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17 May 25, 2023	17
18 3:02 p.m.	18
19	19
20 Remote Proceeding	20
21 Houma, Louisiana	21
22	22
23 Jabriel Alshehabi	23
24 Digital Reporter	24
25 Notary Commission No. 170827	25
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1 APPEARANCES OF COUNSEL	1 (The proceedings commenced at 3:02 p.m.)
2 On behalf of the Plaintiff, Hunter Moak:	2 THE VIDEOGRAPHER: Good afternoon. We are now
3 VUK VUJASINOVIC, ESQ.	3 on the record. The current time is 3:01 p.m. Today's
4 VB ATTORNEYS	4 date is May 24, 2023.
5 6363 Woodway Drive, Suite 400	5 This begins the videotaped deposition of
6 Houston, Texas 77056	6 Trevor Bardarson in the matter of Hunter Moak versus
7 713-224-7800	7 Skanska USA. My name is Sanam Murphy. I am your remote
8 vuk@vbattorneys.com	8 videographer. Your court reporter is Jabriel Alshehabi.
9 (Appearing via Zoom)	9 Counsel, will you please introduce yourselves,
10 On behalf of the Defendant, Skanska USA Civil SE, Inc.:	10 and the witness will be sworn.
11 MATT POPP, ESQ.	11 MR. VUJASINOVIC: Vuk Vujasinovic for Mr.
12 SCHOUDEST BAMDAS SOSHEA BENMAIER & EASTHAM PLLC	12 Moak.
13 365 Canal Street, Suite 2730	13 MR. POPP: Matthew Popp for Skanska USA Civil
14 New Orleans, Louisiana 70130	14 SE, Inc.
15 504-561-0323	15 THE REPORTER: My name is Jabriel Alshehabi,
16 mpopp@sbsb-eastham.com	16 Notary Public in and for the State of Louisiana.
17 (Appearing via Zoom)	17 Before appearing remotely, Mr. Bardarson
18 Also Present via Zoom:	18 identity confirmed by his medical ID and badge, and the
19 Sanam Murphy, Videographer	19 witness is currently located in Houma, Louisiana.
20	20 TREVOR BARDARSON
21	21 having been first duly sworn, testified as follows:
22	22 DIRECT EXAMINATION
23	23 BY MR. POPP:
24	24 Q. Good afternoon, Mr. Bardarson.
25	25 A. Good afternoon.

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1 Q. My name is Matthew Popp. I represent
2 Defendant Skanska USA Civil SE, Incorporated, in this
3 case. Would you please state your full name?
4 A. Trevor David Bardarson.
5 Q. So what's your occupation?
6 A. I'm a physical therapist.
7 Q. How long have you practiced in the field of
8 physical therapy?
9 A. Twenty-nine years.
10 Q. Are you licensed by anybody?
11 A. Yeah, the State of Louisiana and the State of
12 Mississippi.
13 Q. And when did you obtain your license in the
14 State of Louisiana?
15 A. 1998.
16 Q. And when did you obtain your license in the
17 State of Mississippi?
18 A. Was that April, maybe, of this year? At the
19 request of doing an FCE out of state.
20 Q. Your Louisiana license, have you held it
21 continuously since you obtained it?
22 A. Yes.
23 Q. Has it ever been suspended or revoked or in
24 any -- subject to any disciplinary proceedings?
25 A. No.

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1 Q. Have you conducted functional capacity
2 evaluations?
3 A. Yes.
4 Q. When did you start conducting functional
5 capacity evaluations?
6 A. I've been doing them most of my career, but 25
7 years ago when I moved to Houma, Louisiana, I started
8 doing them very regularly, you know, to the tune of, you
9 know, three to four FCEs a week, since that time period.
10 Sometimes it varies. Sometimes I only do two, sometimes
11 I go five. It just depends.
12 Q. Over the course of your career, can you
13 estimate how many functional capacity evaluations you've
14 conducted?
15 A. Thousands, and I -- no other number.
16 Q. I'm going to show you your CV.
17 A. Okay.
18 Q. At least I think I am. Oh, bear with me one
19 second. I'm sorry for the delay.
20 A. If I could only share my screen and pull up my
21 CV on this end if that would make things easier.
22 Q. I think I got it.
23 A. Yeah, looks like it. Something's happening.
24 Q. Oh, here we go. All right.
25 A. Yeah, that's not the CV, but that one is up

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1 top there. Yeah, there we go.
2 Q. Okay. We received this either -- well,
3 yesterday from you. It is -- I believe it's 19 pages,
4 and I can scroll through it. Oh, I'm sorry, 14 pages.
5 I marked it as Exhibit 2.
6 I'm going to -- I've marked the notice,
7 amended notice of oral and videotaped deposition as
8 Exhibit 1. I'll attach that as Exhibit 1. And then I
9 marked your CV as Exhibit 2.
10 (Exhibits 1 and 2 were marked for
11 identification.)
12 BY MR. POPP:
13 Q. It says revised 12/13/17. Has it been revised
14 since December 13th of 2017?
15 A. Yes. Let's see. So that's the beginning of
16 presentation, instruction, and analysis, so yeah, that's
17 an old version. I wonder where you all got that one
18 from. I can send an updated one.
19 Q. Oh, okay. Okay. Well, can you see -- well,
20 what can you see on your screen right now?
21 A. So I can see the CV where it says experience,
22 president, WorkSaver Employee Testing Systems, CEO, ISR,
23 physical therapy.
24 Q. Okay. Is that information accurate?
25 A. Yes.

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1 Q. And then moving up to director of
2 rehabilitation, is that information accurate as well?
3 A. Yeah. Yeah, that was way back in '97, '98.
4 Q. Okay. Well, would you please provide us an
5 updated version of your CV?
6 A. Sure.
7 Q. And we'll attach that as Exhibit 2. What's
8 your educational background?
9 A. So I graduated from physical therapy in 1994.
10 Back then, it was a bachelor in physical therapy, and
11 what I have is two years of prerequisites, three years
12 of PT school.
13 Today, it's a doctorate-level of physical
14 therapy where they have four years of prerequisites and
15 three years of PT school, so I basically have the same
16 PT school training.
17 I'm also a clinical instructor for some of the
18 physical therapy schools, Louisiana State University of
19 New Orleans, Shreveport, et cetera.
20 I'm a Board-certified orthopedic specialist in
21 physical therapy. Been like that since 2003, I believe,
22 and then, you know, I'm certified in functional capacity
23 evaluations, and been doing those for over 25 years.
24 Q. And you graduated from the University of
25 Manitoba in 1994?

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1 A. Yes. Yeah, that's in Canada. I'm from Canada
2 originally.
3 Q. All right. And what body or organization did
4 you obtain your Board certification from in 2003?
5 A. The American Physical Therapy Association
6 Specialty Boards.
7 Q. Have you ever been accepted as an expert in
8 the field of physical therapy in conducting functional
9 capacity evaluations in an expert course?
10 A. Yes, and --
11 Q. I'm sorry. In any federal courts.
12 A. Yes, federal, state, and Worker's Comp courts.
13 Q. What different states?
14 A. I know Louisiana. I do -- I get FCEs from all
15 over, so I don't know if I've been tendered an expert in
16 some other states. I'm assuming I have, but definitely
17 Louisiana, and then federal court and then Worker's
18 Compensation courts here in Louisiana.
19 Q. Have your qualifications ever been rejected by
20 any court?
21 A. Not to my knowledge, no.
22 Q. Could you please explain to the jury what a
23 functional capacity evaluation is?
24 A. A functional capacity evaluation is a
25 systematic battery of tests to try and determine what

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1 somebody's physical ability is for working. That's
2 probably the most succinct explanation. I don't know if
3 you wanted me to expound on that.
4 Q. No. What are the different purposes for
5 conducting a functional capacity evaluation?
6 A. Well, so the -- there's two main reasons that
7 I'm referred functional capacity evaluations, is to
8 determine two things, essentially: The ability of the
9 individual and the validity of effort that the
10 individual gives when they come for the FCE.
11 So when an individual comes for an FCE, I have
12 to answer two questions. Number one, what can they do,
13 and number two, did they give a reasonable effort. Did
14 they try?
15 And so if I can answer those two, you know, if
16 I can answer the second question with confidence, I'm
17 very confident in the first answer about what they can
18 do. If I've got questions about the degree of effort,
19 then I'm not confident in what they can really do.
20 And it's important that you have these
21 consistency checks in the FCE testing process because if
22 somebody comes in and they just, you know, lay down on
23 the floor and say I can't do anything, if you take them
24 simply at their word, they're going to be totally
25 disabled, so you need to have some kind of objective

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1 measures to correlate what their subjective complaints
2 that would help to validate their symptom presentation.
3 Q. Have you had the opportunity to conduct a
4 functional capacity evaluation with Hunter Moak?
5 A. Yes, I did.
6 Q. What was the date of that functional capacity
7 evaluation with Mr. Moak?
8 A. It was May 13, 2023.
9 Q. Did you prepare a report on that?
10 A. Yes, I did.
11 Q. And how many reports did you prepare?
12 A. Just one. I think I --
13 Q. Did you make it -- I'm sorry. Did you make
14 any revisions?
15 A. I did. I sent the revision when I realized
16 that on Page 2, I hadn't updated the weight. I took his
17 -- I got a verbal on his weight, and then I checked it
18 afterwards and updated it on Page 1 but not on Page 2.
19 So that was the only update, was I just changed the
20 weight from --
21 Q. Okay.
22 A. -- 170 to 181.
23 Q. Okay. No other changes to the functional
24 capacity evaluation other than his weight?
25 A. Correct.

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1 Q. What were the results of his functional
2 capacity evaluation?
3 A. I didn't find --
4 MR. VUJASINOVIC: Objection to the form. Can
5 you all hear me?
6 MR. POPP: Yes.
7 MR. VUJASINOVIC: Okay. Good. Objection,
8 form. Sorry. Sometimes I might make some objections,
9 and if you all could just, you know, let me get them
10 out, I appreciate it.
11 MR. POPP: Sure. Well, then strike the
12 question.
13 BY MR. POPP:
14 Q. What were the results as to what you found to
15 be Mr. Moak's ability to perform work?
16 MR. VUJASINOVIC: Objection, form.
17 THE WITNESS: So we have a current estimated
18 physical demand level, capacity, on Page 1, and I state
19 a physical demand level of light to medium with
20 restrictions was demonstrated, but he likely has a
21 greater ability, due to the presence of submaximal
22 efforts.
23 And then, on the question of did he
24 demonstrate sufficient ability to return to previous
25 employment, he did not demonstrate sufficient ability to

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1 return as a deckhand, but I found I didn't get good
2 effort either.
3 MR. VUJASINOVIC: Objection, nonresponsive.
4 BY MR. POPP:
5 Q. What did you do to assess Mr. Moak's ability
6 to perform?
7 A. So the --
8 MR. VUJASINOVIC: Objection to form.
9 BY MR. POPP:
10 Q. Well, hold on. Hold on.
11 MR. POPP: What's wrong with the form of the
12 question?
13 MR. VUJASINOVIC: Any -- we're objecting to
14 any questions about anything on validity. We're
15 objection on basis on the qualifications, methodology,
16 Daubert.
17 MR. POPP: Okay. Well, my first two --
18 MR. VUJASINOVIC: If that's going to be --
19 MR. POPP: I'm sorry. Go ahead. I'm sorry.
20 MR. VUJASINOVIC: Matt, I was just going to
21 say if you want to give me a running objection on that,
22 or I'll have to keep jumping in.
23 MR. POPP: Sure, but my first two questions
24 were only to as ability. So I mean, are you --
25 MR. VUJASINOVIC: Yeah, well, yeah --

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1 MR. POPP: -- objecting to the entire or --
2 MR. VUJASINOVIC: Well, when you asked him
3 about that last time, he already started talking about
4 validity, so to preserve my objections, again, anything
5 on validity, we're objecting on qualifications,
6 methodology, Daubert, so that's my basis.
7 MR. POPP: Okay. All right.
8 BY MR. POPP:
9 Q. Well, then, Mr. Bardarson, strictly as to the
10 -- Mr. Moak's ability to perform work when -- at what
11 levels, what were the results of the FCE with Mr. Moak?
12 A. He tested at a light to medium with
13 restrictions.
14 Q. Okay. And did you -- were you able to
15 identify exactly what restrictions?
16 A. Yes.
17 Q. What were the restrictions?
18 A. So the restrictions are listed on -- a short
19 summary on Page Number 4, which talks about occasional
20 lifting of up to 30 pounds from waist level, 20 pounds
21 from floor level, frequent lifting of 15 pounds from
22 waist level, 10 pounds from floor level, occasional
23 carrying of up to 10 pounds, limit sustained crouching
24 to rare, limit standing and walking to occasional. And
25 then I further delineate his estimated functional

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1 capacities on Page Number 5 of the report.
2 Q. Okay. Those sustained static postures and
3 dynamic activities?
4 A. Yes.
5 Q. Okay. And you've mentioned some of the tests
6 that you performed. What's the listing of tests that
7 Mr. Moak conducted on May 13, 2023?
8 A. So when you say the listing, the functional
9 tests that we did?
10 Q. Yes, sir.
11 A. Sure. So we did a horizontal transfer lift,
12 waist to shoulder lifting, floor to waist lifting, floor
13 to shoulder lifting, a carrying task, both one-handed
14 and two-handed. We did a -- tested a kneeling and
15 crouching. We did treadmill testing, stairs, ladder,
16 pushing and pulling testing, and we -- what's called a
17 near arm isometric lift test.
18 Q. Along with the FCE report, there is a --
19 there's a technical, a six-page JTEK Data.
20 A. Okay.
21 Q. What is that?
22 A. So that's -- that, basically, is just a
23 hardcopy I printed out for myself, but I've embedded it
24 into the report itself. So it's -- that's encompassed
25 on Pages, let's see, 21 to 26 of the report, and that's

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1 just some data, isometric testing data that we use some
2 computer integration to help collect the data.
3 Q. Okay. And there's also, in addition to the
4 test you told me, there's also grip strength and pinch
5 tests?
6 A. Oh, yes. So yeah, so we did -- in terms of
7 functional testing, we did grip testing in a variety of
8 different positions, as well as pinch strength testing.
9 Q. As far as horizontal lifting, the horizontal
10 lifting test, how many times did he conduct that test,
11 as far as repetitions?
12 A. Well, we do that -- we did -- it was four
13 different repetitions with a progressive increase in
14 weight as we went along.
15 Q. And is there a specific number of repetitions
16 that the person performing the functional capacity
17 evaluation is supposed to complete?
18 A. Well, he was --
19 MR. VUJASINOVIC: Objection, form. Objection,
20 form.
21 BY MR. POPP:
22 Q. Go ahead.
23 A. Can I answer the question? Okay.
24 Q. Sure.
25 A. So yeah, what we're looking for is a single

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1 lift, and then we ask the individual how they managed
2 that, how they feel, if it's something they think they
3 can do as part of a regular work day, what they're
4 subjective weight rating is, et cetera, and if they feel
5 they can do more, then we progress the weight up as a
6 way to get an occasional lifting ability, which would be
7 lifting a weight occasionally.
8 From a work perspective, it would be lifting
9 it once or twice per hour, but every hour, as part of a
10 way of giving it --
11 Q. Okay. What weight did Mr. Moak start with?
12 A. Started with 10 pounds, which is an empty box.
13 Q. And then tell me how did it increase up to 30?
14 A. Yeah, we went up in 10-pound increments up to
15 40.
16 Q. Okay.
17 A. He felt he could not do 40 pounds safely and
18 dependably as part of work, and he couldn't handle any
19 more weight.
20 Q. Okay. And his waist to shoulder level
21 lifting, how many repetitions was he able to complete?
22 A. Again, so we did single repetitions, adding
23 weight as we went along, so it was a total of four
24 repetitions, starting at 10 pounds and progressing at 10
25 pounds per repetition, so he finished at 40 pounds but

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1 reported that wasn't something he'd be able to do as a
2 regular part of work, but did those four lifts up to 40
3 pounds.
4 Q. Okay. And floor to waist, how many
5 repetitions and what weight gradations?
6 A. Just three repetitions on that. Again, we
7 started at 10 pounds. We worked our way up. He didn't
8 feel at 30 pounds he would be able to do that as part of
9 a regular workday or be able to handle any more weight.
10 Q. And floor to shoulder, how many repetitions
11 and then what weight?
12 A. The floor to shoulder, three repetitions.
13 Again, we started at 10 pounds and stopped after the
14 completion of 30 pounds, where he felt he wouldn't be
15 able to lift that weight as part of a regular workday or
16 be able to lift any more weight.
17 Q. All right. And then the carrying, how many
18 repetitions was Mr. Moak able to complete on the
19 carrying exercise?
20 A. We have a 50-foot distance. We started with
21 10 pounds, and this was a two-handed carry. 10 pounds
22 was basically an empty box. He was able to do 4
23 repetitions of varying weight.
24 We did a 10-pound carry, which he reported he
25 could do, so we progressed by 10 pounds and did a

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1 20-pound carry, which he reported he couldn't do as part
2 of a regular workday. So we decreased it to 15. He
3 reported -- and he repeated the carry.
4 He reported that wouldn't be something he'd be
5 able to do as part of work either. And then we
6 decreased the weight to 12-and-a-half pounds, and
7 repeated it again, and he, again, he reported he
8 wouldn't be able to do that as part of a regular
9 workday.
10 Q. And then the kneeling test, other than
11 kneeling, did Mr. Moak do anything while kneeling?
12 A. No. We just -- we have just a quick kneeling
13 test. He was able to get into that position and get his
14 foot comfortable, the one he had more difficulty which
15 -- with was the crouching test, where he had subjective
16 reports of pain.
17 Q. Okay. And well, then crouching, did he
18 conduct any activities while crouching, or is it simply
19 getting in the crouching position?
20 A. It was just getting in the crouching position.
21 Q. All right. And then, the treadmill test, how
22 did he perform on the treadmill test?
23 A. On the treadmill, he walked -- let me just
24 pull it up here. So he walked for 2 minutes, 30 seconds
25 at 0.04 of a mile -- well, he went 0.04 of a mile, and

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1 his speed was, I think, 1 mile per hour, if I remember
2 correctly. And then he had to discontinue due to
3 reports of pain.
4 Q. With regard to the stair climbing, did you
5 measure that by steps or by time? How did you measure
6 his stair climbing?
7 A. It was a number of steps. So we had him do
8 four steps up and down times five repetitions. He was
9 able to complete them all with reports of pain.
10 Q. And you have noted in your report he reported
11 that he had some pain with stairclimbing but ambulated
12 with a reciprocal gait. What is a reciprocal gait?
13 A. So that means when they walk step after step,
14 alternating feet, generally, the expectation is when
15 somebody's having a lot of pain, especially at the
16 severe level as reported by Mr. Moak, my experience has
17 been with FCEs and with just general patience is they
18 all -- they'll go one step at a time with their good
19 leg, and then bringing their bad leg, you know, up
20 behind it to reduce the weight bearing on that leg.
21 MR. VUJASINOVIC: Objection, nonresponsive.
22 BY MR. POPP:
23 Q. All right. And then what is the ladder
24 exercise?
25 A. Climbing a step ladder. So we had him do two

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1 rungs times five repetitions, which would be a total of
2 10 steps. He reported he had to stop after 6 of them,
3 reported his pain was a 9 out of 10, and for note, his
4 heart rate was 72 beats per minute, which is well into
5 resting.
6 MR. VUJASINOVIC: Objection, nonresponsive.
7 BY MR. POPP:
8 Q. And pushing and pulling, is that done at the
9 same time, or is -- are they separate tests?
10 A. Separate tests.
11 Q. What is the pushing test?
12 A. So we have a dynamometer and an immovable
13 object, and we have him -- integrated into a computer
14 and this force gauge, we have him push for five seconds,
15 isometrically into the object, relax. He gets a
16 15-second rest period. We do that three times.
17 Q. And the pulling?
18 A. So again, we hook up to another immovable
19 object, and we do that same activity in reverse.
20 There's a force gauge hooked into a computer. The
21 individual leans back and pulls on that immovable object
22 for five seconds, doing three repetitions.
23 Q. The computer measures the force that Mr.
24 Moak's applying in the pushing and pulling test?
25 A. Yes.

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1 Q. Does the computer assess Mr. Moak's force in
2 any other test?
3 A. Yes. So in the -- so the near arm lift test,
4 the pushing, the pulling, and then in all the grip and
5 pinch testing.
6 Q. Okay. And I hadn't gotten to those yet. So
7 the near arm lift test, what is that? How do you
8 perform that?
9 A. So the -- there's a T-handle that the
10 individual holds onto. His arms are down by his side,
11 his elbows bent to 90 degrees. It's pretty much like
12 doing a bicep curl where you're lifting up.
13 It's -- we hook onto an immovable object, and
14 isometrically, we have them lift that up. And in this
15 case, Mr. Moak demonstrated highest maximum force of 124
16 pounds. His average force was 95 pounds in that
17 position.
18 Q. And the grip strength, is that the overall
19 grip and the pinch?
20 A. Correct. So we have the -- the grip is done
21 in a number of different positions. It's a grip
22 strength dynamometer that has five different positions
23 you can place the handle into for squeezing, squeezing
24 from a very close near grip to a very far grip.
25 So there's five different positions where the

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1 -- for the standard grip, we do it in Position 2, and
2 the maximum voluntary effort test, we do it from
3 Position 1 to Position 5.
4 Q. Now, with regard to validity, what has been --
5 what training have you had in determining whether or not
6 a subject is providing a valid effort?
7 A. Well, so there's a body of literature that's
8 been around for a long time on validity of symptom
9 presentation and validity of effort, and so with the
10 development of this FCE over the years, we've collected
11 this information. We have two binders full of the
12 different publications that talk about it.
13 And it really comes down to consistency of
14 symptoms, certain responses to certain tests when we're
15 looking for exaggeration of symptoms, looking for, from
16 a symptom perspective, things that make anatomical
17 sense.
18 And then from a functional standpoint, things
19 that make biomechanical sense. You know, for example,
20 when you're doing the grip strength testing, the way
21 your muscles work is they're strongest in mid-range.
22 So when your muscles are fully contracted or
23 fully stretched out, that's where they're weakest. So
24 in the grip testing, for example, which is peer-reviewed
25 published literature, we expect the individual to be

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1 stronger in Positions 2, 3, and 4, weaker in Position 1,
2 which creates a bell-shaped force curve, is what we
3 expect from Position 1 all the way to Position 5, you
4 know, from side to side, where you're stronger in
5 Positions 2 to 4 than you are in 1 to 5, which
6 biomechanically we know your muscles are stronger in
7 those positions.
8 MR. VUJASINOVIC: Objection, nonresponsive.
9 BY MR. POPP:
10 Q. Have you attended any seminars or continuing
11 education courses that discuss and educate on validity
12 assessment?
13 A. Yes. We -- you know, we did the, I think, the
14 Matheson course. I'm trying to think of what other
15 courses I did. I know, you know, we've been presenting
16 at the same conferences as Susan and Dennis Igerhagen --
17 Isernhagen, who had an FCE protocol from long ago.
18 A lot of the -- I've done training with my --
19 a Dr. Richard Bunch, who's a PhD, PT, former professor
20 at LSU New Orleans Medical School, and then Dr. Bunch
21 and I actually worked together on the development of
22 this protocol.
23 So for many, many years now easily the last 20
24 years, you know, I would be the one presenting at these
25 conferences, talking about these things.

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1 And just to talk a little bit more about what
2 I do, so I'm the president of WorkSaver Employee Testing
3 Systems. We design functional tests, which is in
4 essence an FCE test, for companies across the country to
5 make sure that the employers they are hiring are
6 physically capable of doing the job in a safe and
7 dependable manner.
8 And so we train clinics all over the United
9 States to do this type of testing. We've got
10 240-something clinics in 43 different states. We've
11 done over 22,000 of these tests just last year.
12 So basically, you know, I'm looked at as one
13 of the -- and as I was called in conference the other
14 day, one of the gurus on FCE testing. So this is
15 something I've been doing for a long time and have read
16 the research, understand how this all works, and it's
17 basically based on symptom presentation and
18 biomechanical presentation.
19 MR. VUJASINOVIC: Objection, nonresponsive.
20 BY MR. POPP:
21 Q. Do you do validity assessments within every
22 functional capacity evaluation that you conduct?
23 A. Yes.
24 Q. And did you -- going back to the University of
25 Manitoba, were there any courses during college and

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1 getting your -- the five-year program to get your
2 physical therapy degree, were there any courses in
3 validity assessment?
4 A. There was not courses in there, but there was
5 courses on biomechanics. So when you're looking at the
6 validity assessment, what you're looking at is
7 biomechanical consistency, right? And so that's
8 something that we were taking in physical therapy
9 school.
10 If you notice from a functional capacity
11 evaluation standpoint, it is done primarily by physical
12 therapists across the country. You know, physical
13 therapists, as part of their training, this is a normal
14 task that a physical therapist -- a normal test that
15 physical therapists perform across the country, and it
16 really dovetails well with the training that's provided
17 at the school.
18 MR. VUJASINOVIC: Objection, nonresponsive.
19 BY MR. POPP:
20 Q. And the biomechanical aspect of it, is that
21 something that is accepted within the field of physical
22 therapy?
23 A. Yes.
24 Q. And if you could, kind of take -- tell me how
25 you started to get involved with validity assessment,

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1 beginning with after college. When did validity
2 assessment start to occur in the course of your career?
3 A. Validity assessments is always a necessary
4 part of a functional capacity evaluation and has been
5 around since I've been doing it. So yes, I do validity
6 assessments as part of the FCE process.
7 The important thing that you have to be able
8 to answer, as I alluded to earlier, is what can the
9 individual do and did they try and give reasonable
10 effort. And the only way we can do that is by setting
11 up validity tests to look at the degree of effort the
12 individual is giving and are there discrepancies between
13 the different types of tests, which should be similar
14 but are turning out different, causing a validity
15 question.
16 Q. And the assessing and getting educated on and
17 learning more and more about validity assessment, has
18 that been a continuing process throughout the course of
19 your career, starting in the '90s through the 2000s
20 through the 2010s?
21 A. Yes.
22 Q. And how long have you been president of
23 WorkSaver Employee Testing Systems?
24 A. Since 2014, I have been working with WorkSaver
25 in one capacity or another 2000.

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1 Q. And have you been working with -- you
2 mentioned Richard Bunch. Have you been working with
3 Richard Bunch since 2000?
4 A. Yes.
5 Q. As far as heart rate and blood pressure go,
6 are those two factors that can be looked at to see if
7 there's a valid effort being given?
8 A. Yes.
9 MR. VUJASINOVIC: Objection, form.
10 THE WITNESS: Yeah. So blood pressure and
11 heart rate are two indicators that could be used to --
12 for validity of testing. If an individual is reporting
13 they're giving a very tremendous effort or difficult
14 effort and their heart rate isn't rising in response,
15 that's very unusual.
16 Another example is if an individual is
17 reporting severe pain, but yet their heart rate and
18 blood pressure are completely normal, that brings into
19 question the validity of their subjective complaints,
20 because the expectation is if somebody's having pain
21 levels that high, your heart rate is going to be much
22 higher and your blood pressure is going to be much
23 higher. You're not going to be at very, very low
24 resting levels.
25 And that's something that I've seen in my

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1 career, having done thousands of these tests, people who
2 are, you know, in pain that their objective findings
3 correlate with their subjective complaints. One of the
4 other findings you have is elevated heart rate and blood
5 pressure. And another --
6 MR. VUJASINOVIC: Objection, nonresponsive.
7 THE WITNESS: -- thing that can impact blood
8 pressure is if somebody's taking a beta blocker, which
9 can artificially lower the heart rate, but Mr. Moak
10 wasn't doing that in this case.
11 MR. VUJASINOVIC: Sorry to interrupt.
12 Objection, nonresponsive.
13 BY MR. POPP:
14 Q. What was -- did Mr. Moak report taking any
15 medication at the time of the FCE?
16 A. No, I don't believe he took any medication.
17 Q. Have you been to any seminars or education or
18 read any medical literature that establishes pain, and
19 specifically intense pain, causing an increase in blood
20 pressure as well as pulse rate?
21 A. Well, that's the generally accepted principle
22 in medicine. If you speak to physicians, physical
23 therapists, occupational therapists across the country,
24 and if you ask them is there an expectation that heart
25 rate and blood pressure would be elevated in conjunction

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1 with severe pain, the answer would be invariably yes,
2 unless there's something artificially lowering it.
3 MR. VUJASINOVIC: Objection, nonresponsive.
4 BY MR. POPP:
5 Q. And as far as Mr. Moak's pre-FCE status and
6 post-FCE status, was there any significant difference
7 between his pre-FCE pulse rate or heart rate and blood
8 pressure versus his post-FCE heart rate and blood
9 pressure?
10 A. So there was no -- so no, there wasn't a
11 significant difference between the two, and you know, in
12 his pre-FCE status where he had a pain report of 7 out
13 of 10, which is severe, his heart rate was 63, which is
14 at the low end of resting. So normal resting is 60 to
15 100 beats per minute. And his blood pressure was 100
16 over 64, where normal is generally considered 120 over
17 80. So he had low resting heart rate, low blood
18 pressure, yet he had a pain of 7 out of 10.
19 And then, at the end of testing where he had a
20 9 out of 10 pain, which I think we reviewed at the
21 beginning of the test, you know, 10 is so bad it's like
22 somebody set you on fire, we got to call the ambulance,
23 send you to the hospital, so he was one step away from
24 there.
25 His heart rate went from -- was at 65, so it

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1 was two beats higher than when he started, and his blood
2 pressure was 92 over 64, meaning that his systolic blood
3 pressure was even lower than when he started, and his
4 diastolic pressure was the same. So his blood pressure
5 and heart rate were low, normal in the presence of his
6 reported subjective pain of severe, which is unusual.
7 MR. VUJASINOVIC: Objection, nonresponsive,
8 and also, I'm going to object to the form because he's
9 testifying about an issue that I addressed earlier.
10 Anyway, objection, form.
11 BY MR. POPP:
12 Q. Did Mr. Moak report what pain he was
13 experiencing when he first arrived?
14 A. Yes. So in his intake paperwork -- so he was
15 7 out of 10 when he first arrived. When he filled out
16 the paperwork the day before, which we had him do for
17 the sake of time, since the FCE was limited to only four
18 hours when normally I would do an eight-hour FCE, he was
19 a 6 out of 10, but he reported it was higher on the
20 following day.
21 Q. So does the computer-generated results of
22 tests performed during a functional capacity evaluation;
23 do those assess for validity?
24 A. They look for coefficient of variation, and
25 then they also have, you know, on the -- specifically on

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1 the grip and the pinch, looking for a bell-shaped curve
2 on what's called a maximum voluntary effort test, and
3 this is a validity test that's been around, peer
4 reviewed, published for decades.
5 And then on the pinch grip test, we're looking
6 for a key in the palmar pinch to be stronger than the
7 tip pinch, because biomechanically, you're -- the
8 positions are going -- you're going to be stronger on
9 the key in the palmar than you would be on the tip. And
10 then, we're also looking for coefficient of variation,
11 which is consistency between trials where --
12 Q. No, go ahead and finish. I'm sorry.
13 A. Yeah. So where the trials are closely aligned
14 in effort. So for example, if I'm doing a grip test and
15 I'm squeezing 100 pounds on Grip 1, 105 on Grip 2, and
16 95 on Grip 3, that effort's, you know, pretty -- the
17 coefficient is low because they consistency between
18 efforts is pretty even.
19 If he squeezes 100 on Grip 1, 20 on Grip 2,
20 and then 150 on Grip 3, just to make an exaggerated
21 example, that would have a very high coefficient of
22 variation, meaning there was inconsistency between
23 trials.
24 Q. So between the high and the low, the
25 coefficient --

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1 A. The --

2 Q. Yeah, the coefficient of variation, how is it

3 calculated?

4 A. So it's a calculation looking for differences

5 between the efforts of the two of them, but it gives you

6 a percentage. It's called CV percentage, and we're

7 looking for CVs, you know, 15 percent or lower, meaning

8 they're basically within 15 percent of each other.

9 When their numbers are higher than that, when

10 there's too much difference between the efforts to where

11 we have concerns about the consistency of the effort in

12 that testing process.

13 Q. Okay. And why was 15 percent selected as

14 opposed to 10 or 20 or 30?

15 A. That's what's in the peer-reviewed published

16 literature. That's the general accepted number, is 15

17 percent. I've seen some, you know, at 10 percent, but

18 in our case, you know, if we're going to err, we want to

19 err on the side of the individual, and so we use, you

20 know, what's more generally accepted as the 15 percent.

21 Q. Okay. And within this functional capacity

22 evaluation for Mr. Moak, did the calculation of the

23 coefficient of variation have any of your input, in

24 terms of observation, versus just what the computer

25 calculated he performed?

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1 A. I'm not sure if I understand that question. I

2 apologize.

3 Q. Yeah. Well, in determining the -- well, the

4 pushing, pulling, and the grip tests --

5 A. Uh-huh.

6 Q. -- those were monitored by the computer?

7 A. Yeah.

8 Q. Did the computer come up with its coefficient

9 of variation on those tests all by itself, or was there

10 any other information inputted into the computer?

11 A. No, the computer comes up with that.

12 Q. Okay.

13 A. And you know, along the coefficient of

14 variation for pushing, it was 20 percent, because we had

15 -- rep one was 90 pounds, rep two was 87, and then rep

16 three was 133 pounds. It's a big difference between the

17 two.

18 Q. Did you --

19 MR. VUJASINOVIC: Objection, nonresponsive,

20 form.

21 BY MR. POPP:

22 Q. The coefficient of variation, does it

23 calculate the percentage off of the highest versus or

24 lowest versus the average or the difference between the

25 highest and the lowest?

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1 A. The difference between the trials is what it's

2 looking for. So if you -- you know, if you had the 90

3 and the 87, those two numbers are close together, so

4 that's going to be a low coefficient of variation, but

5 then on rep three, it was 133 pounds, so it was, you

6 know, 43 and 46 pounds higher.

7 So basically, you know, 50 percent greater

8 force was exerted on rep three than on rep one and two,

9 and so that's combined between the three because the two

10 reps that are close together bring the coefficient of

11 variation a little bit lower, and then that one outlier

12 was what brought it to the 20 percent, which is --

13 MR. VUJASINOVIC: Objection, nonresponsive.

14 THE WITNESS: -- really like a 50 percent

15 difference.

16 MR. VUJASINOVIC: Objection, nonresponsive and

17 form.

18 BY MR. POPP:

19 Q. So on the four or five computer-generated

20 coefficient of variation tests, which of those tests

21 showed an invalid effort by Mr. Moak?

22 MR. VUJASINOVIC: Objection to form.

23 THE WITNESS: So he had a high coefficient of

24 variation on pushing. He had a high coefficient of

25 variation on the left hand rapid extraneous grip, and

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1 then he had a high coefficient of variation on the

2 palmar pinch test on the right side.

3 BY MR. POPP:

4 Q. Now, for the other tests -- well, strike that.

5 Of the non-computer tests, which ones of those

6 did Mr. Moak demonstrate an invalid effort?

7 MR. VUJASINOVIC: Objection, form.

8 THE WITNESS: Well, so on the -- so his

9 reported ability was 30 pounds in the horizontal

10 transfer test. That's where he's lifting with his arms

11 bent to his side, moving an object from one shelf to the

12 other. But on his isometric test where he's curling up,

13 doing -- basically, using the same muscles, same motion,

14 he had an average ability of 95 pounds, so three times

15 greater than on his box lifting. That's one example.

16 You know, another example is the, you know,

17 the -- how the postures will change when distracted, so

18 the limp was greater and then lesser at different times,

19 you know, during testing. He was using a reciprocal

20 gait on the stairs and ladder, were at pain levels of

21 eight or nine.

22 You know, I've been treating patients for 29

23 years. They don't do that. They're going to baby that

24 leg because of the levels of pain, and you could see on

25 the -- when he was doing his lift tests, these were

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1 pretty easy for him. You didn't see a whole lot of
2 accessory muscles being brought into play.
3 And then on the musculoskeletal testing, he
4 had a stocking glove, complaints of pain to palpation,
5 which was the entire foot from the ankle down, with --
6 not specific to any one nerve, and he had cogwheel
7 weakness on the manual muscle testing.
8 That's where they exert full strength, and
9 then it suddenly gives way and it's not a smooth break
10 pattern that you'd expect on regular weakness.
11 On the psychometric tests, Dallas Pain, when
12 asked, you know, on a lot of psychological factors, he
13 scored very high, indicating a psychosocial component to
14 his reports of pain and disability. And then based on,
15 you know, his perceived disability, his performance, you
16 know, wasn't consistent with what he thought his
17 disability was. And then he --
18 MR. VUJASINOVIC: Objection, nonresponsive.
19 THE WITNESS: He had --
20 MR. VUJASINOVIC: Sorry. I thought you were
21 done.
22 THE WITNESS: Sure. He had the -- he reported
23 completed absence of spells of very little pain in the
24 last year, but had been working as a laborer, marine
25 laborer. So there was just a whole -- you know, and

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1 he's reporting severe pain but doesn't really take any
2 pain medicine for that.
3 MR. VUJASINOVIC: Objection, nonresponsive.
4 BY MR. POPP:
5 Q. You also mention in your report Waddell tests.
6 A. Correct, yeah.
7 Q. What are Waddell tests?
8 A. So Waddell tests are something that was
9 developed by Dr. Gordon Waddell back in 1980. It's
10 specific to the lower back, but it has some relevance on
11 some of the other body parts as well, where the -- if we
12 were to do axial loading, for example, we put a little
13 bit of pressure on the top of his head, less than five
14 pounds, and ask if that increases pain in his ankle.
15 That would be inconsistent, but that was
16 negative in this case, but he had the cogwheel
17 non-myotonic weakness. He had the nonanatomic symptom
18 distribution, and then he had the nonspecific tenderness
19 where he had the stocking glove tenderness to the entire
20 foot, not specific to any structures.
21 MR. VUJASINOVIC: Objection, nonresponsive.
22 THE WITNESS: And then he had the overacting
23 facial expressions for pain.
24 BY MR. POPP:
25 Q. So what is cogwheel or non-myotonic weakness?

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1 A. So that's when you're doing manual muscle
2 testing, so you're testing the strength of a specific
3 muscle, excuse me, and the muscle has full strength, and
4 then all of a sudden just gives way or -- an example
5 using the bicep, for example, as you can see on camera
6 is I do some manual muscle testing, so I'm putting some
7 pressure on it, and it's full strength and then it give
8 way and then it's full strength and it gives way and
9 full strength and it goes down in this cogwheeling
10 fashion.
11 Having tested thousands and thousands and
12 thousands of people over the years, when you have a true
13 weakness, it's just a smooth break. You push on it, and
14 it just gives very smooth. It doesn't have that
15 ratchety feeling. It's something that's a routine test
16 that's done by physicians all over the country.
17 Q. And what is nonanatomic symptom distribution?
18 A. Well, he was complaining of, you know,
19 numbness just to his second and great toe, which is
20 innervated by the -- a cranial nerve, but that covers
21 the entire top of the foot, not just those two specific
22 toes, so that's kind of odd. And then, the nonspecific
23 tenderness sort of correlates with that, where it was
24 just a stocking glove, the entire foot hurts, to
25 palpation.

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1 Normally, when I -- when I'm poking on an
2 area, the individuals are very specific as to where it
3 hurts. On an ankle, for example, like, I'll be pushing
4 around very specifically on, say, the inside of the
5 ankle but not further down the foot or not back up the
6 leg or not on the other side. In this case, it just
7 hurt everywhere.
8 MR. VUJASINOVIC: Objection, nonresponsive.
9 BY MR. POPP:
10 Q. The Waddell tests, are they part and parcel of
11 the validity tests, or are they separate and apart?
12 A. Yes.
13 Q. Oh.
14 A. No, they're part and parcel.
15 Q. Okay. Now, when you're viewing and doing
16 these tests, is anybody with you, other than Mr. Moak,
17 obviously?
18 A. So normally, I have an assistant that works
19 with me and helps out. In this case, it was Mr. Moak,
20 myself, his mom was there, one of his attorneys, and the
21 videographer.
22 Q. Okay. So you didn't -- it was just you? You
23 didn't have an assistant with you?
24 A. Correct.
25 Q. Okay. And this is on Page 18 and 19 of your

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1 report --
2 A. Yes.
3 Q. At the bottom, nonorganic criminal -- clinical
4 -- nonorganic clinical findings, and it starts at 9, and
5 if you turn the page to 19, 17, "functional improvement
6 were observed while distracted."
7 Can you give me a couple of examples of what
8 Mr. Moak did to make you write positive next to this
9 factor?
10 MR. VUJASINOVIC: Objection, form.
11 THE WITNESS: Well, the limp would change,
12 depending on, you know, where he was in the evaluation,
13 and then one of the big ones was when we were testing
14 range of motion, and I asked him to -- he was laying on
15 his back, and I asked him to pull his feet up, and his
16 left foot stayed in this position, never even made it to
17 neutral.
18 But a little bit earlier when we were doing
19 range of motion measurements, he was able to come passed
20 neutral to five degrees into what's called dorsiflexion,
21 where you're pulling your toes towards your shin.
22 But again, when asked in that situation where
23 I was looking to compare one side to the other, you
24 know, he made sure that that left foot stayed down and
25 the right foot going up.

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1 BY MR. POPP:
2 Q. And "The heart rate, BP changes do not
3 correlate with report of sudden increased pain."
4 A. Correct, yeah.
5 Q. That's what you explained earlier?
6 A. Yeah, and we covered that one earlier.
7 MR. VUJASINOVIC: Objection, form.
8 BY MR. POPP:
9 Q. Okay. And who was taking his pulse rate, and
10 who was taking his blood pressure?
11 A. I was taking his blood pressure and we had him
12 hooked up to a heart rate monitor to continuously
13 monitor his heart rate.
14 Q. Okay. And please explain Number 20, "The
15 self-perceived disability not consistent with
16 performance."
17 MR. VUJASINOVIC: Objection, form.
18 THE WITNESS: So if he perceived himself as
19 being moderately disabled, but then, you know, wasn't
20 able to carry anything more than an empty box or a -- so
21 a 10-pound object or a 5-pound object, had difficulty,
22 you know, going what was basically about 200 feet on the
23 treadmill, yet was able to walk from the parking lot,
24 you know, into the clinic in the back and then move
25 around the clinic at different times and go to the

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1 restroom and things like that. That's probably some of
2 the best examples I have.
3 BY MR. POPP:
4 Q. And can you give me some examples for Number
5 21, "Reported disability does not correlate with
6 measured impairments?
7 A. So objectively --
8 MR. VUJASINOVIC: Objection, form.
9 THE WITNESS: So we've got a -- so we've got
10 a, you know, congenital club foot where he has findings
11 consistent with the -- his original diagnosis of this,
12 you know, problem that he was basically born with, but
13 I've got subjective pain. The color's normal. The
14 temperature's normal. The skin looks normal. The nails
15 are normal, so we're not thinking of, you know, CRPS,
16 complex regional pain syndrome.
17 And then pre- and post-FCE testing, looking
18 for swelling, there's no swelling in this foot
19 whatsoever. So what I've got is a hypermobile foot,
20 consistent with his diagnosis of club foot, and
21 subjective reports of pain. So the fact that he was
22 reporting how much disability he was having didn't
23 correlate with what our findings were.
24 MR. VUJASINOVIC: Objection, nonresponsive. I
25 also had a form objection to that one. I'm not sure the

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1 court reporter heard it. Anyway.
2 THE REPORTER: I got it.
3 MR. VUJASINOVIC: Okay. Thank you.
4 BY MR. POPP:
5 Q. Yeah, Mr. Bardarson, after my questions, just
6 give a little pause to let Mr. Vujasinovic make any
7 objections he wants to make, please.
8 A. Understood.
9 Q. So overall -- so it's entitled the test for
10 nonorganic signs or inappropriate illness behavior, and
11 it starts off with Waddell tests, and that's on Page 18.
12 That incorporates the validity tests as well?
13 A. Yes.
14 Q. Okay. And so given his results, what kind of
15 probability was it that he was engaging in a -- an
16 invalid effort?
17 A. So --
18 MR. VUJASINOVIC: Objection, form.
19 THE WITNESS: So we found 12 of them positive,
20 so we stated that the signs are suggestive of a high
21 probability of nonorganic symptoms, illness behavior,
22 psychological overlay.
23 And I should mention that we -- you know, we
24 allow for, you know, nine positives in there to where,
25 you know, we -- or somebody can have as many as five --

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1 or as many as four positives, and we're still thinking
2 that that's organic symptoms.
3 We've got some questions if it's five to nine,
4 and if it's greater than 10, then we're concerned about
5 -- there's some kind of psychosocial issue going on,
6 something nonphysical, that could be impacting testing.
7 BY MR. POPP:
8 Q. Could the psychosocial issue going on be a
9 trial or a --
10 MR. VUJASINOVIC: Objection, form.
11 THE WITNESS: That is a possibility, yes.
12 BY MR. POPP:
13 Q. And you've testified that he tested positive
14 for 12. How many total tests are there?
15 A. Thirty-six.
16 MR. VUJASINOVIC: Objection, form. Please
17 give me a chance to get those out. Thank you.
18 MR. POPP: And then just for the record, Vuk,
19 you can make it continuing. If you'd rather do it every
20 time, that would be fine as well. I don't -- and if the
21 court reporter didn't get it and you did object, I'm
22 happy to so stipulate.
23 MR. VUJASINOVIC: Okay. So can I have a
24 running objection --
25 MR. POPP: Sure, sure.

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1 MR. VUJASINOVIC: -- form on any and all
2 grounds, form objection, to the end of this deposition?
3 MR. POPP: Certainly.
4 MR. VUJASINOVIC: Okay.
5 BY MR. POPP:
6 Q. Were you able to view Mr. Moak's left foot and
7 right foot without any clothing on them before he
8 started any exercises?
9 A. Yes.
10 Q. Okay. And were you able to view his feet
11 without any coverings on them after he completed the
12 FCE?
13 A. Yes.
14 Q. Did you appreciate or see any swelling in
15 either foot?
16 A. No.
17 Q. So ultimately, with the questionable effort,
18 what does that tell you about the results of the test?
19 A. Essentially, the results of the tests, I can't
20 rely on them in confidence to say this is a good
21 representation of what he can actually do. So it's a
22 very good possibility he's capable of doing much more.
23 Q. Is it fair to say that his results in this
24 test would, excuse me, be the bare minimum?
25 A. So when you say -- yeah, so this is what he

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1 was willing to do.
2 Q. Okay. Thank you, Doctor. That's all the
3 questions I have. Doc, I'm sorry. Thank you, Physical
4 Therapist Bardarson. That's all the questions I have.
5 MR. POPP: I tender the witness.
6 THE WITNESS: Thank you.
7 MR. VUJASINOVIC: You guys want to take a
8 break or just keep going?
9 THE WITNESS: I'm okay to keep going, but I
10 should mention -- so the deposition fee was just for one
11 hour of actual deposition time. I see we're into the
12 second hour here.
13 MR. POPP: Well, we'll pay it.
14 THE WITNESS: Okay.
15 MR. VUJASINOVIC: Yes.
16 MR. POPP: And then, Vuk, if you want 5, 10
17 minutes, take 5, 10 minutes.
18 MR. VUJASINOVIC: That's okay. I was just
19 going to get a water.
20 MR. POPP: Oh, okay. Do you need to use the
21 bathroom or anything, Mr. Bardarson?
22 THE WITNESS: I'm good.
23 MR. POPP: Okay.
24 THE WITNESS: I'll let you know if I do,
25 though.

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1 MR. POPP: All right.
2 CROSS EXAMINATION
3 BY MR. VUJASINOVIC:
4 Q. All right, sir. Are you ready?
5 A. Yes.
6 Q. Okay. You were chosen by the lawyers for
7 Skanska in this case; is that correct?
8 A. Yes.
9 Q. And you have worked with the same law firm on
10 other cases; is that correct?
11 A. I don't know, actually, the answer to that
12 question.
13 Q. Do you keep a testimony list for purposes of
14 federal court expert disclosures?
15 A. Yes.
16 Q. That hasn't been given to me, and on a break,
17 I'm going to ask you to please get that for me.
18 A. Sure.
19 Q. Okay. The lawyers for Skanska are paying you
20 for what you're doing in this case; is that correct?
21 A. Yes.
22 Q. And the lawyers for Skanska gave you what --
23 whatever information and materials you've reviewed in
24 this case; is that correct?
25 A. Correct.

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1 Q. And you're not a medical doctor?
2 A. Correct.
3 Q. You're a physical therapist?
4 A. Yes.
5 Q. There are medical doctors who do functional
6 capacity evaluations?
7 A. Yes. Not very many, but there are some.
8 Q. And information or materials that were not
9 made available to you by the lawyers for Skanska could
10 cause you to change your opinions in this case; is that
11 correct?
12 A. That's correct.
13 MR. POPP: Objection to form.
14 BY MR. VUJASINOVIC:
15 Q. You did not identify in your report that you
16 reviewed any medical or physical therapy records; is
17 that correct?
18 A. Correct.
19 Q. You write in your report, on Page 2, your
20 understanding of Mr. Moak's medical treatment; is that
21 correct?
22 A. Correct.
23 Q. Under a section called introduction?
24 A. Yes.
25 Q. So you said he had an orthopedic consultation

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1 and management; is that correct?
2 A. Correct.
3 Q. Has crutches, was place in a boot; is that
4 correct?
5 A. Yes.
6 Q. Was put in a -- had a bone stimulator; is that
7 correct?
8 A. Correct.
9 Q. Has had physical therapy?
10 A. Yes.
11 Q. MRI and X-rays.
12 A. Correct.
13 Q. And you didn't write anything else about any
14 of Mr. Moak's medical treatment in your report; is that
15 correct?
16 A. Correct.
17 Q. And that -- and so the universe of what you're
18 aware of his medical treatment is what we just went
19 over; is that correct?
20 A. I did review medical records prior to, so I
21 saw the physical therapy notes, the medical records from
22 the orthopedist who treated him, so Dr. Ahmed, and then
23 I got to see the FCE report that was conducted down in
24 South Florida as well.
25 Q. You didn't write anything about any of those

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1 records in your report; is that right?
2 A. Correct.
3 Q. And you wrote in your report your
4 understanding of Mr. Moak's medical diagnosis; is that
5 correct?
6 A. Yes. Correct.
7 Q. On Page 1; is that correct?
8 A. Correct.
9 Q. And all you wrote was deep bone bruise; is
10 that correct?
11 A. Correct.
12 Q. Is it your understanding he got a deep bone
13 bruise from a crane ball hitting his foot?
14 A. That's my understanding, yes.
15 Q. All right. And do you -- did anyone at
16 Skanska ever tell you how heavy that crane ball was?
17 A. No.
18 Q. Okay.
19 A. Has anybody weighed the crane ball? Because I
20 know on some of the reports I've seen, they talked about
21 an 800-pound header ball.
22 That, in my experience, having gone out and
23 looked at a lot of these different jobs; that seems
24 heavy. And then, getting struck by an 800-pound object,
25 in my experience, you know, does a lot more damage than

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1 just a deep bone bruise.
2 MR. VUJASINOVIC: All right. Well, objection,
3 nonresponsive.
4 BY MR. VUJASINOVIC:
5 Q. Are you -- do you see yourself as an advocate
6 in this case for Skanska?
7 A. No.
8 Q. Okay. And so -- and then you are aware of a
9 club foot diagnosis?
10 A. Correct.
11 Q. And do you know how old Mr. Moak was when he
12 was diagnosed with club foot?
13 A. As an infant.
14 Q. And do you know if it was surgically repaired?
15 A. They casted him for a year, and then they did
16 a surgical repair when he was a year, I think.
17 Q. You did not write in your report any diagnosis
18 by Dr. Lamb; is that correct?
19 A. Correct.
20 Q. And you didn't put in your report the
21 diagnosis of avascular necrosis; is that correct?
22 A. Correct. That wasn't seen by his treating
23 orthopedist.
24 MR. VUJASINOVIC: Objection, nonresponsive.
25 BY MR. VUJASINOVIC:

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1 Q. You did not write anything about any diagnosis
2 of avascular necrosis in your report, did you, sir?
3 A. Correct.
4 Q. You also didn't write in your report the
5 diagnosis by Dr. Lamb of deep peroneal nerve
6 compression; is that correct?
7 A. Correct.
8 Q. You didn't write anything in your report about
9 Dr. Lamb's recommendation almost two years ago that Mr.
10 Moak needs surgeries to address these conditions; is
11 that correct?
12 A. Correct, and also in -- you know, read the --
13 I think it was an IME or SMO from the orthopedist who
14 didn't think those were -- would be beneficial to Mr.
15 Moak.
16 MR. VUJASINOVIC: Well, objection,
17 nonresponsive after the word correct.
18 BY MR. VUJASINOVIC:
19 Q. And so if the other attorney for -- if the
20 attorney for Skanska wants to clear stuff up with you,
21 he's -- he will be able and willing to do that. So
22 please just try to answer my questions.
23 The judge in this case has made it a very,
24 very fine point that she doesn't want experts being, you
25 know, nonresponsive, okay, sir?

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1 A. Understood.
2 Q. All right. I appreciate that. And so let me
3 just ask it again. You didn't write anywhere in your
4 report anything about Dr. Lamb's recommendation almost
5 two years ago that Mr. Moak needs surgeries to address
6 these conditions; is that correct?
7 A. Correct.
8 Q. You didn't write anywhere in your report that
9 Mr. Moak, to this day and to the day that you saw him
10 for the FCE, hasn't had these surgeries because
11 Skanska's refused to pay for them, did you?
12 A. Was the question I didn't write in my report?
13 Q. Yeah, you didn't write anything in your report
14 about the fact that Mr. Moak has not had these
15 surgeries; is that correct?
16 A. Correct.
17 Q. And you didn't write anything in your report
18 anywhere that you tested or looked for diminished
19 sensation anywhere in Mr. Moak's left leg down to his
20 foot; is that correct?
21 A. Correct.
22 Q. And you don't know how many different doctors
23 and therapists have documented that Mr. Moak has had
24 diminished sensation in his left foot and ankle area, do
25 you?

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1 A. Correct.
2 MR. POPP: Object to the form of the question.
3 THE REPORTER: Could you repeat that, Mr.
4 Trevor?
5 THE WITNESS: Correct.
6 BY MR. VUJASINOVIC:
7 Q. So you questioned why, subject to my -- the
8 Daubert challenge we're going to file on you -- this is
9 my next series of questions. You questioned why Mr.
10 Moak says he has as much pain as he has and why he
11 couldn't do more physically than he did during your FCE;
12 is that correct?
13 A. Correct.
14 Q. You are not qualified to know how much pain
15 can be caused by Mr. Moak's medical diagnosis of
16 avascular necrosis and deep peroneal nerve damage, are
17 you?
18 A. I'm a physical therapist with 29 years'
19 experience and a Board-certified orthopedic specialist
20 in physical therapy, so I'm familiar with those
21 diagnoses and the pain produced.
22 MR. VUJASINOVIC: Objection, nonresponsive.
23 BY MR. VUJASINOVIC:
24 Q. I'm not -- I didn't ask you if you're familiar
25 with them. Those are medical conditions, correct?

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1 A. Correct.
2 Q. All right. You are not qualified to know how
3 much pain can be caused by Mr. Moak's medical diagnoses
4 of avascular necrosis or deep peroneal nerve damage, are
5 you?
6 A. I'm qualified, based on my education,
7 training, and experience.
8 Q. So you're going to tell the judge in this case
9 that as a physical therapist, you're qualified to talk
10 about how much pain could be caused by avascular
11 necrosis and deep peroneal nerve damage; is that
12 correct?
13 A. Correct.
14 Q. And what do you -- do you even know what deep
15 peroneal nerve damage is?
16 A. It's a nerve that runs to your foot, and so
17 I've actually treated patients with deep peroneal nerve
18 injuries. I've treated patients who have CRPS.
19 I've had patients who have nerve problems in
20 their legs. I've treated patients with neuropathy in
21 their feet, so this is something I do as part of my
22 regular course of practice.
23 MR. VUJASINOVIC: Objection, nonresponsive.
24 BY MR. VUJASINOVIC:
25 Q. You are not qualified to know the extent to

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1 which someone's physical capabilities can be restricted
2 by these medical diagnoses either, are you?
3 A. I am qualified for that. That's exactly what
4 I do for a living.
5 Q. You think as a physical therapist you're
6 qualified to do that?
7 A. Yes, and I'm asked by physicians to render my
8 opinion on somebody's physical ability on a variety of
9 conditions all the time.
10 MR. VUJASINOVIC: Objection, nonresponsive
11 after yes.
12 BY MR. VUJASINOVIC:
13 Q. Now, these questions you told the jury you
14 have, all of that falls under the concept of what you
15 refer to as a validity assessment, correct?
16 A. Yes.
17 Q. So all the different words you used, the, I
18 don't know, the psychosocial and submaximal and this and
19 that, it all falls under the big umbrella of validity
20 assessment; is that correct?
21 A. Correct.
22 Q. Okay. Now, go to, please, Page 4 of your
23 report, actually, Page 3. Your section on validity
24 assessment starts on Page 3, and it ends on Page 4; is
25 that correct?

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1 A. Yes.
2 Q. And so every single issue about validity and
3 his pain and how much he could do all falls -- is
4 addressed in this section of your report; is that
5 correct?
6 A. I summarize there, yes.
7 Q. Yeah. All right. And so on the top of Page
8 4, you said, "The presence of symptom and disability
9 magnification behaviors," again, that's just all part of
10 different words to talk about this validity assessment,
11 right?
12 A. Correct.
13 Q. You said, "The presence of symptom and
14 disability magnification behaviors identified in the FCE
15 may be conscious or unconscious in nature, the
16 determination of which is beyond the scope of this
17 evaluation." Is that what you wrote?
18 A. Yes.
19 Q. Okay. So all that is -- and when it says this
20 evaluation, that means your evaluation that you did in
21 this case, correct?
22 A. Correct.
23 Q. Okay. And so the presence of symptom and
24 disability magnification behaviors is beyond the scope
25 of what you did in this case; is that correct?

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1 A. No. The presence of whether or not it's
2 conscious or unconscious --
3 Q. Okay.
4 A. -- is beyond the scope of this evaluation.
5 Q. All right. So whether or not, number one --
6 whether or not you say it's there or whether or not it's
7 conscious or unconscious, that's beyond the scope of
8 what you did in this case, and you can't say either way,
9 correct?
10 A. I'm not sure I understand that question.
11 Q. Whether or not what you claim, in terms of
12 symptom and disability magnification, whether or not
13 that was conscious or unconscious is beyond the scope of
14 what you did in this case; is that correct?
15 A. Correct.
16 Q. All right. Then there's a section called --
17 this is the submaximal effort paragraph, also under the
18 big umbrella of validity assessment. You see that?
19 A. Yes.
20 Q. "The determination of sincerity of effort or
21 the degree which cautious behavior is directed at
22 controlling the outcomes of this FCE are beyond the
23 scope of this examination." That's what you wrote,
24 right?
25 A. Yes.

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1 Q. Okay. That's a true statement?
2 A. Yes. So when we say sincerity of effort, that
3 means conscious intent, right? And so, like we said in
4 the previous one, whether it's conscious or unconscious,
5 I'm not able to determine, but I can determine
6 exaggeration of symptoms. I just can't tell you why
7 they're doing it.
8 MR. VUJASINOVIC: Objection, nonresponsive.
9 BY MR. VUJASINOVIC:
10 Q. You didn't write anything about conscious or
11 unconscious. You specifically said the determination of
12 sincerity of effort is beyond the scope of your
13 examination, correct?
14 A. For the degree which conscious behavior is
15 directed, like controlling the outcomes, and we say
16 sincerity of effort.
17 Q. Exactly.
18 A. That's beyond the scope of this FCE, correct.
19 Q. So what's beyond the scope of what you did in
20 this case includes sincerity of effort by Mr. Moak,
21 correct?
22 A. Correct.
23 Q. And also what's beyond the scope of anything
24 you did in this case is the degree to which conscious
25 behavior is directed at controlling the outcomes of the

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1 FCE you did, correct?
2 A. Correct. I can't tell you why he's --
3 Q. It all --
4 A. -- why he's doing these things, but there are
5 several possibilities.
6 MR. VUJASINOVIC: Objection. That's
7 nonresponsive --
8 THE WITNESS: That means --
9 MR. VUJASINOVIC: -- after --
10 THE WITNESS: -- psychological exam.
11 BY MR. VUJASINOVIC:
12 Q. You don't have any -- you're not a
13 psychologist?
14 A. Correct.
15 Q. Or you're not a psychiatrist? You don't have
16 any training in any of that, correct?
17 A. Correct. That's why I was saying that it
18 needs a clinical psychological or psychiatrist --
19 psychiatric examination for those components --
20 Q. And all these things that --
21 A. -- conscious --
22 THE REPORTER: One at a time, gentlemen.
23 MR. VUJASINOVIC: Sorry about that.
24 BY MR. VUJASINOVIC:
25 Q. All these things you say are beyond the scope

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1 of your evaluation, nobody else that you're aware of
2 addressed any of that in this case; is that correct?
3 A. The -- I think on one of the SMOs, there was
4 some discussion about -- one of the orthopedists, there
5 was some discussion of that, but I don't think there was
6 any determination on malingering, or anything like that,
7 that was made.
8 Q. What's an SMO?
9 A. Second medical opinion.
10 Q. Second medical opinion?
11 A. Correct. Or an IME, independent medical exam.
12 Q. So it's right -- what I asked is these things
13 that you have said are beyond the scope of the
14 evaluation, your examination, you're aware of -- you
15 can't tell us anybody else that's an expert in any way
16 who's going to come in and address those issues; is that
17 correct?
18 A. Well, that's where the clinical psychological
19 exam comes in. I can recommend some physicians, Dr.
20 Yakini (phonetic), one in New Orleans that specializes
21 in this where they're a psychologist that specialized in
22 looking at sincerity and conscious intent.
23 Q. Okay. But none of that's been done in this
24 case, to your knowledge, correct?
25 A. Correct.

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1 Q. So if you go to Page 13, the second paragraph,
2 you wrote, "Variable challenging the validity of the FCE
3 outcome related to symptom and/or disability
4 magnification behaviors, also referred to as nonorganic
5 illness behaviors." You see that?
6 A. Yes.
7 Q. That's all included under the validity
8 assessment umbrella, correct?
9 A. Correct.
10 Q. And so you say you identified that stuff,
11 right?
12 A. Yes. I can tell you if there was consistency
13 of effort or exaggeration of the symptoms. I can't tell
14 you why he's doing it, but I can tell you they're there.
15 MR. VUJASINOVIC: Objection, nonresponsive
16 after yes.
17 BY MR. VUJASINOVIC:
18 Q. And then you said, "When identified, further
19 examination, such as a clinical psychological
20 examination, may be required to clarify the basis of the
21 identified nonorganic illness behavior"; is that
22 correct?
23 A. Correct.
24 Q. And you're not qualified to do any clinical
25 psychological examination; is that correct?

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1 A. Correct. So that's where we --
2 Q. And you're aware --
3 A. -- the clinical psychosocial exam, or
4 psychological exam, which I had mentioned earlier --
5 Q. Yeah. You have --
6 A. -- to look for a conscious or -- or to look
7 for conscious intent.
8 MR. VUJASINOVIC: Objection, nonresponsive.
9 BY MR. VUJASINOVIC:
10 Q. Please just answer my question. And you are
11 aware of no --
12 A. Well, do I not -- my understanding when I do
13 FCEs is I get to say yes or no, and then I can explain.
14 MR. POPP: You can.
15 THE WITNESS: I'm going to continue to do that
16 then.
17 BY MR. VUJASINOVIC:
18 Q. Okay. Well, I'll -- that's fine. You can do
19 what you need to do. Now, the reason you're, like,
20 trying to refer Mr. Moak for some -- to some
21 psychologist is because this clinical psychological
22 examination hasn't been done; is that correct?
23 A. I'm saying when -- if we want to determine if
24 there's a conscious or unconscious -- to determine if
25 this is conscious or what degree this is conscious

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1 versus unconscious, that needs a clinical psychological
2 examination.
3 Q. And so in the past, you've done FCEs where
4 there was this clinical psychological examination that
5 was done; is that correct?
6 A. Yes.
7 Q. And how often is it the case where in the
8 cases where you're coming in and finding these validity
9 issues where then you bring in a clinical psychological
10 examination? What percent of the time is that?
11 A. I'm not sure I understand the question. Are
12 you --
13 Q. Okay. Of the times where you're doing --
14 A. -- asking how many of these are -- as are part
15 of the case or how many of these I'm referring out and
16 making recommendations?
17 Q. Where it's in the case. So in the case,
18 there's -- number one, you've got validity questions,
19 and then number two, as part of the same case, there is
20 -- an arrangement has been made to have his clinical
21 psychological examination.
22 A. So the majority of the functional capacity
23 evaluations that are done are referred to me by
24 physicians looking for validity of symptoms and physical
25 workability, and then so a lot of them may be referred

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1 out after I've seen then, so I'm not aware of that
2 necessarily. But on the legal cases that I see,
3 probably 10 to 15 percent have that clinical
4 psychological exam in them.
5 Q. Okay. So --
6 A. And sometimes it's done after the FCE, and
7 sometimes it's done before.
8 Q. All right. So let's confine it to the legal
9 cases where you say you find validity issues 10 -- only
10 10 to 15 percent of the time, clinical psychological
11 examination is done. Is that what you're saying?
12 A. Yes, that's my guesstimate.
13 Q. All right. And how often are you finding
14 validity issues in your legal case examinations?
15 A. Probably -- I don't know. It's hard to put a
16 number on it. Probably 40 to 50 percent of the time.
17 Q. So half the people you -- and these are
18 plaintiffs in civil cases who are suing for injuries,
19 right?
20 A. I'm sorry. I don't understand the question.
21 Q. Legal cases that you work on, 40 to 50 percent
22 of the time, you find validity issues is what you just
23 testified, correct?
24 A. Yeah. Well, that's true, yeah, because they
25 -- when there is a legal case involved, there -- that

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1 creates a psychosocial issue with individuals, just like
2 Worker's Comp does in general, but it -- you tend to
3 find a lot of individuals are exaggerating symptoms and
4 disability, especially when there's attorneys involved.
5 Q. So you kind of come into the FCEs in the legal
6 arena expecting to find validity issues in your own
7 mind. That's what you're saying, right?
8 A. No.
9 Q. Yeah, that's what it sounded like, but --
10 A. Well, my answer is no. My answer is no.
11 Q. Okay. All right. So legal cases, and these
12 legal cases where you're doing all these FCEs, I mean,
13 how many -- have you done thousands of FCEs just in
14 legal cases?
15 A. No.
16 Q. How many FCEs have you done in 29 years in
17 legal cases? Tell the jury.
18 A. You know, I'm completely guesstimating. It's
19 in the high hundreds or the low 1,000-something.
20 Q. Could be 900?
21 A. The bulk of the cases -- yeah, it could be
22 800, 700, 1,000. I'm not sure. I don't really keep
23 track of a whole lot of that, and then I don't know, you
24 know, what's just regular Worker's Comp or regular
25 doctor's referral ends up with attorneys involved into

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1 it. So it's hard for me to know. So it's --
2 Q. So if it's --
3 A. The legal work is just a small percentage of
4 the FCEs that I do.
5 Q. Right. So anyway, this is a legal case, so
6 I'm going to stick to legal cases. So let's say it's
7 1,000, 1,000 legal cases you've done -- you've said 400
8 to 500 of those 1,000, those people were -- you
9 questioned the validity, and you're calling them,
10 basically, fakers, right?
11 A. So that's a very interesting question. So
12 the -- when you say something, a lawyer-y question like
13 that, am I calling them fakers, that implies conscious
14 intent. And so what I clearly state in my FCE here is
15 that I don't know if it's conscious or unconscious.
16 I'm a physical therapist. My expertise is
17 looking at what's going on physically. If they're
18 exaggerating symptoms or disability, I can tell you
19 they're doing it. Why they're doing it, I don't know.
20 Q. Okay. So now we get to the point where you'll
21 admit to the jury you're not saying Mr. Moak is a faker,
22 right?
23 A. I have no idea if he is. That's a
24 possibility, but I don't know if that's the case.
25 Q. Well, anything's possible, but you're not here

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1 to tell the judge or jury that Mr. Moak, more likely
2 than not, is a faker, are you?
3 A. All I can tell the judge and jury is that's a
4 possibility, but I have no idea if that's the case.
5 Q. Okay. Beyond it just being --
6 A. That is one of the possibilities.
7 Q. All right. Beyond it being a possibility, you
8 can't say whether or not he's faker beyond oh, it's
9 possible, correct?
10 A. Correct.
11 Q. Okay. Possible he's not, right?
12 A. That's a possibility.
13 Q. All right. So these other 400 to 500 people
14 who you've questioned their validity, I mean, over how
15 many years is that, are those 400 to 500 cases?
16 A. Over the last 25 years, I'm sure, and I have
17 no idea if that number is even right. I'm just total
18 guessing.
19 Q. Well, we're just going off what -- your sworn
20 testimony, and that's what you told us, so it's possible
21 it's higher, right?
22 A. Yeah, in my -- in my --
23 Q. It's possible it's higher.
24 A. Yeah, my sworn testimony is I don't know. I'm
25 just guessing at the number.

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1 Q. Okay. It might be higher; it might be way
2 more than 1,000, right?
3 A. Or it could be lower.
4 Q. Okay. All right. So please go to Page 4 of
5 your report. At the bottom, well, there's a section
6 called estimated residual functional capacity. You see
7 that section?
8 A. Yes.
9 Q. That's the -- that's what you were hired to
10 do, is to determine that; is that correct?
11 A. Correct.
12 Q. That's like your ultimate opinion in this
13 case; is that correct?
14 A. Yes. Well, it's one of two. One, what can
15 they do, and two, did they try. Those are my -- the two
16 things I have to answer.
17 Q. Well, if it's unconscious, he still tried,
18 right? You can't say if it's conscious or unconscious.
19 You've already admitted that, right?
20 A. No, I can't tell you why they're doing what
21 they're doing, but I can tell you if they're not trying,
22 right?
23 Q. I don't think that's consistent, but we'll
24 talk to the judge about it.
25 A. That's totally consistent, and that's what I

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1 do for a living.
2 Q. Okay. Okay.
3 A. For the last 25 years.
4 THE REPORTER: Gentlemen.
5 BY MR. VUJASINOVIC:
6 Q. All right. You done with your answer?
7 A. Yes.
8 Q. According to you, Mr. Moak did not demonstrate
9 sufficient residual functional capacity to safely return
10 to his prior job as a deckhand without the restrictions
11 you describe in your report; is that correct?
12 A. Correct.
13 Q. Then you preface that with saying he was
14 either unable to do it or unwilling to do it, right?
15 A. Yeah. Correct.
16 Q. And when you wrote your report and you signed
17 your report as to your ultimate opinion in this case on
18 Mr. Moak's estimated residual functional capacity, all
19 you said he was either unable or unwilling; is that
20 correct?
21 A. Correct.
22 Q. You didn't pick one or the other. You didn't
23 say one was more likely than the other in your report,
24 did you?
25 A. Correct.

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1 Q. And your statement of unwilling, would be tied
2 into your validity assessment; is that correct?
3 A. Yes. Yes.
4 Q. And you've admitted that you're not in a
5 position to say whether or not Mr. Moak was willing or
6 unwilling to do what you had him do; is that correct?
7 A. No. I can't tell you if it's conscious or
8 unconscious; I can just tell you if the effort was
9 consistent.
10 Q. All right. And there was something that you
11 all didn't discuss, when Skanska's attorney was asking
12 you questions about a certain measurement you did on Mr.
13 Moak's body. Do you know what I'm talking about?
14 A. No.
15 Q. No? Was there any measurements you did that
16 you think the jury would like to discuss, have you
17 discuss?
18 A. I don't understand your question.
19 Q. No? Okay. Okay. You measured each of his
20 calves, right?
21 A. Correct.
22 Q. All right. So go to Page 8 of your report,
23 please. You measured each of his calves, and his left
24 calf was three centimeters smaller than the right calf;
25 is that correct?

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1 A. Yes.

2 Q. And the left calf is where he's got the
3 injured foot, right?

4 A. And the congenital club foot, yes.

5 Q. And the club foot, yeah. And so now when
6 someone's got a muscle mass that's that less in the left
7 leg calf than the right calf, that's the result of
8 something called disuse atrophy; is that correct?

9 MR. POPP: Objection to the form of the
10 question.

11 THE WITNESS: Yes, or it could be due to the
12 congenital deformity of his ankle.

13 BY MR. VUJASINOVIC:

14 Q. Okay. Well, some condition is causing the
15 person not to use certain muscles is what we're
16 discussing here, correct?

17 A. Correct, or yeah, he had a condition since he
18 was born that limited the use of that calf muscle.

19 Q. And so at the time you examined Mr. Moak last
20 week, some condition was -- has been causing him not to
21 use those left calf muscles; is that correct?

22 A. Correct.

23 Q. Okay. And so one question would be what
24 condition is causing that; is that right?

25 A. Yes.

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1 Q. Okay. And that is a medical question,
2 correct?

3 A. Correct.

4 Q. Okay. And because it is a medical question,
5 you are not qualified to answer it; is that correct?

6 A. No, I can answer that from a physical therapy
7 perspective.

8 Q. Okay. So you wrote in your report, "We
9 suspect" -- you said, "The left calf was three
10 centimeters smaller than the right," and then you said,
11 quote, "which we suspect was pre-existing due to his
12 congenital left club foot." Did I read that correctly?

13 A. Yes.

14 Q. Okay. So you, right there in the report, you
15 said you suspect that the condition that was causing the
16 left calf to be three centimeters smaller was the club
17 foot. That's the one you picked, right?

18 A. Correct.

19 Q. And by that, you meant that your suspicion was
20 that he would not be using that left calf due to that
21 club foot, and that would make it, that left calf, be
22 smaller than the right calf because the right foot did
23 not have the club foot; is that correct?

24 A. Yeah.

25 Q. Okay. And if what you say is true, then the

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1 -- Mr. Moak would have had a smaller left calf, even
2 before the 800-pound crane ball hit his foot, right?

3 A. That would be my -- that's what I would
4 anticipate, yes.

5 Q. And if he had it as a baby, I mean, you'd
6 expect he -- him to have a significantly smaller left
7 calf for many years leading up to the incident; is that
8 correct?

9 A. Correct.

10 Q. Okay. And that is something that Mr. Moak
11 would definitely be able to notice had he had it years
12 and years before this incident; is that correct?

13 MR. POPP: Objection to the form of the
14 question.

15 THE WITNESS: Well, that's his subjective --
16 so he could say he noticed that, yes.

17 BY MR. VUJASINOVIC:

18 Q. I mean, it's something that --

19 A. I guess, my question is was it documented
20 somewhere else prior to the injury.

21 Q. That's a fair query, and I'm going -- we'll
22 get to that, but all I want to discuss right now is the
23 fact that if Mr. Moak, for years and years leading up to
24 the incident, had a left calf that's three centimeters
25 smaller than the right, that's something that would be

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1 obvious to him, and you would expect him to notice that,
2 correct?

3 MR. POPP: Objection to the form of the
4 question.

5 THE WITNESS: I don't disagree.

6 BY MR. VUJASINOVIC:

7 Q. Okay. And how about you also disagree that
8 family and friends would probably also notice something
9 like that?

10 MR. POPP: Objection to the form of the
11 question.

12 THE WITNESS: Sure.

13 BY MR. VUJASINOVIC:

14 Q. Have Skanska's lawyers given you any evidence,
15 for example something documented like you just asked
16 about, that substantiates that Mr. Moak had a
17 substantially smaller left calf at any date before this
18 incident with the crane ball?

19 MR. POPP: Objection to the form of the
20 question.

21 THE WITNESS: Not to my knowledge, no.

22 BY MR. VUJASINOVIC:

23 Q. How about, have Skanska's lawyers given you
24 any evidence that contradicts any assertion that Mr.
25 Moak had a substantially smaller left calf at any time

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1 before this incident?
2 MR. POPP: Objection to the form of the
3 question.
4 THE WITNESS: Sorry. Could you repeat that?
5 BY MR. VUJASINOVIC:
6 Q. I'd be happy to. Has Skanska's lawyers given
7 you any evidence that contradicts any assertion that Mr.
8 Moak had a smaller left calf before the incident?
9 MR. POPP: Objection to the form of the
10 question.
11 THE WITNESS: So you're asking me was -- have
12 I been shown information that shows the calf was larger
13 prior to the incident?
14 BY MR. VUJASINOVIC:
15 Q. That would be --
16 A. Is that the question?
17 Q. Yeah, that would be an example.
18 A. Okay. No, I haven't seen anything.
19 Q. Well, no. Actually, I misunderstood you. So
20 now when you say you suspect the three centimeters small
21 left calf was pre-existing due to club foot, that means
22 you're speculating, right?
23 A. Yeah. Based on my education, training, and
24 experience, yes.
25 Q. You admit that's speculation?

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1 A. And based on -- yes. And based on the range-
2 of-motion measurements, that would seem to be the
3 reasonable answer.
4 Q. Well, you're not answering my question. Are
5 you -- is -- are you speculating, or are you not
6 speculating?
7 A. I'm giving my opinion based -- my speculative
8 opinion based on my education, training, and experience.
9 Q. Okay. All right. When you said the word
10 speculative opinion, that's all we needed to hear.
11 Thank you.
12 You did nothing to rule out that the cause of
13 Mr. Moak not using his left calf muscles is the
14 injuries he sustained to his left foot and ankle when
15 the 800-pound crane ball hit it; is that correct?
16 A. Say that again.
17 Q. You did nothing to rule out that the actual
18 cause of Mr. Moak not using his left calf muscles,
19 resulting in your three-centimeter smaller measurement,
20 is that the injuries he sustained to his left foot and
21 ankle was from the crane ball hitting it, did you?
22 A. I'm having a tough time with that one. So --
23 Q. All right. Well, let me --
24 A. So I don't -- and I think I've already
25 testified, you know, I don't know if there was any

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1 existing measurements beforehand, but he was working as
2 a laborer for a year, marine laborer for a full year, so
3 he was using the foot and ankle, which would maintain
4 the muscle mass in there, assuming it was the same size
5 as the other side. But you know, it's very common for
6 us to find a difference in muscle mass with different
7 extremities, if one extremity has a congenital problem,
8 too.
9 MR. VUJASINOVIC: Objection, nonresponsive.
10 BY MR. VUJASINOVIC:
11 Q. Here's what I'm getting at. So you said you
12 suspect that his three-centimeter smaller left calf is
13 due to club foot. You wrote right there in your report,
14 right?
15 A. Yes.
16 Q. Okay. And so the other -- would you agree
17 that based on the evidence you've seen in this case that
18 the only other plausible, possible cause of that smaller
19 left calf would be injuries sustained -- he sustained
20 being hit by an 800-pound crane ball?
21 A. That's a possibility, but he's been walking on
22 the ankle, with the exception of that non-weight-bearing
23 in the boot immobilizer. He's been walking on the ankle
24 since that time. He doesn't have a walking aide.
25 He wears regular tennis shoes, and he worked

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1 as a marine laborer for about a year. So I would say
2 this is consistent with his congenital diagnosis of club
3 foot more than it would be from the injury he sustained
4 from the crane ball.
5 MR. VUJASINOVIC: Objection, nonresponsive
6 after you said this is a possibility and then went on to
7 give a completely nonresponsive answer.
8 THE WITNESS: I thought I could say yes, and
9 then --
10 MR. POPP: Well, object to all the editorial
11 --
12 THE WITNESS: Yeah, I thought I could -- I
13 thought my, you know, rights as an expert in my
14 testimony is to say yes, but, no, but, maybe, but right,
15 and I can actually elaborate on my answer, because
16 sometimes I find the yes or nos where the attorneys want
17 it to be worded a certain way isn't -- doesn't
18 necessarily give the full picture.
19 BY MR. VUJASINOVIC:
20 Q. All I can tell you, sir, is that I will object
21 to nonresponsive when I feel you've been nonresponsive.
22 A. Sure.
23 Q. And I apologize for making the little
24 commentary --
25 A. No, no, no reason.

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1 Q. -- comments, but --
2 A. I don't understand. Yeah, I don't understand
3 all the legal wrangling, but I'm sure the judge will
4 look at it and figure it out.
5 Q. Okay. So let me backtrack now or let me try
6 to refocus what I'm asking you. So we got a calf on the
7 left side that's three centimeters smaller than the calf
8 on the right side that you measured, right?
9 A. Yeah.
10 Q. All right. And so -- and you did that last
11 week?
12 A. On 12 days ago.
13 Q. Or 12 days ago. Okay. And so you said it's
14 possible that's from the injuries he sustained from
15 being hit by the crane ball, right?
16 A. That's possible, but I think it's more likely
17 due to his pre-existing condition.
18 Q. All right. Well, great. So the other
19 possible cause would be club foot, that you're hanging
20 your hat on with a speculative opinion, right?
21 A. Correct.
22 Q. Okay. And so you got it's either the club
23 foot or it's from the crane ball incident. Those are
24 the -- do you agree those are the only two plausible,
25 possible causes that are raised by any evidence that

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1 you've seen in this case?
2 A. Yes.
3 Q. All right. Now, you did not do anything to
4 try to rule out that the actual cause was the incident
5 as opposed to the club foot. That's my question.
6 A. Well, the only way I could know that -- so the
7 answer is no because the only way I could know that is I
8 would need to see some pre-existing documentation that
9 shows -- so if I had read something showing that they
10 were measured prior to and they were the same size, then
11 I would have suspected it was related to the incident in
12 question.
13 Q. Okay. So you would look at pre-existing
14 information, meaning information existing before the
15 crane ball hit him, right?
16 A. Correct.
17 Q. Okay. Did anybody --
18 A. Or immediately after.
19 Q. Did Skanska's lawyers or anybody ever show you
20 the pre-existing information about Mr. Moak playing a
21 high-level of baseball as a catcher?
22 A. Was the question have I seen anything about
23 him playing baseball?
24 Q. My question is what I just asked you.
25 A. And so I was repeating the question because I

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1 didn't understand what you were asking.
2 Q. Well, you kind of twisted it around, so I'll
3 just ask it again.
4 A. Okay.
5 Q. Did anyone at Skanska or anyone else ever show
6 you any information, pre-existing the incident, about
7 the level to which Mr. Moak could play baseball as a
8 catcher?
9 A. The only thing -- I saw some information, I
10 think in the medical records somewhere that he was a --
11 he had played baseball at a high level when he was
12 younger in high school, and that's all I know.
13 Q. Okay. And you didn't make any reference at
14 all to that in your written report for this case, did
15 you?
16 A. No.
17 Q. All right. And then the other -- how about
18 any -- did Skanska's attorneys or anybody else give you
19 any information pre-existing the incident of Hunter
20 playing at a high level of football as a linebacker?
21 A. Again, the same answers as before. I think in
22 the medical record, there was some mention of him
23 playing football in high school.
24 Q. Okay. Again, you didn't write anything about
25 that in your report; is that correct?

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1 A. Correct.
2 Q. Okay. And then there is also, would you
3 agree, pre-existing information concerning Mr. Moak
4 being able to work a very heavy-duty job as a deckhand
5 for Skanska before his injury?
6 A. Yeah, my understanding is he worked there for
7 six months.
8 Q. Well, I didn't ask you how long he worked
9 there; I asked you to agree that that would be
10 pre-existing information.
11 A. So is the question did I know he was working
12 as a deckhand for Skanska?
13 Q. I'll repeat the question because that was not
14 my question. My question was do you agree that there is
15 pre-existing information that Mr. Moak, pre-existing the
16 incident, that Mr. Moak worked a very heavy day labor
17 duty job as a deckhand for Skanska.
18 A. Well, yes. My understanding is he worked at
19 Skanska as a deckhand.
20 Q. Okay. All right. And then did Skanska's
21 attorneys ever show you a copy of the medical exam Mr.
22 Moak passed when he was applying to his captain's
23 license?
24 A. I don't believe I've seen that, no.
25 Q. Okay. That would be also pre-existing

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1 information, right?
2 A. Correct.
3 MR. POPP: Objection to the form of the
4 question.
5 THE REPORTER: Could you repeat your answer,
6 Mr. Trevor?
7 THE WITNESS: Correct.
8 BY MR. VUJASINOVIC:
9 Q. On Page 3 of your report, you did a -- you
10 have a section called physical and biomechanical
11 assessment summary.
12 A. Yes.
13 Q. And you said here you put out your key
14 clinical findings?
15 A. Correct.
16 Q. And this is primarily ankle range of motion
17 and ankle strength; is that correct?
18 A. On Number 2, yes.
19 Q. And according to your examination, is right or
20 left ankle range of motion was limited in four different
21 ways; is that correct?
22 A. Correct.
23 Q. And then, also according to your examination,
24 his ankle strength was diminished on his left ankle in
25 four -- the same four different ways; is that correct?

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1 A. Yes, with cogwheel weakness noted.
2 Q. And the cogwheel weakness thing, is that where
3 you told us about you are pushing the arm down, then it
4 stops and breaks, and then it goes down again, right?
5 A. Correct.
6 Q. Okay. And you didn't -- you realize your
7 entire exam was videotaped and audiotaped?
8 A. Uh-huh.
9 Q. Is that a yes?
10 A. Yes.
11 Q. Okay. And so why didn't you discuss with
12 Skanska's attorney and show the jury any video of this
13 cogwheel stuff you're talking about?
14 A. I don't have the video.
15 Q. Okay. Well, if that actually occurred, the
16 video would have shown it, right?
17 A. So it's something that you discern when you're
18 doing the manual muscle testing, so I would have to see
19 the video to see how obvious it is to the layperson.
20 Q. Okay. So --
21 A. But having done thousands of these tests, you
22 know it when you feel it.
23 Q. You know it when you feel it. Is that what
24 you're saying?
25 A. Yes.

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1 Q. So are you saying it wouldn't -- are you
2 saying it wouldn't come up on the video?
3 A. What I said was I don't know how obvious it
4 would be to the layperson.
5 Q. Okay. Well, it seems like it ought to -- you
6 know, I mean, if you -- you explained what it is
7 earlier, and if that was going on, wouldn't that be
8 readily apparent by just watching the video?
9 MR. POPP: Objection to the form of the
10 question and asked and answered.
11 THE WITNESS: And I agree with the asked and
12 answered, and the -- I haven't seen the video, so I
13 don't know what angle he took it from. Can you see what
14 I was doing? Was my body blocking the way? There's
15 many different things that are -- so if I had seen the
16 video, I could answer the question, but I haven't seen
17 the video.
18 BY MR. VUJASINOVIC:
19 Q. Did you ask Skanska to provide you the video?
20 A. I asked them about the video, and then -- if
21 it was ready yet or something like that, and so I
22 haven't seen it. It hasn't been produced.
23 Q. I've got all your emails with the lawyers, and
24 you asked about the video, didn't you?
25 A. That's what I just said.

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1 Q. Okay. And Skanska's lawyers, as we sit here
2 right now, have not given you that video; is that
3 correct?
4 A. Correct. Correct.
5 Q. Okay. And so you could have -- if they had
6 given you the video, you could have sat down with them
7 before the deposition, and you could have been, like,
8 look, here are all the points where I see these validity
9 issues, and you all could have shown the jury,
10 demonstrating by the videotape, correct?
11 MR. POPP: Objection to the form of the
12 question.
13 THE WITNESS: Yes.
14 BY MR. VUJASINOVIC:
15 Q. Okay. And the reason you haven't done that is
16 because Skanska's attorneys never gave you the
17 videotape, right?
18 A. I haven't seen the video, correct.
19 Q. All right. So how long was this exam from --
20 and not just the exam. How long was it from when Mr.
21 Moak showed up and then he left?
22 A. He was there, basically, from 9:00 to 1:00.
23 Q. You took the full four hours?
24 A. Yes.
25 Q. All right. And so you all talked about the

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1 treadmill and the stair tests that he did. You all
2 seemed to talk about that a lot. You remember that?
3 A. Correct.
4 Q. Okay. And so did you -- did he do those tests
5 closer to the beginning of the exam, or was that, like,
6 near the end of the four hours?
7 A. Closer to the end.
8 Q. You saved those ones for the end, didn't you?
9 A. I wouldn't say that's a correct
10 representation. I did them where they fit in well.
11 Q. Okay. Well, the point is you chose the order
12 in which they would be done; did you not?
13 A. Yes, I chose the order.
14 Q. Okay. And I'm going to share screen with you.
15 So you see this is Photo 7785 from your -- in the video,
16 you're taking photos with a -- looks like it's not even
17 your phone. It's a little camera, right?
18 A. Correct.
19 Q. All right. And so I've got photos that you
20 took, numbered 7744 through 7787. Does that sound
21 accurate?
22 A. Sure.
23 Q. So you took 43 photos, right?
24 A. Correct.
25 Q. All right. And so this is Mr. Moak on the

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1 treadmill with the -- right?
2 A. Correct.
3 (Exhibit 3 was marked for identification.)
4 BY MR. VUJASINOVIC:
5 Q. And this is Photo Number 7785, so we know this
6 is -- this will be Exhibit Number 3 to your deposition.
7 It's Photo 7785 that you took. Is that a photo you
8 took, and does that show Mr. Moak on the treadmill?
9 A. Yes.
10 (Exhibit 4 was marked for identification.)
11 BY MR. VUJASINOVIC:
12 Q. Okay. And then Photo 7786, we'll mark as
13 Exhibit 4, is a photo you took of Mr. Moak on the stairs
14 that you all talked about quite a bit, right?
15 A. Yes.
16 (Exhibit 5 was marked for identification.)
17 BY MR. VUJASINOVIC:
18 Q. And then Photo 7787 is the very last photo you
19 took, that will be Exhibit 5, and it shows Mr. Moak
20 trying to do the heel-toe walk, right?
21 A. Yeah, correct.
22 Q. Now, did you all talk about that one, too, or
23 I don't remember?
24 A. I don't think so, no.
25 Q. Okay. How did he do on that one?

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1 A. He completed it with some pain and
2 restrictions, but overall it was -- he had mild loss of
3 balance, but otherwise, normal test.
4 Q. Okay. And so you -- when he was -- on which
5 one of these tests were you pointing out to the jury
6 that he had a reciprocal gait?
7 A. On the stairs.
8 Q. So this one?
9 A. He had a reciprocal gait on the treadmill,
10 too.
11 Q. Okay. Well, start with the treadmill.
12 Reciprocal gait, your point is oh, hey, look, he's
13 walking, and his gait is -- you know, he's not limping
14 or something like that, right?
15 A. Well, he's walking, you know, one foot in
16 front of the other, and he's not walking where he leads
17 with his right leg and brings his left one up to his
18 right left and steps with his right leg and brings his
19 left up.
20 Q. He's not limping?
21 A. That's the best way to describe it.
22 Q. It means he's not limping, right?
23 A. No, no. It means he's walking step after
24 step.
25 Q. Okay. Well, when he's walking on the

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1 treadmill, he's got a support on either side and in
2 front of him to use while he's walking on it; is that
3 correct?
4 A. We talked about that, and we just want him to
5 hang on for balance and not to wait there through that
6 like he's using crutches or something.
7 Q. All right. Well, but he's got the -- there's
8 -- if he needs to use it or wants to use it, there's a
9 support in front of him, all the right side, on all the
10 left side to use with his hands; is that correct?
11 A. Yes, he was just using the support in front.
12 Q. That's the same -- well, all this was on
13 video, right? The whole thing, right?
14 A. Yeah.
15 Q. Okay. And then on the ladders, again, you
16 mentioned about oh, he had a reciprocal gait. Well,
17 he's using the railings, isn't he?
18 A. Uh-huh.
19 Q. And so --
20 THE REPORTER: Is that a yes?
21 THE WITNESS: That's a yes, yeah.
22 BY MR. VUJASINOVIC:
23 Q. Okay. Obviously, when he's -- he's going to
24 have reciprocal gait if he's bracing himself with both
25 hands using the railing going up or down; is that

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1 correct?
2 A. Well, what I normally see when I'm working
3 with patients in FCEs is they'll -- if their leg is in
4 severe pain, they will use a step-to gait where they'll
5 lead with the good one and just have the bad one follow.
6 Q. Okay. But he had the full support of both of
7 these railings to use on both of his arms and hands had
8 he wanted to use them, right?
9 A. Correct.
10 Q. And this is all on the video, too, isn't it?
11 A. Yes.
12 Q. And then also on the heel-toe, there's railing
13 for him to use on the left and the right, if he wanted
14 to use them; is that correct?
15 A. Correct. It didn't have to be in there. It
16 was just expedient to use that area.
17 Q. Okay. Was this even your --
18 A. Bars are used for patients who have, you know,
19 severe, you know, strength deficits in their lower
20 extremities.
21 Q. Okay. Was this even your facility?
22 A. No.
23 Q. So this -- had you ever used that facility
24 before?
25 A. No.

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1 Q. And when was the -- never used. Okay. So the
2 day you showed up to do this FCE, is that the first time
3 you were ever at that facility?
4 A. Inside, yes.
5 Q. And you had nobody at all assisting you in any
6 way because you were in a different facility?
7 A. Well, we had somebody open up the building for
8 us and was there if we needed help with anything,
9 locating equipment, et cetera.
10 Q. Well, I don't mean --
11 A. This is one of the clinics that's in WorkSaver
12 network, and so I knew that they do this functional
13 testing as, you know, part of their day-to-day
14 activities and they had all the equipment.
15 Q. Yeah. I'm not asking you, like, someone
16 opened the door for you and unlocked it. I mean,
17 usually, when you do the FCEs at your home base in
18 Houma, you're going to have an assistant assisting you
19 throughout the FCE; is that correct?
20 A. Correct, but there's no reason --
21 Q. And you did not --
22 A. -- I can't do the FCE myself.
23 Q. And you did not have anyone assisting you in
24 this FCE; is that correct?
25 A. Correct.

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1 (Exhibit 6 was marked for identification.)
2 BY MR. VUJASINOVIC:
3 Q. I'm going to show you -- there's some emails.
4 Okay. So this will be Exhibit 6 to your deposition.
5 This is nine pages. How much have you been paid by
6 Skanska's attorneys in this case, all said -- you know,
7 the whole kit and caboodle so far?
8 A. So it was \$10,000.00 for the FCE, which
9 included, you know, renting of the facility, travel out
10 of state, getting licensure out of state, staying in a
11 hotel, and all the time associated with doing all of
12 those things, and then \$1,500.00 for the deposition.
13 Q. Okay. And so the \$10,000.00 for the FCE, is
14 that -- that's -- they have to pay that up front?
15 A. Correct.
16 Q. And so the deposition, the \$1,500.00, did they
17 have to pay that up front?
18 A. Yes.
19 Q. For how much time does that \$1,500.00 cover?
20 A. Two hours of preparation, one hour of
21 deposition time.
22 Q. Okay. And so you're going to be sending them
23 another bill because we've gone over your time there,
24 right?
25 A. Correct.

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1 Q. You wrote an email dated May the 12th, which
2 is the date before the depo, to Skanska's attorneys,
3 Leslie Knowles and some other folks; is that correct?
4 A. Correct.
5 Q. You got Keila Bardarson on here. Who is that?
6 A. That's my wife.
7 Q. Okay. Does she work with you?
8 A. Yes, she does billing and collections for
9 WorkSaver.
10 Q. All right. And so you, right here, you told
11 the attorneys for Skanska you were, basically, telling
12 them some things to pass along to Mr. Moak; is that
13 correct?
14 A. Correct.
15 Q. And one thing that you told them to pass along
16 to Mr. Moak was he should take no pain medicine the
17 morning of the evaluation, if possible; is that correct?
18 A. Correct.
19 Q. Okay. And earlier, do you remember that one
20 of the validity signs you talked about was the fact that
21 he wasn't taking pain medicine?
22 A. No, that he was reporting severe pain but
23 wasn't taking it as part of his normal course. He was
24 just using Advil to control his pain.
25 Q. Well, so he could have taken an Advil that

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1 morning?
2 A. When I asked him, he said he hadn't taken any
3 medication that day.
4 Q. No. When you said no pain medicine the
5 morning of the evaluation, were you including things
6 like Advil?
7 A. Ideally, yes.
8 Q. Okay. So the reason --
9 A. If somebody is reporting that they're having
10 severe pain, they're usually using an opioid pain
11 medicine.
12 MR. VUJASINOVIC: Objection, nonresponsive.
13 BY MR. VUJASINOVIC:
14 Q. And opioid?
15 A. Yeah, that's very common. If someone is
16 reporting a seven or greater pain, severe pain, you
17 know, having personally had surgeries done, when you're
18 a -- when -- my personal experience, when I'm a seven or
19 eight, I'm -- you're needing some kind of opioid
20 medicine short-term for the pain to settle down.
21 MR. VUJASINOVIC: Objection, nonresponsive.
22 BY MR. VUJASINOVIC:
23 Q. But as a non-medical doctor, you're not even
24 qualified to prescribe medicine for anybody, right?
25 A. Correct.

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1 Q. You can't even prescribe Advil, can you?
2 A. Correct.
3 Q. Okay. But in any event, you told the Skanska
4 attorneys no pain medicine for Mr. Moak. That would
5 include Advil. So if he's not on pain medicine at your
6 clinic, or the clinic you borrowed, it's because that
7 were your instructions, correct?
8 A. Correct.
9 Q. All right. Then you wrote this email that's
10 dated May the 17th, so it's like four days after the
11 incident, and you were working on the FCE report; is
12 that correct?
13 A. Yes.
14 Q. And you emailed Skanska's attorneys, Ms.
15 Leslie Knowles, another person at their law firm, and
16 your wife, correct?
17 A. Correct.
18 Q. And you said, "I am currently working on the
19 FCE report and was curious to know if you have any
20 surveillance video on Mr. Moak, and if so, is it
21 possible for me to review." Is that what you wrote?
22 A. Yes.
23 Q. And had you had talks with Skanska's attorneys
24 about them trying to conduct surveillance video on Mr.
25 Moak in connection with your FCE?

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1 A. No.
2 Q. So how -- I mean, so are you telling the jury
3 that you had no talks at all, there was no information
4 from Skanska's attorneys or anyone in their office to
5 you before this FCE that, or even after the FCE, up to
6 the point of this email, that made you believe they
7 would have done surveillance video in connection with
8 the FCE?
9 A. If I understand -- it was a long question, but
10 if -- so I -- so up until I sent out this email, I had
11 no knowledge if there was any surveillance done
12 whatsoever.
13 Q. Okay. So you, out of your own mind, wanted to
14 know if somebody had conducted surveillance video on Mr.
15 Moak; is that correct?
16 A. Yes, because I often get sent surveillance
17 video to review in conjunction with the FCE.
18 Q. And surveillance video is like where a company
19 makes -- typically, they're -- it's an injury case, and
20 they're defending a lawsuit. They go hire private
21 investigators who go and secretly try to videotape a
22 person who says they're injured; is that correct?
23 A. Yes.
24 Q. Okay. And so you, in your own mind, have had
25 a lot of experience with that apparently; is that

Page 100

1 correct?
2 A. I wouldn't say a lot of experience, but I've
3 looked at surveillance video.
4 Q. Okay. So like, the 400 to 500, or whatever it
5 is, other people involved in injury proceedings where
6 you question their validity, about how often in those
7 cases are you getting surveillance video on them?
8 A. Oh, very small amounts.
9 Q. Okay.
10 A. Very small.
11 Q. Okay. How about on any FCE you've ever done
12 in 29 years has the people who hired you conducted
13 surveillance on the FCE person who -- the person you're
14 examining, as they either arrived to or left your
15 facility?
16 A. I don't know the answers to that question. I
17 do know what happens, and I've had the opportunity to
18 review surveillance video on a number of occasions. How
19 many, I don't remember exactly.
20 Q. Okay. I appreciate your general knowledge and
21 familiarities, but so is it correct that you, in 29
22 years doing FCEs, can't recall a single time where a
23 company set up and FCE with you and then arranged for
24 surveillance video to be conducted on the person you're
25 examining, either when they're arriving at your facility

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1 or leaving your facility?
2 A. I only know of that happening one time, and
3 that was back in the '90s. I think that was '98 or '99.
4 Q. Okay. So in 20 years --
5 A. And it was unbeknownst to me until after I saw
6 the video.
7 Q. All right. In 29 years and in thousands and
8 thousands of FCEs, that's only happened to you that you
9 know about one time, correct?
10 A. Yes, but the surveillance videos have happened
11 on numerous occasions. I can't tell you how many times,
12 but I've been asked to look at surveillance videos
13 post-FCE on a number of occasions.
14 Q. Okay. Did you get any surveillance -- when
15 you were asking this question here, when you were asking
16 about this surveillance video, were you asking about
17 surveillance video that was conducted as -- in
18 connection with your FCE or surveillance video conducted
19 at any other time, not involving your FCE?
20 A. At any other time.
21 Q. Okay. So you definitely were not thinking to
22 yourself hey, I think they surveilled Moak when he came
23 to this shop in Mississippi or anything, right?
24 A. Correct. Yeah, that thought never entered my
25 mind.

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1 Q. Okay. So you were asking about other
2 surveillance video that they might have done any time in
3 the years since he was injured, correct?
4 A. Yes.
5 Q. All right. And so did they ever give you any?
6 A. No.
7 Q. Okay. Did they tell you whether or not any
8 existed?
9 A. I think they did in a following email.
10 Q. All right. That would be this one where the
11 attorney for Skanska says -- this is dated the same day
12 you asked her about surveillance, right?
13 A. Correct, yeah.
14 Q. And this is the attorney for Skanska, said,
15 "We weren't able to get very much surveillance on him.
16 We got a couple of shots of him walking through a
17 parking lot. There was one of him carrying a water jug,
18 nothing strenuous, though. We'll see about getting the
19 footage over to you." Did I read her email to you
20 correctly?
21 A. Yes.
22 Q. And did you read that as goodness, they were
23 surveilling him as he was walking up to your FCE?
24 A. No.
25 Q. Well, that's what this says, doesn't it?

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1 A. No, it says he was walking through a parking
2 lot, and there was one of him carrying a water jug.
3 Q. Well, and you took this to -- you understood
4 this to mean the parking lot where you did the FCE,
5 correct?
6 A. No.
7 MR. POPP: Objection to the form of the
8 question.
9 BY MR. VUJASINOVIC:
10 Q. Sir, I'm being dead serious.
11 A. And I've got to laugh. I'm sorry. No.
12 Q. You're laughing. Why are you laughing?
13 A. I never even considered that until you said
14 something at this point. I was just wanting to see if
15 there had been any surveillance video that I could
16 compare to --
17 Q. Okay.
18 A. -- his performance of the FCE, which isn't
19 unusual for me to ask.
20 Q. Well, are you literally LOL, laughing out
21 loud, because that would be a highly unethical process?
22 A. I wouldn't even know if it's ethical or
23 unethical, the process. I was just asking your
24 question, and --
25 Q. What if --

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1 A. -- it's got nothing to do with the FCE of that
2 day. That's my testimony.
3 Q. What if Skanska, before the FCE, told you,
4 hey, sir, so we got this Mr. Moak, you're doing the FCE,
5 okay, and when he's on his way into the clinic, we're
6 going to do surveillance of him so we can see how he
7 walks up there? What would you have said in response to
8 that?
9 MR. POPP: Objection to the form of the
10 question.
11 THE WITNESS: So you're asking me a
12 hypothetical?
13 BY MR. VUJASINOVIC:
14 Q. Well, it actually happened, but yeah, you can
15 treat it as a hypothetical.
16 MR. POPP: Objection to the form of the
17 question.
18 THE WITNESS: So --
19 BY MR. VUJASINOVIC:
20 Q. Answer it, please, as a hypothetical.
21 A. So the question is would I -- I'm sorry. I'm
22 not sure I understand the question, so I have --
23 Q. All right. That's okay.
24 A. I have no knowledge about any videoing on the
25 day of the FCE, except what occurred inside the clinic.

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1 That's all I know.

2 And there was no intent on my part to

3 coordinate a surveillance video of him walking up to the

4 clinic on the day of the FCE, other than the video that

5 was going on as part of the FCE process. That's all I

6 know.

7 Q. Okay. Did he have a water bottle with him

8 when you first saw him? It's all over the video. Do

9 you recall?

10 A. No, I don't remember if he had a water bottle

11 with him or not.

12 Q. Okay.

13 A. I think if I remember correctly, the facility

14 provided some water for us.

15 Q. Okay. Now, so but here's -- let's take this

16 step by step. Here's my question. Let's say Skanska

17 told you they're going to surveil Mr. Moak as he's

18 walking into the clinic right before you're going to do

19 the FCE. What would have been your response, please,

20 sir?

21 MR. POPP: Objection to the form of the

22 question.

23 THE WITNESS: I would have said that's --

24 you're the attorneys; do whatever you think, but if you

25 can do -- I honestly know nothing about all of that.

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1 BY MR. VUJASINOVIC:

2 Q. Okay.

3 A. From a legality side, I have no clue.

4 Q. If they had asked you to participate in the

5 planning and setting up of that, would you have agreed?

6 MR. POPP: Objection to the form of the

7 question.

8 THE WITNESS: So again, this is a hypothetical

9 and I would tell them, you know, do whatever you are

10 legally allowed to do. That's all I know, sir.

11 BY MR. VUJASINOVIC:

12 Q. Okay. Well, do you consider yourself an

13 expert?

14 A. In functional capacity evaluations, yes. In

15 surveillance videos, no.

16 Q. Okay. You understand --

17 A. Other than looking at what somebody's doing

18 physically in the surveillance video.

19 Q. All right. You understand we're allowed to

20 ask people who say they are experts hypothetical

21 questions, don't you?

22 A. Sure. You can tell me the --

23 MR. POPP: Objection to the form of the

24 question.

25 THE WITNESS: -- make that a statement, if

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1 there's -- you know, if you're talking to me about all

2 the legal stuff, you know, I'm a physical therapist.

3 I'm really good at what I do, but I let the lawyers do

4 the lawyering.

5 BY MR. VUJASINOVIC:

6 Q. All right. So the lawyer from Skanska said,

7 "We'll see about getting the footage over to you," and

8 she's referring to some video surveillance in a parking

9 lot, right?

10 A. Yeah, and I'm assuming that's some prior

11 surveillance video they had done.

12 Q. And you're telling us they never got you the

13 footage?

14 A. Yeah. I haven't seen any footage, correct.

15 Q. Now, we'll come back to that in a second. I

16 wanted to ask you something here about your report.

17 Now, did you observe Mr. Moak while walking through the

18 parking lot into the FCE before you started it?

19 A. I was out there to get some equipment, I

20 think, as they were pulling in, and then I walked

21 inside, and he came in shortly -- I think he was meeting

22 with his attorney for a few minutes before he came in,

23 so I don't know if I saw him walking in the parking lot

24 or not.

25 Q. Well, I just need to know, do you have any

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1 independent memory whatsoever of seeing Mr. Moak walking

2 from the parking lot into the clinic?

3 A. I don't think so.

4 Q. Okay. Now, go to Page 12 of your report,

5 please.

6 A. Uh-huh.

7 Q. So there's the photo there where Mr. Moak is

8 on the treadmill. You see that?

9 A. Yeah.

10 Q. And you said, "Mr. Moak lasted 2.5 minutes at

11 1.0 miles per hour on the treadmill and only ambulated

12 for 0.04 of a mile." Is that what you wrote?

13 A. Yes.

14 Q. Then you wrote, "This is equivalent to about

15 211 feet"; is that correct?

16 A. Yes.

17 Q. Then you wrote, "It was farther to walk from

18 the parking lot into the clinic, which he did

19 successfully." Is that what you wrote?

20 A. Yes.

21 Q. Okay. And so how do you know he did that

22 successfully if you didn't see it?

23 A. Because you got inside the clinic, and I

24 didn't see anybody carrying him and I did not see a

25 wheelchair.

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1 Q. So when you say he was able to successfully
2 walk from the parking lot into the clinic, that's
3 because he got there?
4 A. There is windows in the front, too, so they
5 parked in the front.
6 Q. So were you, like, spying on them through
7 those windows to see how he walked in from the parking
8 lot?
9 A. Part of my job is to observe the individual at
10 all opportunities when they come for the FCE.
11 Q. All right. Well, you already told the jury
12 you can't remember a single thing about seeing him. Do
13 you want to change that testimony?
14 A. So I'm trying to remember if I can think. So
15 the point being does he have to get into the facility.
16 So he walked from his truck, which was jacked up and a
17 long climb in and out, into the facility, but he could
18 only last that short bit of time on the treadmill where
19 he had to discontinue due to pain, but yet, he was able
20 to walk around the facility successfully, walk in and
21 out of the facility, walk to the bathroom and back. So
22 there was a discrepancy between focused testing and
23 distracted testing. That's what I --
24 Q. And him walking on the treadmill was at the
25 end of a four-hour physical exam by you?

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1 A. Yes, and he successfully walked out of the
2 clinic all the way into the parking lot and to the
3 truck.
4 Q. Did you watch him do that?
5 A. Yes. I watched him walk to -- as he exited
6 the building, and then, you know, there was windows in
7 front. How much I saw of him walking to his truck, I
8 don't know, but I know he got there, and as far as I
9 know, he wasn't carried by someone.
10 Q. Okay. And then now isn't it true that it's
11 the Skanska attorney who told you he was able to walk
12 from the parking lot to the clinic successfully?
13 A. No.
14 MR. POPP: Objection.
15 BY MR. VUJASINOVIC:
16 Q. And isn't it --
17 A. This is weird line of questioning.
18 Q. Isn't it true that Skanska has conducted
19 surveillance on him in the parking lot arriving at the
20 clinic where you did the FCE, and they're the ones who
21 told you from looking at the video that he did that
22 successfully?
23 MR. POPP: Objection to the form of the
24 question. The document speaks for itself.
25 BY MR. VUJASINOVIC:

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1 Q. Isn't that true?
2 A. No.
3 Q. Okay. Did you know that there was a specific
4 discussion with the judge in this case about Skanska
5 having a desire to conduct surveillance in connection
6 with your FCE of Mr. Moak?
7 A. All I know is that they told me it was going
8 to be videoed, yes, and that's all I know.
9 Q. All right. And then before signing the
10 report, you sent it to the attorneys for Skanska?
11 A. Yes.
12 Q. And you wanted them to review your draft of
13 the FCE, right?
14 A. Correct.
15 Q. Why did you need the lawyers to review a draft
16 of your FCE report?
17 A. I believe it says in my email please let me
18 know if I've answered all questions or if further
19 clarification is required.
20 Q. Okay. And then they told you it looks good,
21 and you finalized it, right?
22 A. Correct.
23 Q. Where is the normative data that's behind your
24 opinions?
25 A. In the research papers associated with those

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1 tests.
2 Q. Well, how are we supposed to analyze that
3 normative data?
4 A. You've got to pull up the research papers.
5 Q. Okay. Well, which one is it in?
6 A. Oh, so if you look at the -- there's a list of
7 references.
8 Q. Yeah.
9 A. There's a grip testing and references in
10 there.
11 Q. Let me stop you there. On Page 29 of your
12 report, it says references; is that correct?
13 A. Yes.
14 Q. That would be references that you would refer
15 to in terms of supporting your methodologies and your
16 opinions in this case; is that correct?
17 A. Some of them, yes.
18 Q. Okay. All right. So --
19 A. I don't think this is a -- I don't think this
20 is an exhaustive list.
21 Q. All right. So where, under these references
22 in Page 29, do we -- can we go get the normative data
23 that backs up your conclusions?
24 A. So Stokes; HM Landrieu, Identification of
25 Low-effort Patients Through Dynamometry; the Waddell

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1 Signs, Spine, 1980; Kaplan, Maximal Effort During
2 Functional Capacity Evaluations; Pain Drawing and
3 Nonorganic Signs.
4 And then if we go to the stuff -- I didn't
5 feel there's any point to list it twice, so under, you
6 know, Mathiowetz, Grip and Pinch Strength Normative Data
7 for Adults; Reliability and Validity of Grip and Pinch
8 Strength Evaluations by Mathiowetz; Janda, Objective
9 Evaluation of Grip Strength; Stokes, The Seriously
10 Uninjured Hand; Westbrook, The Rapid Exchange Grip
11 Strength Test and Detection of Submaximal Grip Efforts;
12 Hildreth, Detection of Submaximal Effort by the Use of
13 the Rapid Exchange Grip; and then pinch, where they talk
14 about the AMA Guides to the Evaluation of Permanent
15 Impairment, Fifth Edition.
16 And then Mathiowetz, Grip and Pinch Strength;
17 Mathiowetz, Reliability and Validity of Grip Strength;
18 McDermott, Intra-Instrument Oral Liability of Grip
19 Strength Scores; and then McDermott again, Inter-Read
20 Reliability of Pinch and Grip Strength Measurements.
21 Q. Now, as a non-medical doctor, you're not
22 qualified to either diagnose or rule out that anybody
23 has complex regional pain syndrome; is that correct?
24 A. I can identify the signs associated with that
25 and comment the presence or absence of both sides.

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1 Q. But you can't make the diagnosis or rule out
2 that diagnosis, because you're not a medical doctor,
3 right?
4 A. I can make a physical therapy diagnosis
5 associated with those things.
6 Q. But it would be limited to a, quote-unquote,
7 "physical therapy diagnosis," end quote, right?
8 A. Yes.
9 Q. All right. Business, I want to ask you about
10 your business interests. Is that okay?
11 A. Sure.
12 Q. Okay. Do you have any ownership in any
13 business?
14 A. Yes.
15 Q. Tell us about that.
16 A. So I own ISR Physical Therapy, and I own
17 WorkSaver Employee Testing Systems, and the I have --
18 Q. Are you the --
19 A. And then I have some other businesses related
20 to some investment properties and stuff like that.
21 Q. All right. So are you the sole owner of ISR?
22 A. I'm -- so we have three locations, and one
23 location is owned 50-50 by myself and my business
24 partner, and then I own the other two locations 100
25 percent.

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1 Q. Who's your business partner?
2 A. Mark Catilever.
3 Q. All right. And WorkSaver, are you the sole
4 owner?
5 A. Now, yes.
6 Q. Who used to co-own it with you?
7 A. Dr. Richard Bunch.
8 Q. That's who you mentioned earlier, right?
9 A. Yeah, he's retired, and so I bought him out
10 over the last, was it, nine years, I guess.
11 Q. Got it. So you all were former business
12 partners?
13 A. Correct.
14 Q. For about how many years?
15 A. Twenty-four years, I guess.
16 Q. All right. Do you have any ownership in any
17 proprietary products?
18 A. The certified behavioral based ergonomic
19 specialist training program that's online and that we
20 use to conduct in person prior to Covid, and then the
21 functional testing protocols with WorkSaver for new
22 hires and return-to-work individuals. And then --
23 Q. Did you use any of those products with Mr.
24 Moak's case?
25 A. Yeah. And then we also have the WorkSaver

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1 functional capacity evaluation process that's used in
2 conjunction with WorkSaver, and yes, that's what we
3 used.
4 Q. Okay. So you own two businesses, the ISR
5 Physical Therapy place, and the WorkSaver Systems,
6 correct?
7 A. Yes.
8 Q. Okay. And the WorkSaver Systems is based in
9 Louisiana?
10 A. Correct.
11 Q. And how many employees does that company have?
12 A. Seven.
13 Q. Are you an employee of that company?
14 A. I'm an owner, so --
15 Q. I know sometimes the owners can also hold an
16 employee position. Do you not?
17 A. It's an LLC, so I don't think I can
18 technically be an employee.
19 Q. All right.
20 A. I don't know all the legalities of that.
21 Q. Where are the employees located?
22 A. Louisiana.
23 Q. How many locations does WorkSaver Systems
24 serve?
25 A. So we have somewhere around 240-some clinics.

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1 It changes. We're adding them all the time. And we're
2 in 43 different states, I believe.
3 Q. And so how do you make money off all those
4 locations?
5 A. So we develop functional -- we help companies
6 develop what's called a functional job description to
7 find out what physical requirements are required for
8 their employees to successfully perform their jobs.
9 From there, we develop a testing protocol,
10 functional testing protocol, for new hires and
11 return-to- work cases, and the -- we subcontract clinics
12 across the country to perform these tests for us, based
13 on our training and with the use of our proprietary
14 software.
15 Q. So whenever any of those -- you've got to be
16 talking thousands of exams, right?
17 A. We did over 22,000 last year.
18 Q. Whenever those are done, you all get a -- you
19 all are paid in part from each of those, correct?
20 A. God bless America, yes.
21 Q. Okay. Now, what industries does WorkSaver
22 Systems -- what are the biggest industries that you
23 serve?
24 A. So we do oil and gas. We do ship building.
25 We do marine industries. We do fabrication, mining,

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1 forestry, trucking and warehouse distribution, coffee
2 companies. There's a whole bunch of them.
3 Q. That's okay. Give the jury -- like, tell us
4 just like the couple of your two biggest clients that
5 you can think of.
6 A. Well, some of the big in the oil and gas space
7 is Chevron, Transocean, Schlumberger, and then, you
8 know, in the ship building space is Huntington Ingalls
9 Shipbuilding, and then, you know, in the marine
10 industry, we have, you know, Blessy Marine, Florida
11 Marine Transporters, two examples.
12 Q. How long has, like, have you had Chevron,
13 Transocean and BP as your clients? It been a while?
14 A. Yeah. Chevron's been since the '90s. BP is
15 since we started working in 2011. Transocean, I think
16 was somewhere in the mid-2000s, if I remember correctly.
17 Q. All right. You ever heard of Skanska before
18 this case?
19 A. No, I'd never heard of Skanska before this
20 case.
21 Q. Okay. And so how many of your FCEs that you
22 do in these, in your legal cases are Jones Act cases?
23 A. I don't know if I could put a percentage to
24 that. So it's usually -- it's Jones Act, motor vehicle
25 accidents, and the occasional Worker's Comp when the

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1 attorneys are involved, and I don't know if I'm missing
2 anything that's common when the attorneys are involved.
3 Q. On the legal cases, you're predominantly hired
4 by the defendant in the case, who's the person that's
5 being sued; is that correct?
6 A. I'm hired by both sides. I would say
7 somewhere, probably 30 percent on the plaintiff side and
8 70 percent on the defense side.
9 Q. All right. So 70 percent of the time, it's a
10 company hiring you in a case?
11 A. That's -- yeah, that's probably fairly
12 accurate.
13 Q. All right. How many depositions have you
14 given, roughly?
15 A. I don't know. I'd have to count them up. You
16 want me to look it up and see if I can --
17 Q. Let's take a break. Let's just -- yeah, it's
18 probably a good time for a break, if you don't mind, and
19 then maybe you can --
20 A. How much --
21 Q. -- grab your testimony list.
22 A. How much longer do we have?
23 Q. I don't have much longer at all, but I just
24 need your testimony list.
25 A. Okay.

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1 MR. POPP: Provided it.
2 MR. VUJASINOVIC: Oh, you did?
3 THE WITNESS: And Matthew --
4 MR. VUJASINOVIC: Thanks, Matt. I didn't
5 realize it was --
6 THE WITNESS: Matthew, from my perspective, I
7 just have to provide the last four years, correct?
8 MR. POPP: Right.
9 MR. VUJASINOVIC: But Matt, if you're telling
10 me you all produced it to me, then I don't need to mess
11 with it right now. You know that for a fact?
12 MR. POPP: Yeah, I'm trying to find the email,
13 because I sent it with the CV and the other thing.
14 MR. VUJASINOVIC: Okay. Fair enough. Let's
15 take a --
16 MR. POPP: I mean, I can email it to you right
17 now, if you want.
18 MR. VUJASINOVIC: Yeah, go ahead and email it
19 to me again. Thank you. And let's just take a
20 five-minute, and then I'm pretty much done, guys. I
21 have a -- one more set of topic area and that's it, and
22 it's not going to be long.
23 THE WITNESS: Okay.
24 THE VIDEOGRAPHER: We are now going off the
25 record. The time is 5:32 p.m.

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1 (Off the record from 5:32 p.m. to 5:38 p.m.)
2 THE VIDEOGRAPHER: We are now back on the
3 record. The time is 5:38 p.m.
4 BY MR. VUJASINOVIC:
5 Q. All right, sir. I think you were going to
6 check on a rough number of depositions.
7 A. Yeah, and I understand you received some --
8 Q. Well, that's just the four-year list.
9 A. Okay.
10 Q. Just ballpark. I mean, how many of these have
11 you done?
12 A. Give me one second here. I think I've got
13 some done -- yeah, this is not a complete list. I only
14 have 22 on here.
15 Q. Let me just ask it this way. Have you done
16 more or less than 500 depositions?
17 A. Less than 500.
18 Q. All right. More or less than 100?
19 A. I would say less than 100.
20 Q. All right. More or less than 50?
21 A. I think probably right around 50, somewhere
22 right there.
23 Q. All right. And when was your last deposition?
24 A. Not that long ago. I'm trying to remember.
25 It was probably three or four weeks ago. I don't

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1 remember. I don't even remember how many I had --
2 depositions I had this year.
3 Q. All right. And when's your next one?
4 A. I don't think I have one on the schedule.
5 Q. How many times have you appeared at trial to
6 testify, approximately?
7 A. Trial testimony, probably, I'm thinking around
8 20, 22 times, something like that.
9 Q. All right. And when was the last time?
10 A. I think it was June of '22, if I remember
11 correctly. I literally have to go through my schedule
12 to --
13 Q. Yeah, you don't need to do that.
14 A. Yeah.
15 Q. Have any of your opinions ever been challenged
16 in any way in a legal proceeding?
17 A. What does that mean?
18 Q. Well, it means some party to a case is asking
19 the judge to either limit or throw out your opinions.
20 A. Not to my knowledge.
21 Q. What do you call the methodology that you used
22 in this case to question the validity of the FCE
23 results?
24 A. It's the WorkSaver FCE testing protocol.
25 Q. WorkSaver testing protocol?

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1 A. Yeah, FCE testing protocol.
2 Q. And WorkSaver is the company you own, and you
3 created that methodology yourself?
4 A. Myself and Dr. Bunch, yes.
5 Q. All right. And the normative data underlying
6 that methodology is contained in the references you told
7 us about before?
8 A. That's not an exhaustive list, but that's some
9 of them, yes, but we've covered all of them.
10 Q. And what's the rate of error of the
11 methodology you used?
12 A. We haven't done a study of particular rate of
13 error, but the -- it's based on the peer-reviewed
14 published literature that we're using.
15 Q. All right. So there is no known rate of
16 error, correct?
17 A. Correct.
18 Q. All right. What about has the methodology you
19 used, and I'm limiting the -- when I say methodology,
20 I'm just talking about -- I'm not talking about the FCE
21 itself; I'm talking about the validity part of it, okay?
22 A. Okay. That's part of the FCE, but yeah, sure.
23 Q. All right. Well, that's the only part I'm
24 asking about. So the -- is it still that the
25 methodology you used on the validity question still the

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1 WorkSaver testing protocol?
2 A. Yes. Yeah.
3 Q. Okay.
4 A. And it's based on the peer-reviewed published
5 literature, which includes, you know, medical textbooks,
6 anatomy and physiology, biomechanics, and then the --
7 Q. Right.
8 A. -- peer-reviewed published literature on
9 effort analysis.
10 Q. And you cannot tell us any rate of error of
11 the methodology you used as to the validity, correct?
12 A. We haven't done a study on the rate of error,
13 but I know it's in some of the publications that are in
14 --
15 Q. And you'd be able to tell Skanska's attorneys
16 whatever publications those are?
17 A. Yeah, I would just have to go look, pull the
18 publications --
19 Q. Okay.
20 A. -- and look at the rate of error --
21 Q. All right.
22 A. -- that they're publishing.
23 Q. Well, you understand whoever hired you, it's
24 their burden to prove you're qualified and your opinions
25 are reliable, right? You understand that?

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1 A. Correct. Well, I've qualified as an expert in
2 functional testing in federal, state, and Worker's Comp
3 courts, so --
4 Q. And what about the methodology you used for
5 the validity part of this? Has that ever been tested by
6 anybody?
7 A. So we're in the process of developing a study
8 on the WorkSaver functional capacity evaluation test
9 itself. We've got some of the data collection done. We
10 just haven't found time to write the paper, but it's
11 interesting, though, in the sense that we have a group
12 of people who -- they get injured on the job, but are
13 highly, highly motivated to back to work because of the
14 income that they make. So it's going to make for an
15 interesting set of --
16 Q. That's interesting. So the answer to my
17 question is the methodology you used to question the
18 validity of Mr. Moak has never been tested, correct?
19 A. Well, the methodology is based on the peer-
20 reviewed published literature that we cite.
21 Q. That's fine, but has it ever been tested,
22 other than that? Other than it being based on --
23 A. What do you mean when you say tested?
24 Q. I mean has it ever been tested. That's -- I
25 don't --

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1 A. What does that mean?
2 Q. I don't know. You tell me.
3 A. So well, that's what I'm trying to -- I'm
4 trying to answer the question, and so I have to
5 understand the question before I can answer it. So when
6 you say tested, what do you mean?
7 Q. I don't know. Has the methodology you used to
8 question Mr --
9 A. Well, then if you don't know, then I say it's
10 definitely been tested. So we've been using the FCE
11 protocol now for 25 years, so it's been --
12 Q. Okay.
13 A. -- used by and tested by medical physicians.
14 Medical physicians rely on the test results in clinical
15 decision making. It's been used in court cases,
16 federally, state, Worker's Compensation court, et
17 cetera. So has it been tested? I would have to say yes
18 then.
19 Q. Okay. So where can we find the result of the
20 test you just claimed?
21 A. You're going to have to look at individual
22 physician's notes. You're going to have to look at
23 individual court cases, et cetera where all the
24 testing's occurred.
25 Q. All right. That's the best answer you can

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1 give on the testing, huh?
2 A. Well, so you just told me you don't know what
3 the testing is, so how am I supposed to answer the
4 question. I don't understand that.
5 Q. Well, as an expert, I would think you know
6 what testing means.
7 MR. POPP: Objection to the form of the
8 question.
9 BY MR. VUJASINOVIC:
10 Q. But anyway, you've given me the best answer
11 you can, and we'll run with that. Okay. Now, the
12 technique that you used in questioning validity, has
13 your specific technique ever been subjected to peer
14 review and publication?
15 A. It's based on peer-reviewed published
16 literature.
17 Q. No, has it been subjected to it? Has your
18 actual technique actually been subjected to any peer
19 review and publication?
20 A. So are you asking my evaluation skills, have
21 they been objected to, peer reviewed, published?
22 Q. No. I'm asking -- remember, we're talking
23 about the methodology that you used --
24 A. Uh-huh.
25 Q. -- for the validity part of our work, and you

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1 talked -- told us about reports --
2 A. And the answer is it's based on peer-reviewed
3 published literature.
4 Q. Okay. That's not my question. Please try not
5 to interrupt me.
6 A. What's your question?
7 Q. So tell the -- identify to the judge anywhere
8 where your methodology that you used in terms of the
9 validity issue in this case has ever actually been
10 subjected to peer review and publication.
11 A. So it's based on peer-reviewed published
12 literature.
13 Q. So it's based on it, but never been subjected
14 to it, correct?
15 A. I'm not sure I understand the question. So
16 are you saying the peer-reviewed published literature
17 hasn't been subjected to peer review and --
18 Q. One of the --
19 A. -- peer review?
20 Q. One of the requirements for your opinions not
21 to get thrown out of court here is going to be whether
22 your scientific technique, which is the methodology you
23 used to address the validity issues, has ever actually
24 been subjected to peer review and publication.
25 A. I'm basing my evaluation on peer-reviewed

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1 published literature.
2 Q. Okay. Well, we'll run with that evasive
3 answer. Okay. Let's see here. You've already told us
4 --
5 MR. POPP: Objection.
6 BY MR. VUJASINOVIC:
7 Q. -- there's no known rate of error. Check that
8 one off. And is your technique --
9 A. I said there's --
10 Q. -- generally -- please don't interrupt me. Is
11 your technique generally accepted by the scientific
12 community, specifically whatever your methodology was
13 addressed to the validity issue?
14 A. Well, so the physicians who order functional
15 capacity evaluations rely on my opinions to help them
16 make decisions in some of the cases that they deal with.
17 Q. Oh, is that the best answer you can give on
18 that one?
19 A. So it's a medical test that's being used by
20 medical physicians, that's being used by courts in the
21 land.
22 Q. Have you -- how many peer-reviewed and
23 published articles have you written?
24 A. One, two, three. I think we've got four
25 different articles out there. It's in my CV. I'm

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1 trying to remember.
2 Q. You said four?
3 A. Yeah.
4 Q. Okay. Do any of those address the methodology
5 you used on the validity issue in this case?
6 A. Well, it's part of the -- one of the papers we
7 did on the -- let me pull the name of the paper up here.
8 The Decided Value of the Medical Fitness for Duty
9 Program is the name of the paper.
10 Q. Okay. I assume that you've listed your
11 published articles under the references on Page 29 of
12 this expert report?
13 A. I haven't, no.
14 Q. No?
15 A. Dr. Bunch has listed on here the AMA Guide to
16 Functional Capacity Evaluations, Handbook of --
17 Q. Okay.
18 A. -- Lower Extremity --
19 Q. Okay. I just want to make sure that it's
20 accurate that you didn't include any of the four things
21 you wrote under the references, Page 29, of the expert
22 report in this case; is that correct?
23 A. Correct. It's in my CV.
24 Q. Okay, sir. Thank you for your time.
25 MR. VUJASINOVIC: I'll pass the witness.

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1 MR. POPP: I want to attach -- I'm going to
2 attach a copy of his report as Exhibit 7, and I don't
3 have any follow-up.
4 (Exhibit 7 was marked for identification.)
5 THE REPORTER: Okay. Mr. Trevor, we're going
6 to do the read and sign?
7 THE WITNESS: I guess -- can I ask if this
8 goes to trial -- Matt, can you guys provide me with a
9 copy of the deposition so I can review it?
10 MR. POPP: Sure, sure.
11 THE WITNESS: Yeah, so then I waive the read
12 and sign.
13 THE REPORTER: All right. Mr. Matthew, would
14 you be doing a transcript order?
15 MR. POPP: Yes, please.
16 THE REPORTER: All right. Standard turnaround
17 delivery?
18 MR. POPP: Yes.
19 THE REPORTER: Okay. And Mr. Vuk?
20 MR. VUJASINOVIC: Yeah, I'll take a
21 transcript. I don't need the video at this time, but I
22 might get it from you later.
23 THE REPORTER: And Mr. Matt, did you need
24 anything with the video?
25 MR. POPP: I'll take the video.

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1 THE REPORTER: Okay. All right. I'm good to
2 go, Sanam.
3 THE VIDEOGRAPHER: We are now going off the
4 record, the time is 5:53 p.m.
5 (Deposition was concluded at 5:53 p.m.)
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1 CERTIFICATE OF REPORTER
2 I, Jabriel Alshehabi, a Digital Reporter
3 within and for the State of Louisiana do hereby certify:
4 That the foregoing witness whose examination is
5 hereinbefore set forth was duly sworn by me upon
6 authority of R.S. 37:2554 and that said testimony was
7 accurately captured with annotations by me in the
8 electronic reporting method, was prepared and
9 transcribed under my direction, and is a true and
10 correct transcript to the best of my ability and
11 understanding; that the transcript has been prepared in
12 compliance with transcript guidelines required by
13 statute or board rules, that I have acted in compliance
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15 defined by Louisiana Code of Civil Procedure Article
16 1434 and in rules and advisory opinions of the board.
17 I further certify that I am not related to any
18 of the parties to this action by blood, marriage, or
19 employ, and that I have no interest in the outcome of
20 this matter, financial or otherwise.
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24 Jabriel Alshehabi, Digital Reporter.
25 Notary Commission Louisiana 170827.
Commission Expires: November 17, 2026.
Certificate Dated June 8, 2023

1 CERTIFICATE OF TRANSCRIPTIONIST
2 I, Nancy Krakower, Legal Transcriptionist, do
3 hereby certify:
4 That the foregoing is a complete and true
5 transcription of the original digital audio recording of
6 the testimony and proceedings captured in the
7 above-entitled matter.
8 As the transcriptionist, I have reviewed and
9 transcribed the entirety of the original digital audio
10 recording of the proceeding to ensure a verbatim record
11 to the best of my ability.
12 I further certify that I am neither attorney
13 for nor a relative or employee of any of the parties to
14 the action; further, that I am not a relative or
15 employee of any attorney employed by the parties hereto,
16 nor financially or otherwise interested in the outcome
17 of this matter.
18 IN WITNESS THEREOF, I have hereunto set my
19 hand this 8th day of June 2023.
20
21
22 *Nancy E. Krakower*
23 _____
24 Nancy Krakower, Transcriptionist
25