

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

THOMAS NEELY,

Plaintiff,

v.

No.: 3:05-CV-304
(Guyton)

FOX OF OAK RIDGE, INC. and
BENJAMIN H. CURD,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION IN LIMINE

The Plaintiff's response to the Defendant's motion in limine is as follows:

The Defendant has asked this Honorable Court for an Order excluding the testimony of Thomas Koenig, M.D., as to his opinion whether the Plaintiff, Thomas Neely, was capable of gainful employment relative to his former employment. Depo. Thomas Koenig, M.D., 30:14-17 (Nov. 30, 2005) In reviewing the Defendant's objection/motion in limine, it appears to be an evidentiary question, which goes to the weight of the evidence not the qualifications of Dr. Thomas Koenig. Dr. Koenig was never proffered as an expert in the field of vocational rehabilitation. However, Dr. Koenig did testify in his expert capacity as an orthopedic surgeon about Mr. Neely's physical restrictions, "no duty" (Depo. Thomas Koenig, M.D., 32:1-2) and Dr. Koenig's first-hand knowledge regarding Mr. Neely's former job description, which was obtained in the course of over a year by Dr. Koenig's treatment of Mr. Neely. (Depo. Thomas Koenig, M.D., 14:13-20; 30:22-25, and 31:1-6) Thus, Dr. Koenig testified concerning his

treatment and the physical restrictions, which he placed upon Mr. Neely, and not as a vocational rehabilitation counselor as the Defendant would suggest.

In regards to the Defendant's motion in limine to strike Dr. Koenig's testimony that he did not believe that Mr. Neely would have been "employable" (Depo. Thomas Koenig, M.D., 32:10-11) the Defendant made no objection during or after that statement. Furthermore, the Federal Rules of Civil Procedure, Rule 32 (d)(3)(A) (2005), states:

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

This lack of objecting to Dr. Koenig's testimony prejudices the Plaintiff in that the objection is one which might have been obviated or removed if presented at that time. Therefore, the Plaintiff is incapable of remedying this objection and will be forever prejudiced. The Federal Rules of Civil Procedure, Rule 32 (d)(3)(B) (2005), further states:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

The Defendant was aware the Dr. Thomas Koenig's proof deposition was taken with the Plaintiff not waiving any objections until the time of trial. (Depo. Thomas Koenig, M.D., 3:12-13) A proper objection could have and should have been made to the form of the answer. However, as the record will show no objection was made and is therefore forever waived.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

THOMAS NEELY, Plaintiff

v.

NO. 3:05-CV-304 PHILLIP/GUYTON

FOX OF OAK RIDGE, INC. and BENJAMIN H. CURD, Defendants

APPEARANCES:

ROBERT J. ENGLISH, MICHAEL C. INMAN, Attorneys for the Plaintiff, Thomas Neely

CLINT J. WOODFIN, Attorney for the Defendant, Fox of Oak Ridge, Inc. and Benjamin H. Curd

DEPOSITION OF THOMAS M. KOENIG, M.D. November 30, 2005

1 client and Mr. Inman's client, Thomas Neely. And if you 2 would throughout this deposition, testify based on 3 reasonable medical certainty or probabilities. Will you do 4 that for us? 5 A I will. 6 Q Okay. Dr. Koenig, where do you practice 7 medicine? 8 A I practice in Knoxville, Tennessee, on 9 Kingston Pike. 10 Q What's your specialty? 11 A Orthopedic surgery. 12 Q Doctor, what does that mean, what does 13 that entail? 14 A It involves the study and treatment of 15 bones, muscles, tendons, ligaments, discs and nerves. 16 Q Okay. And where did you take your 17 medical training, sir? 18 A Most of my medical training was in 19 Philadelphia, Pennsylvania. I went to a medical school 20 there called Hahnemann Medical University, and then from 21 there I did a residency for five years at Hahnemann Medical 22 University, and then I did an optional one year in 23 Washington, D.C. with George Schonholtz in arthroscopy. 24 Q Okay. Doctor, where do you do your 25 surgeries here in Knoxville when you do surgery?

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Table with 2 columns: WITNESS and PAGE. Includes THOMAS M. KOENIG, M.D. with sub-entries for Direct Examination, Cross Examination, and Redirect Examination.

EXHIBITS

Table with 3 columns: NO., DESCRIPTION, and PAGE. Lists exhibits 1 through 4 including Curriculum vitae, List of medical expenses, and MRI reports.

1 A I've got privileges at a fair number of 2 facilities. Most of my surgery is done out west, the more 3 major cases at Parkwest. There are a bunch of surgery 4 centers like Parkwest Surgery Center Tower, Knoxville 5 Surgery Center, Fort Sanders West. It may be easier to 6 tell you where I don't have privileges, but primarily out 7 here in the west. 8 Q Okay. Is that for convenience sake? 9 A Yes. Whenever I first came here in 10 1992, I didn't mind the travel so much and thus I had 11 privileges at Children's, I'm sorry, East Tennessee 12 Children's, U.T., Regional, and as your practice matures, 13 you don't have the time to run around to the various 14 different places, so it's more or less stayed out here in 15 the west. 16 Q Doctor, as a matter of maturity, how 17 long have you practiced, been licensed to practice 18 orthopedic surgery in the state? 19 A In the state, since '92. 20 Q Okay. Are you Board certified, sir? 21 A Yes, sir. And recently recertified. 22 Q Okay. What does it mean to be Board 23 certified, Dr. Koenig? 24 A When you sit for your Boards the first 25 time, you undergo a rigorous written exam with several

1 The videotaped deposition of THOMAS M. KOENIG, 2 M.D., taken by agreement of counsel, for any and all 3 purposes allowable under the Federal Rules of Civil 4 Procedure, before DENISE M. HOOD, Court Reporter and Notary 5 Public in and for the State of Tennessee at Large, on the 6 30th day of November, 2005, at the office of the witness, 7 11808 Kingston Pike, Knoxville, Tennessee.

8 It is agreed that the reporter may swear the 9 witness, take the deposition stenographically, and 10 afterwards reduce the same to typewritten form when the 11 completed deposition may be used in the above-styled cause.

12 The plaintiff does not waive any objections until 13 the time of the trial. All formalities are expressly 14 waived as to caption, certificate, transmission, and the 15 reading and signing of the deposition by the witness.

16 THOMAS M. KOENIG, M.D., 17 having been first duly sworn, was examined and 18 deposed as follows:

19 DIRECT EXAMINATION

20 BY MR. ENGLISH:

21 Q Would you state your name for the 22 record?

23 A Sure. Thomas Martin Koenig, M.D.

24 Q Dr. Koenig, my name is Bob English, as 25 you know, and I'm here to ask you some questions about my

1 hundred questions. I no longer remember, but I'm sure it's 2 four or five hundred questions, and you have to pass those. 3 On the assumption that you've passed those, then the Board 4 queries you as to what you actually do as far as practice 5 goes, and you have to simulate for them and gather all the 6 x-rays, all the operative reports for about a six-month 7 period of your time and they have the ability to scrutinize 8 that. They ask you to come to Chicago and you carry a 9 bunch of bags with x-rays and all kinds of stuff, MRI's, 10 your operative reports, and then they grill you. You sit 11 for about eight hours and they ask you anything and 12 everything and hopefully you pass, and if you pass, then 13 you are, at that time, Board certified. I think ever since 14 1988, if you're certified, you're certified for a limited 15 time, ten years, then you had to re-sit for Boards again. 16 Q And you did so? 17 A Yes, sir. I think I'm good through the 18 year 2014, if I'm not mistaken. I have a CV, if you'd 19 like. 20 Q Doctor, we have a copy of your CV. 21 Would you hand that to the doctor and see if that's the 22 most recent CV he has, Ms. Court Reporter? 23 A Yes. That is correct. And I'm 24 recertified through the 31st of December, 2014. 25 MR. ENGLISH: Let's make your CV Exhibit

1 understand a psychiatric technician would need to
2 potentially have to subdue potentially unruly psychiatric
3 patients, would have to assist them in feeding, have to
4 assist them in lifting them on occasions to beds and
5 commodes and/or move them from one place to another for CAT
6 scans and things of that nature.

7 Q Doctor, when you last saw him the 15th
8 of November, did you give him a permanent no duty, no work
9 status with certain impairments?

10 A Yes, sir.

11 Q Restrictions?

12 A Yes, sir.

13 Q What were those restrictions? And I'll
14 ask you to refer back to your July 6 note, the specifics of
15 that, sir.

16 A On July 6th, it was written for no
17 repetitive bending, stooping, squatting, or lifting greater
18 than fifteen pounds. He should be allowed frequent changes
19 in position.

20 Q Are those still the restrictions that
21 you had him on permanently at this time, sir?

22 A If I can, sir, allow me just a few
23 seconds to check my notes.

24 Q Okay.

25 A No. In effort -- I should state that

1 benefits of that study, the physician can use his thumb and
2 try various limited duty attempts. Sometimes he
3 undershoots, sometimes he overshoots. It was my opinion
4 that he could not tolerate the fifteen pounds of repetitive
5 lifting that we attempted to get him to do in July, so I
6 overshot the mark in July; I asked him to do too much.

7 Q So you think he should have been
8 restricted from doing anything from the first time that you
9 saw him up until the time that you last saw him here in
10 November?

11 A No, sir. I think it was appropriate to
12 try it in July. I don't think that there was an error in
13 medical decision making. I think that I just was overly
14 hopeful that he would be able to do that.

15 Q When you say he is not able to do
16 anything, are you saying he needs to sit in a bed for a
17 complete day and not do any activity at all?

18 A What I'm saying is that this gentleman
19 probably can't even tolerate sitting in bed for eight
20 hours. He's going to have to sit, stand. He's going to
21 have to move his self to a recliner. He's going to have to
22 walk, he's going to have to pace. In that regard, no to
23 your question, simply, and similarly at the workplace do I
24 think he could sit and just answer a phone, I don't think
25 so. He's going to have to stand, he's going to have to

1 those were amended further to whereby he was placed on no
2 duty on the 15th of November, 2005.

3 Q What does that mean, sir, in your
4 opinion?

5 A Meaning that I really don't think he
6 could do anything. When I saw him in the office, let's
7 say, on the 15th of November, I saw him for forty-five
8 minutes to an hour and during that time the man just could
9 not sit or lay still or stand still. He was constantly
10 having to change positions. I don't think that he would
11 have been employable in that regard. He would have been a
12 distraction to any workplace with as frequently as he had
13 to move to try to keep himself in some semblance of
14 comfort.

15 Q Doctor, do you have an opinion as to
16 whether or not this man will suffer pain in the future as a
17 result of these injuries?

18 A Yes, sir. I think that that
19 unfortunately also is permanent, and that's the reason why
20 we sent him to a pain management consultation through Dr.
21 Browder.

22 Q Will he require medications to alleviate
23 the pain of this wreck and injuries in the future?

24 A Most likely.

25 Q Have you done everything that you can

1 sit, he's going to have to lie down for a short period of
2 time. I know that I couldn't employ him in a clerical
3 position in my office, and I certainly couldn't employ him
4 to do any manual labor in my office.

5 Q Do you have any training as a vocational
6 assessor?

7 A Indirect training in the fact that I
8 have substantial -- how can we put it, in the fact that I
9 deal with a lot of vocational reports. I discuss with
10 vocational rehabilitation counselors various options and
11 how they orthopedically or mechanically can be potentially
12 adjusted or improved, so I have a fair bit of experience,
13 but, no, sir, I'm not a vocational rehabilitation
14 counselor.

15 Q Do you have any training in what jobs
16 are available for disabled people in this area?

17 A I have a good general idea. Do I have
18 the ability to know that at this particular time that one
19 company "X" has a job that's opened, no, sir.

20 Q Is that general ability similar to what
21 any of us who have an understanding as to what work
22 involves has?

23 A I would think it would be similar to
24 what any other Board certified orthopedic surgeon has in
25 the area.

1 for him at this time from an orthopedic standpoint, Doctor?

2 A Yes, sir.

3 MR. ENGLISH: I believe that's all.

4 CROSS EXAMINATION

5 BY MR. WOODFIN:

6 Q Dr. Koenig, my name's Clint Woodfin, and
7 I represent Mr. Curd and Fox of Oak Ridge in this lawsuit.
8 Mr. Curd was driving the vehicle that rear-ended Mr.
9 Neely's vehicle. If I understood your testimony correctly
10 about his restriction, you have changed the restriction
11 that you had him on since July of 2004 as of 11-15-05; is
12 that correct?

13 A That was correct. I just want to make
14 sure I heard the dates correctly. He was -- we attempted
15 to put him back to work on a limited duty basis, very
16 limited, in July, and I responded as such to Mr. English's
17 question. He said as of July, what was his duty status,
18 and then on the 15th of November, 2005, he was placed on no
19 duty.

20 Q And that original restriction didn't
21 change until November 15th, 2005, correct?

22 A That's correct. Please understand that
23 this gentleman has never had a Functional Capacity
24 Evaluation, which would objectively describe exactly what
25 this gentleman can and cannot do. When you don't have the

1 Q No more or no less?

2 A No more, no less.

3 Q And as far as whether or not you've ever
4 actually performed a vocational analysis on someone, I
5 think that would be no?

6 A That is correct.

7 Q You mentioned his inability to do these
8 activities, and I'm thinking that's primarily based on the
9 complaints of pain that he's relating to you, correct?

10 A Based on the complaints of pain coupled
11 with the objective findings on MRI, CT scan and plain films
12 as well as a physical examination that's repetitively done.

13 Q There are no objective indications which
14 would lead you to conclude that if he tried to do anything,
15 he would hurt himself, are there?

16 A Not within the fifteen pounds that he
17 was allowed to do back in July. I don't think that the
18 fifteen pounds would hurt him. I just don't think that he
19 was able to do the fifteen pounds.

20 Q And that's still the same in November of
21 2005, when you last saw him? There's nothing objective
22 that you can point to that says if this man tries to do
23 something, he's going to hurt himself?

24 A I think if he tried to lift more than
25 fifteen pounds again, I think that he would fail again.