

STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
CLAIM PETITION NO: 2010-700

MICHAEL LANGOWSKI :
 PETITIONER, :
 : :
 vs. : :
 : :
TECOGEN, : :
 : :
 RESPONDENT. :

DATE: March 19, 2018
PLACE: Lebanon, New Jersey

B E F O R E

THE HONORABLE GEORGE PSAK
SUPERVISING JUDGE OF COMPENSATION

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I N D E XWITNESSPAGE

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1 ARTHUR CANARIO, M.D., having first been
2 duly sworn, was examined and testified as follows:

3
4 THE COURT: Please be seated. Please
5 state your full name and spell your last.

6 THE WITNESS: Arthur Canario,
7 C-a-n-a-r-i-o.

8 THE COURT: Have we premarked any
9 exhibits?

10 MR. LYNN: Yes.

11 THE COURT: Appearances, please.

12 MR. WACHTEL: May it please the Court,
13 Todd Wachtel from Levinson, Axelrod on behalf the
14 Petitioner.

15 MR. LYNN: Good afternoon, your Honor,
16 Daniel Lynn, Braff, Harris, Sukoneck & Maloof and I
17 Represent the Respondent.

18 MS. SCHOBBER: Linda Schober on behalf of
19 the Second Injury Fund.

20 THE COURT: Thank you.

21 We've been through the stipulations many times.
22 I don't think there's a need to repeat them, but if we
23 have exhibits, I'd like to make sure they get
24 premarked.

25 MR. LYNN: Yes, your Honor. I've taken

1 the liberty of premarking four exhibits, R-10, R-11,
2 R-12 and R-13. I've shown them to both attorneys and
3 provided them with copies.

4 R-10 is Dr. Canario's curriculum vitae. R-11 is
5 his narrative report of December 13, 2013. R-12 is a
6 report of September 8, 2015. And R-13 is a report of
7 September 29, 2015.

8
9 (At which time, R-10, Dr. Canario
10 Curriculum Vitae, was marked for identification.)

11
12 (At which time, R-11, Dr. Canario Report
13 12/13/13, was marked for identification.)

14
15 (At which time, R-12, Dr. Canario Report
16 9/8/15, was marked for identification.)

17
18 (At which time, R-13, Dr. Canario Report
19 9/29/15, was marked for identification.)

20
21 THE COURT: Thank you.

22 MR. LYNN: Thank you. I'm giving the
23 Court the originals and I have an additional set for
24 the court reporter if needed.

25 MR. WACHTEL: No objection to the

1 documents.

2 THE COURT: Move them right in evidence.

3 MR. WACHTEL: No problem.

4 THE COURT: We'll move them all in
5 evidence as marked and will be on the record.

6

7 (At which time, R-10, Dr. Canario
8 Curriculum Vitae, was received in evidence.)

9

10 (At which time, R-11, Dr. Canario Report
11 12/13/13, was received in evidence.)

12

13 (At which time, R-12, Dr. Canario Report
14 9/8/15, was received in evidence.)

15

16 (At which time, R-13, Dr. Canario Report
17 9/29/15, was received in evidence.)

18

19 THE COURT: Your witness. Proceed.

20 MR. LYNN: Thank you. I'm offering
21 Dr. Arthur Canario this afternoon, your Honor, as an
22 expert in orthopedics and orthopedic surgery. If
23 necessary I will question the Doctor as to his
24 qualifications, unless counsel will stipulate as to the
25 Doctor's qualifications.

1 MR. WACHTEL: No, you're going to have to
2 voir dire the witness.

3 THE COURT: Okay.
4

5 VOIR DIRE EXAMINATION

6 BY MR. LYNN:

7 Q Doctor, can you please tell the Court,
8 summarize your experience and qualifications in the
9 area of orthopedics and orthopedic surgery.

10 A Well, I did my orthopedic residency at the
11 Hospital for Joint Disease in Manhattan. I did an
12 optional year of training, spending six months in
13 London and six months in California and it was a
14 fellowship. Came back, started my practice at the
15 Hospital for Joint Disease. I was recruited by Newark
16 Beth Israel Medical Center to be chief of orthopedics.
17 I was there for 25 years.

18 I then moved the practice to local areas, I'm
19 now in Kearney. I do basically office orthopedics,
20 treating patients, I don't operate anymore. I stopped
21 doing surgeries several years ago, but I do treat
22 patients and I do these examinations and I'm board
23 certified.

24 Q And have you ever been qualified as an
25 expert witness in a workers' compensation court before?

1 A Yes, several times.

2 Q Has any court ever found that you're not
3 qualified as an expert witness in the area of
4 orthopedics and orthopedic surgery?

5 A No.

6 Q Okay. And unlike some other medical
7 witnesses who may have testified, have you actually
8 performed a back surgery?

9 A Yes.

10 Q How many have you performed?

11 A Many.

12 THE COURT: I'm sorry?

13 THE WITNESS: Many. I couldn't give you a
14 number.

15 MR. LYNN: Your Honor, I'd offer the
16 Doctor at this time as an expert in orthopedics and
17 orthopedic surgery.

18 THE COURT: Voir dire?

19 MR. WACHTEL: Yes. Thank you, your Honor.

20

21 VOIR DIRE EXAMINATION

22 BY MR. WACHTEL:

23 Q Doctor, the curriculum vitae that counsel
24 submitted to the Judge, is that the most up-to-date
25 curriculum vitae?

1 A Yes.

2 Q And when was the last time it was updated?

3 A It's been a while. I haven't updated it in a
4 while. I think there's enough on there to put down
5 what lectures I go to and things, it just didn't make
6 sense anymore so I stopped. So whatever year it
7 says --

8 Q When did you stop going to lectures?

9 A I haven't stopped going to lectures, I just
10 don't record them.

11 Q What was the last lecture you went to?

12 A I couldn't tell you offhand.

13 Q Why not?

14 A Because I don't remember.

15 Q When was it?

16 A If I knew, I would tell you. I tell you I don't
17 remember.

18 Q Do you remember testifying in a case
19 called Patricia Larrahondo vs. United Airlines in 2015?

20 A No.

21 MR. LYNN: Objection.

22 THE COURT: Basis of the objection?

23 MR. LYNN: It's completely irrelevant to
24 the Doctor's qualifications as whether he's qualified
25 or not to give an expert opinion in the area of

1 orthopedics and orthopedic surgery.

2 MR. WACHTEL: The question is does he
3 remember.

4 THE COURT: How does his opinion in some
5 other case have to do with his qualifications?

6 MR. WACHTEL: The objection is premature.

7 THE COURT: I disagree. If the question
8 is you gave testimony in another case, right? What
9 could that possibly -- you're talking about his
10 qualifications tendered in another case?

11 MR. WACHTEL: Yes.

12 THE COURT: You can ask him questions
13 about that, but I don't know that I'm going to get into
14 transcripts in some other proceeding.

15 MR. WACHTEL: All I asked was if you
16 remember testifying in that case.

17 THE COURT: Go ahead. Let's see where it
18 goes.

19 THE WITNESS: No.

20 THE COURT: By the way, Doctor, I know
21 that we're always rushed to do this stuff. Make sure
22 the attorney is finished the question before you
23 answer.

24 THE WITNESS: Absolutely. I thought that
25 he was finished.

1 THE COURT: I get it, but I want to make
2 sure everybody gets a chance to do their thing.

3 You may proceed, Mr. Wachtel.

4 BY MR. WACHTEL:

5 Q At that time, you indicated that you still
6 have privileges at the Hospital for Joint Disease. Do
7 you still?

8 A They're in abeyance, I've never actually given
9 them up. I haven't used them since I was practicing in
10 Manhattan. So technically, I still have privileges
11 because I never gave them up, but I haven't been to
12 Manhattan or practicing there since 1980.

13 Q And at that time, you said that you
14 couldn't be sure, 100 percent sure that you have
15 privileges at St. Michael's.

16 A No, I gave up my -- once I stopped operating, I
17 gave up my hospital privileges because I was not
18 admitting patients, and I quite frankly didn't want to
19 pay the fees.

20 Q So as we sit here today, do you have any
21 privileges at any hospitals?

22 A I do not. I gave up my privileges at
23 St. Michael's and at Newark Beth Israel.

24 Q And how long ago did you give up your
25 privileges?

1 A I don't remember, maybe five years ago, probably
2 less. It was recently when I decided -- within
3 five years, let me put it that way, because I did check
4 into this, I remember, because I was asked this once
5 before and I did actually call the hospitals. And once
6 I stopped paying the fees that were necessary, because
7 I didn't want to pay them, I gave up the privileges.
8 It's within five years.

9 Q And are you currently treating patients
10 now?

11 A Yes.

12 Q How many patients are you currently
13 treating?

14 A I would say probably 5 percent of my practice is
15 actually treating patients.

16 Q What's the other 95 percent of the
17 practice?

18 A 94 percent is doing workers' compensation
19 evaluations and one percent could be liability
20 evaluations.

21 Q And of the workers' comp evaluations that
22 you do, how many are for the Petitioner and how are
23 many for the Respondent?

24 A Well, Let me just say that I, unlike your
25 expert, has testified for the Petitioner.

1 Q How many times?

2 A Once. But I have done it, okay, and we both
3 know in the State of New Jersey you do either
4 Petitioner or you do Respondent. Of course in
5 liability cases it's completely different.

6 Q So it's fair to say that the majority of
7 your practice is performing evaluations for insurance
8 companies and the Respondent?

9 A For Respondents, yes. It doesn't have to be
10 insurance companies, but for the Respondent.

11 Q And as far as Kessler, you gave those
12 privileges up as well?

13 A Yes, I haven't been to Kessler in a while. I
14 used to run many clinics, which was very interesting,
15 but I haven't been there in a long time, once I stopped
16 operating.

17 Q Now, you indicated that you're board
18 certified.

19 A That is correct.

20 Q What do you have to do to maintain that?

21 A Nothing.

22 Q Why?

23 A That's the rules of the board.

24 Q What rule?

25 A The rule of the board is that when I took the

1 boards, when you become board certified you're board
2 certified for life.

3 Q Well, Doctor, I went on the American Board
4 of Orthopedic Surgery website and it says that there's
5 a program called the maintenance of certification
6 program; is that when you're grandfathered in --

7 A I'm grandfathered --

8 MR. LYNN: Objection.

9 THE COURT: What's the basis?

10 MR. LYNN: One, it's still an irrelevant
11 question and two, Mr. Wachtel is testifying, is making
12 himself into a witness by saying that he's searched
13 something on a website --

14 THE COURT: I disagree. The Doctor is
15 board certified, he should understand the rules by
16 which such certification is issued or maintained. I'll
17 allow it. But I'm not going to take judicial notice of
18 what's in your hand. But you can question the witness.

19 MR. WACHTEL: I'm not asking you to.

20 THE COURT: It's voir dire. Go ahead.

21 BY MR. WACHTEL:

22 Q It says are you doing the maintenance and
23 certification program?

24 A No, I am grandfathered in, I do not have to do
25 maintenance and to recertify the boards. If you are a

1 recent board member you have to recertify, but when I
2 took the boards that was not the rule, and I have been
3 grandfathered in and I am not required to retake the
4 certification tests.

5 Q Are you aware that many people, diplomates
6 certified prior to 1986, are voluntarily participating
7 in the certification program?

8 A No.

9 Q And you understand that part of that
10 program involves peer review; do you understand that?

11 A I have -- no, I don't participate in the program
12 and therefore -- and I personally don't know anybody in
13 my age group that participates in it so I don't know
14 that there are a large number of people that do. And
15 since I am not required by the board to participate in
16 the program I do not know what the program makes up --
17 what it consists of.

18 Q You understand that on the American --

19 MR. WACHTEL: I would like to mark this --
20 I don't know what we're up to. I have it right here.
21 I think it's P-5.

22 THE COURT: It was P-7. So your next
23 exhibit will be P-8.

24

25 (At which time, American Board of

1 Orthopedic Surgeons Web Page was received and marked as
2 Exhibit P-8 for identification.)

3

4 BY MR. WACHTEL:

5 Q Doctor, I'm showing you what was on the
6 American Board of Orthopedic Surgeons website. It says
7 that you're certified in general orthopedics not
8 orthopedic surgery; is that accurate?

9 A No, I am an orthopedic surgeon, period. It's
10 general orthopedics, the word surgery should be there.
11 This is a standard board certification, this has
12 absolutely no meaning. I am an orthopedic surgeon.

13 Q I understand.

14 A There is only one board. Either you're an
15 orthopedic surgeon or you're not. There is nothing
16 that exists that's called orthopedic medicine. You're
17 either an orthopedic surgeon or you're not. Orthopedic
18 medicine is a fabrication.

19 Q But on that piece of paper you would agree
20 with me it says orthopedics --

21 A General orthopedics, yes.

22 Q When was the last time you did surgery?

23 A Ten years ago, maybe more.

24 Q Maybe more? Were you alone doing it or
25 were you with another doctor?

1 A You expect me to remember the last time I did
2 surgery that's been ten years if I had an assistant or
3 not?

4 THE COURT: Well, Doctor, the easy answer
5 is I don't recall.

6 THE WITNESS: I don't recall.

7 THE COURT: Thank you.

8 BY MR. WACHTEL:

9 Q The majority of your surgeries, were they
10 solo surgeries or with other doctors?

11 A Most of the surgeries I did I was the lead
12 surgeon. Sometimes I had an assistant. The vast
13 majority I was the doctor. Sometimes I did it alone,
14 sometimes I did it with a physician's assistant. We
15 had one at Newark Beth Israel. Sometimes I did it with
16 another doctor. But the vast majority I was the lead
17 surgeon.

18 Q And going back to your CV, you indicated
19 you stopped updating the classes you take and the
20 lectures you go to?

21 A Some years ago, yes.

22 Q And you can't recall the last time you
23 went to a lecture?

24 A Whatever that says. No, no, I mean a lecture --
25 the last time I updated it was whatever it says there.

1 I cannot recall the last time I went to a lecture, no.

2 Q And so at least before 2015 since you've
3 been to a lecture?

4 A No, I wouldn't say that. I just told you I
5 can't recall. If I can't recall I can't recall.

6 Q You indicated in other cases that you go
7 to the Academy.

8 A I did.

9 Q You did?

10 A I did.

11 Q When was the last time you went to the
12 Academy?

13 A I think it was about three years. I haven't
14 gone for the last two years. It could have been
15 four years, but I'm not sure.

16 Q What classes did you take at the Academy
17 that would be helpful for this case?

18 A I have no idea what you mean by that question.

19 Q What classes did you take at the
20 Academy --

21 A The Academy --

22 THE COURT: One at a time. Let him
23 finish.

24 BY MR. WACHTEL:

25 Q What classes did you take at the Academy

1 that would keep you up to date in modern orthopedic
2 practice?

3 A That's a good one. Probably the most relevant
4 thing that I did was an instructional course on
5 interpretations of MRIs. That was one of the, I
6 thought one of the highlights the last time I was
7 there.

8 Q But you're not board certified in
9 radiology?

10 A I'm a board certified orthopedic surgeon.
11 Reading MRIs and x-rays are part of the board.

12 Q Were you teaching that class or attending
13 that class?

14 A No, I was attending.

15 Q You did a lot of time assisting with
16 Dr. Krieger (ph)?

17 A Yes.

18 Q And he was the one who did a lot of these
19 surgeries that you assisted on?

20 A I was co-surgeon, I wasn't assisting.

21 MR. WACHTEL: Judge, I have nothing
22 further as to credentials.

23 THE COURT: Okay. Now that you've had a
24 chance to voir dire, do you have any objection to the
25 witness testifying as an expert in orthopedic surgery?

1 MR. WACHTEL: Yes.

2 THE COURT: I'm going to admit the Doctor
3 as an expert, and to the extent his qualifications go
4 to his opinions I'll carry that, but I'll allow him to
5 testify.

6 MR. WACHTEL: Okay.

7 THE COURT: You may proceed.

8 MR. LYNN: Thank you, your Honor.

9

10 DIRECT EXAMINATION

11 BY MR. LYNN:

12

13 Q Dr. Canario, how many times did you
14 examine the claimant in this case, Mr. Langowski?

15 A Twice.

16 Q One time was in 2013 and the second time
17 was in 2015; is that correct?

18 A Yes.

19 Q Okay. And I'm not going to dwell too much
20 on the 2013 exam, but I would like to direct your
21 attention to the 2013 exam for a few moments.

22 A '13?

23 Q 2013.

24 A '13.

25 THE COURT: That would be R-11.

1 MR. LYNN: That would be R-11, yes. Thank
2 you, Judge.

3 BY MR. WACHTEL:

4 Q And particularly, can you tell us the
5 history that you took from Mr. Langowski at that time?

6 A Yes, that he worked for this company, Tecogen,
7 for three and a half years. His job entailed bending
8 and lifting. There were no accidents. He developed
9 back pain. He did have a fall from machinery once, he
10 injured his knee. He thought he could have injured his
11 back from that fall. He came under the care of a
12 Dr. Pan. He had testing done and had surgery done by
13 Dr. Pan. He began to develop some numbness into his
14 legs, he had difficulty walking and other problems.

15 He was not doing well, he went to Dr. Heary, he
16 had a second operation done, again to the same region
17 of the back. He also had an injury to his knee. He
18 went to an emergency room for that. He eventually had
19 surgery done to his knee arthroscopically.

20 Again, he had a prior surgery done. He had a
21 fusion at a different level, at L5-S1. The fusion done
22 by Dr. Heary then the surgery by Dr. Pan was several
23 levels above, at L2-3. He denied again all injuries or
24 other problems.

25 Q Okay. And at that time he told you that

1 he wasn't working, right?

2 A That's right.

3 Q He told you he was unable to work at that
4 time, right?

5 A That's correct. He was unemployed, he said he
6 couldn't work because of the pain in his back that
7 radiated to his leg, and at times his left knee was
8 also giving him trouble and swelling.

9 Q And at the time that you did that exam in
10 2013, you produced this report which is R-11 in
11 evidence and gave an opinion, did you not, as to
12 permanent disability regardless of cause?

13 A Right, 15 percent of total for the one level
14 fusion that he had and 7 1/2 percent of the leg for the
15 knee surgery.

16 Q Okay. And then you reexamined him again
17 in September of 2015, correct?

18 A That's right.

19 Q I'd like direct to your attention to that
20 exam. And that exam took place September 8, 2015?

21 A Yes.

22 THE COURT: R-12.

23 BY MR. LYNN:

24 Q Was there any relevant interim history at
25 that time?

1 A Other than he had surgery to repair a phrenic
2 nerve because he had a collapse of the diaphragm, but
3 no, nothing else.

4 Q And did you reexamine his back and his
5 left leg?

6 A I did.

7 Q Directing your attention to Page 2 of R-13
8 in evidence, can you give us the relevant observations
9 and findings that you made starting with his
10 lumbosacral spine?

11 THE COURT: You're on R-12 or 13?

12 MR. LYNN: Judge, I thought I was on R-13,
13 but I may have mismarked them. I'm referring to the
14 report of September 8th at this time.

15 THE COURT: That's R-12.

16 MR. LYNN: My apologies, your Honor.

17 BY MR. LYNN:

18 Q R-12 is the report of September 8, 2015.
19 Does that report accurately reflect the examination
20 that you did of Mr. Langowski?

21 A Yes.

22 Q What did you find with respect to his low
23 back?

24 A Again, the scars remain well healed, he has
25 excellent motion within normal range, only mild pain at

1 maximum flexion. He had back pain, although not a
2 great deal, with straight leg raising. No leg pain.
3 Normal reflexes, no loss of sensation, no weakness, no
4 atrophy. Did have tenderness about the scar.

5 Left knee showed that he maintains full motion,
6 he was stable. He had tenderness medially and
7 laterally within the knee, as he did when I previously
8 examined him.

9 Q Okay. I want to ask you a few questions
10 about the lumbosacral spine. When you talk about range
11 of motion, and for example you say he flexes beyond 90
12 degrees, what does that look like when the person is
13 performing that?

14 A If someone is standing up straight and if you
15 could imagine a right angle from his hip --

16 Q I'm standing up straight.

17 A Bend forward and touch your toes.

18 MR. LYNN: (Indicating.)

19 THE WITNESS: That's beyond 90 degrees.
20 If you're at a right angle you'd be at 90 degrees.

21 THE COURT: The record should reflect --

22 THE WITNESS: That's 90.

23 THE COURT: The record should reflect that
24 Mr. Lynn flexed below waist level.

25 THE WITNESS: He is quite supple.

1 BY MR. LYNN:

2 Q Now, extension to 30 degrees, what does
3 that look like?

4 A Lean backwards. Just lean backwards.

5 MR. LYNN: (Indicating.)

6 BY MR. LYNN:

7 Q Okay. And how far is 30 degrees?

8 A Thirty degrees is a normal range.

9 And then lateral bending is when you're standing
10 up straight and you're down to the side, lateral
11 rotation is when you twist.

12 Q Okay. Now, that type of test, is that an
13 objective test, a subjective test, or some combination?

14 A Well, first of all, range of motion is
15 subjective because it depends on the patient, if he's
16 doing the best he can. I have no way to know if I ask
17 him to bend forward, he tells me he can't bend more
18 than 10 degrees, it's subjective. I have no way to
19 know. But if you're within normal range, then I
20 consider it objective.

21 Q And straight leg raising test, what's the
22 significance of that, if any?

23 A It's a sciatic stretch test. So if there's a
24 sciatica or it produces nerve pain, if it produces back
25 pain which is to be expected, but it's still a negative

1 test.

2 Q What does Bragard's sign mean?

3 A It's another sciatic stretch test where I
4 dorsiflex the foot and that would further stretch the
5 sciatic nerve and if it produces nerve pain in a
6 pattern, that's a positive test.

7 Q Does the fact that this guy has had
8 multiple back surgeries, would that affect what you
9 expect to see when he is doing these tests?

10 A Yes, I think he's doing -- for someone who's had
11 three back surgeries, two fusions done fortunately at
12 different levels with distance between them, he's doing
13 quite well.

14 Q Okay. And how do you test the reflexes
15 for the knee and the ankle, and why do you do that?

16 A Well, these indicate if there's any damage to
17 the nerves, and I did not see any change in the
18 reflexes.

19 Q Okay. And when you say no loss of
20 sensation, sensation to where? To his low back?

21 A No, in his legs. It's another subjective test.
22 But if he had specific decreased sensation in what we
23 consider a dermatomal pattern, then that could be
24 relevant. And it's not that uncommon, for instance for
25 the L5-S1 distribution he could have numbness towards

1 the little toe. That would be a finding that could be
2 there or could not be there. I didn't find it on him.

3 Q So he wasn't -- correct me if I'm wrong,
4 he wasn't saying, I have pain shooting into my legs or
5 my feet or my toes?

6 A No, he said that sometimes he could still get
7 pain into his legs, but on the examination it wasn't.
8 He had back pain, sometimes he'll have some leg pain,
9 this is all within what one expects who have had back
10 surgery.

11 Q Okay. Now, directing your attention to
12 his knee. We know that he had a prior knee surgery.

13 A Right.

14 Q And he had knee surgery later on after the
15 work incident?

16 A Right. On my information sheet he wrote that in
17 2002 he had had an ACL injury at another time. When I
18 saw him I estimated what was done following this
19 injury, which was straightforward arthroscopy and
20 estimated some disability secondary to the meniscal
21 resection that he underwent.

22 Q Now, based upon your examination of the
23 Petitioner, did you form an opinion as to percentage of
24 permanent disability?

25 A I did. For the one level fusion --

1 Q I don't want you to answer that one yet.

2 A Yes.

3 Q Stick with the yes, you did, right?

4 A Yes.

5 Q You reviewed some x-rays of his fusion,
6 lumbar fusion that you referred to on Page 3 of your
7 report, or you reviewed some findings of Dr. Heary?

8 A Just give me a chance, a second to read it.

9 Right. This was from Dr. Heary's report that
10 the fusion was solid.

11 Q Do you know if Mr. Langowski was using a
12 cane when he was in your office?

13 A No, I would have recorded it.

14 Q Doctor, I'd like you to assume that in
15 2015 while Mr. Langowski's workers' compensation claims
16 were pending and while Mr. Langowski was claiming to be
17 totally permanently disabled, he was observed by
18 investigators --

19 MR. WACHTEL: I'm going to object to this.

20 THE COURT: Is this a hypothetical
21 question?

22 MR. LYNN: I'm going to ask a hypothetical
23 question based upon evidence that has already been
24 admitted to the Court without objection by Petitioner's
25 attorney.

1 MR. WACHTEL: I understand, but it's
2 calling for opinion based on a videotape that could
3 have been provided to the Doctor well before today and
4 the Doctor could have formulated his own opinion based
5 on the videotape without Mr. Lynn's characterization of
6 the tape. And they have not chosen to do that.

7 MR. LYNN: I can rephrase my question.

8 THE COURT: Well, do that.

9 BY MR. LYNN:

10 Q Doctor, prior to your testimony today, did
11 you have an opportunity review some photographs and
12 videotapes of Mr. Langowski?

13 A Yes.

14 Q And did those photographs and videotapes
15 include the footage of him pushing race cars, using
16 hand tools to jack vehicles up, conducting mechanical
17 work on motors, carrying compressors and moving
18 generators?

19 MR. WACHTEL: Judge, I would object to
20 this line of questioning. There is no supplemental
21 report. The Doctor should be kept in the four corners
22 of his reports.

23 THE COURT: How do you respond to that?

24 MR. LYNN: His prior objection was the
25 Doctor should have been provided with --

1 THE COURT: I'm worried about this
2 objection. This objection is that the Doctor is being
3 asked to render an opinion that is not included in his
4 report.

5 MR. LYNN: Well, one, your Honor, I think
6 the rules do allow for a hypothetical opinion, and I
7 also think the rules allow for any witness to comment
8 on items that have been marked into evidence.

9 THE COURT: If this witness doesn't have
10 those facts and didn't include them in his report, I
11 think the best you can do is present a hypothetical.
12 But not -- you know, it's hard for me to consider what
13 you're saying versus what he viewed. Okay? So you got
14 to lay out a set of facts that you want him to assume.
15 Whether in fact those facts support his opinion is for
16 me to make the decision about, because I've seen the
17 tapes. You know, and you got to break it down a
18 little, well, not so broadly.

19 MR. LYNN: Well, I asked the Doctor to
20 assume that the tape shows what the tape shows, and if
21 that is objectionable --

22 THE COURT: Well, the objection here is
23 it's not included in the report, that's the objection
24 that's made so far.

25 MR. LYNN: Well, your Honor, he's correct,

1 it's not included in the report. I still think it's a
2 proper question to ask the Doctor.

3 THE COURT: Is there a requirement that
4 any witness who testifies here has a report?

5 MR. WACHTEL: I would argue, Judge,
6 absolutely there is.

7 THE COURT: Let him finish his response.
8 I'm listening.

9 Is there a rule that says that an expert witness
10 has to put his opinions in a report? Yes, there is.
11 Yes, of course there is.

12 MR. LYNN: But an expert witness can also
13 be asked to make an observation, Doctor, have you seen
14 this? Yes, I have or no, I haven't. And if the Doc
15 says yes, I have --

16 THE COURT: Right.

17 MS. SCHOBBER: Your Honor, may I weigh in?

18 THE COURT: Sure.

19 MS. SCHOBBER: Doctors are routinely asked
20 hypothetical questions that they haven't been presented
21 with beforehand because they examine a Petitioner,
22 produce a report before the trial starts. Then the
23 Petitioner testifies and then the other potential
24 evidence goes in, and then a hypothetical question is
25 created. It's a hypothetical, it might not be accurate

1 or true, but they're entitled to comment on it.

2 THE COURT: I understand.

3 MR. WACHTEL: However, this video was
4 taken a long time ago. Respondent's chosen for
5 whatever reason not to get a supplemental report or
6 prepare us prior to today that the Doctor would be
7 relying upon that video to have a different opinion
8 than what's in his reports.

9 THE COURT: I understand, but my initial
10 comment still holds true, that I think a hypothetical
11 question can be presented, and the extent that it
12 supports some opinion is for me to determine whether
13 the hypothetical matches the facts that I have to find.
14 Okay? And you may be looking at all the tapes. I have
15 done that. So if in fact the hypothetical deviates
16 from what the tapes show, well, that works against
17 Dr. Canario. But I will leave that to you. You can
18 present a hypothetical. Just try to keep it simple.

19 MR. LYNN: Okay.

20 BY MR. LYNN:

21 Q Doctor, I would like you to assume that on
22 June 11, 2012, Mr. Langowski was observed by a private
23 investigator carrying a case of beer and a bottle of
24 liquor from a store to his vehicle not using any type
25 of orthopedic device such as a cane.

1 I would like you to further assume that on
2 Friday, July 11th; Friday, July 18th; and Saturday,
3 July 19, 2014, Mr. Langowski was observed and
4 documented in the pit area of a racetrack in Hamlin,
5 Pennsylvania where he appeared to be part of a race
6 team for Stage 1 modified driver John Comandini.

7 I would like you to assume that on September 20,
8 2014 Mr. Langowski was observed by an investigator
9 performing activities at Hamlin Speedway in
10 Pennsylvania including pushing a race car, using a hand
11 tool to jack the vehicle up, conducting mechanical work
12 on the motor, carrying a compressor around the vehicle
13 to inflate the tires and removing a generator from a
14 trailer. And this was all documented in the
15 photographs, videos and reports that have been entered
16 into evidence.

17 I would like you to assume that on September 20,
18 2014, between 4:00 p.m. and 10 o'clock p.m. that
19 Mr. Langowski was observed and filmed conducting pit
20 crew activities, including but not limited to
21 mechanical work, repeatedly using a hand jack to lift
22 and lower the rear of the vehicle from the ground,
23 lubricating the wheels, carrying the generator and
24 checking tire pressure and bending and kneeling to
25 drain fuel from the vehicle.

1 I would like you to assume that on April 18,
2 2015 Mr. Langowski was observed arriving at the
3 residence of driver John Comandini and traveling with
4 Mr. Comandini to Hamlin Speedway in Moscow,
5 Pennsylvania where he worked as a race team crew member
6 during the late afternoon and evening.

7 MR. WACHTEL: Judge --

8 THE COURT: Yes?

9 MR. WACHTEL: Counselor is reading into
10 evidence what's already been submitted into evidence
11 with a videotape.

12 THE COURT: I'm going to allow him to
13 present his hypothetical.

14 MR. WACHTEL: But reading the surveillance
15 report into the record is not the same as providing a
16 hypothetical.

17 THE COURT: Everybody reads their reports.
18 I get it. You force him into a hypothetical, I agree
19 with that, okay, but it has to be laid out so that
20 there's a record.

21 BY MR. LYNN:

22 Q I would like you to assume those
23 statements to be true and accurate, and ask you whether
24 or not they would have any impact on your opinion
25 regarding either the nature and/or extent of permanent

1 disability, or causation, or any of the things that
2 you've testified about today.

3 A Well, first of all, I saw two of those videos.
4 Okay. I saw July 2014 and I saw April 2015. And in no
5 time was this man in any distress or showed any sign of
6 any type of discomfort. As far as him -- I mean, in my
7 examination he was able to bend beyond 90 degrees. So
8 if you tell me he's bending on a video I would believe
9 it, and it would support my opinion and my examination
10 the way I examined him.

11 Q Now, Mr. Langowski testified -- I'd like
12 you to assume that when Mr. Langowski testified in this
13 Court before Judge Psak --

14 MR. WACHTEL: I object to this.

15 THE COURT: Which time are you talking
16 about? Give us a page and a line, please.

17 MR. WACHTEL: There were two days of
18 testimony.

19 BY MR. LYNN:

20 Q The date of testimony was January 4, 2017.

21 On Page 39, line 22 and 23 Mr. Langowski was
22 asked: Do you use the cane all the time?

23 Answer: Yes, when I do a lot of walking.

24 Did you observe him using a cane in any of the
25 pictures or videos that you saw?

1 A No.

2 Q Did you observe him using a cane during
3 either of your physical examinations?

4 A No.

5 Q On Page 46 Mr. Langowski testified that it
6 is difficult for him to tie his shoes because, "I have
7 a hard time bending down." That's lines 6 through 8.

8 Is there anything in your examination or what
9 you observed which indicates that he would have
10 difficulty bending down?

11 A No.

12 Q In fact, he was able to bend down during
13 both of your examinations in 2013 and 2015; isn't that
14 true?

15 A That's correct. As I already testified to, he's
16 voluntarily bending to beyond 90 degrees.

17 Q Do you have an opinion, Doctor, as to the
18 cause of the disability that you found?

19 MR. WACHTEL: I'm going to object.

20 THE COURT: Basis of the objection?

21 MR. WACHTEL: Net opinion. There's been
22 no foundation as to any studies or any kind of academic
23 parts on how the Doctor reached his conclusion as to
24 causality.

25 THE COURT: Overruled.

1 BY MR. LYNN:

2 Q That means you can answer the question.

3 A The only thing that came close to being a
4 causative factor was what Dr. Pan actually placed as
5 the causative factor, that is riding on his motorcycle.
6 You know, bouncing on some type of a vehicle, I found
7 many people who ride hi-lows, bouncing on the hi-lows
8 get a herniated disc to have it causally related. It
9 can be certainly causally related to that. But there
10 was no, you know, definite cause of it. What his
11 operating surgeon thought, though, was that it had to
12 do with his motorcycle riding.

13 But we all know that a herniated disc can occur
14 spontaneously without cause. There is no indication
15 that it was caused by his job or his occupation. He
16 thought maybe it was when he fell, but he admits that
17 there was no actual causal relationship then. And we
18 can have a herniated disc in pediatric populations that
19 just occur. Any orthopedic surgeon you ask who
20 actually treats patients will tell that you there are
21 herniated discs occur without cause or without trauma.

22 Q Thank you very much.

23 MR. LYNN: That's all I have, your Honor.

24 THE COURT: Cross?

25 MR. WACHTEL: Okay.

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CROSS-EXAMINATION

BY MR. WACHTEL:

Q Okay, Doctor, we'll start at the top. On top of your letterhead, your group has yourself, Dr. Blumenthal and Dr. Laikin.

A Yes.

Q Dr. Blumenthal is an expert in occupational medicine; is that correct?

A Yes. He's also an emergency room physician.

Q Okay. I've met him. Nice guy. This is an occupational case, correct, as far as the back?

A Yes.

Q Did you consult with Dr. Blumenthal, who is an expert in occupational medicine in regard to this case?

A No.

Q Why not?

A First of all, Dr. Blumenthal and Dr. Laikin are not in my group.

Q Okay.

A They're on the letterhead, they are -- they simply rent space from me. I'm a sole practitioner, so they're not in my group.

1 Q Okay.

2 A Okay? And I have no need to ask Dr. Blumenthal
3 anything, I can come to my own conclusions based on
4 orthopedic surgery and causal relationship.

5 Q Nowhere in your reports do you discuss any
6 of the studies that you relied upon to make your
7 conclusion in this case.

8 A No. What studies? In what way? I don't really
9 understand the question.

10 Q What did you rely upon to make your
11 decision as to how this is related or not related?

12 A Examining thousands of patients over the years.
13 Having done this surgery, having treated people in the
14 realm of workers' compensation and when there are no
15 lawyers around.

16 Q What standard do you use to determine
17 whether or not something is related or not?

18 A Based on the history that I have, the facts that
19 I have, what has been involved, what caused it and the
20 general type of each individual case being, of course,
21 separate from each other. And I rely on my experience
22 as a board certified orthopedic surgeon and having done
23 quite a few of these examinations over the years. And
24 I found no evidence that there was any causal relation
25 to anything other than riding a motorcycle.

1 Q Are you aware of the New Jersey statute
2 for what a compensable occupational disease is and what
3 standard is used?

4 A I'm not a lawyer, I have a general idea of what
5 it is. It has to be a material exacerbation or caused
6 by one's occupation. A significant exacerbation or
7 cause, that's how I understand it.

8 Q Okay. It's not that material is something
9 greater than de minimis?

10 A It has to be significant. So, yes. It has to
11 be a significant reason, it has to be something that
12 would lead to this particular condition, such as if you
13 use a jackhammer and if you get carpal tunnel. We all
14 agree that the vibration in the jackhammer is going to
15 cause carpal tunnel.

16 Q So just to be clear, the standard that you
17 use to define compensable occupational disease in a
18 New Jersey workers' compensation case is that the work
19 effort has to be a significant contributing factor?

20 A Material I think is a better word.

21 Q How do you define material?

22 A Something that could be causally related to the
23 problem that he has. Is there a reasonable cause for
24 this, not just I happen to have a job and I have back
25 surgery, therefore it has to be related. Well, what

1 did you do, why is it caused by that. Do you have
2 documentation of it. Over the years have you seen
3 various doctors that have treated you. So you have to
4 look at the entire spectrum, but there has to be
5 something there that is significant, that would make it
6 occupational beyond the simple fact that I work.

7 Q Would it change your opinion that if the
8 New Jersey standard for compensable occupational
9 disease is that the work effort has to be something
10 greater than de minimis?

11 A I don't know what you mean by greater than
12 de minimis. The way I understand it is it has to be
13 something significant in the work that could cause it.

14 Q How do you weigh the work history?

15 A It depends on what the patient tells me. I give
16 him all the opportunity in the world to tell me what it
17 is. Some people don't relate it to anything in
18 particular. He related it, he thought to a fall, he
19 also said that he did bending and lifting and thought
20 that that might have caused it. Of course, he also had
21 prior surgery.

22 But I didn't see anything in anything he told
23 me, any specific way or anything that was unusual or
24 anything that worsened him and that he was seeing his
25 private doctor for over the years that caused this.

1 There was just absolutely nothing unusual about this,
2 this was in all probability a herniated disc that
3 occurred at some time, I think probably when he was
4 riding his motorcycle, or maybe it just occurred
5 spontaneously without cause.

6 Q When you weigh whether or not something is
7 work-related or not in an occupational context, what
8 weight do you put on work history?

9 A It depends on what -- again, it's each
10 individual case. The man worked for three and a half
11 years, I know that he worked repairing machinery.
12 Everybody who has a job has to do some bending and
13 lifting. It depends. I would want to see some strong
14 correlations, some things that have happened, some
15 treatment that has been going on rather than just,
16 well, it must be this because I have been working
17 there.

18 Q So what weight do you put on the work
19 history, a little bit, not a lot, a lot?

20 A It depends on the history. Everyone is
21 different from itself. Over here, I didn't place very
22 much emphasis on it because I didn't see anything that
23 would lead me to believe that his work had anything to
24 do with this condition that he developed. And also his
25 operating surgeon that didn't think that either.

1 Q Okay. We'll talk about that.

2 A Let's go.

3 Q Okay. You got at all medical records from
4 the Respondent that I gave them?

5 A I have no idea. I don't have them with me. I
6 mean, I take some of the things that I think are
7 important and keep them. I can't save everything that
8 is sent to me.

9

10 (At which time, P-9, Dr. Pan Letter dated
11 July 12, 2011, was marked for identification.)

12

13 BY MR. WACHTEL:

14 Q Doctor, can you read that out loud?

15 MR. LYNN: Objection, your Honor.

16 THE COURT: What's the objection?

17 BY MR. WACHTEL:

18 Q Doctor, have you seen this letter before?

19 A I can't say I have or I haven't. I mean, if you
20 sent it to him, then he would have sent it to me.

21 THE COURT: Could you identify what P-9
22 is, please?

23 MR. WACHTEL: P-9 is a letter from Dr. Pan
24 dated July 12, 2011.

25 THE COURT: Thank you.

1 BY MR. WACHTEL:

2 Q Have you had an opportunity to review the
3 letter today?

4 A Yes.

5 MR. LYNN: Your Honor, I object. Dr. Pan
6 has never been shown to be unavailable. Dr. Pan was
7 not called as a witness. This line of questioning is
8 an attempt by counsel to back door a hearsay
9 non-admissible opinion into evidence. It should not be
10 allowed.

11 MR. WACHTEL: Judge, the Doctor opened the
12 door, saying he relied heavily on Dr. Pan, and I gave
13 these records.

14 THE COURT: I agree he did rely on Dr. Pan
15 and I think that it's proper cross-examination because
16 he's looking into the basis for the opinion.

17 Now, I'm only assuming that the witness has
18 already seen these records if they were supplied. I
19 don't know that. But, you know, I don't have any
20 problem with testimony about it, I don't know that I'm
21 necessarily going to accept any opinion that Dr. Pan
22 puts in his letter. But you can certainly ask him
23 whether he's reviewed it or not.

24 BY MR. WACHTEL:

25 Q Doctor, you have reviewed that letter

1 today, haven't you?

2 A Yes.

3 Q In that letter it says that Dr. Pan is --
4 Michael Langowski is the patient and he's treating him
5 for lumbar surgery on July 1st. And he says due to his
6 job's requirement to lift, push, pull and bend for long
7 periods of time, I believe that it contributed to the
8 degeneration and disc herniation of his lumbar spine.

9 A Yes, he says that. That's not what he said in
10 one of his other reports, but that is what he said in
11 that report.

12 MR. LYNN: This doesn't say what job he's
13 referring to.

14 THE COURT: I don't know about that. I'm
15 not the only one to not accept an opinion from an
16 expert who's not here. The only thing that's before me
17 is what this expert relied upon to give his opinion.
18 And it's proper cross-examination, because he testified
19 he relied upon Dr. Pan's comments. Where they came
20 from, I don't know.

21 BY MR. WACHTEL:

22 Q So, Doctor, now that you've had an
23 opportunity to review that letter, does that change
24 your opinion?

25 A No, of course not.

1 Q Had you reviewed it prior to today?

2 A If you sent it to him, I have reviewed it prior
3 to today.

4 Q Why does it not change your opinion?

5 A Because there's absolutely nothing in that
6 letter that would change my opinion. Also, this is not
7 what Dr. Pan said in other of his reports. I mean,
8 he's talking about that he developed, again, weakness,
9 he was riding his motorcycle. This is what seems to
10 have led to the surgery. Now he said, well, now it's
11 his job. I don't recall that, but if you sent it to
12 him, I saw it. I just don't agree.

13 Q There is no indication in the report that
14 Dr. Pan ever said due to riding a motorcycle
15 exclusively.

16 A It says -- no, not exclusively, it says that he
17 had been riding his motorcycle for several days prior
18 and developed this weakness and numbness into his left
19 leg.

20 Q So, again, it's not exclusive to
21 motorcycle riding that caused his need for treatment?

22 MS. SCHOBBER: Asked and answered.

23 THE COURT: I'll allow it.

24 THE WITNESS: The way I read that is, is
25 that he is relating that this onset of the pain

1 radiating into the leg was from riding a motorcycle.

2 BY MR. WACHTEL:

3 Q But you don't say that the subsequent
4 letter, that the job requirements was a significant
5 contributing factor?

6 A I agree with that, yes. I agree that it's not a
7 significant contributing factor.

8 Q Now, Doctor, you evaluated the Petitioner
9 last in 2015; is that correct?

10 A Yes.

11 Q And you haven't seen him since?

12 A Correct.

13 Q Wouldn't it have been helpful for you to
14 see him again to know what his current complaints are?

15 A My opinion's based on the time that I saw him.
16 I cannot comment -- I mean, anything could have
17 happened between 2015 and today. I have no way of
18 knowing.

19 Q You have no way of knowing whether or not
20 he's gotten worse, better, or the same?

21 A I have no way of knowing, since I haven't seen
22 him.

23 Q And you have no opinion in your report as
24 to the nature and extent of any preexisting disability,
25 you just evaluated for the last accident?

1 A That's correct. There was no accident, though.

2 Q Well, as far as any kind of other
3 preexisting medical conditions, the only thing you
4 provided an estimate for was what the allegations were
5 in the claim petition?

6 A Yes, the one level fusion at L2-3.

7 Q And the knee.

8 A And the knee, yes.

9 Q And subsequent to your reviewing this
10 video, whenever that was, did you read the testimony
11 that the Petitioner provided when he came back to court
12 to explain to the Judge what was going on in the video?

13 A No.

14 Q What is your role in this process, do you
15 think?

16 A I'm sorry?

17 Q What is your role in the workers'
18 compensation process?

19 A My role?

20 Q Yes.

21 MR. LYNN: I object.

22 THE COURT: Overruled. I'd like to know
23 what the Doctor thinks he's doing here.

24 THE WITNESS: The purpose is for me to
25 give expert medical opinion as to causation of an

1 injury, proper treatment for injury, because sometimes
2 I see patients that need more treatment that haven't
3 been properly treated, and I will so say. And then the
4 amount of disability, if any.

5 BY MR. WACHTEL:

6 Q Does the amount of settlement factor in,
7 any kind of settlement that the Petitioner's received
8 in the past, or third party settlement, does that
9 factor into your evaluation of disability?

10 A No.

11 Q Doctor, I'd like to present a report that
12 you issued in 2016 in a case called Calvin Lane. Do
13 you recall that?

14 MR. LYNN: Objection.

15 THE COURT: Basis of the objection?

16 MR. LYNN: Relevance, your Honor.

17 THE COURT: I can't tell you whether it's
18 relevant unless I hear the testimony. But have you
19 shown the document to your adversary?

20 MR. WACHTEL: I'm showing it to him now.

21 THE COURT: Certainly if there's
22 contradictory testimony, that might be relevant, but I
23 don't know to what extent.

24

25 (At which time, P-10, Dr. Canario Report

1 12/16/16 (Calvin Lane), was marked for identification.)

2

3 MS. SCHOBBER: Your Honor, since counsel
4 hasn't made copies for both of us ahead of time I would
5 appreciate if I could have an opportunity to review
6 them.

7 THE COURT: You can have all the time you
8 need. And we will allow the witness the same
9 opportunity.

10 BY MR. WACHTEL:

11 Q Doctor, this is a report that you wrote?

12 A Yes, it is.

13 MR. LYNN: Your Honor, I have now reviewed
14 the document, and I object because it's completely
15 irrelevant to the proceeding here today, which is what
16 is the Doctor's opinion on the nature and extent of
17 permanent disability and causation as to Mr. Langowski.

18 THE COURT: Well, I don't know what the
19 document says, so I can't make any ruling on relevance.
20 But he's also made some general comments about how he
21 assesses disability and I suspect, I don't know, that
22 that report may say something different. So to that
23 extent, I will overrule the objection and I'll allow
24 the Petitioner's attorney to proceed.

25 BY MR. WACHTEL:

1 Q Doctor, on the third page of that report
2 you indicated that the Petitioner already received
3 compensation of 50 percent, and you felt that more than
4 enough compensated him on the reopener?

5 A Right.

6 Q Does compensation factor into your
7 estimates of disability?

8 A No, if my disability rating is less than what
9 he's already received, then in my opinion there's no
10 increase in the disability. It's just common sense.

11 Q But in that case you felt that the
12 compensation that he received was enough?

13 A More than adequate. More than what I had
14 estimated, therefore I found no increase in his
15 disability. He's already beyond what I estimated.

16 THE COURT: But just to clarify. Your
17 testimony in this case was that the disability that you
18 placed upon the Petitioner was just for his current
19 conditions and did not consider his prior disability.
20 Isn't that what your testimony was?

21 THE WITNESS: In this -- the 15 percent
22 total that I estimated for his back surgery was for the
23 injury that he sustained occupationally at L2-3.

24 THE COURT: And did not take into
25 consideration his prior disability.

1 THE WITNESS: At the L5, did not take into
2 account the disability at the L5 level. I was not
3 asked to examine him as a physiologic whole for the two
4 different surgeries. However, I felt even with that
5 that he was capable of employment.

6 THE COURT: I understand. I just wanted
7 to make sure the record was clear.

8 You may have proceed.

9 MR. WACHTEL: I'd like to mark, and I've
10 given a copy to counsel, P-11.

11 THE COURT: What I need you to do is tell
12 me what this is. I'll save you the hassle. This is a
13 report by Dr. Canario in the case of Jimenez vs.
14 Shiseido America on February 4, 2014.

15
16 (At which time, Dr. Canario Report 2/4/14
17 (Jimenez) was received and marked as Exhibit R-11 for
18 identification.)

19
20 THE COURT: Would you like me to show this
21 to the witness?

22 MR. WACHTEL: Yes.

23 THE COURT: Take your time. You're
24 entitled to review the document.

25 MS. SCHOBBER: We were debating whether or

1 not this is a HIPAA violation for the Petitioner's
2 attorney to be handing out reports on other people to
3 several of us here and --

4 MR WACHTEL: They're public record and
5 part of the Court's file.

6 THE COURT: Let her finish her objection,
7 please.

8 MS. SCHOBBER: Well, Mr. Wachtel just told
9 me that we have no way of knowing that since, number
10 one, we've never seen them before, and number two, we
11 don't know anything about these particular cases and
12 they're not marked for evidence on those cases that you
13 refer to.

14 MR. WACHTEL: Actually in regards to one
15 that I'm about to ask questions about, Mr. Lynn was
16 Respondent's counsel.

17 MS. SCHOBBER: That does not necessarily
18 mean it's public record.

19 THE COURT: I'm not in the position to be
20 ruling on HIPAA violations because I don't have the
21 background from whence these reports come. I don't
22 know, are these clients of yours?

23 MR. WACHTEL: Yes.

24 THE COURT: Okay. I mean, you proceed at
25 your own peril, but I'll allow the questions at this

1 point, but I can't protect you on a HIPAA violation.

2 BY MR. WACHTEL:

3 Q Doctor, when you evaluated Dr. Jimenez on
4 behalf of Mr. Lynn, in the report you said that you
5 were aware of a large settlement.

6 A First of all, I don't believe Mr. Jimenez is a
7 doctor. And secondly, I didn't mess up.

8 Q Well, I did.

9 A But I do say on the second to last paragraph
10 that I was aware of a large settlement, yes.

11 Q What is the role of settlements and money
12 in making your decisions as to nature and extent --

13 A No, it has to do with percentages, not what
14 you're --

15 Q It's a simple question, Doctor.

16 A You're completely mixing up apples and oranges.

17 THE COURT: Guys, guys. Doctor, you
18 jumped the gun before he did. Make your question
19 succinct, and no argument here.

20 Please restate your question.

21 BY MR. WACHTEL

22 Q What is the role of settlements and money
23 in making your determinations?

24 A I can answer now?

25 Q I believe so.

1 THE COURT: If his question is done. Do
2 you think it's done?

3 THE WITNESS: I thought it was done
4 before, but anyway, now I'm sure it's done.

5 I am asked to give a percentage of disability.
6 In this case, Mr. Jimenez was 15 percent of total. If
7 the man has received in excess of 15 percent of total
8 there's a question of is there any more disability that
9 he is entitled to. If my disability rating is
10 15 percent of total and he's received more than
11 15 percent of total, common sense tells you that what
12 I'm saying is that he's already gone beyond what I
13 would have estimated, and he's not any worse.

14 BY MR. WACHTEL:

15 Q That's a good answer, but it didn't answer
16 the question.

17 What role does settlements and money have in
18 making your decision?

19 A I told you that percentages and numbers have a
20 great deal, because the question often is, is this case
21 more now at a different period -- this was a 2006
22 injury. So this report is from 2014, quite a few years
23 later. So obviously it's a reopened case, and the
24 question is, is he entitled to anything more than he's
25 already received. Therefore we come to numbers. Okay,

1 I don't know anything about dollars, I put it in
2 numbers. The numbers don't change. I found no
3 increase in that disability.

4 Q Do you believe that some Petitioners are
5 getting paid too much?

6 MR. LYNN: Objection.

7 MS. SCHOBBER: Objection.

8 THE COURT: He can answer the question if
9 he can.

10 THE WITNESS: Some get paid too much, some
11 get paid too little.

12 THE COURT: But, Doctor, I'm confused now.
13 And I've been listening carefully to your answers. Are
14 you telling me that in this case you put 15 percent of
15 total on his back and you put 7 1/2 on his leg, right?

16 THE WITNESS: Right.

17 THE COURT: I thought you told me earlier
18 that that did not assess any disability for his L5-S1
19 surgery.

20 THE WITNESS: That is correct.

21 THE COURT: How is that consistent with
22 you saying, if I thought he had already gotten
23 15 percent I wouldn't give him anything.

24 THE WITNESS: No, no, because it's a
25 different injury, it's a different complete body part.

1 I have no idea -- first of all, the L5-S1, I have no
2 idea what happened with that. I don't even know if it
3 was a worker's comp -- I think it's a workers'
4 compensation case.

5 THE COURT: So you're separating the
6 injury just by the disc level.

7 THE WITNESS: Separate, exactly. Separate
8 by what was done.

9 THE COURT: Thank you.

10 THE WITNESS: Judge, just to finish my
11 thought, and also the fact that the only treatment he
12 received was the L2-3 level. He wasn't treated for an
13 L5-S1 prior surgery in this matter at all, so we're
14 dealing only with, in this matter the question is the
15 L2-3 fusion and the knee injury secondary to an
16 accident and/or his job. That's the way I see it.

17 THE COURT: I understand. You made the
18 clarification when you separated out two different
19 discs, that's what I was going to try to clarify.

20 BY MR. WACHTEL:

21 Q Did you review the interrogatories in this
22 matter?

23 A I don't know.

24 MR. WACHTEL: I'd like to mark for P-11
25 the answer to interrogatories.

1 THE COURT: We're up to P-13. Answers to
2 interrogatories, I would assume by the Respondent.

3 MR. WACHTEL: Answered by the Petitioner.

4 THE COURT: We just marked P-12.

5 MS. SCHOBBER: So there's not P-13 yet.

6 THE COURT: We're up to 12.

7

8 (At which time, P-12, Answers to
9 Interrogatories, were marked for identification.)

10

11 BY MR. WACHTEL:

12 Q I'd like to direct your attention to the
13 answer to interrogatory number 10.

14 A Yes.

15 Q Did you have a chance to review that
16 answer?

17 A Yes.

18 Q And that is to what the Petitioner's
19 version of how he came to know the events of his back,
20 how it was related to work.

21 A Yes.

22 Q Is that what he told you?

23 A He told me that he -- he did not have a specific
24 incident such as on a specific date, June 10, 2011. He
25 told me that this was more occurred over a period of

1 time because his job entailed specific lifting. He did
2 not give me this type of a specific injury.

3 Q And it also refers to the Dr. Pan report.

4 A It says Dr. Pan operated on him, which he
5 related to his employment, yes.

6 MS. SCHOBBER: Counselor, do you have the
7 first page of the questions?

8 MS. WACHTEL: They're standard answers to
9 interrogatories.

10 MS. SCHOBBER: You have one page which has
11 all the answers and one page that has some of the
12 questions.

13 MR. WACHTEL: Here are the questions that
14 were served.

15 THE COURT: Can we attach the questions to
16 the exhibit?

17 MR. WACHTEL: Can do.

18 BY MR. WACHTEL:

19 Q Doctor, would you agree with me that the
20 United States Department of Health & Human Services
21 comes out with publications that talk about the work
22 relatedness of back injuries to the employment?

23 A Yes.

24 MR. LYNN: Objection, relevance.

25 THE COURT: Overruled.

1 THE WITNESS: Yes. I can't quote them,
2 but if you tell me that they do, then I believe you.

3 BY MR. WACHTEL:

4 Q Do you review those publication?

5 A No.

6 Q Why not?

7 A Because I have no interest in them.

8 Q Why not?

9 A Because they're not going to change my opinion.
10 I really don't care what the government says most of
11 the time.

12 Q Would you be surprised that a publication
13 in 1997 talks about -- does a summary of about 40
14 articles to determine whether or not an occupation
15 causes work-related back disability?

16 A I have no knowledge of this summary, and I can't
17 possibly comment on it unless I have a chance to read
18 the whole thing, which I have no desire to do.

19 Q Would you agree that some of the factors,
20 or at least five factors that would make something
21 work-related are heavy physical work --

22 MS. SCHOBBER: Objection. The Petitioner's
23 attorney is reading from a document that, again, we
24 don't have and isn't even proffered.

25 THE COURT: The document isn't being

1 offered, but you can ask him generically. But I'm not
2 going to put any credence to what you're reading out of
3 some study.

4 BY MR. WACHTEL:

5 Q Would you agree then, Doctor, that five
6 factors to determine whether or not something is
7 work-related would be whether or not they had to do
8 heavy physical work; would you agree that that would be
9 a factor?

10 A I'd like to hear the five factors.

11 Q Well, you don't agree to that one?

12 A It depends. Depends on what heavy physical work
13 is. But I would agree that it can be.

14 Q Okay. How about lifting and forceful
15 movements?

16 A It's -- you can't take these things out of the
17 air and say, well -- lifting and forceful movements can
18 mean anything, literally anything.

19 Q Would it be a factor in determining --

20 A No, I don't buy that. It has to be far more
21 specific than that.

22 Q How about bending and twisting?

23 A We all know that a twisting lift can cause a
24 back injury, so if you're telling me somebody is
25 lifting something and twists and has pain in his back,

1 I would say of course that it's causative.

2 Q How about if your whole body vibrates?

3 You were talking about a jackhammer before.

4 A Jackhammering can cause carpal tunnel, I said
5 that. Certain vibrations can cause certain types of
6 ailments, the classic is the carpal tunnel.

7 Vibratory -- I mean it depends on what it is.

8 Q And static work postures, could that be a
9 factor?

10 THE COURT: I'm sorry, I didn't hear that.

11 BY MR. WACHTEL:

12 Q Static work postures, could that be a
13 factor?

14 A Static? It depends on what you mean by static
15 work postures.

16 Q Staying in one position for a long period
17 of time. Could that be that factor in determining
18 whether or not a back injury is related to work --

19 A It depends on the position. If you're telling
20 me that I'm working in a cramped space and I'm bent
21 over for two hours and I can't move out of that space
22 and my back starts to hurt, I would agree. If you're
23 telling me I'm sitting in a nice comfortable chair for
24 two hours and my back starts hurting, I would say I
25 don't think it's from sitting in a comfortable chair.

1 Q Now, Doctor, I want you to assume the
2 following as a hypothetical. Assume that there's been
3 no opposing testimony from the employer as to what the
4 Petitioner did on a day-to-day basis. Okay?

5 A Okay.

6 Q Assume that there's no interrogatories
7 being submitted by the Respondent as to what the
8 Petitioner's job responsibilities were.

9 A Okay.

10 Q Assume that Petitioner really didn't
11 testify on cross-examination what he did as a
12 day-to-day basis, there was no opposition to that. Do
13 you understand that? It's probably inartfully worded,
14 but...

15 THE COURT: I don't understand it.

16 BY MR. WACHTEL:

17 Q That there was no cross-examination that
18 the Petitioner had an easy job.

19 A Okay.

20 Q And also as to this point -- well, we'll
21 come back to the knee.

22 I want you to assume that on Page 11 of the
23 transcript he was moving 55-gallon drums of oil to
24 chillers.

25 I want you to assume that on Page 16 of the

1 transcript he testified that he was using 50 to 60
2 pound cranes to get the oil drums off the truck twice a
3 day.

4 I want you to assume on Page 19 that he moved a
5 hundred pounds of tools.

6 I also want you to assume on Page 20 of the
7 transcript that he and a coworker would move 300-pound
8 condenser plates.

9 I'd also like you to assume that he moved heavy
10 things like cylinder heads, drums, boilers, tools, and
11 going up and down stairs.

12 Would you consider that to be heavy work?

13 MR. LYNN: Objection.

14 THE COURT: Basis?

15 MR. LYNN: Well, one, that hypothetical
16 question was not accurate at all.

17 THE COURT: I'll figure that part out.
18 I've got the page numbers written down. I heard the
19 question.

20 MS. SCHOBBER: Your Honor, I would object
21 because there is no reference to how often any of these
22 things were done. So how could the Doctor comment on
23 whether they'd be a factor.

24 THE COURT: That's for the Doctor to tell
25 us.

1 THE WITNESS: That's exactly what I was
2 going to say. First of all, it's hard to say what that
3 means. If you're going to ask me is lifting 300 pounds
4 heavy lifting, I would say yes. But who lifts
5 300 pounds? I mean very few people can possibly do
6 that. If you tell me the man lifted 300 pounds, had a
7 sudden onset of back pain radiating into his leg I
8 would say it's causally related 100 percent of the
9 time. But that's not what happened.

10 BY MR. WACHTEL

11 Q And I want you to assume that he used a
12 forklift to put drums in the truck.

13 A Okay.

14 Q I'm sorry, that was on Page 15.

15 On Page 17, he used a hand truck to get it where
16 it had to go up and down stairs.

17 I would like you also to assume on Page 23 that
18 he would have to change a Cogent generator ends with
19 other coworkers, and they had to put their backs into
20 it to move it.

21 I would also like you to assume on Page 26 that
22 he talks about a drum at Horizon House that he had to
23 bear hug and move up two steps.

24 Do you consider those bear hugging kind of
25 movements and jerking with a hand truck to be lifting

1 and forceful movements?

2 A If you have to lift a drum, I would concede that
3 that's a forceful moment. Having loaded and unloaded a
4 lot of the trucks myself using a hand truck, it's not
5 particularly difficult.

6 Q How often did you do it?

7 A For a lot of years, until I got into medical
8 school.

9 THE COURT: Until your back went out.

10 BY MR. WACHTEL:

11 Q Your back did go out, didn't it?

12 A Yes, I developed a herniated disc, I didn't
13 blame it on my occupation. I was treated. I still
14 have a numb great toe and L5 radiculopathy.

15 Q Do you blame it to the hand truck?

16 A No, I don't blame it on the hand truck. I don't
17 blame it on anybody, it was God's will.

18 Q So it's God's will on Mr. Langowski?

19 A I have no idea.

20 Q I want you to assume on Page 19 of the
21 transcripts he said -- on the first transcript, the
22 original testimony.

23 THE COURT: By the way, are all these page
24 references to what date?

25 MR. WACHTEL: The original testimony that

1 he first came in on.

2 THE COURT: I didn't get that memorized.

3 MR WACHTEL: I'm sorry, Judge.

4 THE COURT: That's all right.

5 MR. WACHTEL: That was on January 4, '17.

6 THE COURT: Thank you. I'm sorry for
7 interrupting. Go ahead.

8 BY MR. WACHTEL:

9 Q They did tune ups on a ladder, in a
10 stationary position on a ladder for a long period of
11 time.

12 And I also want you to assume that he had to
13 climb on top of the drums to get -- to change spark
14 plugs.

15 I'd also like you to assume that moving a, that
16 he had to move a condenser plate that was a big awkward
17 piece of equipment with a coworker.

18 Do you agree that those are bending and twisting
19 movements with awkward postures?

20 A I'm having a hard time picturing exactly what it
21 is, but it's certainly bending and lifting maneuvers,
22 which is what he told me when he described what he was
23 doing, that he did do bending and lifting of various
24 objects. I knew quite well that that was part of his
25 job.

1 Q Assume that on Page 21 of the transcript
2 he was using an electric impact gun to remove 50 or 60
3 bolts off the chiller.

4 Also I want you to assume that the truck that he
5 was going back and forth to work and to deliveries and
6 things like that on Page 35 of the transcript indicates
7 it had a worn out seat, causing discomfort in his back.

8 Does that count as the whole body vibrations
9 that you were talking about?

10 A No. If you're telling me that he had an injury
11 when he was driving in the truck, there was bouncing in
12 the seat and he hurt his back, I would say if there's
13 documentation of it I would find it to be related, to
14 be causally related. The simple fact that these things
15 occurred does not mean, because the majority of people
16 never develop these problems and they work on the same
17 jobs. Do you know how many people I've seen in my
18 private practice never have a problem in their life
19 with a particular back, and they work very, very -- you
20 know, longshoremen and really heavy workers and all the
21 Teamsters I used to work with.

22 I mean, you can have an injury and you can
23 certainly develop pain from that injury, but the simple
24 fact that you have a job, without documentation over
25 the years of problems and things occurring, I don't

1 find that that, that there's a reason to causally
2 relate it to the fact that you're employed.

3 Q So if the Judge finds that it was credible
4 that he had a worn out seat in his truck, it would be
5 compensable?

6 A No. No, absolutely not. I just said that I
7 don't find a worn out seat in a truck, whatever that
8 means, to be causative of having a back surgery.

9 Q Okay. Well, do you remember the last time
10 that you and I spoke in court?

11 A No, I purposely blocked that out.

12 Q Great. I didn't.

13 Do you remember testifying with Judge Moore in
14 the little courtroom -- in her chambers, actually, a
15 couple years ago on a case named Ed Housel.

16 A You're kidding me?

17 Q No.

18 A No, I don't remember.

19 Q That was August 26th of '16.

20 MR. LYNN: Objection.

21 THE COURT: August 26, 2016?

22 MR. WACHTEL: Yes. And Ms. Schober was
23 there for that one.

24 MS. SCHOBER: I don't remember that
25 either.

1 THE WITNESS: That's Judge Moore?

2 MR. WACHTEL: Yes.

3 THE COURT: I'm glad we have a transcript.
4 What's your question?

5 THE WITNESS: She was a good Judge.

6 BY MR. WACHTEL:

7 Q And at that time you indicated that the
8 Petitioner who filed an occupational claim in that
9 case, whose sole reason for filing an occupational
10 claim was bouncing up and down in a truck; do you
11 recall that?

12 A I have absolutely no recollection of this.

13 Q And would it surprise you, then, that your
14 testimony at that time that it was compensable for
15 bouncing up and down in the truck, but the majority of
16 the disability was preexisting?

17 MR. LYNN: Objection, your Honor. Again,
18 this is of zero relevance to this case. Every case is
19 different and factually sensitive.

20 THE COURT: I'm not so sure what the
21 Doctor's opinion in a completely different case would
22 have to do with his opinion here, but I get the purpose
23 of the cross-examination. I'll allow it. I don't know
24 what effect it has --

25 MR. LYNN: What is the purpose of the

1 cross-examination? There's been no testimony in this
2 case that there was any bouncing around the truck.
3 There's been no testimony --

4 MR. WACHTEL: Yes, there has.

5 MR. LYNN: There's been no testimony
6 there's been repeated carrying of drums. There's been
7 no testimony about many of the things that counsel is
8 asking.

9 THE COURT: For that very reason it may
10 have very little effect or weight in this case, but
11 it's cross-examination. I'm going to allow Mr. Wachtel
12 to cross-examine the Doctor.

13 MR. WACHTEL: And on Page 35 of the
14 transcript Mr. Langowski complained -- of the original
15 transcript, the January 17th, Mr. Langowski complained
16 of a worn out seat in his truck.

17 THE COURT: I understand that. I'll
18 accept that. You're looking at the transcript, I
19 haven't reread it.

20 MR. WACHTEL: I want the record to be
21 clear when we have that objection.

22 MS. SCHOBBER: The objection was not
23 regarding a worn out seat, it was that there was no
24 testimony regarding bouncing up and down on a seat for
25 an extended period of time.

1 BY MR. WACHTEL:

2 Q Okay. Would a worn out seat cause injury
3 to a back over time?

4 A It depends.

5 MR. LYNN: There was no testimony about a
6 worn out seat.

7 THE COURT: Mr. Lynn, I understand that.
8 I'm going to let him get through his cross-examination.
9 I'm not sure what it has to do with this case. I'm
10 going to allow it because it's cross-examination. If
11 the Doctor has sworn testimony in another case that may
12 be relevant here, fine. I don't know to what extent
13 it's tied up quite yet, but I'm going to allow it.

14 BY MR. WACHTEL:

15 Q Doctor, you indicated in your report, you
16 said regardless of cause. That these numbers were
17 provided regardless of cause.

18 A That's correct.

19 Q But today you're saying not related?

20 A I didn't relate it. If I thought it was
21 related, I would have said it was related. Could have
22 been from the motorcycle accident, could have been from
23 an injury at home he hasn't told us about, I don't
24 know. I didn't feel it was related to the injury,
25 still he did have an injury and he had surgery. So

1 regardless of whatever caused it, God knows what it
2 was, I found to him to have disability.

3 Q But you don't flat out say that it's not
4 related, that work could be a factor?

5 A No, I flat out said it's not related.

6 Q Do you have an opinion overall, as an
7 industrial working unit as the Petitioner, regardless
8 of the occupational exposure, do you have an opinion
9 with the preexisting and the new surgery that he had,
10 do you have an overall number for him?

11 A Well, I didn't at that time. I felt that he was
12 employable, I felt that he had a very good result. I
13 mean he had a very benign examination for three back
14 surgeries and two fusions at different levels. Of
15 course, it would have been higher than the 15 I
16 estimated. It would not have been 30, probably --
17 again, you're really making me guess, but in the range
18 of 22 1/2 to 25.

19 Q Preexisting or overall?

20 A No, overall. That would be for considering the
21 other surgery.

22 Q And as far as the knee, let's go back to
23 that.

24 A You haven't forgotten.

25 Q I haven't forgotten.

1 A Good.

2 Q Did you?

3 A I never forget.

4 Q You understand that that was an admitted
5 accident by the carrier?

6 A He told me he fell, that's a legitimate
7 accident.

8 Q You understand that Dr. Warshauer, one of
9 the treating doctors who provided the surgery, related
10 that to the accident?

11 A I related it too.

12 Q But you just said regardless of cause, and
13 not --

14 A No, no, that was the back. The knee was a
15 different story. The knee, there was a specific fall
16 that he had injured his knee, we all agree to that. So
17 the 15 was regardless of cause, the 7 1/2 was because
18 of the accident that happened when he hurt his knee.

19 Q How do you define permanent disability?

20 A A loss of body function.

21 Q And how did you determine that it was only
22 7 1/2?

23 A Because I've examined 40,000 of these knees in
24 the past.

25 Q The left or the right?

1 A Both.

2 MR. WACHTEL: I have nothing further, your
3 Honor.

4 THE COURT: Ms. Schober?

5

6 CROSS-EXAMINATION

7 BY MS. SCHOBER:

8 Q I just have one question, Doctor. You
9 stated before that you hadn't seen the Petitioner since
10 you last examined him in 2015, correct?

11 A That is correct.

12 Q And you'd agree with Petitioner's attorney
13 that you couldn't state whether he was better or worse
14 or the same since then, correct?

15 A Correct.

16 Q And you're aware that Dr. Weiss saw the
17 Petitioner on several occasions, the last being 2014?

18 A I am aware.

19 Q So would it be fair to say that Dr. Weiss
20 or anyone couldn't say whether Petitioner had gotten
21 worse since he last saw the Petitioner?

22 A Of course.

23 Q But you've seen him more recently than
24 Dr. Weiss?

25 A I did.

1 MS. SCHOBBER: That's all I have, your
2 Honor.

3 THE COURT: Mr. Lynn?

4 MR. LYNN: I have no redirect.

5 MR. WACHTEL: Nothing else.

6 THE COURT: I have P-9, 10, 11 and 12, all
7 for identification.

8 MR. WACHTEL: Yes, I think so. I'm not
9 moving any of them into evidence.

10 THE COURT: Let me get my records straight
11 here.

12 The State rests?

13 MS. SCHOBBER: Yes, your Honor.

14 MR. WACHTEL: I've already rested.

15 THE COURT: Okay, it's a wrap.

16 (Whereupon, the witness was excused.)

17 (Whereupon, this matter was adjourned.)

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C E R T I F I C A T E

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