

SCENE FOUR

INTRODUCTION

Monet meets Dr. Irving about 10 minutes before the doctor's testimony. Monet figured that Dr. Irving was a "pro" and would need little preparation time. He basically said there were two things he wanted to focus on. One, that Petitioner was fully functional and almost completely pain free from his prior cervical injury immediately before this accident occurred. Monet explained to the doctor this was a "legal issue" and the Judge would have to give the Petitioner a starting point of permanency at 27 ½%. This would bolster the "legitimacy" and value of the compensable chronic pain disorder claim. He also focused on the report of Dr. I.M. Mello which he felt could be amplified by Dr. Irving since he was qualified in pain management. Frankly, Monet didn't want to pay for Dr. Mello's testimony. The Petitioner attended the hearing. He will be attending all hearings. He made an alteration in his work schedule so that he would not be missing any hours.

TESTIMONY OF DR. J. IRVING, PETITIONER'S EVALUATING PHYSICIAN

MM – Michael Monet

DM – Donald MacDonald

JW – Judge Wrightman

JI - Dr. Jules Irving

JW: Good morning counsellors. We are here on day two of CP 2017-001 James John Jones, Petitioner v. Waste Away, Inc., Respondent. I know that Dr. Jules Irving, Petitioner's evaluating physician for permanency is here consistent with the pre-trial memorandum. Any other housekeeping before we ask Dr. Irving to approach and be sworn?

MM: Well, Your Honor, we have already marked and offer as evidence the exhibits that we will all be relying upon in connection with this claim per the pre-trial memorandum P1 through P-3, R1 through R-3 and J1 which is a transcript of Petitioner's testimony in connection with his previous Award. We also have PR-1 which is an abbreviated CV for all expert witnesses and PR-2 which is all treating records and reports, all relevant MRI studies and the 02/10/18 report of Dr. I.M. Mello.

JW: Mr. MacDonald?

DM: I concur with counsel's representations and the introduction of the entire exhibit list into evidence which has been consistent with Respondent's position to attempt to do everything reasonably possible to expedite the resolution of this claim for the Petitioner without imposing unduly on the Court's time.

JW: As stated before Counselors, the Court is very appreciative of you both attempting to move this trial forward as expeditiously and as fairly as possible. Dr. Irving, please come up and our trusty court reporter will administer the oath.

At which time Mia Teller administers the oath.

MM: Doctor, what has just transpired is that all of the exhibits which constitute the exhibit list that was previously provided to you a few weeks ago are now in evidence, which include your two previous reports. It is as if you had testified verbatim consistent with those reports. This allows us to concentrate on some of the more significant aspects of your findings and opinions. By the way, any opinion that you render here should be based on reasonable medical probability. That's true even if a question asked does not specifically state those magic words.

Jl: That's fine with me. I often wondered why in so many of these hearings I was asked to basically read everything into the record. I think this is an excellent way of getting the background into the picture and focusing on the most important things. Definitely a time saver.

NOTE: His previous report was dated June 1, 2017 per the prior hypothetical. For this exercise, the date is June 1, 2018 so there's not an Allen v. Ebon issue (staleness).

MM: Doctor, I call your attention to your report of June 1, 2018. It is the one and only time that you evaluated this Petitioner in connection with this particular claim, is that true with regard to this accident of July 1, 2016?

Jl: That is correct. As referenced in the report, I did see the Petitioner one other time for permanency and that was back on November 1, 2005 in connection with a previous January 2, 2003 injury to his neck.

MM: Thank you Doctor, we'll get to that in a second, but the point is that the report of June 1, 2018 references everything that you relied upon when you rendered the opinions which you rendered in connection with that report.

Jl: Yes.

MM: Can you describe to the Court the severity of the trauma which the Petitioner suffered on July 1, 2016?

MD: Objection.

JW: Reason?

MD: This witness is here as a permanency expert on the disability which the Petitioner has as a result of the accident. He is not a fact witness nor expert as to the severity of the trauma itself. His resume has no specific expertise in biomechanical engineering, physics, force vectors or anything of the like.

JW: The objection to the particular question asked is sustained. However, Dr. Irving assuming the injury occurred in the manner in which it is described in your report of

June 1, 2018 what would be the etiologic significance of that in terms of the injuries claimed here today?

JJ: Well, Your Honor, I think that the compensable accident of July 1, 2016 is the primary reason for why we are here today. The accident itself is the primary reason why Mr. Jones' clinical loss of function is what it is, notwithstanding that it is superimposed upon both a prior instrumented fusion surgical procedure which had basically resolved from a clinical perspective well before the July 1, 2016 accident. There were some asymptomatic degenerative findings by way of diagnostic studies of the spine, post the accident of July of 2016, but again we are now just dealing with the anatomic platform upon which the compensable trauma was superimposed. Clearly this was a significant injury. The Petitioner is over 200 pounds, he fell forward on an unforgiving surface, down 5 unforgiving steps, striking his forehead on a concrete surface. Neither the brain nor the spine likes that type of trauma. It represented a classic contrecoup response for the brain. Also this would have placed significant force on the cervical spine. He was fortunate that he was able to get his hands forward to a certain extent to lessen the blow and avoid a potentially catastrophic injury involving the spinal cord itself given the fusion instrumentation. He was moving forward with such velocity that once he hit the concrete, he twisted and rolled ending up on his back with what appears to be closed head trauma that really did not get significantly addressed by way of treatment. But nevertheless, to Your Honor's question, I would say this accident has everything to do with the majority of the clinical findings which I ultimately found in my report.

JW: Thank you, Doctor. Mr. Monet?

MM: There were X-rays taken of both the cervical spine and lumbar spine on July 1, 2016 at emergency care. They indicate 1mild straightening of the cervical and lordotic curvature.1 Can you explain to the Court what that means?

JJ: It means that there was significant spasm as a result of the trauma resulting in loss of the normal curvature of the spine in both the cervical and lumbar regions. It means the spasm is significant enough to be able to have this effect. This is not something that can be feigned. It's an indication that there was a significant orthopedic injury to both the neck and the low back.

MM: There was also X-ray findings of 'mild osteoarthritis C4-7 and L3-5.' What is the significance of that finding?

JJ: It is significant in the sense that while those findings represent a pre-existing degeneration of the cervical spine at the C4 vertebrae through 7, the lower four cervical vertebrae and lumbar vertebrae at L3-5, it is clear that while the Petitioner may have had a relatively asymptomatic degenerative spine, it became symptomatic post-accident based on all the data I reviewed. Traumas of the type that this Petitioner sustained on July 1, 2016, can and often do develop chronic spinal pain in part because the trauma is significant enough to make an asymptomatic spine now symptomatic. They are anatomically predisposed in the person within the perfect storm of trauma, genetics and

predisposition to have the exact chronic pain disorder response he had. The medical literature is incomplete on the pathogenesis of this condition, but we in the field see it frequently. It is very real. Kind of like a "tipping point" for spinal orthopedic medicine.

MM: Is there anything in any of the medical records that you reviewed to suggest that the patient was malingering?

JJ: No.

MM: When you reviewed the medical records on Page 3 of your report, the next to the last paragraph, you had indicated that you felt that he should make a re-application to determine if he would be a candidate for medicinal marijuana for which you thought he would be an 'ideal candidate given his anxiety and chronic pain with his aversion to narcotics-opioids.' What did you mean by that?

DM: Objection.

JW: The reason, Mr. McDonald, since all of this is already in evidence?

DM: The mere fact that the report is in evidence doesn't mean that we have stipulated the doctor has expertise to testify here as a chronic pain management expert or what Petitioner's treatment needs are. The doctor was offered as a permanency evaluator and I have indicated in stipulations that his report could be admitted into evidence for the purpose of facilitating the hearing. Counsel is now asking him as to his reasoning for a gratuitous remark which he made in his report in the area of pain management which respectfully is not the doctor's area of expertise nor the reason why he was being offered as an expert witness. He has also made a reference to anxiety and again he definitely is not qualified in that arena either. While I could have asked for the report to be redacted prior to admission, this doctor is simply not qualified to testify as to Petitioner's treatment needs. It's beyond the four corners of his report and not pertinent to Petitioner's permanency.

JW: I'll hear you, Mr. Monet.

MM: Well, respectfully Your Honor, while I agree that the primary purpose of Dr. Irving's expertise is to determine the Petitioner's compensable permanency on an orthopedic basis, part and parcel of that orthopedic disability is Petitioner's overall medical condition and the pain generated by the injuries. Pain is an inextricable part of the overall permanency that any Petitioner presents. Orthopedic physicians prescribe pain medication all the time. Here the doctor does have specific pain management credentials. The doctor chose to make some remarks as a physician as to what he felt might be advisable to the Petitioner which frankly is something that Your Honor and my adversary discussed after the last hearing. As significantly, the doctor is a Fellow of the American Family of Physical Medicine and Rehabilitation, and he is a member of the American Congress of Rehabilitation Medicine together with being certified by the National Board of Medical Examiners, but more importantly as to the specific objection,

he has board certifications in not only physical medicine and rehabilitation but also internal medicine and most significantly pain management. He has had a private practice in that regard as recited in his CV and therefore his education and his actual practice is such that at a minimum he ought to be able to explain his remarks in his report in our search for the 'truth.' He is an overall highly qualified physician in trauma medicine and should be permitted to give his opinion on these issues.

JW: While the Court appreciates your remarks Counselor, I'm going to sustain the objection. Dr. Irving was not evaluating this Petitioner as to his actual need for treatment. He is not his treating physician. He is strictly the orthopedic permanency evaluating physician who was called here strictly to address permanency today and any further commentary concerning treatment needs would be outside the four corners of his report and inconsistent with our attempt to expedite a full and fair hearing of this claim.

MM: Your Honor, respectfully, what we're trying to accomplish though on an expedited basis is a full, fair and comprehensive assessment of all the issues, one of which is the Petitioner's potential eligibility under the very specific circumstances and diagnostics which have been present in his case relative to the potential compensable nature of medicinal marijuana. Rule 703 allows this type of hearsay reliance and here we already have the pain management physician's report in evidence.

JW: Counselor, if you wanted to have someone address this issue specifically by way of testimony you should have placed that doctor's name on the pre-trial memorandum for that purpose.

MM: I did place Dr. Irving's name as the medical witness who was going to testify, and I felt that he would be able to provide the Court with insight into this issue especially given his impressive CV. He has the quantum of knowledge that allows him to testify on the topic. The Court is free to give his opinion appropriate weight.

JW: Counselor, I note that this opinion was rendered by the doctor at the time of his report, at which time he very clearly indicated the issue of the more relaxed standards in New Jersey for obtaining medicinal marijuana of which your client was apparently not aware given his testimony at the last listing. Did you provide your client with a copy of this report?

MM: Your Honor, I don't see the relevancy of Your Honor's line of questioning at this point in time. We are here to simply determine whether Dr. Irving can be permitted to provide the Court with his thought process and exploration which led to him making an important comment in his report. That's only fair.

JW: You mean with respect to a comment that was so important that you apparently were not aware of it until testimony today? As I have now stated multiple times, Mr. McDonald's objection is sustained. If you want to bring some pain management physician in such as Dr. I. M. Mello, I will allow the pre-trial memorandum to be amended in that regard but I

am not going to allow Dr. Irving to testify on that issue since he was not offered for such a purpose.

MM: Doctor, in connection with your physical evaluation, you found paraspinal muscle spasm with trigger points in the lower paraspinal region at C4-T1. What is the significance of those findings?

JJ: It is a clear indication of ongoing muscle guarding in fairly broad regions of the lower cervical and lower lumbar spine regions consistent with the findings which I made and the diagnosis which I made on Page 5 of my report.

MM: Can you explain the basis for your diagnoses which you found in Paragraph 1 and 2 under the category "Diagnoses" on Page 5 of your report of June 1, 2018?

JJ: Orthopedically, the cervical spine region is the most significant area for disability purposes in this particular claim. This is a chronic cervical spine pain disorder which is a culmination of the multiple other findings set forth in that paragraph. I would like to explain to the Court that there appears to be a typographical error in the first paragraph because basically there has been some redundancy. To be perfectly clear, the main diagnoses that I have made include severe cervical strain with chronic cervical pain disorder characterized in part by the loss of cervical range of motion. He has a cervical myofascial pain syndrome with likely facet arthropathies at C4-7, also part of the overall cervical pain syndrome. There is early disc desiccation at C3 through 7 with early osteoarthritis demonstrated at C3 through 7 all of which is now superimposed upon the prior C6-7 instrumented fusion. That instrumented fusion was the only diagnosis I previously made in connection with my assessment of November 1, 2005. As to his low back, in the paragraph it's very clear as to what I found as the diagnoses for this claim.

MM: Dr. Irving, can you tell us how you come to the conclusion that the patient has a main diagnosis of residuals of a "severe" cervical strain with chronic cervical pain? Same thing with the low back. It was a severe lumbar strain with chronic low back – I note that the report itself does not say "severe." It says "cervical strain."

JJ: I see what I said in the report. It may be a typographical error. I can't say for certain, but it's clearly implied. I note that it is abundantly clear this man has a chronic pain disorder in both his neck and his low back. Chronic pain disorder means that there has been persistent significant pain in that location of the body for more than 90 days on a continuous basis, on an objective basis. There are sufficient bona fide findings on the clinical examination to make that diagnosis. It's not a diagnosis consistent with a common sprain or strain. Here the presentation has been persistent over three years. There are multiple ways of addressing this issue. But it is clear that this man does not have a mere minor soft tissue injury. He has a substantial condition; the majority of which immediately presented itself after his fall and was thereby triggered by the compensable accident. It is well-documented in the literature, and in my personal significant practice in the area of pain management and accurately presented in the tens of thousands of patients I've seen over the years in workers' compensation, that often

times the magnitude of a bona fide chronic pain situation can vary disproportionately with the magnitude of diagnostic findings. In other words x-ray and even MRI studies are poor predictors of a person's clinical functionality as a result of a bona fide chronic pain disorder. Lots of other orthopedic conditions present similarly. For example, mild osteoarthritis in the hip can be a sufficient generator of pain that even the bible of medical school orthopedics, Campbell's, states that such a clinical presentation justifies a total hip replacement even with modest osteoarthritic findings. Here this Petitioner has a bona fide chronic pain disorder no doubt. He doesn't have simply some amount of "pain" that he is alleging to be ongoing for a limited period of time. Rather he has the qualitative type of severe pain which is unrelenting and is significantly impacting him in almost all the areas of the life he previously enjoyed. It impacts his pursuit of activities of daily living, and creates a daily challenged workplace. I think I understand his ostensible reason for staying away from opioids. Frankly at this point, I don't believe that injection modalities would likely be therapeutic in view of the length of time at which this condition has been entrenched. This is one of those situations that demonstrate the inadequacies of modern medicine and the spine. Just because he doesn't have a disc herniation that would be a surgical lesion does not mean that he does not have a serious spinal condition. In a lot of ways, simple disc herniations with clear related radiculopathy are far easier issues to address and far less disabling than people such as this Petitioner who have a bona fide chronic pain disorder that isn't being adequately managed. We can decompress a disc and get rid of the radiculopathy in clear cut cases. Petitioner's problem is the type of problem that could potentially in the future be permanently and totally disabling with significant psychiatric residuals especially if inadequately treated. At this point in time, I believe this Petitioner is to be commended for at least seemingly containing this problem, but it's absolutely not being adequately addressed medically from a treatment perspective. There are modalities that can and should have been tried. There is still some medical hope, and one of the potential solutions in my opinion at this point that's designed to give this individual any type of relief would be medicinal marijuana. I am not guaranteeing its efficacy in this case but because thus far medicinal marijuana has shown to be as efficacious as opioids in the right situation and certainly seemingly with less long-term harmful effects.

DM: Objection and motion to strike the last aspect of the doctor's opinion concerning the Petitioner's medicinal marijuana candidacy, largely for the reasons already indicated on the record by Your Honor sustaining my previous objection.

JW: Sustained and granted. We are not going to allow through the back door that which we did not permit through the front door, Mr. Monet.

MM: My continued objection is noted for the record.

JW: So noted.

MM: Your report indicates a 40% permanency with respect to the cervical spine with overall permanency greater due to the previous Award at 27½% permanent partial total. Can you explain to the Court your reasoning in support of your conclusion?

JJ: I think it's straightforward. There was a previous Award of 27½%. I feel that the 27½% status has increased to an additional 40% for the reasons I have already described. This is a significant but non-operated on problem superimposed upon a prior surgery from which the Petitioner had improved significantly, but it is that precise prior surgery that gave rise to an alteration in the architecture of the spine together with his long-term work duties which all contributed to the relatively asymptomatic degeneration in the spine, following which this trauma occurred causing the chronic pain disorder and the Petitioner's failure to improve. He is able to work albeit with severe pain and in a situation where most people might stop working altogether or at least stop performing physically demanding work. He has already altered the physicality of his activities of daily living as a way of compensating. Basically it's his way of self-medicating.

MM: Can you advise as to the basis for the 30% finding which you found solely to the accident of July 1, 2016 referable to the low back?

JJ: I think I have already provided this to the Court. At the precise moment of this accident, he had an asymptomatic degenerative spine onto which this trauma occurred. He has a bulging disc which presumptively is related to the trauma, but even if not, it was asymptomatic and was not a cause of any type of disability. His entire lower spine is now symptomatic due to the diagnoses which I have described. There is not one focal point in the lower back or the cervical spine which is the precise lesion generating his overall pain. This is a presumptive multifaceted consideration, but the ensuing disability is 30% permanent partial total with respect to the lower back.

MM: Doctor, you've also had the opportunity to review the transcript of the Petitioner's testimony in connection with this claim. Has anything that you've read in the transcript concerning his testimony changed your opinion concerning the compensable permanency which he has?

JJ: No. If anything it bolsters my opinion and completely confirms his significant disability. I think the Petitioner was very detailed describing the level of severity of his symptomatology and its impact in working and non-working activities.

MM: Thank you, Dr. Irving. I have nothing further.

JW: Cross-examination.

DM: Thank you, Your Honor. Doctor, forgetting about any legality of the Petitioner's prior permanency award of March 1, 2006 in the amount of 27½% permanent partial total for the residuals of his operated C6-7 cervical spine, and simply dealing with the functionality consideration on a clinical basis from a medical perspective, there is no doubt in your mind, is there, that immediately prior to this compensable accident which brings us here today of July 1, 2016, this Petitioner had successfully rehabilitated himself over the years with respect to his previous cervical spine injury and was functioning at a reasonably high level allowing him to engage in significant sporting activities and

employment duties on a sustained repetitive basis with no ongoing significant symptoms or sequelae? Is that correct?

JJ: Well, I never want to minimize an instrumented fusion surgery of the nature of which this Petitioner had, but your point is well-taken. In my opinion, he's a highly unusual individual as Petitioners go, and he was extremely determined to overcome the residuals of a very serious injury in order to protect himself, his employment and his family.

DM: And he succeeded on all three, did he not, Doctor?

JJ: Yes he did.

DM: When you evaluated this Petitioner on June 1, 2018 did you receive any information from Petitioner's attorney in terms of the issues presented in this claim?

JJ: No.

DM: Did he send you an email or a letter describing the purpose of your evaluation?

JJ: No.

DM: Well, how did the appointment get scheduled and the records received if there wasn't any communication?

JJ: I believe his legal assistant simply sent an email to my scheduling coordinator requesting an evaluation be scheduled for the accident of July 1, 2016 and that all relevant treating records were going to be provided. More often than not, I rarely get helpful overviews but it really doesn't matter because I have a medical record person who actually puts everything in order before I perform my examination.

DM: Did you have your previous report of November 1, 2005 with you when you prepared your June 1, 2018 report?

JJ: Actually, I did not. I knew from the records that there was a previous evaluation and what my assessment was in terms of a permanency rating but I did not have the report. I received a copy of the report from Mr. Monet after I had already prepared my report, as I had requested the same from his office.

DM: Interesting. Well, Doctor, when you prepare these preliminary reports generally, is any part of this word-processed?

JJ: Yes. There's processing usually in our first paragraph which reflects my office practice. If there was some inaccuracy, I would change that. Other than the first paragraph, each report is individualized with most of the history coming from the medical record person which history I review, but all clinical findings and estimates of disability come from me.

DM: Do you actually speak with the Petitioner referable to his level of severity?

JJ: Actually, the history and symptoms are from the nurse's assessment in order to expedite these exams, but I personally perform all clinical testing. There would also be some interaction with the patient in that regard. If there's anything unusual about his symptoms or anything about his situation, I will note that as part of the exam. But again, I perform the clinical findings and make the assessment which is contained in the report based upon my review of everything.

DM: I would like to bring your attention to your first report of November 1, 2005. In that report you made a finding of 65% permanent partial total with respect to the cervical spine strictly with respect to the overall residuals associated with the C6-7 instrumentation. Is that correct?

JJ: Yes.

DM: And in your June 1, 2018 report, you make a finding of a 40% compensable component which you indicate is then added to the 27½% previously awarded. Is that also correct?

JJ: Yes.

DM: In other words, your report does not say he has a 67½% overall rating at this point in time. You merely state that it is 40% above the Award. Is that correct?

JJ: Yes, I, see your point, and I believe that there is a distinction between what I'm saying here and what I stated the last time I saw him. He is clearly worse.

DM: Well, Doctor, if he was 65% before and now you have him at 40% more, then now he would be 105% disabled, and that's impossible. So clearly that's not the situation, is it?

JJ: No, it is not, but that's not what my report means.

DM: Okay, what your report is basically saying is that is you're estimating 40% strictly for his cervical spine associated with the clinical presentation at this point in time in combination with his new diagnoses contributing to that diagnosis and his present overall loss of function. Is that a fair statement?

JJ: Not exactly. What I'm saying is that I am respecting that the Court found him to have a 27½% rating before, and I am now saying with respect to that as a baseline, he is now 40% worse from the Court determination.

DM: And that would be only 2½% worse from your previous determination?

JJ: Again Counselor, I do not believe that analogy holds.

DM: Respectfully doctor, it is up to Judge Wrightman to determine whether it does or doesn't.

MM: Objection, argumentative.

JW: Overruled. He's accurate.

DM: The instrumented fusion resulted in a significant radiculopathy which was present at the time of your last assessment. Is that correct?

JJ: Yes.

DM: And the patient now no longer has any radiculopathy resulting from any type of nerve root compression, with respect to his neck and/or his low back.

JJ: That is correct.

DM: And that is a significant improvement over the functioning of his cervical spine as compared to when you last saw him.

JJ: That is also correct.

DM: Frankly, Doctor, he has dramatically improved, at least prior to this last compensable accident with respect to almost all of the indicia of disability such as loss of function at work and outside activities before the last compensable accident. Is that correct?

JJ: That's absolutely true. You and I finally agree.

DM: At the time of your first evaluation, he was not able to bowl and he was not able to play softball.

JJ: No, he was not. He rehabilitated himself and was able to fully function in that highly competitive area with no adverse impact with respect to his cervical spine, nor did he have any limits because of his cervical spine. As far as I was concerned, he was a relatively completely healthy and functional individual before the last compensable accident. Except of course that structurally he had an instrumented fusion that can't be completely discounted.

DM: I appreciate that, Doctor. But again, from strictly a medical, functional, clinical perspective, legalities aside, that instrumented fusion was not causing him any meaningful residuals either in working or non-working activities for frankly a number of years before this last compensable accident occurred. Is that correct?

JJ: That's a fair statement, Counselor.

DM: And Doctor, after this compensable accident, he was provided authorized care. Is that correct?

Jl: Yes.

DM: He had 7 weeks of physical therapy which was a good starting point for the diagnosis presented at the time.

Jl: That is correct, at least on an authorized basis. He had subsequent unauthorized physical therapy.

DM: He testified that he was very pleased with Dr. Payne, the authorized orthopedic physician, who he had an excellent relationship with as far as he was concerned.

Jl: I'll take your word for it. He stated as much when he testified. Refreshing.

DM: You note in the records that Dr. Payne was to have him return if he got any worse, and the Petitioner did not return at all since he was discharged a significant time ago. Is that true?

Jl: That is true. He did treat with other physicians, however, because Dr. Payne got him as far as he could with the paucity of treatment provided. It's not surprising he didn't improve.

DM: As to these other physicians, there was a primary care physician, Dr. Moore, who had him undergo MRI studies of his neck and back.

Jl: Yes. Dr. Payne did not order it, notwithstanding his intractable pain presentation.

DM: And those MRI studies did not reveal any clear trauma-related pathology, especially since you basically said it was "degenerative pathology."

Jl: Well, I would say that none of that pathology was caused by the accident other than potentially the bulging disc at L5-S1 which, in my opinion, was traumatic, but I would candidly admit that it also could be concentric bulging consistent with the aging process, but in his case we don't see it anywhere else in the spine so I'm staying with traumatic. However, the important thing is that the level of osteoarthritis and degeneration, especially the facet arthropathies, and disc desiccation, are all fertile predisposition areas for potentially producing a chronic pain disorder in the right genetically predisposed individual such as the Petitioner. The literature is clear on that. The degenerated or desiccated discs were unhealthy by definition and more prone to further injury like any other part of the body.

DM: You say "genetically predisposed." What specific genetic predisposition proven by way of any actual testing does this Petitioner possess?

Jl: You're correct, Counselor. I do not know specifically nor does modern medicine, but people are predisposed to reacting differently to different traumas. The spine is an area of the great unknown as much as it is an area of the known. Chronic pain is a major "X"

factor. It is a multifaceted condition, and it takes careful professional analysis to conclude what's real and what isn't. What works and what doesn't. What this patient has is clearly real and significant.

DM: Motion to strike, Your Honor, as not being responsive to the question asked.

JW: Objection sustained. Motion granted.

DM: By the way, the patient's present range of motion deficits in the cervical spine are precisely what they were when you examined him the first time as an overall consideration. Is that true?

JJ: That does appear to be true, Counselor. At least as a one-time test which really is not particularly meaningful.

DM: And it's also true that the Petitioner has not availed himself of any pain management/injection modalities that have been suggested.

JJ: That is true, but the Petitioner has provided a bona fide explanation.

DM: And pain management modalities of the type suggested are relatively innocuous protocols these days in terms of attempting to address the early infancy of bona fide chronic pain when the initial periods of physical therapy and rehabilitation do not help.

JJ: That is relatively true so long as we are not dealing with a diabetic or otherwise discounting infection potential. You'd be surprised how many patients are scared to death of injection modalities.

DM: And by the way, Doctor, there is absolutely no radiculopathy in neither the Petitioner's cervical spine nor lumbosacral spine. Is that correct?

JJ: That is correct.

DM: And from a neurosurgical standpoint, usually the radiculopathy is a major component to addressing what could be anticipated relief from surgical intervention. Is that also true?

JJ: Yes, that and the instability of the spine. The first surgery was because he had a massive herniation which in and of itself was problematic with significant radiculopathy, and I believe cord compression.

DM: And none of that is now present.

JJ: That is correct.

DM: There is such a thing known as adjacent disc disorder. Is that correct?

JJ: Yes.

DM: Doctor, can you explain to the judge what that is?

JJ: It is simply where there is altered compression on the discs above and below the surgical site, usually primarily the adjacent disc, hence the name "adjacent disc disorder" where probably in the area of 13% of spinal fusions result in extension of fusions within 10 years post original surgery. These figures are very rough. There's some controversy in the literature, but there's clearly an alteration in the way in which loads are spread through the discs above and below fusion levels both in the cervical spine and lumbosacral spine simply because of the nature of that anatomy.

DM: And the etiology of the mild osteoarthritic findings and degeneration in this particular instance, early stages according to the readings on the diagnostics includes genetics, the aging process and the residuals of the first surgery insofar as the cervical spine is concerned. Is that a fair statement?

JJ: Probably. However, I think we probably could include some level of occupational exposure which is significant.

DM: Well, if that was the case, then I would also assume that we would also include some of his significant sporting activities as well.

MM: Objection Your Honor, compound question.

DM: It's not compound. I asked whether these diagnoses were caused by the three etiologies I named. It's not compound. The answer is either "yes" or "no" or an explanation. It's not confusing. It's simply a direct question Your Honor.

JW: Objection overruled.

MM murmurs to the court reporter sarcastically "what a surprise" which is heard by the court reporter but not transcribed.

JJ: I would also agree with that. That's part of the aging process, the activities associated with the same and here this Petitioner was extremely active and functional as a practical matter for a number of years once he essentially recovered from his instrumented fusion surgery.

DM: And by the way, in your evaluation this time around, you didn't note severity other than you felt he had a severe presentation. In terms of his pain on the visual analog scale of 0-10, where is severe pain?

JJ: Severe pain is anywhere between 8 to 10, moderately severe 6 to 8.

DM: And in your first report, you found that his actual pain at that time was 3-5/10 spiking to 7-9/10. Is that correct?"

Jl: Yes.

DM: But all of that basically resolved before this last compensable accident. Is that also true?

Jl: Yes.

DM: Nothing further Your Honor.

JW: Any redirect Mr. Monet?

MM: No, Your Honor.

QUESTIONS

1. Critique Monet's questioning of Dr. Irving.
 - 1a. Critique Monet's preparation of Dr. Irving.
2. Critique MacDonald's objections especially with respect to Dr. Irving's qualifications to testify regarding severity of trauma; medicinal marijuana; his ability to testify regarding pain management either by way of qualifications or beyond the four corners of his report.
3. Critique Monet's objections.
4. Critique Judge Wrightman's rulings.
5. In your opinion, did Judge Wrightman conduct a fair hearing regarding Dr. Irving? Why or why not?
 - 5a. Was Wrightman trying the case for MacDonald?
6. Discuss the Four Corners of the report doctrine with respect to expert testimony generally. When is it permissible to go beyond the four corners?
7. Was Dr. Irving qualified to testify on the issue of pain management or medicinal marijuana?
 - 7a. What is the test which would be applied by the Appellate Division?
8. Should Dr. Irving have been permitted to testify regarding medicinal marijuana? Why or why not.
9. Rate the relative professionalism of Monet and MacDonald in this scene.

10. What is an objectionable compound question?
11. Rate the persuasiveness of Dr. Irving's testimony.
12. Were there any appealable issues which arose during the course of this scene?
13. Did Irving create an adequate record of explanation regarding the Petitioner's alleged chronic pain disorder and/or his traumatic aggravation of asymptomatic degenerative disc disease and osteoarthritis?
14. What was the most unprofessional moment in this scene?

PREPARATION OF DR. A. D. DRAKE

Petitioner's psychiatric doctor is to testify next. He arrives early and sits in the court room and watches most of Dr. Irving's testimony. There are other people in the court room. No one even realizes the doctor is in the room. He is not sequestered. Monet is somewhat disappointed with Irving's testimony and felt that it could have gone better. He felt that Judge Wrightman was being unfair to him in preventing the full scope of Dr. Irving's potential testimony. But he also felt that he established a baseline prima facie claim. He took a few minutes with Dr. Drake to emphasize that he just needed the doctor to explain the bona fides of Petitioner's psychiatric disability and diagnoses not even in the absence of psychiatric treatment. Secondly he was going to try to have the doctor address the general challenge of Petitioner's pain management. He especially wanted the doctor to focus on the report of Dr. I.M. Mello. He advised the doctor that Dr. Mello's report was already in evidence. He wanted his expert opinion to be more than a "net" opinion. He felt that Judge Wrightman would allow elaboration. He really felt that the weakest part of his claim was the psychiatric issue and felt that even if Judge Wrightman didn't find that the Petitioner had compensable psychiatric disability, the Judge would more likely find the existence of a bona fide chronic pain syndrome associated with Petitioner's neck and low back. Since the neck "had" to be stacked on 27 ½% PPT, he was still in good shape in terms of how he was proceeding thus far.

TESTIMONY OF DR. A.D. DRAKE, PETITIONER'S PSYCHIATRIST

MM – Michael Monet

DM – Donald MacDonald

JW – Judge Wrightman

ADD – Dr. Alan D. Drake

JW: We are back on the record in connection with Jones v. Waste Away, Inc. We have just taken the Petitioner's evaluating orthopedic expert's testimony and now I understand that Petitioner's evaluating psychiatric expert is prepared to testify. Is that correct?

MM: Yes, Your Honor.

JW: Have the doctor approach.

As the doctor moves forward, Wrightman says:

JW: Oh, so you're Dr. Drake. I saw that you were in Court for most of the testimony of Dr. Irving. Was that intended?

ADD: No, Your Honor. I arrived early. It's my habit. I have never been late for Court testimony. I had asked the security officer where Mr. Monet was and he advised that he was in this court room which is why I entered. I just sat down and waited for the proceedings to be over. Interesting testimony. Took me a while to figure out what was going on.

JW: Took me a while too. Come on up doctor and have a seat in the witness box and the court reporter will administer the oath. However, before we do that, Mr. MacDonald do you have any objection to the doctor having heard the testimony of the Petitioner's physician?

DM: Your Honor, it's my normal practice and custom, not to permit any witness in the court room during testimony if that witness is going to be called for testimony as I believe the testimony of any witness should be simply what they bring into the court room with no further collateral information. Certainly no information gleaned during trial. There is the potential for improper influence. However, we are trying to move this case forward. So long as the doctor confines his opinions to the four corners of his report and doesn't rely on any further collateral information, especially some of the objectionable portions of Dr. Irving's testimony, then I see no reason why he should not be permitted to testify. He's here for psychiatric. Dr. Irving was for orthopedic. So with that proviso, I have no objection to his testimony. As Your Honor knows, his report is already in evidence.

JW: Your remarks are well taken. I appreciate your candor and your position. Had you objected, we very well could have had a serious problem. Perhaps Dr. Irving's testimony

would have to be stricken or Dr. Drake's barred. Tough position. Mr. Monet I trust you have no objection.

MM: Well respectfully while I have no objection, I find it outrageous that Your Honor has gratuitously suggested Dr. Irving's testimony might have been stricken merely because Dr. Drake was in the court room. I am speechless on the issue. This coming after your remark to Dr. Drake about Your Honor "taking a while" to figure out "what was going on" during Dr. Irving's testimony. I'm not really sure what that meant.

JW: Counselor, just a little levity. Let's proceed and get down to business. Mr. Monet. Your witness.

(Monet is a little shaken after that exchange).

MM: Dr. Drake you saw this Petitioner for psychiatric evaluation and generated a report dated February 15, 2018 is that correct?

ADD: Yes.

MM: And your report is already in evidence as is your curriculum vitae. Consequently you can dispense with your reading from the report in its totality and rather focus on some specific parts of its contents relative to your findings and your opinions that we will be asking you about. Do you understand?

ADD: Yes.

MM: By the way any opinion that you render here should be based on reasonable medical probability. In the event I do not use any of those words specifically in any of the questions I ask, you do understand that all your opinions should be based on that standard. Is that correct?

ADD: Yes.

MM: Doctor, did you personally take a history in connection with your evaluation of the Petitioner?

ADD: Yes. I always do. It's been my professional practice for years. I don't believe that a psychiatrist can adequately do his or her job without personally meeting with the patient and exploring not only the relevant history but the personally stated descriptions of that history where a lot can be learned by tone and body language which never appears in a written document. It's an important part of the interview process where I can glean a lot of information by simply the manner in which the patient is describing things; things that to me will impact potentially further questions on my behalf or underscore either the severity or lack thereof of any bona fide overall clinical presentation.

DM: Did you know Dr. Irving, Petitioner's evaluating physician doesn't do that?

MM: Objection. Your Honor that's irrelevant and inflammatory and Mr. MacDonald is out of order!

JW: Mr. MacDonald can we please move this along. While a well-timed clever question, I'm not interested in Dr. Drake's opinion of Dr. Irving's office practice. You interrupted counsel. You could have at least waited until cross. Mr. Monet is right. Let's move on.

DM: Sorry, Your Honor.

MM: How long did your interview take?

ADD: Approximately one hour. I do not keep exact time. Based on looking at this particular report I can tell that this interview probably took about one hour.

MM: Is everything you relied upon in consideration of your findings referenced in the report?

ADD: Yes other than my own personal observations as I just indicated.

MM: Did you perform any specific type of tests on the Petitioner to assess his overall condition?

ADD: I did not find any specific testing was really necessary as I found a post-concussion syndrome in view of the history that was presented with a significant head trauma with an alteration of consciousness. He has an undiagnosed undertreated post-concussion syndrome which at least represented part of his overall presentation referable to his chronic headaches. He has not slept well since the accident. That's an indicator. His thought processes could easily be potentially associated with head trauma in addition to being an obvious part of his overall chronic pain disorder with depression and anxiety. These things are not necessarily mutually exclusive. But to your question, any testing for significant concussion residuals would be necessitated only if there were significant concussion issues such as photophobia, vertigo, significant short-term memory issues, personality changes, fatigue, and the like. The point is we see many patients who have closed head trauma with potential mild brain injury. Personality alterations are real but often under appreciated. The brain is a very complex organ and what we can say is that there can be a collection of symptoms following a closed head trauma which symptoms are potentially consistent with the head trauma itself. This is the basis for my diagnosis in that regard. Relative to any specific tests, I felt the situation was obvious enough to not have to press the issue with a battery of tests that I don't believe would necessarily provide any more insight than my own careful professional clinical observation of this patient in combination with his apparently undisputed history. In the area of psychiatric assessment there is a great need for credible histories and credible information from a patient, the failure of which undermines the entire process.

MM: What was the significance, if any, of the history of his brother's death?

ADD: That history is very significant. Petitioner meets all the criteria for major depression disorder associated with that episode yet amazingly no specific treatment. One could even consider a "post-traumatic stress disorder" at least initially but it has at least remained a major depressive disorder as it seriously impacted him on many levels. Ironically it's one of the issues that impacted Petitioner's decision making process in this very case. This is a big factor that's under appreciated. For example, his complete refusal to consider any type of pain management injection modality or any type of modality is directly related to his brother's death. That death made him feel vulnerable in his own life. It also created a huge void for him as his brother was not only a role model but his best friend. After all, he was his twin brother. One could argue it's like losing a limb. It's one thing to be close to someone but it's another thing to love someone as unconditionally as he did his twin brother and see everything that he respected and loved about that individual slowly erode. Especially when it is resulting from the very modality of medical treatment he received which was supposed to improve his quality of life. In Petitioner's mind and actually in reality the prescribed narcotics killed his brother. It created Petitioner's huge abnormal distrust of opioids and secondarily of those who prescribe them. One could argue these were elements of paranoia or hysteria. It's one of the reasons why the Petitioner has significantly under treated in connection with this claim because not only does he not even consider modalities that can help him, which I believe would clearly be pain management and inclusive of medicinal marijuana and secondarily psychiatric management, but ironically the failure to consider these potential avenues are outside the parameters of what normal functioning would be. It underscores the depth that his pre-existing depression and secondary anxiety have impacted him and how he functions in his daily living and at work. It's all tied together. He's in a no-win situation. He didn't treat for his brother's death and that is a trauma he will never get over. How do you expect him to treat for chronic pain? The only hope would be if he couldn't work due to chronic pain, but then it might be too late.

MM: Doctor, thank you for your answer with respect to my question about the pre-existing condition. Can you explain to us how the compensable accident residuals have impacted him in light of the pre-existing condition?

ADD: Certainly. As I have indicated in my report there are two major traumatic incidents in his life from a psychiatric standpoint. The first is the death of his brother which sets up a certain pre-disposition with respect to judgment and coping mechanisms for subsequent serious injuries such as we have here. The second obviously is that second serious injury which is the compensable accident of July 1, 2016. Unfortunately this has resulted in a chronic pain disorder which has been inadequately treated psychiatrically and also the chronic pain itself which is a specific driver. The inability of the Petitioner to improve this significant chronic pain disorder has created both further depression and anxiety which I have described as an overall mood disorder. All of this is tied to a deep-seated fear of being unable to provide for his family. In an odd way his brother's death has only galvanized him in that regard but at the same time it has made him more terrified about the prospect of not being able to continue with employment. It's more real to him since he saw and felt it happen. He tells no one about this condition and there is a daily reminder with respect to his chronic pain condition. He is both ashamed and afraid of his

condition. He is fearful of the consequences. The longer it persists, the more severe it is and harder it is to conceal. It's a bad dynamic. Probably the more intractable the condition is. All of this is a source of interactive stressors superimposed upon his pre-existing condition.

MM: Doctor, can you clarify on Page 4 where the estimates of disability are with respect to the 35% you found on a compensable basis and a 25% permanent partial disability pre-existing. Are these separate and distinct disabilities or is the 35% overall and 25% pre-existing? Or is it 60% overall apportioned 35% compensable and 25% pre-existing?

DM: Objection Your Honor. I object to the form of the question. It's a compound question and he is leading the witness. Counsel is trying to cross examine his own witness and to get him to change the explicit language in his report. It's as plain as day. The report is perfectly clear that after the compensable accident the doctor found 35% psychiatric disability with a specific pre-existing disability of 25%.

JW: I'll hear you Mr. Monet.

MM: Judge, there's nothing wrong with the question. I simply wanted a clarification as to his opinion as to what he meant by those two figures so that we would have a clear record.

JW: Then why didn't you just ask him that? I am going to sustain the objection, but doctor can you please tell us first what is this Petitioner's overall psychiatric disability for his overall mood disorder with overtones of depression and anxiety?

ADD: Certainly Your Honor, the overall mood disorder is 60% permanent partial total.

JW: And it's comprised of what?

ADD: 35% of that figure is compensable as I've indicated in the report and 25% is strictly pre-existing. I apologize for not giving the overall figure but I did clearly identify each percentage with each condition.

JW: I note that there was an overall mood disorder but the overtones of depression and anxiety are referenced in the first not the second.

ADD: That doesn't change the overall psychiatric condition Your Honor. It's clear that there was also a depression component not necessarily anxiety with respect to the death of his brother and I use the word depression and anxiety because Petitioner meets most criteria in connection with those diagnoses. Certainly it all fits under the category of mood disorder which is a recognized overall diagnosis which I feel aptly applies in this case.

JW: Doctor let me make certain I understand what you're saying. Are you stating that this individual who has not ever seen a psychiatrist for treatment, who hasn't missed a day of work with this company even in his brother's death except for a brief period of time that he recovered after his first spinal surgery, and for which he has never seen a psychiatrist

and is not taking any psychiatric medication, does in fact have a 60% overall permanent loss of function?

ADD: Yes, Your Honor. I do believe he has that because I believe his overall psychiatric condition is substantial notwithstanding it has not been treated as has not his chronic pain condition. Petitioner's depression, as are with most depressions, is under reported and untreated. The mere fact that he hasn't treated in no way compromises the bona fides of his condition. Remember his previously significant depression *predisposes* him to have a more significant worsened condition. He is more at risk. He fell into a perfect storm. It's not unlike a person with undiagnosed cancer who is a long-term smoker who refuses to get proper lung exams to early identify a treatable cancer but hasn't done anything productive about it. This Petitioner, similarly, to some extent is in such denial. He's in denial in a good way, in a well-intended way but it's a bad way for him medically. It's not good for his present health. His future prognoses do not bode well the longer this goes unattended. He's not helping himself with how he's functioning and refusing the potential for psychiatric treatment that probably wouldn't be curative but would improve his quality of life. The same is true for his chronic pain. Both modalities would be beneficial. We don't know exactly what the efficacy of proper injection modalities would be. It's impossible to predict. I would be combining psychiatric treatment with pain management to give him his best choice. We also don't know what the efficacy of medicinal marijuana would be. At this point medicinal marijuana is his only realistic practical option in his mindset, but I still would have strongly urged him to get some psychiatric management to gently coax him to understand that what he has is a medical condition that can be helped both by medication and psychotherapy, at least in my opinion.

JW: Thank you doctor. Any further questions?

MM: No, Your Honor.

JW: Cross-examine.

DM: Your Honor I believe that the only thing that will be accomplished by any cross-examination that I perform at this point in time would be repetitive and belabor the points raised by the questions of Your Honor. It would burden the record. We have established that the doctor has not performed any specific testing of significance and that the Petitioner has not received any treatment nor requested any treatment for psychiatric management as the doctor here is the evaluating psychiatrist who makes findings basically parroting the Petitioner's subjective complaints and all of this is obvious from the contents of the doctor's report which is already in evidence. This doctor has basically suggested that Petitioner's psychiatric condition is self-limited and possibly not even permanent with at least some conventional psychiatric management. But we are not here on a motion, we are here on permanency. For me to waste the Court's time re-emphasizing these points would be inconsistent with the judicial economy we intended to accomplish in the first place.

MM: Your Honor, I object to Mr. MacDonald's inflammatory argumentative soliloquy in response to the simple question of whether he had any questions for cross-examination. His reasoning not to is irrelevant, superfluous and inappropriate for this record. It's just another obvious opportunity for Respondent to argue its position in connection with this claim. Answering Your Honor's simple question was not the time, with all due respect. We are not seeking psychiatric treatment just medicinal marijuana. The doctor was simply trying to explain the complexity of the unfortunate situation in which the Petitioner finds himself.

DM: Now who's arguing?

JW: Gentlemen, I don't think we need any more of this bickering. I am not striking anything from the record in regards to Mr. MacDonald's remarks nor your remarks Mr. Monet. I believe Mr. MacDonald was simply being courteous to you and me by explaining why he was declining to cross-examine your expert. Frankly I appreciated his comment. I'm not saying I agree with his decision nor am I saying that I concur with his comments. However, I appreciated his intention with respect to the judicial economy component. Counsellor you will also note that he has taken the same position with respect to the medicinal marijuana situation. He has given you unusual latitude, as has this court, in how you are trying this case. I do believe that a return of courtesy can be reciprocated to him in the limited fashion that I have just suggested. Any other questions?

MM: No, Your Honor. *(He mutters "that was helpful" to the Court Reporter and only she hears it. It is not recorded.*

DM: No, Your Honor.

JW: Witness excused.

JW: Mr. MacDonald can I expect your experts at the next listing?

DM: Yes, Your Honor.

(After the hearing there's no further conference with the court. Petitioner is in court to watch the entire proceedings. He was actually moved to a certain extent by the testimony of each of his witnesses. It was insightful to him at least. He did feel that respondent's attorney was being very difficult and it seemed like the judge was not really helping matters. He felt the Judge seemed fairly hostile and biased towards Mr. Monet. Monet told him not to worry, that all is going well and that he would see him in three weeks at which time Respondent's witnesses would testify and the case would be over.

QUESTIONS

1. Should Dr. Drake have been sequestered? If so why or why not?

2. Would Judge Wrightman have abused his discretion if he granted a motion to strike the testimony of Dr. Irving and/or for Dr. Drake from testifying?
 - 2a. Do you think Judge Wrightman's position was a reasonable one or not?
3. Do you feel by this point in time, Judge Wrightman is conducting this trial in a fair, competent and unbiased manner? Explain.
4. Do you feel Dr. Drake's testimony met the requirements of Saunders in establishing a "careful professional analysis" to support his findings of a compensable psychiatric disability?
 - 4a. Did Dr. Drake make a prima facie claim for permanency?
5. Was there adequate objectivity found by Dr. Drake?
 - 5a. Was there sufficient reference to DSM-5 with respect to Dr. Drake's compensable diagnoses?
6. Critique Dr. Drake's overall performance.
7. Did Monet obtain adequate reasoning from Dr. Drake regarding his opinions regarding diagnosis and etiology?
8. What did you think of MacDonald's decision not to cross-examine? Did he commit malpractice? Was this simply arrogance?
9. Critique Monet's performance. What was his best question? What was his worst?
10. Critique MacDonald's performance.
11. What was Dr. Drake's most persuasive testimony?
12. What, if any, compensable psychiatric award would you have determined at this point?

The night before the last day of the trial, August 1, Monet reviews for the first time the respondent's medical reports (in preparation for cross-examination) and he realizes that respondent's attorney has written letters to each of the experts as to his thought process and more significantly respondent's position in connection with each of these reports. Monet has never raised this issue previously because he was never aware of it (since he hadn't even looked at the reports) and frankly may not have done anything about it had that happened. Monet believes that these reports will now significantly undermine MacDonald's "credibility" before the court which he feels will be a major factor towards increasing the petitioner's likelihood of success. Monet feels whatever inadequacies he may have, these letters are at least clearly "dirty pool." Once again petitioner attends the last testimony hearing date in this case.)

TESTIMONY OF DR. M. JORDAN, RESPONDENT'S ORTHOPEDIST

MM- Michael Monet

DM – Donald MacDonald

JW – Judge Wrightman

MJ – Dr. Monte Jordan

JW: We are here commencing the third day of trial in the matter of James John Jones v. Waste Away, Inc. and we've taken petitioner's testimony, the testimony of his two expert witnesses and today we will conclude this matter with the taking of the respondent's two medical witnesses. Mr. Monet you did formally rest your case at the last listing did you not?

MM: Yes Your Honor. I don't believe I did so on the record but certainly the same was implied with the court.

JW: Yes I agree. Anything further either of you wish to bring to the attention of the court or any other housekeeping before we go on to take the testimony of respondent's evaluating physicians?

MM: No Your Honor.

DM: No Your Honor, other than we are not producing any fact witnesses as expected because we believe Petitioner's own testimony clearly established his absence of any actual loss of cervical function immediately prior to his accident.

MM: Objection Your Honor. Once again, argumentative.

JW: Overruled.

JW: All right then Mr. MacDonald I understand Dr. Monte Jordan is your first witness.

DM: Yes Your Honor.

MJ: Okay.

(The witness is sworn.)

DM: Dr. Jordan you performed two permanency evaluations of this Petitioner, one on October 31, 2005 and one on June 2, 2018 is that correct?

MJ: Yes.

DM: I note there's a typographical error in your report of June 2, 2018 indicating that previous examination was June 2, 2005.

MJ: Yes that was a typographical error. The previous date was October 31, 2005.

DM: Okay each of these reports reference all of the data which you relied upon to come to your conclusions is that true?

MJ: Yes.

DM: These reports are in evidence. You will be testifying regarding a few areas of inquiry on each report. I want to bring your attention to the first report of October 31, 2005. In that report you concluded a 7 ½ % overall permanency with respect to petitioner's body solely in connection with petitioner's cervical spine is that true?

MJ: Yes.

DM: Your medical findings included your physical examination of the cervical spine confirmed clinical evidence of left sided radiculopathy is that true?

MJ: Yes.

DM: You found a reduction of range of motion in all spheres of ten degrees is that true?

MJ: Yes.

DM: At that time you found a 7 ½ % overall permanency with respect to the cervical spine is that true?

MJ: Yes.

DM: You are aware that the claim went on to result in a permanency award entered on March 1, 2006 for which his cervical spine disability was rated at 27 ½ % permanent partial total for his orthopedic and neurologic residuals.

MJ: Yes, you have advised me of that.

MM: Your Honor, is Mr. MacDonald testifying or Dr. Jordan?

JW: Is that an objection?

MM: Yes, Your Honor. Leading – he's been leading with every question posed so far.

DM: Your Honor, respectfully counsel very well knows, or at least ought to know, my questions are not improper. Yes I am "leading" this witness to some extent but not improperly. You always must "lead" or the testimony doesn't go anywhere. I have asked him a few foundation questions about which there is no dispute. That's not improper leading. This is not an improper suggestion of his answers. I'm just trying to move this case along.

JW: Overruled. Please continue Mr. MacDonald.

DM: Turning your attention to your June 2018 report can you tell the court how, if at all, the clinical examination changed as compared to your prior report.

MJ: Actually the main difference on clinical examination is he no longer had his left sided cervical radiculopathy, when I last examined him.

DM: What is radiculopathy doctor?

MJ: In this patient's case it was when there was a nerve root compression due to the cervical disc herniation. Once there is a proper surgical decompression, the disc is then removed and no longer compresses the nerve. Further stabilization occurs. Like here, sometimes it takes a while for the nerve to respond and the pain radicular symptoms to resolve but in this case there was eventually a full neurologic resolution which fortunately was not disturbed by the July 1, 2016 accident.

DM: Did you find any clinical abnormalities with respect to his lumbar spine?

MJ: No. The examination was essentially normal with no clinical signs of radiculopathy which is the important thing.

DM: Have you had an opportunity to review all treating records that are on the exhibit list?

MJ: Yes.

DM: Specifically as to the MRI studies of December 2016 which are to his neck and low back, are there any trauma related pathologies demonstrated by those studies?

MJ: Not at all. He has obvious signs of early stage osteoarthritis as one would expect in an individual of his occupation and age. There is a bulging disc in the back but this is a concentric disc which again is associated with the aging process since it is uniform around its circumference. After 30, findings like this are commonplace in hardworking people like this Petitioner.

DM: What do you mean by concentric disc?

MJ: A concentric disc is what happens to the disc as we age naturally. The disc, both annulus and nucleus, is a water based tissue as opposed to the vertebral bones. It begins to dehydrate and loses its height and strength. Instead of the annulus appearing as a straight vertical line on MRI study, the perimeter of the disc is softly rounded in a minimal way which is associated with mild bulging. This happens throughout the spine as time goes on but more pronounced in areas of the spine which are most at risk for which the L5-S1 level is notorious in part because there is no moveable disc underneath it. This is why they describe a fulcrum effect when lifting with your arms extended as creating the most significant pressure placed on the L5-S1 disc because of its unique location in the spine. It does not surprise me at all that Mr. Jones' MRI study shows a mild bulge for which no treating physician has indicated is anatomically significant. It's rarely a normal finding for someone his age given his work history.

DM: I note your report indicates that you found no objective evidence of permanent partial disability with respect to the low back and that you find and I will quote your report "that the petitioner continues" to have a compensable disability with respect to the cervical spine in the amount of "5%" solely to his prior cervical repair." You had indicated also that the disability was entirely associated with the successful cervical spine instrumented fusion." You will note doctor that the previous assessment was 7 ½%. Is this a typographical error?

MM: Objection Your Honor. Counsel is now clearly leading the witness and cross examining his own witness who hasn't been established as hostile, yet.

JW: Come on counselor. Your objection is overruled. It's clear that Mr. MacDonald was bringing the doctor's attention to the specific inconsistency noted as to whether or not this was a typographical error. The report clearly states the Petitioner continues to have compensable disability. While I have overruled the objection, however, I would appreciate a clarification Dr. Jordan.

MJ: Yes, Your Honor. It's actually not a typographical error. I felt that my findings were actually less because of the absence of radiculopathy on an objective basis and the radiculopathy was a major part of the petitioner's previous disability. It was the main reason why surgery was performed on Mr. Jones. Now he's wholly without radiculopathy and so I reduced my permanency figure to 5%. However that 5% is solely for the objective anatomical findings alone and nothing else. I can't dispute that he has a cervical instrumented fusion which in and of itself will alter his normal cervical range of motion. My report was strictly focused on the objective criteria that constituted demonstrative objective medical evidence. In this particular case his objective findings with respect to his cervical spine architecture are still present but his overall objectivity of neurologically significant findings are reduced.

DM: Doctor if you focused on his basic medical functioning at the time the July 1, 2016 accident occurred, was there any medical indication that he had any ongoing problem whatsoever?

MJ: No he had actually made a full recovery from a medical treatment and clinical standpoint with respect to his cervical spine. He had no ongoing known issue with his low back. Both parts of the spine anatomy were functioning at a very high level as demonstrated in part by his failure to miss a day of work in a very strenuous job position. He had indeed made as full of a recovery which anyone could imagine from a very serious cervical spine injury which occurred approximately 16 ½ years ago.

DM: I have nothing further.

CROSS-EXAMINATION BY MM

MM: Doctor you indicate in your testimony that the only materials which you considered in connection with your testimony today was that which were contained in your report. Is that a fair statement?

MJ: Yes.

MM: Did you receive any specific communication from Mr. MacDonald's office with respect to the scheduling of the Petitioner's appointment?

MJ: I am sure I did. Otherwise I would not have the records nor would we have scheduled an appointment. Actually sometimes the carriers schedule the appointment. I'm not really certain. Mr. MacDonald's office typically schedules a lot of appointments with our office and the requests for appointments usually come directly from his office, normally by email communication.

MM: Do you have your entire file with you today doctor?

MJ: Yes. I have my printed file which basically is a duplicate of my digital file. I still rely on paper in my practice. Old school I guess.

MM: May I see it?

MJ: Certainly.

With that counsel briefly goes through Dr. Jordan's hard copy file.

MM: It appears doctor that what you have are your two prior reports and the medical records but none of the communications from Mr. MacDonald's office.

MJ: Again counselor, normally what comes from the letters would not be part of this file. They would basically represent administrative scheduling with occasionally some clarification. For example in this case I believe I did have some communication from Mr. MacDonald that there had been a previous compensation award that was entered. I had previously evaluated the petitioner and that he had proceeded to receive an award of compensation in connection with that prior claim. Such a prior award and the amount is a good thing to know.

MM: Your Honor - I'm going to provide counsel with a copy of a May 16, 2018 letter which was purported to be written by Mr. MacDonald and I'd like it marked as P-3 for identification and I'd like to show the doctor a copy of that. I'm first going to show it to Mr. MacDonald.

DM: I note the communication. I'll stipulate that I authored a letter to Dr. Jordan dated May 16, 2018 to attempt to clarify the legal issues presented to him that he may not have appreciated and what had been the prior award as he had indicated. I was trying to avoid any type of confusion in this situation. What troubles me is how did Mr. Monet come to possess this correspondence? It's clearly not intended for him. It's part of my work product. The Court knows that any attorney who receives any correspondence not intended for him is required ethically to not read the letter and to immediately return it to its sender, here, me. I can advise the Court that this is the first I am hearing of it. Literally Mr. Monet has never breathed a syllable about this letter until this very moment. That's completely improper. Actually it's unconscionable Your Honor and probably actionable under our RPCs.

MM: Your Honor, that's offensive. Is he making an ethics complaint? Once again we have Mr. MacDonald providing more information than we need. He's stipulating to the letter and that's fine. May I inquire of the doctor with respect to this letter?

JW: First things first, Mr. Monet. Mr. MacDonald is raising a serious point. When did you first receive this letter and how? He's completely right on the ethical issue. You knew that letter was not meant for you, didn't you?

MM: Your Honor, I first saw that letter last night. It was attached to the doctor's report. I had never seen the reports until last night, although I had possession of them.

JW: Last night until now is probably 16 hours at least. You had it when you came to Court this morning. This should have been brought to Mr. MacDonald's and my attention immediately prior to going on the record this morning. Forget about the ethical issue, which I find disconcerting at the moment. If I may, what is the relevancy of the letter?

MM: The relevancy would be obvious if Your Honor reads the letter but I want to focus the doctor as to the impact that this letter may have had on the doctor's opinion.

DM: Objection. What impact is "obvious?" This is a factually neutral letter, a legally neutral letter and a letter completely consistent with the evidence. I will stand by it. If counsel's

effort here is to see whether or not this letter has in any way, shape or form influenced the doctor in his findings let him go ahead and make that inquiry. This is stunningly ridiculous, even for Mr. Monet.

JW: Mr. Monet, have the Court Reporter re-mark the letter J-3 for identification as I want to read it. (At which time the Judge reads the letter). Oh, I now see your point Mr. Monet. Go ahead and inquire of the physician for whatever relevance you feel it may have. I will reserve judgment on the ethical issue raised by Mr. MacDonald, but I would request you make your point quickly.

MM: Doctor I show you a copy of the now stipulated May 16, 2018 letter which pre-dated your examination by 17 days. Per your testimony, it was not contained in your file and I would bring your attention to the second paragraph where he states "you are not necessarily bound to your previous rating." Was that summary informative to you?

MJ: Actually I hadn't really considered it. I don't think I've ever been presented with a situation such as this but I may have. I truly do not remember this letter. I probably equally could have said that I'll keep the same rating because that is what the herniated disc in and of itself would normally anatomically bring except for the obvious anatomic change due to the absence of radiculopathy as I've already stated. I think I was actually confused somewhat by the award and the amount and I suppose Mr. MacDonald was simply trying to clarify that, as he has just indicated. Hence the letter.

MM: OK, let's read on to page 2 where Mr. MacDonald explicitly sets forth what the respondent's position is. Was that similarly "clarifying?"

MJ: Frankly I don't know that I read that second page but now upon reading it I would agree with his findings and the position the respondent is taking because it's the only viable position you can reasonably take in this case at least on the basis of reasonable medical probability as to "demonstrable objective medical evidence." If my job assignment was to find that Petitioner had a "minor cervical and/or lumbosacral strain and/or contusion" as his letter states, then I clearly would have stated those diagnoses in my report, I failed miserably. If you read my report carefully it does not contain any diagnosis of cervical strain or lumbar strain or sprain in connection with my findings.

MM: So here in a situation that you say it is mostly just administrative scheduling through the office and that the standard operating procedure is that this comes from Mr. MacDonald's office and that on occasion there'll be something directly from the attorney and on occasion a clarifying letter comes from Mr. MacDonald, you're asking this Court to believe that you didn't read the second page of such an important "clarifying letter?"

MJ: Counselor I'm not saying what I did or didn't do. I frankly don't remember. I'm not here to guess. I suppose if you gave it back to him when you received it, I would have had the opportunity and time to review it. I can tell you that both pages were probably seen by me. But I just don't remember this particular letter. However, I can unequivocally tell you I would never put in writing a medical opinion about anything relevant in any

case that I didn't believe. If you're asking me specifically "did this letter influence my opinion as stated in any way, shape or form" the answer is "no." If there was something clandestine about this letter I would have expected some nefarious person to contact me by telephone or meet me privately or something where there was no documentation such as this. I feel that it's an innocuous well intended letter. By the way, in answer to your previous question, I have often lowered my prior estimates of disability such as where in a re-opener situation someone who has intractable pain and disability from refusing a recommended surgery and then after re-opening undergoes the recommended surgery and has a great change of life result. Go figure.

MM: Motion to strike everything after "by the way" as not responsive to the question asked.

JW: Overruled. I'll allow it for whatever its worth. Would you please move on Mr. Monet.

MM: Have you ever had such communications with the attorneys or insurance carriers by telephone or individually about what would be at least hopefully expected or hopefully agreed to by you?

DM: Objection Your Honor.

JW: Sustained. Counsellor, can we move on from this. You've made your point for what it's worth and the doctor has made his. I reserve judgment on the RPC issue.

DM: Thank you Your Honor.

MM: Doctor when you perform permanency evaluations is your primary focus on demonstrative objective medical evidence of permanent loss of function as part of the permanency?

MJ: The threshold consideration I always consider is whether or not there are any bona fide objective medical alterations in the anatomy, by reliable diagnostic studies or otherwise. If the person doesn't meet that threshold then I do not overly consider the alleged diminution of working or non-working activities. I realize that there are two parts to the test for the definition of permanency in the state of New Jersey. As a medical doctor my primary expertise is on the first part of that equation. It is a critical part of the inquiry as far as I'm concerned. That would include bona fide clinical findings and true trauma related diagnoses. That's why I feel the cervical spine condition still has permanency from a medical perspective in this case. The natural anatomy is still altered although functional. On the other side of the coin the argument could be made that if the person is truly working in an unrestricted fashion such as apparently your client was maybe he had no permanency immediately before the accident occurred. Maybe that would be proper. That's going to be up to the court to decide. I am not a judge.

MM: But you are the respondent's permanency evaluator for any orthopedic or neurologic disability and you are here as an expert for the existence of any New Jersey workers' compensation permanency isn't that correct?

DM: Objection Your Honor, argumentative. He is now badgering the witness. The record should reflect that counsel stood up, walked closely to the witness with no permission from the court after the permission to hand the letter in question to the witness. This is entirely inappropriate.

JW: Counsellor I agree with Mr. MacDonald. I really would appreciate your moving away and conducting a relevant cross-examination from back at counsel table as to the issues presented.

MM: Respectfully Your Honor I am trying to.

JW: I hope you are being guided by my instructions. I would not like to see this deteriorate to a situation where we may have to take more significant action. Your call counselor.

(At this point Monet has had enough. He feels this is a critical part of his case and the Judge is giving him no latitude whatsoever to make his points.)

MM: Your Honor I am not certain what that last remark means. I am only trying to do my job to get to the heart of the issues presented and the scope of what this witness is considering when he expresses his permanency opinion. If Your Honor is suggesting that my conduct could be contemptuous I respectfully state that this is not my intent notwithstanding the limited contempt powers of the compensation court given its limited jurisdiction within the Department of Labor. In any event I will proceed. I am mindful of what the Court has stated but I would like to continue with my cross-examination.

JW: I never intended to have you stop cross-examination. My only issue is the area in which you were proceeding at that moment in your cross-examination. Please continue counsellor.

MM: Actually I lost my train of thought for a moment. Doctor so continuing with your reasoning, what you're saying in this case is that since there is no adequate medical foundation for any award of compensable permanency therefore you are not considering the second prong of the statute relative to impact on working and non-working activities. Is that a fair statement?

MJ: That is essentially a fair statement.

MM: At the same time when you stated that the petitioner's overall compensable disability from the original award was reduced somewhat ,it is because the clear traumatic anatomic structures involved are still there. But the reduction of radiculopathy would not be the cause of any increased anatomic dysfunction and that's the sole reason for your reduced figure other than Mr. MacDonald's letter. Is that correct?

DM: Objection to the sarcastic remark. It's inflammatory.

JW: Sustained. That part is stricken. Go ahead and answer the question doctor.

MJ: That is entirely accurate.

MM: So following this through, if indeed the court found that petitioner had a bona fide chronic pain condition caused by an aggravation of previously asymptomatic degenerative findings in both the neck and lower back which was in fact a bona fide medical condition, (i.e. chronic pain disorder) then it would be fair to consider those factors that you did not which would be the significance of impact on both working and non-working activities inclusive of his significant complaints of chronic pain both in his neck and low back which has obviously clearly altered his life.

DM: Objection. The form of the question is multi-faceted, compound, otherwise unintelligible.

MM: Your Honor that's for the doctor to answer not Mr. MacDonald.

JW: Doctor can you answer the question?

MJ: Actually I do believe I understand what counsel is asking and I have to honestly answer this is beyond the scope of my expertise as I am not a chronic pain physician. This is a very specific area of medicine in which I do not practice. Frankly I believe it's more closely associated with the neuropsychiatric realm rather than the orthopedic realm at least in many situations. The problem is it runs into the issues of subjective complaints on a bona fide basis which are indispensable to the notion of chronic pain versus possible secondary gain issues. Both conscious and unconscious.

MM: But wouldn't you agree doctor that pain is a major reason for anyone's disability, not necessarily the anatomic pathology diagnosis?

MJ: I believe that's the impact in real life. I don't believe that's the definition that we are required to follow in the State of New Jersey for workers' compensation disability. Our focus is on demonstrable objective medical evidence as an absolute prerequisite so that the door is not open to a potential tsunami of subjective complaints wholly disproportionate to objective findings. It's whether bona fide objective provable compensable medical conditions are causing the pain.

MM: But here the diagnosis of a bona fide chronic pain disorder is what I am asking you about. Forgetting whether you yourself made the diagnosis, other doctors have. Their reports and records are in evidence. There are clear proofs in evidence of a diagnosis of chronic pain disorder. You would agree with that?

MJ: Yes, there are records where that diagnosis is made.

MM: I assume on the basis that where there is a bona fide trauma related compensable chronic pain disorder and when the condition actually exists it is not disproportionate to objective

findings and then the second prong of the permanency test becomes very relevant, doesn't it doctor?

MJ: Counsellor, I am not here to tell you whether or not your client has any type of psychiatric disorder or any type of bona fide chronic pain disorder. It's beyond the scope of my expertise. I'm here to tell you on an orthopedic and neurologic basis he has no disability related to this compensable accident and I would also add that his overall medical functionality prior to this compensable accident, whatever level the court finds legally appropriate, is anatomically less than what it was when I previously evaluated him.

MM: But doctor, when you were testifying earlier about not following Mr. MacDonald's letter instructions, you stated your report did not diagnose minor strains or sprains of the cervical and lumbar spines.

MJ: That's correct.

MM: Actually doctor, your report does not make any diagnosis at all regarding the orthopedic or neurologic sequelae from the July 1, 2016 accident. Is that also correct?

MJ: That's correct.

MM: Isn't making a diagnosis a fundamental component of your assessment?

MJ: Not really.

MM: Not really?

MJ: Look, Mr. Monet, I carefully assessed this case. Your client appears to have had a relatively minor trauma to his head, neck and low back with reports of pain. That's it. No broken bones, no major disc pathology, minor degenerative findings, no radiculopathy. I'm comfortable in concluding no compensable disability.

MM: Even though you haven't ruled out a chronic pain disorder and/or psychiatric disorder because that's beyond your pay grade, correct?

MJ: That is correct.

MM: They could be causes of his problems?

MJ: Anything is possible in medicine, counselor.

MM: No further questions.

JW: Mr. MacDonald do you have any questions?

DM: No Your Honor. Thank you for your time doctor.

QUESTIONS

1. Who was the more persuasive witness, Dr. Irving or Dr. Jordan? Why?
 - 1a. Do you think Petitioner deserves a compensable orthopedic disability award?
Why or why not?
2. Critique Dr. Jordan's testimony as a persuasive witness.
 - 2a. Was he forthright?
 - 2b. Was he credible?
 - 2c. Did he advocate more than educate?
3. Critique Monet's cross examination.
 - 3a. What was his best question?
 - 3b. What was his worst question?
 - 3c. How effective was he regarding MacDonald's covering letter?
 - 3d. What would you have done differently?
4. Critique Monet's objections.
 - 4a. What was his best question on cross-examination?
5. Critique Judge Wrightman's conduct of the hearing.

Was he neutral or biased? Explain.
6. Was Dr. Jordan credible regarding his "limited" expertise so as to avoid assessing the bona fides of Petitioner's chronic pain disorder?

TESTIMONY OF DR. S. VOYYD, RESPONDENT'S PSYCHIATRIST

(In between witnesses MacDonald spoke to Dr. Voyyd who has appeared and he is preparing the doctor for testimony. MacDonald asked him if his file contains a copy of his letter of February 1, 2018 which Voyyd's file did. He asked him if the doctor reviewed that letter before he examined the patient. He stated that he did. He asked him if it had any influence at all on his opinion and the doctor responded that it did not. MacDonald indicated to the doctor that he expects that Mr. Monet will make a big deal about this and rather than him do that he's just going to address the letter directly because he didn't want there to be any potential for an argument that the doctor was biased. He told the doctor to be prepared for some argument.

MM- Michael Monet

DM – Donald MacDonald

JW – Judge Wrightman

SV – Dr. Sigmund Voyyd

(Dr. Sigmund Voyyd is sworn and his testimony begins.)

DM: I'm going to ask you a series of questions and your opinions should be based upon reasonable medical probability. Do you understand?

SV: Yes.

DM: Dr. Voyyd, before you examined this patient, the examination was scheduled by my office and there was a previous letter of February 1, 2018 was there not?

SV: Yes.

DM: That was contained in your file when I spoke to you today is that true?

SV: Yes.

DM: Have you and I ever had any conversation whatsoever about this case at any time other than today?

SV: No.

DM: Did you review my letter of February 1, 2018 which I am going to stipulate into evidence which I am certain is going to be a matter of record with Petitioner's counsel and the Court's consent as J4? You said you saw that letter before. Did you see that letter before you conducted your examination of the petitioner?

SV: Yes I did.

DM: Did that letter have any influence on you whatsoever in terms of the opinions which you provided in your report dated February 15, 2018?

SV: No.

DM: Is that the only report you prepared?

SV: Yes.

DM: Were there any other drafts of the report?

SV: There were no drafts. I dictated the report upon evaluating the petitioner and actually had a problem with the transcriptionist and ultimately there was a delay in getting the report out but other than that glitch it was business as usual.

DM: Did that letter have any impact on you whatsoever in terms of any opinion expressed in your report?

SV: The only impact it had was a helpful orientation as to the basic overview of the claim. I actually very much appreciate overviews in my practice. It is not common, especially with the insurance companies. They basically send a bunch of records and then they ask does this person have any permanency. Often there's a complicated background. Actually, I wish all attorneys did provide an overview. It would save time. However here your covering letter was focused on what was involved, but not in terms of influencing what I would find. My findings are going to be my findings. I take great pride in my honesty. I think it is an important part of any professional's integrity to not be considered a "hired gun". A lot of insurance companies don't use me because they know I try to be as straightforward as possible. I suppose that is why we have the professional relationship that we do.

DM: With counsel's consent I offer this letter as part of the doctor's complete records or we could put it as part of his report although it's not part of his report, whatever the court likes. I do reserve the RPC issue raised by the Court with a similar overview letter to Dr. Jordan regarding Mr. Monet reading the same, acting on it and failing to notify me of it until his cross examination with Dr. Jordan. At least that put me on notice for Dr. Voyyd.

JW: Mr. Monet?

MM: I have no objection to the letter going into evidence any way the court desires as long as it's part of the record. I've already been heard on the rest of this regarding my first notice being last night preparing for Dr. Jordan and Dr. Voyyd. I have done nothing wrong.

JW: All right, entered into evidence as J4.

DM: Dr. Voyyd, your report is already in evidence which is the process that we have undertaken throughout this trial. All the evaluating physician's reports went into evidence in order to help expedite the hearing. Your testimony is going to be no different. You have had an opportunity to review the records at the time of your evaluation is that true?

SV: Yes.

DM: Before your testimony here today, you were provided with all of the petitioner's permanency reports (from Dr. Irving and Dr. Drake his evaluating neuropsychiatrist) and you also had a chance to review the transcripts for each of the Petitioner's testimony in this case and his cervical fusion case. Is that true?

SV: Yes.

DM: You have not seen the transcript of petitioner's medical witnesses. Is that also true?

SV: That is also true.

DM: Can you tell us if your review of those reports and the transcript of petitioner's testimony in any way impacted your opinion as to the absence of any compensable psychiatric disability resulting from petitioner's compensable accident of January 1, 2016.

SV: I can. They actually corroborate my findings. As a threshold consideration there is no doubt that this Petitioner probably has had a post-traumatic stress disorder associated with the loss of his brother which may not be a post-traumatic stress disorder any longer. But it has persisted in terms of both a depression and anxiety and these conditions have significantly affected him notwithstanding that he was able to continue to work and has continued to maintain his marriage and has continued to be an apparently loyal and devoted husband and family man. Actually I think the Petitioner is to be congratulated in that regard because similarly situated people often turn to maladaptive behaviors. Can you imagine his trauma when he lost one, if not the most important person in his life? By all accounts this relationship was more than just a loving relationship. It was really a driver and a creator of his own values and work ethic. The loss of his brother caused him to have an extremely strong determination not to ever let anything like this happen to him. He felt his own mortality and his vulnerability. It also undermined his confidence in the medical community which is unfortunate. However it has made him galvanized in his distrust of opiates which in this day and age is probably a good thing for him. But the point is he is able to continue to function in the real world and cope. He has his own internal coping mechanisms to deal with his stressors so he does not have indicia of a compensable psychiatric disorder. Almost all of his issues come through the prism of his brother's death which from his perspective was tragic in the sense that it was absolutely avoidable. It resulted in an irreplaceable loss to him. Frankly I feel like he's dealing with his entire situation as a reasonable, responsible person should given his perspective. When his pain or his psychiatric issues rise to the level that he himself feels that he needs to do something about it then he will. This is a very determined person and a very

motivated and strong person. These are the types of people we call role models in this society -- not sick people. It's the depression which is flowing from his brother's death which is impacting all of his life decisions. I'm not certain, but if he is somehow persuaded to obtain professional management with respect to his thought processes associated with his brother's death, then I believe he might be able to shirk some of his stress and might be the better for it in terms of overall functionality.

DM: Thank you doctor. No further questions.

MM: Doctor I note your report is limited to findings as to what you believe presents "no clinical evidence of psychiatric disability resultant from this compensable accident of July 1, 2016" is that correct?

SV: Yes. That was my ultimate conclusion.

MM: But you did concede and do concede here that there was clinical manifestation of depression or anxiety at the time of your examination which etiologic consideration was "most likely," your words, related to his brother's death. Is that also correct?

SV: Yes I think I very clearly explained my position regarding the significance of that event.

MM: Doctor do you believe that his brother's death is the cause of his perception of chronic and severe pain from both his neck and his low back following this compensable accident?

DM: Objection.

JW: Basis?

DM: The doctor is not here as a chronic pain expert. He's here as the evaluating psychiatrist as to the existence of any psychiatric disability in an individual who has never treated with a psychiatrist in his life.

MM: Except Your Honor, that chronic pain can potentially give rise to psychiatric disability and/or at least a psychiatric diagnostic condition which in turn is the heart of this case.

JW: I understand what you are saying counsellor. Let me interject. Doctor when you did your examination were you there to make a diagnosis with respect to any other etiologic consideration other than the compensable accident?

SV: Not really although I have to consider all etiologic considerations when rendering my opinion.

JW: Alright fair enough.

SV: What I can say Your Honor is that following this compensable accident there are reported persistent symptoms both in the Petitioner's neck and low back. From his perception they appear to be significant. He has acted as if they were significant. He states they weren't there before the accident. He does appear, in my estimation to have chronic symptoms of pain both in his neck and his low back. I am not here to make a diagnosis of any condition other than psychiatric. He appears to be coping with his perception of pain by way of handling all of this himself. He has modified some activities. His number one priority in his life is maintaining employment. He is accomplishing that. He has worked every day. He hasn't missed a single day from the underlying presentation so I don't believe it is overly severe notwithstanding its persistency. I believe he perceives that he has chronic pain. I believe he would prefer not to have chronic pain. He has not responded to seven weeks of physical therapy. I don't know whether that's a reasonable time or not. He has no definitive diagnosis other than spinal degeneration which presumably was there immediately the day before the accident occurred. I am not here to comment on his orthopedic anatomic issues. I am not a doctor who practices in the area of pain management. Whether or not injection modalities may be of assistance to him I cannot tell you. I can tell you that the medically probable reason why he is not going to consider injections that actually were recommended to him was because of what happened to his brother and I don't believe that's a reasonable thought process, at least with respect to possible short term therapeutic effect. I think someone needed to explain that to him. I do believe that he does not have such an aversion to pain management medicine that he would not turn to the most recent trend in opiate avoidance free pain management, medicinal marijuana. I have found that some of my patients who actually have clinical evidence of depression and anxiety in intractable pain situations, where that has been definitively diagnosed a debilitating condition, have actually improved with the use of medicinal marijuana, placebo effect or not. There's not enough evidence out there. There are side effects. Medicinal marijuana is one modality which may have some efficacy in certain specific situations. The only relevance it has in the Petitioner's situation is that he thought that this may be medicine which might be of some benefit to him and he might be right or he may not be right. He's been disappointed because to date he hasn't been able to do it but it also appears that he hasn't made any attempt to be reconsidered since the state lowered its threshold standards. I'm not commenting on his credibility and I'm not commenting on the extent of anything else other than I do not believe that he has any clinical evidence of psychiatric disability associated with his injury or the residuals of the accident which happened on July 1, 2016.

JW: Thank you Doctor. Proceed Mr. Monet.

MM: Doctor I want you to assume that he does have a bona fide chronic pain presentation which you have already conceded medicinal marijuana can be one of those options which may be of some efficacy. If he does have a bona fide chronic pain presentation stemming from the July 2016 accident, isn't that chronic pain in and of itself impacting his working and non-working life so as to be a material way to an increase in his overall depression and/or anxiety which you feel is "primarily" associated with his brother's death?

DM: Objection Your Honor. Objection to the form of the question. It assumes facts not in evidence. It calls for speculation. It has actually already been asked and answered.

JW: Sustained.

MM: Your Honor I respectfully submit that this is a core consideration for this case. This particular question has not yet been "asked and answered." My question doesn't go to efficacy or medical treatment, it goes to chronic pain's association with enhanced psychiatric disability. It goes to the heart of Petitioner's psychiatric claim. It goes to the bona fides of the psychiatric impact which respectfully also clearly flows to some extent from the residuals of whatever diagnoses one wants to make of the cause of the Petitioner's chronic pain in his neck and low back. None of his symptoms were materially present immediately before his July 2016 accident occurred. This very witness has already conceded Petitioner's chronic pain had created its own issues. I would at least like to know what the Respondent's evaluating physician says about this because at least it would validate the Petitioner's position as to a critical part of his further loss of psychiatric function claim.

JW: I've made my ruling, counselor. Proceed.

MM: Doctor do you think you are capable of answering the question that I just posed to which there was an objection?

DM: Objection. The Court has already ruled on this.

JW: Counsellor you are perilously close to me holding you in contempt. Please move on to another area otherwise I will consider your cross-examination concluded for the day.

MM: Your Honor, I thought we were here on a bona fide search for the truth, a crucial part of which is testing the nature, depth and bona fides of Petitioner's chronic pain in an individual who clearly has a psychiatric disorder as conceded by this very witness. If I can't ask this witness any further questions on the very core of this case then I am done for the day. Thank you. I would respectfully ask that you reconsider and ask the doctor to answer my question so at least the Appellate Division would know what his testimony would have been, if that becomes necessary.

JW: I have ruled counselor.

MM: May I have the doctor answer for a preservation of the record.

JW: Counselor we have exhausted this issue. Anything further or any other area?

MM: No Your Honor.

JW: Redirect?

DM: No thank you, Your Honor.

The witness is excused.

QUESTIONS

1. Who was the more persuasive psychiatrist, Dr. Drake or Dr. Voyyd and why?
 - 1a. Who had the better analysis?
2. How well did MacDonald handle the “letter” issue?
 - 2a. How would you have handled it?
3. How effective was Monet on cross-examination regarding the “letter” issue.
4. Critique Monet’s general cross examination.
5. Critique MacDonald’s performance.
6. Critique Judge Wrightman’s performance. Rate his level of bias on a scale of 0-10.
7. How did Monet handle being barred from questioning the chronic pain etiology issue.
 - 7a. What would you have done differently?

POST TESTIMONY/CLOSING

JW: We will take a 15 minute recess and I will then hear each of your closing arguments if you choose to make any. (At which time a clearly irritated Wrightman asked the attorneys if they were prepared to or desire to make closing statements and if not whether they would prefer a formal trial memorandum otherwise he would proceed to decide the case today. Both attorneys decide to dispense with trial memorandum and have the case decided. The witness is excused.)

At that point MacDonald and the Petitioner leave the court room and only Teller and Monet are left. Teller tells him that she just received a text from a cousin of hers who is a retired law enforcement officer and a part-time private investigator who she asked to check into whether the Judge and MacDonald had any out of court relationship. This was just an informal unpaid request basically to see if there were any business associations or club involvements. He texted her during Dr. Voyyd's testimony that the only thing that existed was that MacDonald was on the Judge's Facebook page as a "friend." That was it. Monet couldn't believe what she said. Teller couldn't believe it either. She felt vindicated. She asked Monet what was he going to do? He said "I don't know." At that point MacDonald and the Judge returned to the court room.

JW: I will hear you Mr. Monet.

MM: Your Honor preliminarily I regretfully feel I have no further alternative here than to ask Your Honor to recuse yourself from this case as I feel that there have been an inexcusable amount of bias and unfairness toward the Petitioner and myself during this case the culmination of which was Your Honor's last ruling. Also, upon information and belief before the commencement of this trial, I believe there was prejudicial improper ex parte communication between Mr. MacDonald and Your Honor regarding his position on this case in my absence. This occurred on the date the pre-trial memorandum was executed at which time the Petitioner's case was trivialized. Your Honor has been wholly supportive of Respondent's position throughout this claim. You have encouraged me to consider to accept a disposition whereby the Petitioner's clearly compensable case would be dismissed in its entirety for a \$15,000.00 Section 20 settlement and that despite our actions taken to try to accelerate this trial, I believe we have been punished for exercising our right to have this case tried to a fair conclusion. I believe there have been other comments that are injudicial about this case which has been communicated to third parties. I have consistently been thwarted on probing Respondent's expert witnesses, opinions and fully addressing Petitioner's expert's opinions. The record is clear regarding those examples. Whenever we've conferenced this case, Your Honor's actions were completely lopsided regarding demeanor, congeniality and respectfulness. Initially I had thought it was just a function of Your Honor being more familiar with Mr. MacDonald, but it persisted and increasingly grew to where it became to me a feeling of unfairness. Your Honor's tone is always one of acceptance for Mr. MacDonald and is rarely if ever with me. I can handle it from an adversary, not a Judge. On top of all of this, I learned earlier today that you and Mr. MacDonald are and have been Facebook friends for quite a while. I thought well, that explains it. There is more to this than my imagination. I could have delayed this application until after your decision, but I felt I

would be accused of reacting to Your Honor's decision rather than making what I feel is a bona fide and timely application. I have never made such an application in my career. I know in an ideal world it should have been formally filed. However, we are here and now and at this time I would respectfully seek Your Honor's recusal prior to proceeding to Your Honor's decision. I recognize that if a recusal occurs a tremendous amount of work may have been for naught but I regretfully feel I am duty bound to make this application at this time.

JW: Counsel I have not interrupted you in connection with your application which has been made against both myself and your adversary, Mr. MacDonald. You are correct regarding timing. You have not had the courtesy of putting either of us on notice or making any type of written application or in fact making this type of application in a timely fashion. This action mimics your similar failure with respect to Mr. MacDonald's covering letter to his experts. First, I'd like to know the source of your alleged information and the time that you received that information concerning the first pre-trial hearing and Facebook because those implicate your adversary and in part occurred before this trial even began. I want to know why you sat on that information if in fact that information exists if you truly felt there was impropriety. Preliminarily, I want you to know, and this record to reflect that I strongly disagree with all of your characterizations which support this ill-timed and ill-considered application. Are you going to answer my question regarding your source or sources?

MM: Your Honor with all due respect my application stands as it is. It's the assertions that matter and they stand.

JW: All right counsel. Then I'm not going to dignify this any further. You will recall you have your own issue pending here regarding your possession of Mr. MacDonald's letters to his experts. I will deliberate on that, however, I deny any ex parte conversations and The Facebook friend allegation is true. A Facebook friend is not a "friend." It is an acquaintance. A person of interest. Mr. MacDonald is that and nothing more. He is a respected lawyer that has earned my respect and nothing more. I respectfully disagree with your position. If there is any further application you may wish to make you may. You have denigrated your adversary as well. There may be consequences to that with respect to your own accusations. However, as to that portion of your application regarding recusal, it's denied. There is nothing in what you have alleged that in any way impacts my ability to make a fair, impartial and considered decision in this case. Would you now like to make your closing statement?

MM: No Your Honor. I prefer not to at this point in time except that I think that the proofs clearly preponderate in favor of a finding of compensability where the Petitioner has a compensable disability both on an orthopedic and psychiatric basis for an aggravation of pre-existing conditions for which there already has been an award of 27 ½% cervically with all experts agreeing that there's pre-existing psychiatric disability. Furthermore whatever Your Honor finds as an adequate figure would result in a stacked overall compensable permanency of a significant amount notwithstanding that the Petitioner is still working and has not treated. The proofs are very clear that the mere fact that he has

not treated psychiatrically nor has availed himself of all potential modalities of treatment for his cervical and low back issues, that alone does not and should not disqualify him from being awarded permanency benefits if Your Honor otherwise find him credible. There is nothing in this record to question his credibility. Hence he is entitled to an increased disability notwithstanding that he continues to work. When he returned to work following his compensable cervical spine disability surgery he did well before he received his award. He was not missing even a day of work. He was entitled to his 27 1/2% rating and is still entitled to have it honored as a matter of law in terms of his pre-existing permanent partial disability for this case's 12d credit. He is still not missing a day of work. That doesn't mean he doesn't have an even greater disability to his cervical spine with additional permanent disability to his low back and psychiatrically over and above his pre-existing psychiatric disability. Thank you Your Honor.

JW: Mr. MacDonald?

DM: Your Honor I am stunned at this ill-timed and ill-conceived application by Mr. Monet. I can only say that in my entire professional career I have never heard anything more outrageous. I vehemently deny the allegations placed on this record and will consider what further actions I think are required and reserve my right to pursue the same. We have done everything we can to accommodate the Petitioner who I believe has been treated with dignity and has received a fair trial based on the law. Not on empathy, not on sympathy, not on being a good guy and not on being credible. Certainly not on the misquoted and misguided allegations of his lawyer. The issue is whether he has met the mandates of the New Jersey Workers' Compensation law to carry his burden of establishing any compensable permanency. I strongly do not believe he has met his burden of proof. In fact he has actually established less disability than existed in connection with his previous award. I think he has failed miserably. If that was Mr. Monet's intended strategy then perhaps his E & O carrier should be put on notice. The mere fact that the Petitioner has complaints of pain, no matter how bona fide, are insufficient to establish permanency entitlement for permanency considerations without more. That "more" has not been established. That "more" has not been established psychiatrically and that "more" has not been established orthopedically. If Mr. Monet believed in the chronic pain assertion, then where was Dr. I.M. Mello's appearance? In fact the Petitioner's entire claim has been built upon a prior award of 27 1/2 % for an accident which occurred 16 years ago for which the petitioner clearly has had no such 27 1/2% existing actual real life loss of function in reality immediately before this accident occurred. His anatomic loss of function is essentially nil or at best a minimal figure. He had actually almost fully recovered from his prior surgery. The law allows a Respondent to apply for a decrease in disability by way of an application for Review or Modification. There's no law on the timeliness but presumably it is the same time as petitioner has. So there is an award. But that award is not dispositive on the actual disability which exists at the time of the compensable accident under appropriate circumstances and this is one of those circumstances. Respondent has been consistent throughout this claim. We generously permitted all records and reports to be admitted. I didn't object to Petitioner seeking medicinal marijuana as an adjunct to his permanency trial. Your Honor permitted it. It's an unheard of precedent in workers' compensation. Maybe we

wouldn't be here today had Mr. Monet properly advised his client to take another shot. I could go on, but for now I would simply urge the Court to dismiss this case based upon a complete failure of proof based upon the record created and the preponderance of credible evidence.

JW: Alright, I have heard you both. I will now render my decision solely with respect to Petitioner's substantive claim. It should be obvious to both of you that the proofs are weak in connection with this claim regarding establishing demonstrable objective medical evidence for permanency. I hate to think that this was the reason for the desperate "Hail Mary" type of application made by Mr. Monet after all proofs were submitted. It was obvious that his lofty expectations in this claim were not going to be realized. They are not. I am not taking anybody's personal position. I am considering this case based on the evidence presented. I disagree with the Respondent that there is no pre-existing cervical disability. Respondent's own evaluating physician admitted as much and I find the Petitioner has actual real pre-existing cervical disability upon which I find real compensable cervical disability is stacked. I also find that he has actual real lumbosacral spine disability from what is a recognizable compensable disability under the statute. Pure minor sprains and strains do not qualify for permanency under the statute. I don't consider either his neck and/or his low back condition to be a minor strain or sprain. I do consider however pre-existing disability associated with the cervical spine at only a 10% rating. That may very well be generous. Petitioner's evaluating physician suggested that there really was no such disability. I do not believe that we simply rubber stamp a prior award under every circumstance as the controlling amount of Abdullah credit especially when an overall condition is stacked upon it. The court has to do justice for all parties under the mandates and intent of the workers' compensation law. This case is no exception. I would have liked to have heard specific medical literature references regarding a lot of the medical opinions regarding the biomechanics of traumatic aggravation of asymptomatic spinal degeneration, but that was not to be. It's not an absolute pre-requisite, but it would have been appreciated for future reference. I'm deciding this case on the record the parties have created. I find that the Petitioner's overall compensable orthopedic disability is 27 ½ % permanent partial total apportioned 17 ½ % with respect to the cervical spine, 10% pre-existing and 10% with respect to the lumbosacral spine. I find the proofs fail as a matter of law with respect to any compensable psychiatric disability as petitioner has not sought any psychiatric treatment nor any thereafter for his alleged chronic pain disorder. I am considering his subjective complaints as a bona fide part of his cervical and low back conditions on an orthopedic basis. He has an asymptomatic degenerative spine that became symptomatic due to the compensable trauma. Every physician feels that a major component of his psychiatric overall condition was the tragic loss of his brother which I agree has been a major factor in everything in connection with this claim. How could it not be? But he has failed to establish compensable psychiatric disability at this point in time based on these proofs. This does not necessarily bar him from an application in the future for any such condition nor will it bar him from filing an application for review or modification of this award with appropriate proofs and/or apply for further application for medical treatment including but not limited to medicinal marijuana when and if he obtains appropriate proofs. I do not believe that there has been an adequate showing for medicinal marijuana

at this point because he has not availed himself of enough authorized medical treatment or even attempted to obtain further unauthorized medical treatment. The door for further authorized treatment has always been left open by Dr. Payne for a return visit. The Petitioner has not accepted that invitation. Petitioner has taken matters into his own hands. Dr. I.M. Mello was not called as a witness. She might have been helpful. There is a requirement under the compensation statute to comply with the established protocol of notice. I do not find an adequate reason for the Petitioner's admitted failure to obtain further compensable treatment through authorized protocol. A return visit to Dr. Payne, who he liked and trusted, could have been helpful. Who knows? I can't decide a case on conjecture. The Petitioner kept his medical problems to himself. The unfortunate consequence of that is his responsibility as a matter of law. I suspect that we may be hearing from the Petitioner at some point in time in the future. I wish him nothing but the best of luck in that regard. I believe that this entire scenario could have been avoided with more forthcoming by the Petitioner but this process, the Workers' Compensation Act, is not geared to solve everyone's problems their way on their terms. Petitioner is credible and the Court was impressed with his determination. No one had a bad syllable to say about him as a person. The Compensation Act cannot mandate behaviors that result in an optimal outcome in every case. I wish the record to reflect that I am in no way emotionally retaliating against the Petitioner or Mr. Monet for the recusal application that was made at the end of the proceedings today. I gave both counsel all the time they wanted to provide legal arguments, briefs and cogent well thought out arguments on the merits. They chose to act today. However whatever my personal feelings are for the timing and nature of the application made by Petitioner's attorney I am not bringing any consequence to his client as my decision today is based solely upon the record created strictly with respect to the proofs submitted to this court. A five day order shall be submitted by Petitioner's attorney, normal fees and costs with a \$600.00 stenographic charge borne by respondent. A 20% fee apportioned in the customary fashion is awarded. In the event of an appeal by either party, I reserve the right to supplement this record in greater detail if necessary. I find that the wage and rate are justified for this award. If the attorneys can stipulate to wage/rate based on the proofs thus far that is fine. Are there any questions from either counsel?

DM: No Your Honor.

MM: No Your Honor.

(At which point Mia Teller interjects while continuing to transcribe the proceedings at which time she admits to be the source of the prior ex-parte conversation and the source of the Facebook allegation. The Judge simply listens and states that he will reserve his right to expand the record and take whatever further and appropriate action may be necessary but for now, the underlying case is decided).

POST TESTIMONY/CLOSING QUESTIONS

1. Was there a bona fide basis for recusal? Discuss the basis for the same and the appropriate manner for application. Include the extent to which the Facebook issue should have been an issue. See, i.e. (See recent Florida decision: Law Offices of Herssein and Herssein, P.A. v. United States Automobile Association, 2018 WL 5994243 (Fla. Nov. 15, 2018))
2. In the event a recusal is denied what if any further action can be taken by the attorney making the application?
 - 2a. What if any further post-hearing options does Monet have?
3. If the recusal was granted and another judge was substituted, would the trial be restarted de novo or could the presiding judge decide the claim based on the record? To what extent is this an issue for the sound discretion of the trial judge?
4. Would the judge have the right to recall any witnesses for partial additional disability concerning any issues which he or she felt might exist with respect to potentially deciding the case on the record developed?
5. What if any further action should Judge Wrightman take based on these developments? What are his options?
6. What potential liability does Teller have relative to her continued position as a court reporter in the division given her conduct?
 - 6a. If she was terminated, would that be "for cause" or would she possibly have a defense such as "whistleblower?"
7. Was the "relationship" between Teller and Petitioner's attorney violative of any ethic provision governing either one's conduct and if so what is/are the provision(s)? If not should Teller have declined to provide stenographic services for any case involving Monet?
8. What, if any further application should MacDonald take concerning Monet's conduct referable to MacDonald's "covering letters"?

SCENE FIVE

POST TRIAL – Conference between Monet and Petitioner

Following his ruling, Judge Wrightman immediately leaves the bench. Nothing is said between MacDonald and Monet each of whom are gathering their materials. Teller is sitting motionless and staring into space. The Petitioner is stunned and he hasn't really fully processed what has occurred. They are the only four individuals in the courtroom and MacDonald is the first to leave and utters one quiet word directed to Monet as he is leaving... "brilliant." The word could not drip more of sarcasm than the manner it was uttered by MacDonald. Teller starts to gather her materials. Monet simply says he will call her when he gets back to his office. He has a brief exchange with the Petitioner simply advising him that "everything will be fine" and that the Petitioner should come into his office at 9:00 a.m. the following day to discuss everything." That evening's conversation with Teller is simply primarily one of mutual consolation with no definitive further action on either one's part being determined. Monet is impressed with Teller's candor.

Petitioner arrives at 9:00 a.m. in Monet's office and they have the following discussion:

JJ: I really don't understand what happened in court yesterday. What is "recusal?" What did that mean? Why was the judge so angry? It sounded like he wasn't holding it against me. It sounded like he said I won or at least partially won. What happened?

MM: Well first of all you did win. He found in your favor. He decided your accident actually caused you two permanent injuries regarding the neck and your low back. He found your overall award was 27½% of your body between your neck and low back but that you had improved so much between your last award and just before this accident that your rating was only 10% pre-existing and not the 27½% previously awarded. Frankly that might have been a generous figure given your testimony and your insistence that you had no pre-existing.

JJ: But I thought you told me that legally he had to find the pre-existing was 27½% and that would make my award higher. And you said that a big part of our strategy was making me as fully recovered as possible so that we could have almost all of my disability related to the accident.

MM: Well we tried your case on the truth in terms of how you were functioning. You actually had made almost a full recovery so we really didn't have much choice. While the case law is not 100% clear I did tell you that I felt strongly that the judge would find in our favor on this particular narrow legal issue. But he saw it differently, but only to the amount of your rating for which pre-existing credit should be given.

JJ: Yes he did.

MM: That's correct and there's almost nothing we can do at this point. The record is the record and under the law if there is any credible evidence to support the Judge's decision then it is upheld.

JJ: But now my overall disability amount is the same in my neck and my low back as it was previously in my award just for my neck alone even though my neck has way worsened. I'm not sure I understand all of this.

MM: First of all this doesn't really impact your previous award. You still keep that money because you've been paid. They won't take that away. But, understand that the insurance company's position all the way through was that you had no real new compensable orthopedic disability because your diagnosis for the injury itself didn't show any herniated discs like you had last time, you didn't undergo surgery like you did last time and in fact all you got on an authorized basis was 7 weeks of authorized physical therapy and you never were out of work. Under most such cases a person would get no disability regardless of what the pre-existing was. That's why they only offered you \$15,000.00 at most to dismiss your case in its entirety. Now you are going to receive 117.9 weeks. You're going to receive approximately \$31,341.00 overall less fees and costs for your neck and your low back and you will have every right to re-open your claim in the future. Your net recovery will approximate \$24,841.00 on a lump sum, tax free basis within 60 days once fees and costs are deducted. You were awarded specific orthopedic disability solely due to your neck and back totaling 17 ½% of your body.

JJ: Well that part I really like. Honestly Mr. Monet this case has never been about the money. I told you before it was about protecting my job and protecting my health and at least the judge ordered that I can come back for treatment, right?

MM: Not only that, but he has encouraged you to go and see about the medicinal marijuana if you qualify. We have at least the right to make a further application to the court. Although frankly at this point I would suggest that you just do it on your own as it would never be considered authorized and then we will see what happens. Hopefully you'll get better. It won't have any effect on your award. But right now it will be out of pocket and probably not covered by insurance.

JJ: Are you certain?

MM: Yes. In the event that you want to try to get psychiatric treatment you can use your own insurance but we could also potentially have it covered under workers' compensation even though there is no psychiatric disability awarded at this time. Basically the judge was covering your pain as part of your orthopedic condition.

JJ: Well that's good too. That's all a relief because I was worried more than ever last night that possibly my case was being dismissed. I just didn't understand it. The judge seemed so angry and even though the actual words he used didn't sound as angry as the way he was saying them. He just seemed really, really mad. What does recusal mean?

MM: It means I made an application for him to step aside and not decide the case and let another judge handle it.

JJ: What?!

MM: Yes it is just that this whole case was building up in terms of how biased I felt he was. It was unacceptable.

JJ: You really didn't tell me anything about that.

MM: Well we did discuss to a certain extent how he was acting but I didn't want to trouble you because you already were worried enough about your case. I wanted you to testify the best you could do. You were great. The Judge actually found you to be completely credible. However too many things occurred during this trial and I had finally had enough and I thought it was in everyone's best interests to ask him to get off the case.

JJ: Well again you're the lawyer but I don't understand why you wouldn't have done that before the trial started. Shouldn't that have been something that you discussed with me before you decided to just pull the carpet out from the judge at the end of the case? I mean, that was a pretty big decision you made. It could have cost me the whole case.

MM: There are certain things that sometimes you have to do at a certain point in time. That's why we have a detailed retainer agreement. That gives me a lot of latitude regarding making decisions in your best interest. Sometimes you just have to have the courage and conviction to pull the trigger when needed. The judge was being so biased in his rulings towards the end. I had found out right before the decision that he was on Facebook with the other attorney and that they were friends. A judge is sworn to be impartial. He can't be real friends with the lawyer appearing before him and then decide that lawyer's case. That's not ethical. That's not fair. He has to at least divulge it and have the lawyers waive any potential conflict of interest. The law is very strict on these things. This was really bad.

JJ: Sure sounds that way. Is that all the information that the court reporter told you?

MM: Yes. She really felt the judge was being unfair. She doesn't think he's professional and she ended up giving me some more information. She could be in a lot of trouble with her company. Maybe even lose her job. Who knows?

JJ: Oh that's really too bad. She seemed really nice. Is anything going to happen to you for making the recusal application?

MM: I hope not. But you never know. If so, I am doing the right thing for you and that is all that mattered. That's what I told you on your first day of meeting with me. You are the only one who counts. There's any number of things that we could do about all of this. If you wanted to file an appeal of the judge's decision because he didn't stack the disability on 27 ½% then that would be up to you. I'm going to suggest that given all

factors and given that you basically won your case with the right to re-open it in all aspects and in 2 years of last payment made that we not file any type of an appeal or take any further action. I think it's probably best for you that we put this entire experience behind you. What do you think?

JJ: You know I'm just a client. I don't know the law. You're the boss. You're the lawyer. I have to trust you. You fought really hard for me. I did get protection, the protection I wanted. I watched every minute of this trial. It seemed like everybody was saying what they had to say to try to win. I can't argue with it. We had some good points. Their side had some good points. I just hope no one, including me, gets fired for me making my claim.

MM: Please don't worry about that. It's illegal retaliation to fire anybody because that person has made a compensation claim. You made your compensation claim the date your accident occurred. Nothing has happened to you since then has it?

JJ: No not really. Other than I haven't gotten any better.

MM: Well then it's your job to see if you can try to get better, to get the medicinal marijuana on your own. See what you can do. Now you have some tax-free money to spend. If you want to try to get psychiatric help see what you can do. If your neck and your back get worse we'll re-open this claim or possibly file a further occupational claim. Who knows? It's possible you could have a further accident and aggravate your condition and then you would have a brand new compensation claim. No one can fully predict the future.

JJ: Oh please don't say that Mr. Monet. I couldn't handle another accident.

MM: Well you need to be careful then. So what do you think about everything? Should we file an appeal and go through all of that time and effort and not knowing how the outcome is going to be or are you willing to simply do what I'm suggesting at this point to go along with what the judge says. It's actually your call. I really can't tell you what to do. I can only give you options.

JJ: Well you can say what's best for me. That's why I hired you. With all of your experience, even though you might not have been as experienced as Mr. MacDonald, you did fight hard for me just like my buddy said you would. I am okay with everything. Tell the court reporter that I'm very appreciative for her concern and especially if it's going to get her into trouble. She didn't really need to do that. Would it be wrong if I sent a thank you note to the judge?

MM: No that's not necessary and I don't think it would be a good idea. If we're going to move on let's just move on and keep it clean.

JJ: Okay Mr. Monet I will listen to what you have to say. You're my lawyer. Thank you for everything. When can I expect my check?

MM: Probably within 60 days unless they decide to file an appeal because they may very well be upset with this and then they might ask for what's known as a stay and that stops the process. Hopefully that won't happen but I can't guarantee anything. I haven't heard anything. I would expect that there may be some further discussion. We could ask for a further reconsideration but again at least at this point I think we're going to take the position that we won although maybe not as much as I wanted. We're just going to move forward and hopefully they won't file an appeal either but there could be some further ethical issues but that won't involve you. I will keep you posted. I'll send you a confirmatory letter regarding all this.

JJ: Thank you very much for everything Mr. Monet. I can't tell you how much all of this means to me even though it was a really stressful experience. We're past it and I think we did okay even though maybe you don't. Maybe we didn't get as much money as you thought, but that really wasn't the point of this.

MM: Mr. Jones you're a really good person. I haven't ever had the privilege of representing someone as decent as you are. You're an understanding individual and deserve the best. Good luck to you. If I can ever be of any further service to you please do not hesitate to call. I'm strongly recommending that you check out attempting to requalify for the medicinal marijuana and please keep me posted how everything goes. When you weather a storm with a trial like this you become even closer to your clients and I feel that way about you.

JJ: So do I. Thanks again. Thanks again for everything.

MM: If you ever have an opportunity to refer any of your friends or relatives or coworkers for me in workers' compensation or personal injury that would be greatly appreciated.

JJ: You bet Mr. Monet. And you don't have to send me a Nike gift card like my buddy gets. I'll be happy just to do it with no expectations.

MM: I appreciate that. You are a good man Mr. Jones. My very best to you.

JJ: And to you Mr. Monet.

QUESTIONS

1. Assess the level of Monet's candor to his client in connection with "explaining" the judge's overall decision.
 - 1a. Was Monet obligated to explain the monetary value of 17 ½% stacked on 27 ½% versus 10% so that Petitioner could make a fully informed decision?
2. To what extent was Monet obligated to obtain the Petitioner's consent concerning the application for recusal before it was made?

3. If Petitioner retained you to re-open his claim and you found out the background of his case, would you recommend a malpractice case or ethics complaint against Monet? Why or why not?
4. Assume the judge becomes aware that Monet is platonically friendly with Teller and he purchased her two cups of coffee over the past 3 months and both were in court at the time of a lunch recess? Would this be a basis for him to take any further action? If so, what?
5. What if any professional/ethical obligations are imposed on a court reporter as part of the workers' compensation court system?
6. Based on their entire performance, rate the overall professionalism of Judge Wrightman, Michael Monet, Donald MacDonald and Mia Teller on a scale of zero-ten and provide your reasoning for the same.
7. What are the post judgment options for Wrightman, Monet, MacDonald and Teller? What action, if any, would you advise each take?
8. Based on the record created here, how would you have decided this case?
9. Go back to the Professionalism section and re-rate yourself on The Ten "C's." Any changes?
10. Did Monet or MacDonald and/or Judge Wrightman err in failing to cite specific precedent regarding the prior award res judicata on the 27 ½%? What is the legal precedent applicable to this issue?