearty was present during the history that was taken?

A Yes. That is written in my report.

Q And the second part of your examination was where you conduct all the tests that are related on your report that you have told us about?

A That is correct.

Q Am I correct that Miss Tricarchi requested that she be present during that examination?

A Yes.

Q Okay. And am I correct that you refused to allow her to be present during that examination?

A That is correct.

Q Did you have any reason for refusing?

A Yes. It is my....that is my posture in my examinations that unless there are reasons for the patient...for someone to be there that I conduct all of my examinations without the benefit of having an attorney in the examining room. There is no reason for it.

Q You are aware that Pat Whearty requested that Miss Tricarchi be there?

A I am not aware of that at all.

Q Are you aware that I requested of Mr. Trubey and Mr. Trubey agreed that...

A I am not aware of that.

Q ....Miss Tricarchi would be present at that examination?

A I am not aware of that. Under special circumstances when I say that I don't want it and I get a call from an attorney requesting that I permit them to stay I may then permit them to stay, but in general I don't let secretaries, paralegals, or attornies stay for my examination.

Q And in this case you remember specifically Miss Tricarchi requested that she stay and that she be allowed to observe the tests you were performing?

A There is no doubt in my mind that she probably did, but I don't have an absolute recollection but I am certain that if she came along that she wanted to stay.

Q And you requested that she leave and in fact insisted that she leave?

A That is correct. That is correct.

Q Have you testified in depositions before, Doctor?

A Yes.

Q Approximately how many times?

A Many times.

Q When you say many what do you mean?

I don't think it adds or subtracts from this case, but I do depositions not infrequently.

Okay. More than 50?

I don't think it makes any difference to this case

how many times I do a deposition. It doesn't make any difference. I don't want to answer something that I don't know exactly, but I do do a fair number of depositions.

Well, with all due difference to you, Doctor, it is not position to determine what is or is not relevant to this proceeding. That is for the Judge to determine.

Well, I will continue to state that I do many of them.

Okay. Have you done more than 50 depositions?

In a life time?

Yes.

Oh, yes.

Have you done more than 100 depositions?

I don't know.

Have you testified at trial?

Yes.

Have you testified at more than 50 trials?

No.

Have you testified at more than 2 dozen trials?

At the courtroom?

Yes.

I don't have any recollection the number of times, but it isn't an infrequent number.

Q You have had a lot of experience then with testifying?

A Oh, yes.

Q Now Pat Whearty wasn't sent to you by a doctor, am I correct?

A No, she was not.

Q She was sent to you by Mr. Trubey the defendant's attorney?

A That is correct.

Q Did Mr. Trubey explain to you what he wanted you to do in this case?

A No.

Q Did you understand what he wanted you to do in this case?

A Absolutely.

Q And what did you understand you were supposed to do?

A To examine the patient and give him a report of my physical examination and the history that I obtained. Mr. Trubey, like all other attornies, know I call them as I see them.

Q Now what did you....I'm sorry. How did you understand that that is what you were supposed to do?

A Well, you asked me if I have done many depositions, obviously I have done many examinations and they are routine.

Q So you have a routine for... .

A You ask a question, you examine a patient, and you render a report.

Q I would appreciate it, Doctor, if you would let me finish my question because I may ask something that you are not answering if you don't let me finish the question.

A I think I can'answer anything that you ask me.

Q I don't think you can read my mind though, Doctor.

A No, but I think I can answer anything that you ask me, Mr. Schulman.

Q I am just requesting, Doctor, that you listen carefully to my question and let me finish the question before you respond.

A Fine.

Q Okay. Did you understand when Mr. Trubey sent Pat Whearty to you that you would be preparing a report to send to Mr. Trubey?

A That is done everyday. When I examine the patients I do examine them, take a history, examine, and send a report that day or shortly thereafter.

Q Did you understand when Mr. Trubey sent you Pat Whearty to examine that at some time you might have to give testimony at a deposition?

A Yes, that is quite common.

Q And did you understand when Mr. Trubey sent Pat Whearty for you to examine that at some time you might have to give testimony at a trial or at a videotape for use at trial as we are doing today?

A Yes, that is quite common.

Q Okay. Have you ever been hired by Mr. Trubey before?

A Yes.

Q To examine any plaintiff?

A Oh, yes.

Q How many times?

A I don't know.

Q More than a dozen?

A I don't know.

Q You don't know whether it is more or less than a dozen?

A Even if I knew I would tell you that many times, but I don't know exactly how many and I refuse to give you a figure.

Q Can I ask you whether you refuse to or you can't?

A I don't. I can't give you an honest....I am here on oath and unless I can tell you the truth I can't answer it any other way than to say many times.

Q I am just trying to clarify, Doctor, whether you can or can not answer or whether you refuse to answer.

A I can not answer an exact figure and so I am telling you many times.

Q Okay. When was the first time?

A I don't recall.

Q Was it more than a couple of years ago?

A I have no recollection as far as time is concerned and far as Mr. Trubey himself is concerned.

Q Okay. You have been hired to do the same thing by other lawyers of Mr. Trubey's law firm, is that correct?

A Oh, yes. Yes.

Q And Mr. Trubey said at your last deposition that every litigation attorney in Mr. Trubey's firm has hired you for this purpose, is that also your recollection?

A I don't know. If he were to mention their names I would be able to tell you if they are from his firm or not. I have examined for several men in that office.

Q Okay. Have you ever performed an examination when you were hired by John Rea, spelled R-E-A?

A No, not that I recall.

Q Have you ever performed an examination when you were retained by Joseph Snyder?

A I don't recall.

Q Henry Hentemann?

A Yes.

Q Richard Talbert?

A I don't recall,

Q Thomas Brunn, B-R-U-N-N?

A Yes, yes.

Q Gerald Jeppe, J-E-P-P-E?

A Yes, yes.

Q Terrence Keneally?

A Yes.

Q Don Brown?

A I don't know Don Brown.

Q Lyn Lazzaro?

A Yes.

Q Joe Wantz?

A I don't think I know him.

Q David Borland?

A I don't know that I know him.

Q Kirk Roman?

A I don't think I know him.

Okay. Don Brown you do know though?

A I don't think I know Don Brown. Any one of those I may have examined, but I don't recall them.

Okay. Do you know how many times you have examined a patient when you have been hired by Mr. Hentemann to do so?

A I don't recall.

Q Do you know how many times you have examined the patient when you have been hired by Mr. Jeppe to do so?

A I don't know any of these people in numbers. I don't know those numbers. I have examined for those people that you have named that I have recalled and I am certain that

I have examined more than one for those people that I said I do know.

Q Okay. And in each case you have prepared a report similar to the report that you prepared for Mr. Trubey in this case?

A Yes. Whether it is plaintiff or defense I do the same thing on each and every case.

Q Okay. And in each case you understood that at some time you might have to give testimony at trial?

Absolutely.

And in each case you understood at some time you might have to give testimony to depositions?

Yes, that is correct.

Now you charge these attornies for your services, is that correct?

A Yes, that is correct.

Q And your charge for the hour for a deposition of $500.00 dollars, is that correct?

A That is correct.

And if you go downtown to testify at trial your charge is much more than that, is that correct?

Yes.

7:16:06 - MR. TRUBEY: Objection for the record.

What is your charge if you testify downtown at a

trial?

A I charge by the hour the same that I do here. It is $500.00 dollars for the first hour and it is $150.00 dollars for every half hour thereafter.

Q Okay. By the way, do you have the same kind of relationship with any other defence firms in the city other than Myers, Hentemann, Snyder, and Rea?

A I have a relationship with plaintiffs and defense attornies in this city. I examine for both.

Q Do you examine patients at the request of the firm of Gallagher, Sharp, Fulton, and Norman?

A Occasionally, yes.

Q Okay. Do you examine patients at the request of Weston, Hurd, Fallon, and Paisley?

A Yes, occasionally I do.

Q Do you examine patients....plaintiffs at the request of Kitchen, Mesner, and Deary?

A I think I have seen some patients from them, *yes*.

Q I could *go* on, Doctor. Is it your belief that you have examined patients for most of the large firms downtown?

A If you ask me specifically these questions I can answer them.

Q Arter and Hadden?

A Yes, I have examined for that office.

Q Reminger and Reminger?

A Yes, I have examined for that office.

Q Well, you are exhausting my memory, Doctor.

A I have examined for....

Q Ulmer, Burn?

A Yes, I have examined for them. Do you want to name some plaintiffs too?

Q Well, you have exhausted my memory of the large defense firms downtown. They retain your services in the same way?

A Everyone gets the same treatment.

Q You render a report to them?

A Everyone gets the same treatment.

Q And you testify the same way as you are testifying today?

A Everyone gets the same treatment.

Q And you charge them the same amounts?

A The same amount. No favoritisms.

Q Am I correct, Doctor, that you haven't seen Pat Whearty since December 27th, 1985?

A That is correct.

Q Am I correct that you don't know how Pat Whearty is feeling today?

A That is correct.

Q Am I correct that you don't know what symptoms she is experiencing today?

A That is right.
Q You don't know what problems she is having today?
A That is right.
Q You don't know whether her condition has improved or not?
A I don't know any of these questions.
Q You don't know whether her condition has worsened?
A I have no idea.
Q I have no further questions.

MR. VERGON: May I borrow your microphone?

OPERATOR: We're off the record.

OPERATOR: We're on the record.

DURING CROSS EXAMINATION BY MR. FRED VERGON:

Q Dr. Brahms, I am Fred Vergon and I represent Sue Pawlak in this case, another defendant. I just have a couple of questions about the degenerative arthritis that you have mentioned throughout your testimony. I think you said earlier that that is a degenerative progressive type of disease?
A Yes.
Q And that means it gets worse as time goes on?
A The X-ray findings get worse, the symptoms may not change.
Q All right. But, this is something that you can

see on X-rays, is that right?

A Oh, yes. Yes.

Q And the X-rays that you had taken of Mrs. Whearty when you examined her did show arthritis in the cervical spine which is the neck area, is that correct?

A That is right.

Q And in the lumbar spine which is in the low back?

A That is right.

Q Okay. Did you also see some arthritis in her knees I believe you said?

A There is no evidence of any arthritis in her knees by X-ray, but that doesn't mean that she doesn't have arthritis. That can best be judged by an arthroscope.

Q The arthritis that you observed on the X-rays of her cervical spine and lumbar spine, is that something that would be unusual for a 52 year old woman?

A No.

Q Did you review the St. John Hospital X-ray reports?

If I did....I didn't review them today. I reviewed them when I wrote this report.

At the time of the examination and at the time of the report?

Yes, yes.

Do you recall whether or not those X-ray reports

indicated that Mrs. Whearty had arthritis in her cervical spine and lumbar spine?

A I don't think that I can give you an absolute answer that I can recall, but if it didn't I would be extremely surprised.

Q I take it, Doctor, that based upon your examination of Mrs. Whearty and your years of experience that the arthritis that you observed in the X-rays that you had taken was not caused by the automobile accident, is that correct?

A That is correct.

Q And that arthritis is something that existed probably long before the automobile accident, is that right?

A Long before. I don't know how long, but long before.

Q Thank you, Doctor. I think that is all I have.

MR. TRUBEY: I have no further questions.

MR. SCEIULMAN: None for me.

OPERATOR: We're off the record. Doctor, you have a right to review this videotape to prove its accuracy or you may waive that right.

DR. BRAIIMS: I waive the right.

OPERATOR: Would all counsel agree to waive any filing of this video and allow Multi Video to hold the tape until trial?

MR. TRUBEY: Yes.

MR. SCHULMAN: Yes.

MR. VERGON: No problem.

OPERATOR: We're off the record.

END OF THE TESTIMONY AS GIVEN BY DR. MALCOLM BRAHMS.

STATE OF OHIO)		
) SS:		IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY)		
PATRICIA WHEARTY, ET AL,	)	CASE NO. 94339
PLAINTIFFS,	)	VIDEOTAPE DEPOSITION
VS.	)	OF
SUE PAWLAK, ET AL,	)	DR. MALCOLM BRAHMS
DEFENDANTS.	)	JUDGE GORMAN

CERTIFICATION

I, Jon Jastromb, a Notary Public within and for the State of Ohio, do hereby certify that the within named witness, Dr. Malcolm Brahms, was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid.

I further certify that the testimony then given by him was transcribed to typewritten form and that the foregoing is a true and correct transcription of the testimony so given by him as aforesaid.

I do further certify that I am not counsel for or related to any of the parties involved in this action nor am I interested in the outcome of this matter. Also I am an independent videotape reporter employed on an as needed basis and not in the employ on a regular or full time basis of any of the parties involved in the aforesaid litigation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office to attest these facts to be true at Kent, Ohio on this 13th day of February, 1987.

Jon Jastromb

My Commission Expires:
May 22, 1988

Jon Jastromb Notary Public
and Videotape Reporter