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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 3:16-cv-01984

BARBARA J. NYLANDER, M.D.,
Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA and PAUL
REVERE LIFE INSURANCE COMPANY,
Defendants.

DEPOSITION OF MELISSA WALSH

AS 30(b)(6) DESIGNEE OF

UNUM LIFE INSURANCE COMPANY OF AMERICA and

PAUL REVERE LIFE INSURANCE COMPANY

TAKEN NOVEMBER 17, 2017

AT THE HILTON GARDEN INN

35 MAJOR TAYLOR BOULEVARD

WORCESTER, MASSACHUSETTS

Reporter: Elizabeth P. Duffy

REAL TIME COURT REPORTING

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Also present:
13 Elizabeth Sanning, Senior Counsel for Unum
14
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WITNESS: MELISSA WALSH,
As 30(b)(6) Designee of
Unum Life Insurance Company of America and
Paul Revere Life Insurance Company

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

It is agreed by and between the parties that all objections, except objections as to the form of the questions, are reserved and may be raised at the time of trial for the first time.

It is further agreed by and between the parties that all motions to strike unresponsive answers are reserved and may be raised at the time of trial for the first time.

It is further agreed by and between the parties that the sealing of the original deposition transcript is hereby waived.

It is further agreed by and between the parties that the notification to all parties of the receipt of the original deposition transcript is hereby waived.

* * * * *

MELISSA WALSH, As 30(b)(6) Designee of Unum Life Insurance Company of America and Paul Revere Life Insurance Company, Deponent, having produced satisfactory identification by means of a Massachusetts Driver's License, was duly sworn, deposes and states as follows:

(Start time 10:13 a.m.)

EXAMINATION BY MR. PEPPER:

Q. Would you state your full name for the record, please?

A. Melissa Walsh.

Q. Ms. Walsh, I'm Ross Pepper, I represent Dr. Barbara Nylander in a case that's pending in district court down in Tennessee; I think you know that. I will be asking you some questions today. I want you to know that you have the absolute right -- if you do not understand the question in any shape, form or fashion, you have the absolute right to ask me to repeat it or rephrase it; do you understand that?

A. Yes, I do.

Q. I do not expect you to answer questions you do not understand. If I ask you a question and

1 you do not ask me to repeat it or rephrase it, I
2 will assume that when you answered it, you
3 understood it; does that sound fair?

4 A. Yes.

5 Q. Okay. If you need to take a break at
6 any time, let me know; this is not meant to be an
7 ordeal. You understand you are here today as an
8 appointed representative of Unum, correct?

9 A. Yes.

10 Q. Okay. And how long have you worked at
11 Unum?

12 A. Nineteen years.

13 Q. What is your current position?

14 A. Lead appeals specialist.

15 MR. WARNOCK: And let's be a
16 little more precise about who she works for
17 and who she is here on behalf of, if you don't
18 mind.

19 MR. PEPPER: Okay.

20 (BY MR. PEPPER)

21 Q. Who are you here on behalf of?

22 A. Well, I work for Unum Group.

23 Q. Okay. Who issued the policies that are
24 in effect in this case? I know Paul Revere issued

1 one policy, correct?

2 A. There's one Paul Revere policy and I
3 believe two Unum Life Insurance Company policies.

4 Q. Is Unum by Paul Revere?

5 A. I'm not exactly sure the logistics
6 behind it. I know Unum has an agreement to handle
7 the Paul Revere policies.

8 Q. They are just administering as far as
9 you know?

10 A. Yes. Well, when I first started with
11 the company, it was -- right after I started, the
12 company was Paul Revere and then there was a merger.
13 I don't know exactly the logistics of it but we
14 maintained the Paul Revere policies in Worcester.

15 Q. Okay. We sent a Rule 30(b)(6) notice
16 to Unum Life Insurance Company of America and Paul
17 Revere Company of America for this deposition, do
18 you understand that you are representing both of
19 those defendants in this deposition?

20 A. Yes, I do.

21 Q. Okay.

22 MR. WARNOCK: That took care of my
23 concern.

24 MR. PEPPER: Okay. But now I want

1 to make sure I'm clear on this, too.

2 (BY MR. PEPPER)

3 Q. If I refer to Unum, can you and I
4 understand that I'm talking about the company that
5 both issued the Unum policies and administers those
6 policies or are they different?

7 MS. SANNING: I'm going to go on
8 the record just and say they are different
9 corporations. So what she understands --

10 MR. PEPPER: Ma'am --

11 MS. SANNING: I understand.

12 MR. PEPPER: That's not
13 appropriate. You are not counsel of record.

14 MS. SANNING: I am just telling
15 you that she is not here as a corporate
16 witness on the corporate structure.

17 (BY MR. PEPPER)

18 Q. Ma'am, you are here for Unum Life
19 Insurance Company of America and Paul Revere Life
20 Insurance Company, correct?

21 MR. WARNOCK: On the topics that
22 you've identified in the 30(b)(6)?

23 MR. PEPPER: Correct.

24 MR. WARNOCK: Yes, she is that

1 person.

2 MR. PEPPER: Okay. Well, let's
3 let her answer the questions.

4 And ma'am, I'm going to ask you --
5 that is completely inappropriate for you to
6 make an objection. I am conducting an
7 examination here. You do not have the right
8 to talk during it. Mr. Warnock does, you do
9 not. I'm going to admonish you not to do that
10 again because I think you are leading the
11 witness.

12 MR. WARNOCK: No, she's not. Ms.
13 Sanning is a lawyer. She is authorized to --

14 MR. PEPPER: She is not a counsel
15 of record in this case.

16 (BY MR. PEPPER)

17 Q. Now, you're here representing Unum Life
18 Insurance Company of America and Paul Revere Life
19 Insurance Company, you understand that, correct?

20 A. Correct.

21 Q. Okay. Who issued the policies that are
22 the subject of this litigation?

23 A. I would have to look at the policies
24 but I believe it was Paul Revere Life Insurance

1 Company for the Paul Revere policy and Unum Life
2 Insurance Company for the two Unum policies.

3 Q. Who do you receive your paycheck from?

4 A. Unum Group.

5 Q. How is Unum Group related to Unum Life
6 Insurance Company of America?

7 MR. WARNOCK: I object to the form
8 of the question.

9 MR. PEPPER: Okay, you've made
10 your objection.

11 MR. WARNOCK: Corporate structure
12 is not one of the topics. So she can testify
13 to what she knows but she is not offering that
14 testimony as a corporate representative
15 pursuant to your notice.

16 MR. PEPPER: Your objection is
17 noted.

18 (BY MR. PEPPER)

19 Q. Answer the question, please, ma'am.

20 A. To be honest, I don't know.

21 Q. Okay. Your paycheck comes from Unum
22 Group?

23 A. Correct.

24 Q. If you are paid by Unum Group, do you

1 know why you are here today representing Unum Life
2 Insurance Company of America?

3 A. We handle Unum Life Insurance Company
4 policies, we administer those. And Dr. Nylander,
5 two of her policies were Unum Life Insurance Company
6 policies.

7 Q. Okay. So Unum Group actually
8 administers policies; is that fair to say?
9 Administers the policies that are at issue in this
10 litigation?

11 MR. WARNOCK: Same objection.

12 Q. Is that correct?

13 MR. WARNOCK: You may answer.

14 A. Yes, that's correct.

15 Q. How long -- you've worked for 19 years
16 at Unum Group; isn't that correct?

17 A. Well, it wasn't Unum Group when I first
18 started.

19 Q. Who was it?

20 A. I believe -- I'm guessing, to be
21 honest, but I believe it was Provident. I don't
22 remember. It's been so long.

23 Q. How long have you been lead appeals
24 specialist? How long have you held that position?

1 A. Since January of 2008.

2 Q. What do you do in that role?

3 A. I review appeals that are assigned
4 to me.

5 Q. Appeals of disability claims?

6 A. Yes, they are all disability claims.

7 Q. You don't review any life insurance
8 claims or other types of claims?

9 A. No. Occasionally if someone has a life
10 waiver policy with their individual policy, I would
11 sometimes review that but it's very, very few.
12 Primarily, individual disability policies, as well
13 as I handle some group disability -- long-term
14 disability appeals as well.

15 Q. Okay. What is your understanding of
16 why you were selected to testify today?

17 MR. WARNOCK: And I object to the
18 extent it calls upon you to answer with
19 information that I have provided you or that
20 Ms. Sanning provided you.

21 Q. You can answer the question. What is
22 your understanding of why you have been selected to
23 represent, in this deposition, Unum Life Insurance
24 Company of America and Paul Revere Life Insurance

1 Company?

2 A. I'm not exactly sure. I was just asked
3 if I would be the company witness on the case.

4 Q. Who asked you?

5 A. Our legal department.

6 Q. What was your role in Dr. Nylander's
7 disability claim with Unum and with Paul Revere?

8 A. I handled the appeal.

9 Q. Were you involved at any point before
10 it was appealed?

11 A. No.

12 Q. What have you done to prepare for
13 today's deposition?

14 A. I reviewed the claim file and I met
15 with counsel.

16 Q. Who else do you know at Unum has been
17 involved in this claim of Dr. Nylander, either in
18 the appeal or in the initial evaluation of the
19 claim?

20 A. What do you mean who do I know?

21 Q. What other persons? What persons have
22 been involved in the initial evaluation of the claim
23 and what other persons have been involved in the
24 appeals -- the appeal, singular?

1 A. I mean, I think the claim file speaks
2 for itself of who was involved. I'm not sure. I
3 don't know if I could name everyone off the top of
4 my head that has touched the claim file or looked at
5 it, I should say.

6 Q. Who can you name?

7 A. I think the benefits specialist was
8 Matt LaRotonda. I don't know if I'm pronouncing his
9 last name correct.

10 Q. Have you spoken with him about this
11 claim, had a conversation with him?

12 A. No, I have not.

13 Q. Who else do you know has been involved
14 with this claim?

15 A. I believe Lee Samuel was the director.

16 Q. What do you understand her involvement
17 was?

18 A. I believe -- and I'd have to go back
19 and look at the file but I believe she may have
20 signed off on Matt's decision to deny benefits. She
21 may have performed other activities in the claim
22 file and I'd have to go back and look. But I
23 believe Lee was Matt's director.

24 Q. Have you spoken with Lee Samuel about

1 Dr. Nylander's claim?

2 A. No, I have not.

3 Q. Other -- and I don't want to know about
4 conversations you had with Mr. Warnock. Other than
5 with Matthew -- excuse me. Who have you spoken with
6 about this claim? Either the appeal or this
7 deposition -- and I'm not talking about
8 conversations with Mr. Warnock or your legal
9 department. Who else have you talked to? Have you
10 gone back and spoken to anybody involved in this
11 claim?

12 A. Do you mean when I was handling it or
13 do you mean afterwards?

14 Q. Okay, let me be clear about it. That's
15 a good point. At any point.

16 A. Well, at any point I would say the file
17 will document who I spoke with. I think all
18 conversations are documented in the claim file.

19 Q. Okay.

20 A. Since my appeal handling ended, I have
21 not spoken with anyone except for counsel about the
22 claim.

23 Q. Okay. Before today's deposition,
24 knowing this deposition was going to take place,

1 have you spoken with anybody about the claim or this
2 deposition other than counsel?

3 A. No. Well, my director knows that I am
4 having a deposition but I don't even know if he
5 knows the case.

6 Q. Okay. So the answer would be you
7 haven't spoken with your director about this
8 particular case; is that fair to say?

9 A. Since I've been noticed for the
10 deposition, that is correct.

11 Q. All right. Who is your director?

12 A. Steve Carlson.

13 Q. Have you ever testified in a deposition
14 before?

15 A. Yes.

16 Q. How many times?

17 A. I don't recall.

18 Q. More than 10, less than 10?

19 A. I would say more than 10.

20 Q. Less than 20?

21 A. That, I don't know.

22 Q. Less than 100?

23 A. Less than 100, yes.

24 Q. Okay. Somewhere between 10 and 100; is

1 that fair to say?

2 A. I really can't answer. I can say more
3 than a dozen times. I haven't kept count so I
4 don't --

5 Q. More than a dozen but less than 100
6 probably; is that fair to say?

7 A. If I'm speculating, I would say yes.
8 But that's pure speculation. I don't have a number.

9 Q. Okay. I don't want you to speculate.
10 I'm just trying to get some idea how many
11 depositions you've given on behalf of Unum, so don't
12 speculate. Can you say you've given less than 200
13 depositions?

14 A. Yes.

15 Q. Okay. Can you be any more specific
16 than that?

17 A. I would say less than 50. I can't
18 remember. I know that at one point in time I had
19 approximately a dozen and then I haven't kept
20 track --

21 Q. All right.

22 A. -- since then.

23 (Exhibit 1, Disability Income Policy, marked
24 for identification)

1 (BY MR. PEPPER)

2 Q. Ms. Walsh, are you looking at what's
3 been marked as Exhibit number 1?

4 A. (Nodding head).

5 Q. Can you verify for the record
6 that you are looking at what's been marked as
7 Exhibit number 1?

8 A. Oh, I'm sorry, yes.

9 Q. And that is the disability policy that
10 was issued by Unum Life Insurance Company of America
11 to Dr. Nylander, correct?

12 Let me ask you this, do you have
13 any reason to believe it's not the insurance policy
14 issued by that company to Dr. Nylander?

15 A. I'm just going to check to make sure
16 she was -- to make sure -- to appropriately answer
17 your question, I was just looking at the
18 application. But yes, this is the Unum Life
19 Insurance Company -- Unum Life Insurance Company of
20 America policy that was issued to Dr. Nylander.

21 Q. Okay. Turn to page 4 of that policy,
22 if you would, please, ma'am. Are you with me there?

23 A. We may be on a different page 4.

24 Q. It would be number page 4. You need to

1 keep turning, I believe.

2 MR. WARNOCK: This is page 4.

3 A. It says page 4 on it, so I don't know.

4 Oh, I was looking at the bates stamp.

5 Q. Actually, it'd be page 6, I'm sorry.

6 A. Okay.

7 Q. It's bates number page 6.

8 A. Okay.

9 Q. So you are with me, the very bottom of
10 the page says 000006, correct?

11 A. Correct.

12 Q. But the policy number is page 4,
13 correct?

14 A. Correct.

15 Q. Okay. Now, do you see regular
16 occupation there?

17 A. Yes, I do.

18 Q. All right. What was Dr. Nylander's
19 regular occupation at the time of the elimination
20 period?

21 A. Gynecologist.

22 Q. Okay. What was her professionally
23 recognized specialty at the time of the elimination
24 period?

1 A. I'm not sure if that was determined.
2 Because it says if she was engaged primarily in a
3 professionally recognized specialty at that time.
4 The occupation as a specialty, I don't know if we
5 determined that it was a specialty. I only know we
6 determined what her occupation was.

7 Q. Okay. Is there a way for you to look
8 at the claim file and tell me what you determined
9 was her professionally recognized specialty?

10 Let me ask it this way. Do you dispute
11 that her professionally recognized specialty was
12 gynecological surgery?

13 MR. WAYNOCK: Object to the form.

14 Q. Do you dispute that?

15 A. I don't think we made that
16 determination. I think we concluded she was a
17 gynecologist who performed surgery but I don't think
18 we ever made a determination as her specialty was
19 gynecological surgery, I don't think that was ever
20 concluded.

21 Q. Well, what did you -- I have the claim
22 file here and you can look at it. What I would like
23 to know is what did you determine her professionally
24 recognized specialty was?

1 A. I don't think we did.

2 Q. Okay. If Dr. Nylander's position is
3 that her professionally recognized specialty was
4 gynecological surgery, what facts do you have to
5 dispute that?

6 MR. WARNOCK: I'm going to object
7 to the form.

8 A. I would say the claim file speaks for
9 itself. I believe that in the claim file there is a
10 vocational analysis, which points to the fact that
11 she was a gynecologist who performed surgery but I
12 wouldn't say that her occupation was that of a
13 surgeon, if that's what you're asking me.

14 Q. Well, I'm asking you what you
15 determined at the time of the elimination period.
16 So my question was what facts Dr. Nylander's
17 position at the time of the elimination -- her
18 elimination period or professionally recognized
19 specialty was gynecological surgery. I think what
20 you are telling me -- I don't want to assume
21 anything -- is any facts that you would put forward
22 to dispute that would be in the claims file; is that
23 fair to say? If they are not, I want to know what
24 other facts you have.

1 A. Yes. But what I am trying to say, I
2 guess, is that I don't think that determination was
3 ever made. And I don't know if you are asking me to
4 make that determination now. I don't think she had
5 ever indicated she had a professionally recognized
6 specialty. We just determined her occupation.
7 That's the second part of the regular occupation.
8 It says if she engages primarily in a professionally
9 recognized specialty, which I don't think she did.

10 Q. Well, do you think or do you -- what is
11 your position today? If her position is that her
12 professionally recognized specialty was
13 gynecological surgery, on what facts do you dispute
14 that?

15 MR. WARNOCK: She's answered that.

16 Q. You can answer.

17 A. I believe I did answer that.

18 Q. What was the answer? Was it in the
19 claims file? Is that your answer?

20 A. My answer in the claim file?

21 MR. WARNOCK: No, her answer is in
22 the transcript. She's already answered the
23 question.

24 Q. The facts that you had put forward to

1 dispute that claim, are they all contained in the
2 claims file or are there any other facts?

3 A. I would say the claim file speaks for
4 itself.

5 Q. Are there any facts that you would use
6 to dispute that that are not contained in the claims
7 file?

8 A. No.

9 Q. All right, thank you. Now, if you'll
10 go up a little bit, Ms. Walsh, you'll see a
11 paragraph that starts with "total disability" and
12 "totally disabled"; do you see that?

13 A. Yes.

14 Q. What did you -- at the time that Unum
15 denied this claim, what had you determined were the
16 material and substantial duties of Dr. Nylander's
17 occupation?

18 A. Are you asking me specifically or what
19 the company concluded?

20 Q. Well, you're here for the company so I
21 am asking you and the company. What did Unum
22 conclude at the time of -- that it denied Dr.
23 Nylander's disability claim, what did it conclude
24 were the material and substantial duties of her

1 regular occupation?

2 A. I would have to go back and look at
3 Matt's decision letter. I don't remember exactly
4 what he indicated.

5 Q. Okay. Well, it's very important for me
6 to know before I leave here today what Unum
7 concluded were Dr. Nylander's material and
8 substantial duties of her regular occupation at the
9 time this claim was denied. So we can have you look
10 at the claim file. Do you need to do that?

11 MR. WARNOCK: I think she said
12 she wanted to look at a letter.

13 A. Can I look at Matt's letter?

14 Q. Sure. Are you talking about the
15 initial claim denial?

16 A. Yes.

17 Q. Okay, I've got that right here.

18 MR. WARNOCK: Ross, you invited
19 her to ask you questions to clarify her
20 understanding of your questions.

21 MR. PEPPER: Sure.

22 MR. WARNOCK: And you asked her
23 first what her position was and she asked you
24 to clarify what you meant; her position as the

1 appeals specialist or whether on behalf of the
2 company. So you toggled back and forth. So
3 we are clear, if I understand your question,
4 you have asked her as a corporate
5 representative what the basis was for the
6 denial and she has asked to read a particular
7 letter?

8 MR. PEPPER: That's correct.

9 (BY MR. PEPPER)

10 Q. You're here on behalf of Unum as a
11 corporate representative. I'm asking you that
12 question as you being the representative of Unum
13 here today. So let me show you this letter. Is
14 this the letter you are referring to, Ms. Walsh?

15 A. Yes. I just want --

16 Q. Okay, let me go ahead and mark this as
17 an exhibit.

18 (Exhibit 2, 3/30/16 Letter by Matt LaRotonda,
19 marked for identification)

20 MR. WARNOCK: Are you finished
21 with the policy?

22 MR. PEPPER: Not yet. You can
23 just leave it.

24 A. Okay.

1 Q. So, my question, would you like me to
2 repeat the question?

3 A. Sure.

4 Q. What did Unum determine were the
5 material and substantial duties of Dr. Nylander's
6 regular occupation at the time it denied her
7 disability claim?

8 A. Matthew's letter doesn't come out and
9 state what the material and substantial duties are,
10 but he --

11 Q. Okay. Go ahead, I'm sorry.

12 A. Okay. But he explains how she reported
13 them and what her billing codes represented. So
14 essentially he is indicating these are what you
15 described your occupational duties to include and
16 your billing codes were consistent with that.
17 And if you want me to go through those, I could.

18 Q. No, that's okay. What you are saying
19 is nowhere in this letter does Mr. LaRotonda state
20 what Unum determined were the materials and
21 substantial duties of Dr. Nylander's regular
22 occupation; is that fair to say? He doesn't state
23 that anywhere in this letter, does he?

24 MR. WARNOCK: I object to the form

1 of the question.

2 Q. Show me where it -- you agree? You can
3 answer the question. He doesn't state anywhere in
4 this letter what Unum determined were the material
5 and substantial duties of Dr. Nylander's occupation,
6 does he?

7 A. He doesn't use those words but I think
8 if you read the letter as a whole, it's implied.
9 Because he's indicating these are what you described
10 your occupational duties to include and he goes
11 through and actually summarizes what all the duties
12 are. And then concludes it by saying, We have
13 determined you are able to perform the duties of
14 your occupation and you are not disabled according
15 to the policy.

16 So when he is indicating that she's
17 able to perform the important duties and the
18 material and substantial duties of her occupation, I
19 think the letter is implying that these duties he's
20 outlined would be the important materials and
21 substantial duties of her occupation.

22 Q. Okay. So that there's no implication
23 here and we don't get confused, I would like to know
24 what did Unum specifically determine were the

1 material and substantial duties of Dr. Nylander's
2 occupation at the time it denied her disability
3 claim? Specifically tell me. If you have to read
4 the letter, read the letter.

5 MR. WARNOCK: You're inviting her
6 to read the letter out loud to you?

7 MR. PEPPER: No, I'm just telling
8 her if she needs to take time to read the
9 letter, read the letter.

10 A. I would say that per Matt's letter, the
11 insured described -- it says, "You described your
12 occupational duties to include performing annual
13 exams and surgeries, both minor and major. You
14 noted you were performing gynecology prior to April
15 15, 2015. You estimated spending 75% of your time
16 in the office seeing patients, 5% rounding, and 20%
17 performing surgery. You noted being on call every
18 Wednesday night and every fifth weekend."

19 Q. Okay. Let me interrupt you. I'm not
20 asking you to read to me. You don't have to do
21 that. What I am asking you is at the time that Unum
22 denied Dr. Nylander's disability claim, what had it
23 determined were the material and substantial duties
24 of her regular occupation? You're reading to me

1 what Dr. Nylander reported. What I am asking you is
2 what did Unum determine were the material and
3 substantial duties of her regular occupation at the
4 time it denied her claim?

5 MR. WARNOCK: She's answered that.

6 MR. PEPPER: She has not answered
7 it.

8 MR. WARNOCK: She has and she's
9 reading to you.

10 (BY MR. PEPPER)

11 Q. Please answer, ma'am.

12 A. You didn't let me finish. If you let
13 me finish, I was going to read the second paragraph,
14 which -- I think you're asking me to summarize the
15 letter but it speaks for itself, which is why I am
16 trying to read it to you.

17 Q. No, ma'am, I'm not asking you to
18 summarize the letter. If you need to look at the
19 letter to answer the question, feel free to do so.
20 If you need to look at anything else, feel free to
21 do so. What I am asking you is -- Unum denied this
22 claim. At the time it denied this claim, what had
23 it determined were the material and substantial
24 duties of Dr. Nylander's occupation?

1 A. And I need to --

2 MR. WARNOCK: She's answered that
3 at least three times.

4 MR. PEPPER: She has not.

5 A. I need to read to you what is stated
6 in this letter.

7 Q. Is what is stated in that letter what
8 Unum determined were the material and substantial
9 duties of Dr. Nylander's occupation?

10 A. Yes.

11 Q. Okay. Tell me what those are?

12 MR. WARNOCK: She was in the
13 middle of it. She was reading the paragraph
14 in the letter. She's asked to be permitted to
15 finish her answer.

16 Q. Finish your answer, please.

17 A. "Your CPT production reports were
18 provided for the month of January 2014 through
19 October 2015. Based on our review, you performed
20 surgical procedures that were consistent with those
21 performed prior to your date of disability, April
22 15, 2015 including, but not limited to Laparoscopy,
23 Hysteroscopy, Myomectomy, Colposcopy, Hysterectomy,
24 Bladder/vagina repair, and Pelvic floor procedure."

1 Q. Which specific duties?

2 A. Are you asking me a question?

3 Q. Yes. Which specific duties?

4 MR. WARNOCK: Objection. She's
5 already answered.

6 Q. Which specific duties?

7 A. I don't know what you're asking me.

8 What do you mean which specific duties?

9 Q. I'm asking you to tell me what were the
10 material and substantial duties of Dr. Nylander?

11 A. I just read them to you.

12 Q. Okay. Let me ask you, is what Unum
13 determined were the material and substantial duties
14 of Dr. Nylander's occupation, are all of those
15 contained in this letter, which is now Exhibit 2?

16 A. At the time of the denial, I would say
17 yes. But I think I also went into it further in my
18 appeal letter. So as far as if you ask me if what
19 Unum determined, I'm only speaking right now to what
20 was in this letter. But as far as the company, I
21 think we went into it further on appeal what the
22 duties of her occupation were.

23 Q. Okay. Here's what I'd like you to do.
24 If you need to read this letter, read the letter.

1 Different jobs have different duties, right?
2 Lawyers take depositions, you review claim appeals.
3 I'm not asking you to read back to me what Dr.
4 Nylander reported to you. What I'm asking you is
5 what did Unum determine were the material and
6 substantial duties of her regular occupation?

7 A. But I believe I already --

8 Q. Can you list those?

9 A. I believe I answered it several times.
10 I've read to you what Unum indicated were her
11 occupational duties.

12 Q. Let's just lay those occupational --
13 I'm not asking about all of her occupational duties.
14 I'm asking about the material and substantial duties
15 of her regular occupation; do you understand that?

16 MR. WARNOCK: She's answered that.
17 She answered that 15 minutes ago.

18 MR. PEPPER: She hasn't answered
19 it.

20 MR. WARNOCK: She did. She said
21 that the duties were identified in the letter.

22 MR. PEPPER: You're leading the
23 witness.

24 MR. WARNOCK: No, I'm not. I'm

1 just summarizing what she --

2 (BY MR. PEPPER)

3 Q. Ma'am, I'm asking you just -- you are
4 reading back to me things Dr. Nylander reported to
5 you. What I'm asking you is can you just tell me
6 what you determined were the materials and
7 substantial duties of Dr. Nylander's regular
8 occupation?

9 MR. WARNOCK: Hang on. You are
10 mischaracterizing her prior testimony. She
11 has told you consistently --

12 MR. PEPPER: Tim, that's not an
13 objection.

14 MR. WARNOCK: It is an objection.

15 MR. PEPPER: Objection starts with
16 objection.

17 MR. WARNOCK: Objection. She has
18 already told you that the letter describes her
19 duties and then she pointed you to the further
20 point in the letter that says, Based on the
21 records, your restrictions and limitations are
22 no longer supported and you do not require any
23 medically necessary restrictions and
24 limitations that limit or restrict you from

1 performing full-time work in your occupation
2 as a gynecologist. That's been her
3 testimony --

4 (BY MR. PEPPER)

5 Q. Ma'am, it will take you a few minutes.
6 Just tell me what specifically did Unum determine
7 were the material and substantial duties of Dr.
8 Nylander's occupation at the time it denied her
9 disability claim. I'm not asking you to recite back
10 to me what she reported to you. I'm asking you what
11 did Unum determine were the material and substantial
12 duties of her regular occupation at the time it
13 denied the claim?

14 MR. WARNOCK: Objection. We are
15 going to have to get Judge Brown on the phone.

16 Q. What were they?

17 MR. WARNOCK: Objection. Don't
18 answer that. We're going to have to get the
19 judge on the phone.

20 MR. PEPPER: What for?

21 MR. WARNOCK: Because she's
22 answered it and you're harassing her by asking
23 her the same thing over and over again.

24 (BY MR. PEPPER)

1 Q. Ma'am, I'm just asking you -- let me
2 ask it this way. Did you determine whether or not
3 was performing hysterectomies a material and
4 substantial duty of Dr. Nylander's occupation?

5 MR. WARNOCK: Don't answer that
6 until we get the Judge on the phone.

7 (Mr. Warnock on the telephone)

8 (Off the record)

9 MR. PEPPER: For the record, I
10 object to this. I think this is totally
11 improper.

12 MR. WARNOCK: There's nothing in
13 the world improper about raising a discovery
14 dispute with the Magistrate Judge.

15 MR. PEPPER: What's the discovery
16 dispute?

17 MR. WARNOCK: That you are
18 harassing her. You asked her a question, she
19 answered you --

20 (Mr. Warnock on the telephone)

21 MR. WARNOCK: Do you want to talk
22 about this some more or you want to --

23 MR. PEPPER: I just want --

24 (BY MR. PEPPER)

1 Q. Ma'am, it will take you one minute.
2 Just tell me, what were those duties?

3 MR. WARNOCK: Ross, she has
4 answered that question a half-dozen times.
5 (BY MR. PEPPER)

6 Q. Well, indulge me and tell me again.
7 What I've heard you, ma'am, say is -- and I promise
8 you, I'm not trying to harass you, I'm just trying
9 to understand. I've heard you read back to me the
10 observations in what Dr. Nylander reported to you.
11 What I'm trying to figure out is, did you make --
12 other than what Dr. Nylander reported to you, did
13 Unum make its own determination of what the material
14 and substantial duties of Dr. Nylander's regular
15 occupation were?

16 MR. WARNOCK: And she has answered
17 that question.

18 Q. Did Unum make its own determination of
19 what the material and substantial duties of Dr.
20 Nylander's regular occupation were?

21 MR. WARNOCK: And that's what we
22 need to get the Judge on the phone to --

23 Q. That's a yes or no question. Did you
24 do that or not?

1 MR. WARNOCK: She has told you
2 consistently --

3 Q. What's your answer, ma'am? Ma'am, can
4 you answer that question? Did Unum make its own
5 determination about what the material and
6 substantial duties of Dr. Nylander's occupation were
7 at the time of her disability? It's a yes or no
8 question.

9 MR. WARNOCK: Don't answer that.
10 Let's take a break. Why don't you two go out
11 in the hall. We'll get the Judge on the phone
12 and straighten it out.

13 Q. Can you answer that question, yes or
14 no, before we get the Judge on the phone?

15 MR. WARNOCK: She's not going to
16 answer anymore questions until we get the
17 Judge on the phone.

18 (A recess was taken)

19 MR. WARNOCK: Will you please ask
20 your question again.

21 MR. PEPPER: Yeah. Let me try to
22 break it down.

23 (BY MR. PEPPER)

24 Q. Did Unum make its own determination

1 about what the material and substantial duties of
2 Dr. Nylander's occupation were at the time it denied
3 her claim for disability?

4 A. I believe so, yes.

5 Q. Okay. And what did Unum determine were
6 the material and substantial duties of Dr.
7 Nylander's occupation at the time of her
8 disability -- at the time it denied her disability
9 claim? And I'm not asking you to tell me what she
10 told you. I'm asking what did Unum determine?

11 A. First of all, the reason why I was
12 reading what she told us -- but you didn't let me
13 finish my entire statement -- is because the company
14 was not doubting what Dr. Nylander told us were the
15 duties of her occupation and that's why I was trying
16 to read to you from the letter. What she described
17 her occupational duties to include, the company
18 later said we understand your CPT codes support what
19 you told us. And then ultimately they concluded --
20 I'm just going to the back of the letter for a
21 second. Ultimately they concluded she had no
22 restrictions and limitations that restricted her
23 from performing full-time work "in your occupation
24 as a gynecologist." And they define the duties she

1 performed on page 2 of 9 of their letter. And
2 that's why I was trying to read those to you,
3 because I think that is what Unum concluded were the
4 important material and substantial duties of her
5 occupation.

6 Q. Okay. So we're clear -- and I promise
7 I'm not trying to harass you. I just want to make
8 sure I understand what Unum determined were the
9 material and substantial duties of her regular
10 occupation at the time it denied her disability
11 claim, so can you tell me what those were?

12 MR. WARNOCK: Ross, she just
13 answered your question.

14 Q. What were those?

15 A. I read them previously. I can read
16 them to you again.

17 Q. Okay, please do.

18 A. And again, I'm going to say what she
19 reported them to be and that the company concluded
20 the billing codes are consistent with that.

21 Q. Okay.

22 A. She was performing gynecological work.
23 75% of her time was in the office seeing patients,
24 5% doing rounds, 20% performing surgery and she was

1 on call every Wednesday night and every fifth
2 weekend.

3 Q. Were there any other duties that Unum
4 concluded were material and substantial duties of
5 Dr. Nylander's occupation at the time it denied her
6 claim for disability, or are those it?

7 A. I believe those are it. They indicated
8 those are the important -- those are the duties of
9 her occupation.

10 Q. Well, but the question was -- so we
11 don't get confused here, the question was what did
12 Unum determine were -- not just the duties of her
13 occupation, but what were the material and
14 substantial duties of her occupation at the time it
15 denied her claim? Did you just tell me what those
16 were?

17 A. Yes.

18 Q. Okay. And how did you determine what
19 the material and substantial duties of Dr.
20 Nylander's occupation were? Based on what she
21 reported to you?

22 MR. WARNOCK: Object to the form.

23 Q. You can answer.

24 A. How did Matt determine what the duties

1 of her occupation were?

2 Q. How did Unum determine what were the
3 material and substantial duties of Dr. Nylander's
4 occupation at the time it denied her claim?

5 A. They looked to what the insured
6 described her occupation -- I mean Dr. Nylander,
7 I'm sorry. They looked to what she advised the
8 company. They then obtained her billing, her
9 production reports, and they also spoke with her
10 officer manager, Caroline Kelly.

11 Q. Did Unum do anything else to determine
12 what were the material and substantial duties of her
13 occupation?

14 A. Yes. They had a vocational review
15 completed by a vocational consultant.

16 Q. Did they do anything else to determine
17 what the material and substantial duties of her
18 regular occupation were at the time of her
19 disability?

20 A. I'm not sure off the top of my head,
21 I'd have to look through the claim file.

22 Q. Is it fair to say that anything else
23 that was done would be contained in the claim file?

24 A. Yes.

1 Q. Did Unum ever -- what vocational
2 resources did Unum consult to determine the material
3 and substantial duties of Dr. Nylander's occupation,
4 if any? I don't know that you did. But if you did,
5 tell me what they were.

6 A. They consulted with the vocational
7 consultant, the one that I mentioned previously,
8 Andrea Cerrachio.

9 Q. Okay. To determine the material and
10 substantial duties of Dr. Nylander's occupation, did
11 Unum consult with any person who had a gynecological
12 practice?

13 A. No.

14 Q. Did Unum undertake to try to determine
15 what a gynecological practice consisted of from any
16 source other than Dr. Nylander?

17 A. No, because they were not doubting what
18 Dr. Nylander told them were her duties. There was
19 no question. They considered what she told the
20 company and they were in agreement with what her
21 duties were.

22 Q. All right. Did Unum ever ask Dr.
23 Nylander what the material and substantial duties of
24 her occupation were?

1 A. I don't know.

2 Q. If they did, would that be in the claim
3 file?

4 A. I would believe so but I would have to
5 look at the claim file.

6 Q. Okay. What duties of Dr. Nylander's
7 occupation did Unum determine were not material and
8 substantial duties of her occupation at the time of
9 her disability?

10 A. I don't think they made that
11 determination. They never came out and said any of
12 the duties were not material and substantial.

13 Q. A determination was never made; is that
14 what you said?

15 A. I don't -- I believe the -- nowhere in
16 the file does it state we have determined -- at
17 least as of this date, I don't believe they said,
18 you know, we have determined duty X is not material
19 and substantial, I don't think that was a stated
20 term.

21 Q. Okay. At any point in time what duties
22 has Unum determined were not material and
23 substantial duties of Dr. Nylander's regular
24 occupation?

1 A. I don't know that that was ever
2 determined. I could look at my letter and see if I
3 mentioned that in my letter. I do recall in my
4 letter, you know, discussing with you about lead
5 surgeon versus surgeon but I would have to look back
6 to determine if we actually said that something
7 wasn't material and substantial. I don't know that
8 off the top of my head.

9 Q. If Unum did make a determination about
10 specific things it determined were not material and
11 substantial duties of Dr. Nylander's occupation,
12 would those findings be in the claim file? I assume
13 they would.

14 A. Yes. If we had concluded that
15 something was not material and substantial, my
16 understanding is that it should be reflected in the
17 claim file. And I don't know that. The company
18 didn't make that determination.

19 Q. Okay, let's talk about -- if you'll go
20 back to -- you're still on Exhibit 1, correct?

21 A. Oh, the policy?

22 Q. Yes.

23 A. I was on Exhibit 2.

24 Q. All right. Yes, Exhibit 1, if you'll

1 go back to the policy, page 4.

2 A. Okay.

3 Q. Do you see where it says "total
4 disability" and "totally disabled", "Mean injury or
5 sickness restricts the insured's ability to perform
6 the material and substantial duties of his regular
7 occupation to an extent that prevents him from
8 engaging in his regular occupation." Do you see
9 that?

10 A. I do, yes.

11 Q. What do you mean by the word engaging
12 in regular occupation? How is it determined that a
13 claimant is or is not engaging in their regular
14 occupation?

15 A. That they are engaged or they can't? I
16 don't know, I think they are two different things.

17 Q. How do you determine whether a claimant
18 is engaging in their regular occupation? What's the
19 criteria?

20 A. We would -- I don't think there's any
21 specific criteria. If we have a question, if
22 someone is engaging in the duties of their regular
23 occupation, we would obtain information necessary to
24 substantiate that and it would vary depending on

1 what someone's occupation is.

2 Q. Okay. For someone that had Dr.
3 Nylander's regular occupation, what criteria would
4 you use to determine whether or not she was engaging
5 in her regular occupation?

6 A. I'm not sure I understand the question.
7 Are you asking me for any insured or are you asking
8 me what the company did?

9 Q. Let's ask both so I'm clear. Do you
10 have criteria to determine whether someone is
11 engaging in their regular occupation? Is there any
12 general criteria Unum uses to make that
13 determination? Like for example, how many days a
14 month they're working or not working or how much
15 income they are making or not making. Do you have
16 any criteria?

17 A. We have general guidelines that --

18 Q. What are those?

19 MR. WARNOCK: Let her finish her
20 answer.

21 Q. I'm sorry, I didn't mean to interrupt
22 you, I apologize.

23 A. We have general guidelines that are
24 referenced in our claims manual. However, it varies

1 case to case. There is no specific guidelines
2 because everyone's occupation is different so we
3 would obtain information relative to that specific
4 insured's occupation. So I can't give you an answer
5 for, you know, what we would obtain for every
6 individual insured. I can only speak to this
7 specific case and what the company did to evaluate
8 her occupational duties.

9 Q. Okay, and I'll get to that in just a
10 second. To determine whether someone in Dr.
11 Nylander's regular occupation was or was not
12 engaging in their regular occupation, what criteria
13 would you use?

14 MR. WARNOCK: She just answered
15 that. Object to the form.

16 Q. I didn't catch it if you did. Would
17 you mind repeating it?

18 A. Could you repeat the question?

19 Q. Sure. To determine whether someone who
20 had Dr. Nylander's regular occupation is or is not
21 engaging in their regular occupation, what criteria
22 would you use?

23 A. I believe I already answered that
24 question.

1 Q. What was the answer?

2 MR. WARNOCK: Let's read back her
3 answer.

4 MR. PEPPER: No, I don't want to
5 read back the answer because I didn't
6 understand.

7 (BY MR. PEPPER)

8 Q. What was the answer?

9 MR. WARNOCK: You can repeat what
10 you've said already.

11 A. I don't know if I could --

12 MR. PEPPER: Tim, wait a second.
13 That's not an objection. You're clearly
14 leading --

15 MR. WARNOCK: You're asking her
16 the same question four, five times in a row
17 because you don't like the answer that she's
18 giving you.

19 MR. PEPPER: No, that's not true.

20 MR. WARNOCK: We'll be here all
21 day.

22 MR. PEPPER: I like the answers.

23 (BY MR. PEPPER)

24 Q. For someone in Dr. Nylander's regular

1 occupation, what is the criteria that Unum would use
2 to determine whether or not she was engaging in her
3 regular occupation?

4 A. I just -- I'm not sure I understand the
5 question because you are phrasing someone in Dr.
6 Nylander's occupation. There are no specific
7 guidelines. This is what we would obtain for a
8 gynecologist. So I'm confused in what you are
9 asking me. I can tell you that there are general
10 guidelines on what information we would -- we could
11 obtain to verify someone's occupational duties or if
12 they are working, what they are engaged in. And I
13 can also tell you what the company did to determine
14 what duties Dr. Nylander was performing. But that's
15 all I can give you.

16 Q. You testified earlier Dr. Nylander's
17 regular occupation was -- you determined was a
18 gynecologist; is that correct?

19 MR. WARNOCK: Object to the form,
20 asked and answered. Any question that begins
21 with "You testified earlier."

22 Q. What was her regular occupation that
23 you determined? I'm sorry, I may have written it
24 down. What did you tell me her regular occupation

1 was?

2 A. Gynecologist.

3 Q. Okay. Do you have any criteria to
4 determine whether or not a gynecologist is or is not
5 engaging in their regular occupation?

6 A. I would say, again, as I stated, our
7 criteria is to obtain information to verify those
8 duties. And the information can vary depending on
9 where an insured works, what they are stating, where
10 their duties are performed. So there's no specific
11 criteria. It varies depending on the case. All I
12 can say is that we obtain information from an
13 insured to evaluate those duties and it varies. I
14 can say, generally speaking, for a physician who is
15 indicating they are seeing patients performing
16 surgical procedures, we would obtain billing codes.

17 Q. You obviously determined that Dr.
18 Nylander was continuing to engage in her regular
19 occupation, correct? Is that fair to say?

20 A. Are you asking me at the time of --

21 Q. At the time Unum denied her disability
22 claim, you determined, I assume, that she was able
23 to engage in her regular occupation; is that fair to
24 say?

1 A. Can I look at the letter again?

2 Q. Sure.

3 A. At the time of Matt's March 30, 2006
4 decision letter, he didn't make any sort of
5 determination that she was engaged in her
6 occupation. He indicated she could return to her
7 full-time occupational duties but his letter does
8 not indicate that she was engaged.

9 Q. That's your answer?

10 A. Yes.

11 Q. All right. If a person can work --
12 perform the material and substantial duties of their
13 regular occupation but they can only do it one day a
14 month, would you consider them to be engaging in
15 their regular occupation?

16 MR. WARNOCK: Object to the form
17 of the question.

18 A. I can't answer that question. I would
19 need to know the specifics of the case.

20 Q. Okay. If a person was able to work one
21 day -- perform the materials and substantial duties
22 of their occupation one day out of the year, would
23 you consider them not to be able to engage in their
24 regular occupation?

1 MR. WARNOCK: Object to the form
2 of the question.

3 A. I can't answer hypothetical questions
4 without having all the facts available to me.

5 Q. What facts would you need?

6 A. All facts. I would need to know what
7 the insured did prior to disability and I would need
8 to know what they were doing after disability and I
9 would have to obtain information to verify that and
10 consult with a vocational consultant. That's not
11 something I could answer hypothetically, I would
12 need to perform a thorough review.

13 Q. Okay. Well, you reviewed Dr.
14 Nylander's claim file, correct?

15 A. Yes.

16 Q. You reviewed it as part of the appeal
17 and I assume you reviewed it before today, correct?

18 A. Correct.

19 Q. If she were able to perform the
20 material and substantial duties of her occupation
21 but she was only able to do that one day of the
22 month, would you consider her to be engaging in her
23 regular occupation or not?

24 MR. WARNOCK: Object to the form

1 of the question.

2 A. I'm not going to answer a hypothetical
3 question.

4 Q. You're not going to answer or you cant
5 answer it? Because you have to answer questions.
6 You can't not answer a question.

7 A. I would say I can't answer that.

8 Q. Okay, I understand. Under this policy
9 that Unum issued, which is Exhibit number 1, is it
10 possible for a person to be back at their regular
11 occupation but still be totally disabled?

12 MR. WARNOCK: Object to the form
13 of the question.

14 A. I'm not sure I understand your
15 question. Could you repeat it?

16 Q. Sure. Under this policy, which is
17 Exhibit 1, is it possible for a person to be back
18 working at their regular occupation but still be
19 totally disabled? Is that possible?

20 MR. WARNOCK: Object to the form
21 of the question.

22 A. I'm not sure I can answer that. I
23 think I would need additional information to answer
24 that question.

1 Q. What additional information?

2 A. I mean, I would -- a number of things.

3 I'm sorry, I just already forgot the question.

4 Q. Okay.

5 A. Could you repeat it?

6 Q. Sure. Is it possible for a claimant to
7 be back at work at their regular occupation but
8 still be considered totally disabled under this
9 policy, which is Exhibit 1?

10 MR. WARNOCK: Object to the form
11 of the question.

12 A. I think it depends on what duties they
13 are back to performing. And that's something that
14 we would need to evaluate.

15 Q. My question is, is it possible?

16 MR. WARNOCK: I object to the form
17 of the question.

18 Q. That's a yes or no question.

19 A. I just feel the question is too vague
20 to answer. Are you asking me -- you're asking me if
21 they're back to work in their occupation. I think
22 it would depend on what they were doing, you know,
23 how many hours, so on and so forth. I can't just
24 say -- so it's hard to answer.

1 Q. Okay. Well, let me repeat it so we're
2 clear. Is it possible that someone could be back at
3 their regular occupation but still qualify for total
4 disability under this policy?

5 MR. WARNOCK: Objection.

6 Q. Is it possible? Under any set of
7 facts, is it possible?

8 MR. WARNOCK: Object to the form
9 of the question.

10 A. Again, it depends on what they are
11 performing. I can say that --

12 Q. Can you answer it yes or no?

13 A. It's tough to answer it yes or no
14 because it depends on what they're doing. In a
15 title -- a title doesn't always mean that they are
16 performing the duties of their occupation. So I'm
17 not exactly sure what you're asking me.

18 Q. Are you saying you did not understand
19 the question?

20 A. I don't think the question is clear.

21 Q. Okay. Well, let me repeat it. Under
22 this Unum policy, is it possible for a claimant to
23 be back at work at their regular occupation but
24 still be able to qualify for total disability

1 benefits?

2 MR. WARNOCK: Object to the form
3 of the question.

4 A. Again, I think it depends on what they
5 are doing. I can't really answer that question. I
6 would need to know what their regular occupation was
7 and what they have returned to doing. So if
8 they're -- and I would need to know if they are
9 performing all of the duties. If they are back to
10 work performing all of the duties of their regular
11 occupation, then I would say no, that they are not
12 totally disabled. So I think I would need more
13 facts to be able to answer that with a yes or no.

14 Q. Has Unum ever paid total disability to
15 someone who is back at work to some extent in their
16 regular occupation?

17 MR. WARNOCK: Objection. That's
18 outside the scope of your notice. If you
19 know, you can answer.

20 Q. Do you know the answer to that
21 question?

22 A. I can say that I know that the company
23 has provided benefits to someone who has returned to
24 work.

1 Q. Total disability benefits?

2 A. I know that the company has provided
3 total disability benefits to someone who has
4 returned to work and is no longer performing the
5 substantial and material duties of their occupation.
6 I can't say if they've returned to their regular
7 occupation. I think they're two different things.

8 Q. Are you aware of Unum ever paying total
9 disability to a claimant who has returned to their
10 regular occupation to some extent?

11 MR. WARNOCK: Objection. That's
12 outside the scope of your notice. If you know
13 the answer, you can answer the question.

14 A. I don't know the answer to that. I
15 think Unum would have to determine if they were
16 performing the duties of their regular occupation.
17 So it's not just as simple as saying they've
18 returned to work. I would need to know, you know,
19 the specific facts. I can't answer that question.

20 Q. This language, total disability and
21 totally disabled, do you see that?

22 A. Yes.

23 Q. And you, as an appeals specialist, your
24 job is to apply the terms of these policies to

1 claims and determine whether or not people qualify
2 for benefits or not, correct?

3 A. Yes.

4 Q. That's part of what you do, correct?

5 A. Correct.

6 Q. And so you've looked at these policies
7 before, I assume, and applied them with certain sets
8 of facts, correct?

9 A. Correct.

10 Q. And made a determination based on
11 whether the policy language allows benefits or not,
12 correct?

13 A. Correct.

14 Q. Okay. When you say material and
15 substantial duties, when you use the word
16 substantial, are you referring to quantity or are
17 you referring to quality? What is Unum's
18 interpretation?

19 A. I don't know what you mean by quality
20 or quantity. I --

21 Q. Well, let me --

22 MR. WARNOCK: Let her finish.

23 Q. Go ahead, I'm sorry.

24 A. I don't think that we have an

1 interpretation of this. I would say that the
2 language in the policy speaks for itself. It's what
3 the material and substantial duties of someone's
4 occupation are. I don't think we have any sort of
5 other interpretation of it other than what is
6 plainly stated in the policy.

7 Q. Okay. Let's talk about the word
8 substantial. To me that can mean two things. It
9 can mean something substantial in terms of its
10 quality or it can mean substantial in terms of
11 number, number of duties. When you read and
12 interpret these policies, what do you take
13 substantial to mean? Does it relate to the quality
14 of the duty or the quantity of the duties?

15 A. I would say both.

16 Q. Okay. If Unum had consulted with a
17 gynecologist or an OBGYN to try to evaluate the
18 material and substantial duties of Dr. Nylander's
19 occupation, any communication in that regard would
20 be in the claim file; would it not?

21 A. It should be, yes.

22 Q. Okay. I did not find any such
23 communication. In trying to determine the material
24 and substantial duties of Dr. Nylander's occupation,

1 who's a gynecologist, why did Unum not consult with
2 a gynecologist?

3 A. I can't speak to why Matt didn't. I
4 can tell you what's in the claim file and I can tell
5 you why on appeal I didn't consult with someone.

6 Q. Tell me why?

7 A. Because we knew what her occupational
8 duties were. She told us what they were. We
9 obtained billing codes to verify that, and we were
10 not disputing them. And we wouldn't need a
11 gynecologist to confirm what duties she was
12 performing because we relied upon what our own
13 insured told us her duties were.

14 Q. Okay. But you're talking about duties,
15 I was talking about material and substantial duties.
16 Why didn't Unum consult with a gynecologist to
17 determine what the material and substantial duties
18 of Dr. Nylander's occupation were?

19 A. I would say my answer is the same. We
20 had information from our own insured to determine
21 what the material and substantial duties were. And
22 we look at what she is performing, not what another
23 gynecologist performs because everybody can perform
24 their occupation a different way. That's why it's

1 important for us to obtain information to verify her
2 specific duties, not what another gynecologist may
3 do.

4 Q. Okay.

5 MR. PEPPER: Do you mind if we
6 take five minutes?

7 (A recess was taken)

8 (BY MR. PEPPER)

9 Q. All right, you understand you're still
10 under oath?

11 A. Yes, I do.

12 Q. Okay. Going back to Exhibit number 1,
13 which is the Unum Life Insurance policy, are you
14 with me there?

15 A. Yes.

16 Q. Where it says "Regular occupation", do
17 you see that?

18 A. Yes.

19 Q. At the time of disability, can an
20 insured have more than one regular occupation?

21 MR. WARNOCK: Object to the form
22 of the question.

23 MR. PEPPER: What's the basis of
24 the objection?

1 MR. WARNOCK: You're asking her a
2 hypothetical question.

3 (BY MR. PEPPER)

4 Q. Does this policy language encompass
5 more than one occupation? What's Unum's
6 interpretation of it?

7 A. It just defines that regular occupation
8 is the insured's occupation at the time the
9 elimination period begins. I can say it is
10 possible -- if someone has two distinct separate
11 occupations that they are performing, that it is
12 possible they have two occupations, but it would
13 depend on the specifics of the case.

14 Q. The answer is yes, it's possible?

15 A. Yes, it is possible.

16 Q. And what criteria do you use to
17 determine whether or not something is a separate
18 occupation?

19 A. I don't think we have any specific
20 criteria. We would start by asking the insured,
21 you know, where they work and what the duties are at
22 each location, if they're separate locations. And
23 then we would obtain information to verify that.
24 Depending on the nature of the employment, that

1 information could vary.

2 Q. Okay. Unum would determine that,
3 correct, whether there was more than one regular
4 occupation?

5 A. We would determine that with the help
6 of the insured to help us gather and obtain that
7 information.

8 Q. Okay.

9 A. But yes, I guess to answer your
10 question, yes, we would make that determination if
11 there was more than one occupation.

12 Q. Okay, thank you.

13 (Exhibit 3, Paul Revere Life Insurance Company
14 Policy, marked for identification)
15 (BY MR. PEPPER)

16 Q. Ms. Walsh, I'm handing you what's been
17 marked as Exhibit number 3. Are you looking at
18 Exhibit number 3?

19 A. Yes, I am.

20 Q. That is the Paul Revere Life Insurance
21 Company policy issued to Dr. Nylander, do you
22 recognize that?

23 A. Yes, I do.

24 Q. All right. If you'll turn to the

1 page that the very bottom number is 000007, do you
2 see that?

3 A. Yes, I do.

4 Q. Okay. And if you'll look at section
5 1.10, do you see that?

6 A. Yes.

7 Q. Okay. And I'm assuming that you
8 determined that Dr. Nylander's occupation under this
9 Paul Revere policy was the same as her occupation
10 under the Unum policy; is that fair to say?

11 A. Yes, it is.

12 Q. Okay. What did Unum determine were the
13 important duties of Dr. Nylander's occupation at the
14 time it denied her disability claim?

15 A. I think I testified to that previously.
16 Do you want me to --

17 Q. I -- I'm sorry, I didn't mean to
18 interrupt you, go ahead.

19 A. Do you want me to go over it again? I
20 would have to take out Matt's letter again. But I
21 think I already testified to that. My answer is no
22 different than what I stated previously.

23 Q. We didn't talk about important duties
24 previously so you'll have to -- I'll have to start

1 from scratch. What did Unum determine were the
2 important duties of Dr. Nylander's occupation at the
3 time it denied her disability claim?

4 A. I believe we looked at important and
5 substantial material as one and of the same, so I
6 don't think that the --

7 Q. Okay, let me --

8 MR. WARNOCK: Whoa, whoa, whoa.

9 Q. I think I can shorten this. Are you
10 telling me that you determined -- the important
11 duties that Unum determined of Dr. Nylander's
12 regular occupation were the same as the material and
13 substantial duties? I'm just trying to shorten it,
14 I'm not trying to interrupt.

15 A. Yes.

16 Q. Okay.

17 A. There was no difference in our
18 evaluation.

19 Q. Okay. To be clear for the record, what
20 Unum determined were Dr. Nylander's important duties
21 of her occupation at the time it denied the
22 disability claim were the very same duties it
23 determined were the material and substantial duties
24 of her regular occupation, correct?

1 A. Correct.

2 Q. All right. Now, what did Unum
3 determine were the unimportant duties of Dr.
4 Nylander's occupation?

5 A. They didn't determine that.

6 Q. Okay. At the time that Unum denied Dr.
7 Nylander's disability claim, did it determine that
8 holding pressure on a patient's bleeding wounds was
9 or was not a material and substantial duty of her
10 regular occupation?

11 A. I don't think they made that
12 determination.

13 Q. Okay. At the time that Unum denied Dr.
14 Nylander's disability claim, did Unum determine that
15 suturing in the deep pelvis was a material and
16 substantial duty of Dr. Nylander's occupation or
17 not?

18 A. I do not recall. I remember -- at the
19 time of Matt's letter, I don't recall them talking
20 about suturing. I think on the appeal it came up.
21 But other than the duties outlined in Matt's letter,
22 I don't think they mentioned anything else.

23 Q. Okay. Was suturing in the deep pelvis
24 a material and substantial duty of Dr. Nylander's

1 regular occupation?

2 A. I do not recall. I'd have to go back
3 and look.

4 Q. Okay. Where would you look?

5 A. I would look at the vocational review
6 that was completed and I would want to look at my
7 letter to see what we had -- my letter meaning my
8 appeal letter to see if I made any comments about
9 that.

10 Q. Okay. If Unum determined that suturing
11 in the deep pelvis was a material and substantial
12 duty of Dr. Nylander's regular occupation, would
13 that be in the claim file?

14 A. Yes, it should be.

15 Q. Okay. If Unum determined that holding
16 pressure on a bleeding wound was a material and
17 substantial duty of Dr. Nylander's regular
18 occupation, that would be in the claim file, too,
19 correct?

20 A. Should be, yes.

21 Q. Okay. At the time that Unum denied Dr.
22 Nylander's disability, was acting as a lead surgeon
23 in surgeries a material and substantial duty of Dr.
24 Nylander's occupation?

1 A. I'm sorry, could you repeat that?

2 Q. Sure. At the time Unum denied Dr.
3 Nylander's disability claim, was being able to act
4 as a lead surgeon a material and substantial duty of
5 Dr. Nylander's regular occupation?

6 A. I don't think that came into play until
7 the appeal. So no, at the time of the decision, the
8 issue of being a lead surgeon wasn't raised by Dr.
9 Nylander so that wasn't addressed in the denial
10 letter.

11 Q. So the answer to that is no?

12 A. No, yes.

13 Q. How about heavy gripping during
14 surgery; at the time Unum denied Dr. Nylander's
15 disability claim, had it determined whether or not
16 that was a material and substantial duty of her
17 regular occupation?

18 A. Again, I think, you know, Matt's
19 decision letter speaks for itself. I think at the
20 time what is listed in his letter are the only
21 duties they consisted to be material and
22 substantial. I do know that on appeal I went into
23 some further detail about her duties. But as far as
24 the -- I'm sorry, you said heavy?

1 MR. WARNOCK: Gripping.

2 Q. Heavy gripping during surgery.

3 A. Yeah, I don't know if that -- that's
4 not mentioned in Matt's letter.

5 Q. If Dr. Nylander testifies that suturing
6 in the deep pelvis is a material and substantial
7 duty of -- was her occupation as a gynecologist,
8 what evidence do you have to dispute that?

9 MR. WARNOCK: Can you read that
10 back, please?

11 MR. PEPPER: I can probably say it
12 back.

13 (BY MR. PEPPER)

14 Q. If Dr. Nylander testifies that suturing
15 in the deep pelvis was a material and substantial
16 duty of hers as a gynecologist who performed
17 surgery, what evidence do you have to dispute that?

18 A. I don't know if there's evidence to
19 dispute that. Because I think as far as once we got
20 to the appeal we had concluded suturing was one of
21 the duties that she performed and we did understand
22 she reported having difficulties performing some of
23 the suturing. But the company concluded she could
24 suture with some accommodations using both hands or

1 having someone help assist her tie knots, which is
2 one of the things she indicated she couldn't do.

3 Q. Would any evidence to refute that
4 position by Dr. Nylander be in the claims file?

5 A. To dispute?

6 Q. Being able to suture in the deep pelvis
7 was a material and substantial duty of her
8 occupation pre-disability?

9 MR. WARNOCK: Can you ask that
10 again please or read it back?

11 MR. PEPPER: Yeah, let me try to
12 just do it again a different way.

13 (BY MR. PEPPER)

14 Q. If Dr. Nylander testifies that
15 pre-disability being able to suture in the deep
16 pelvis was a material and substantial duty of her
17 occupation, what evidence do you have to dispute
18 that? Or if you have any evidence, would it be in
19 the claims file?

20 A. It should be. I would refer to the
21 vocational consultant to see if that was mentioned.
22 I can't remember off the top of my head. What I can
23 say is I do remember suturing coming up in the
24 evaluation because Dr. Nylander indicated that was

1 one of her primary impairments, so she was having
2 difficulty suturing. So I do recall that being
3 addressed. But I think it was addressed more in the
4 appeal level. So yes, I think it would be in the
5 claim file, to answer your question.

6 Q. Okay. Did Unum make a determination as
7 to whether or not being able to use fine motor
8 skills in surgery was a material and substantial
9 duty of Dr. Nylander's occupation pre-disability?

10 A. I'm not sure.

11 Q. If it did, would it be in the claims
12 file?

13 A. It should, yes.

14 Q. In determining the material and
15 substantial duties of Dr. Nylander's regular
16 occupation pre-disability, did Unum consider the
17 income or revenue derived from particular duties to
18 make that conclusion?

19 A. Yes.

20 Q. Can you show me where it did that in
21 the claims file?

22 A. I think when Andrea Cerrachio looked at
23 the billing analysis that was done by our billing
24 analyst, Christina Lupin, I believe it was, I think

1 she broke out, you know, what the charges were, so
2 on and so forth. So yes, income was a factor in
3 determining what the material and substantial duties
4 of her occupation were.

5 Q. Okay. How much weight did Unum give
6 that factor?

7 A. I think they gave it as much weight as
8 they gave all of the additional facts regarding her
9 occupational duties. So yeah, I think they gave it
10 equal weight. I don't think they gave it any more
11 or any less, I'd say it was equal to everything else
12 they looked at.

13 Q. All right.

14 MR. WARNOCK: Have you completed
15 your examination on the Paul Revere policy,
16 Exhibit 3?

17 MR. PEPPER: For now I have, yes.
18 Let's put that in the pile here.

19 (Exhibit 4, Billing/Coding Analysis, marked
20 for identification)

21 (BY MR. PEPPER)

22 Q. Ms. Walsh, I'm showing you what's
23 marked as Exhibit 4. You just mentioned something
24 prepared by -- what was her name? Andrea?

1 A. Christina Lupin and Andrea Cerrachio.

2 Q. Is this what you were referring to?

3 A. Yes.

4 Q. Other than -- I'm trying to shorten
5 this so I don't have to make you go dig through the
6 claims file, Ms. Walsh. I looked through the entire
7 claims file and the only thing that I could find
8 that seemed to take into consideration Dr.
9 Nylander's income from her different duties was this
10 document here. Is this it or was there something
11 else?

12 A. There is this and then there is -- this
13 was just the billing code analysis. I'm not seeing
14 Christina's name on it. So the billing analysis
15 actually takes Dr. Nylander's billing codes and she
16 puts them into certain spreadsheets. Then the
17 vocational consultant performs an analysis of it.
18 So that's what I don't have here, is --

19 Q. Let me --

20 A. -- Andrea Cerrachio's analysis. So she
21 actually goes into, you know, the specific charges
22 and says -- you know, I think gives maybe a
23 percentage of, you know, she performed this
24 percentage of --

1 Q. Let me give you the claims file because
2 I haven't seen anything like that, that's why --

3 A. Oh, okay, sure.

4 Q. Do you have any idea where it might be
5 in here?

6 A. It would be right after this.

7 Q. All right. What's the bates number on
8 that?

9 A. Okay, so the bates number is 930. It
10 goes to -- let's see.

11 Q. Here you go, I'll start you right
12 there.

13 A. It ends at 949. So I believe -- I can
14 probably find it pretty quick.

15 Q. Okay.

16 MR. WARNOCK: Are you finished
17 with 4?

18 MR. PEPPER: Yeah, I probably am.

19 A. Okay, so let me see here.

20 Q. Is that everything?

21 A. Yeah. After that report you showed me,
22 there's another breakdown, a billing code analysis
23 done by Christina Lupin where she actually breaks
24 out every month beginning January 14th.

1 Q. Can I turn that around so I can see
2 that?

3 A. Yes.

4 Q. I was not able to bring two copies of
5 this big claims file. Okay, very good. And the
6 billing code analysis you're referring to starts --

7 MR. WARNOCK: Hang on, I don't
8 think she's completed her answer.

9 MR. PEPPER: Okay, that's fine.

10 A. So yes, there's this analysis that goes
11 from January 2014 and I believe it goes through
12 December -- oh, actually, this one goes through
13 October of 2015. But later on in the file there's
14 another analysis about some additional billing
15 codes.

16 Q. Okay. Where later on in the file is
17 that another analysis about the billing code?

18 A. I'm not exactly sure but I believe she
19 sent in -- oh, I see it. Dr. Nylander I believe
20 sent in additional codes for -- through December of
21 2015, I believe, and then Andrea had looked at those
22 and updated her analysis.

23 Q. Can you find the updated -- before we
24 go to the updated analysis, can you identify for the

1 record the pages on that that you just referred to
2 that were --

3 A. Sure.

4 Q. I asked you about what evaluation -- in
5 determining the material and substantial duties of
6 Dr. Nylander's occupation, I asked you what analysis
7 Unum did of the income the different duties brought
8 in and you referred to documents you're looking at
9 now, correct?

10 A. Yeah.

11 Q. Okay.

12 A. And it's not so much her income, it's
13 the charges that were associated with the
14 procedures. So the number of units, the percentage
15 of those units, of the overall practice makeup and
16 what the charges were and what those charges
17 represented. So they do that basically for
18 everything from surgical procedures, maternity care
19 which was zero. Path/lab, immunizations,
20 injections, evaluation and management services.

21 Q. Can you identify for the record the
22 bates number of those pages?

23 A. Oh, I'm sorry. Sure. So it goes from
24 951 to 954.

1 Q. Okay.

2 MR. PEPPER: Tim, we're agreeing
3 to stipulate to the admissibility the claim is
4 filed under 803(6) subject to any other
5 objections; is that correct?

6 MR. WARNOCK: The claims file is
7 itself a business record. And we will make
8 sure we have an authentic copy that is the
9 deposition exhibit. There are layers of
10 hearsay within the claims file and we may have
11 objections -- we reserve our objections to
12 those.

13 MR. PEPPER: Sure. But we are
14 stipulating it's admissible under 803(6) as a
15 business record subject to any other
16 objections you want to make?

17 MR. WARNOCK: The claims file
18 itself is a business record. But there may be
19 other documents within the claims file for
20 which you would have to locate other
21 exceptions to the hearsay rule if you wanted
22 to admit those particular portions.

23 MR. PEPPER: Okay. I think we are
24 on the same page, I think we are just speaking

1 a little bit of a different language.

2 (BY MR. PEPPER)

3 Q. All right, and those bates numbers you
4 just identified are part of the Unum claims file,
5 correct?

6 A. Correct.

7 Q. And you mentioned there were some
8 updated report that was performed. Can you point me
9 to that?

10 A. Well, first of all, after this
11 analysis, then that's when Andrea Cerrachio performs
12 another analysis and basically is creating a
13 document to the file explaining what these numbers
14 actually mean.

15 Q. Can you find that document for me?

16 A. Sure, it's right after -- so if you
17 look at -- oh, I take that back. Wait a second.
18 Oh, here we go, it's bate stamp number 987.

19 Q. Okay. To what number?

20 A. 987 to 989.

21 Q. All right. Can I see that?

22 A. Sure.

23 Q. Okay, what I see -- I'm familiar with
24 that report and what I see in it is that in that

1 report -- is it Ms. Cerrachio; is that how you
2 pronounce her name?

3 A. Cerrachio.

4 Q. Cerrachio. What I see she says is that
5 an inquiry should be made as to whether or not those
6 charges reflect charges in which Dr. Nylander was
7 acting essentially as the lead surgeon or the
8 assistant; do you see that?

9 MR. WARNOCK: Can you direct her
10 to it?

11 MR. PEPPER: Sure.

12 (BY MR. PEPPER)

13 Q. What I see here is she says, "During
14 the post DOD", which that means date of disability.

15 A. Yes.

16 Q. "During the post DOD time period, the
17 insured performed surgical procedures that were
18 consistent with those performed prior to DOD. There
19 are no modifiers to suggest that she assisted with
20 the procedures and it would be assumed that she was
21 the primary surgeon. It is possible that these
22 procedures were performed by her partner but billed
23 under her name. I would suggest asking the insured
24 if this was the case."

1 A. Mm-hmm.

2 Q. Are you familiar with that part of the
3 file?

4 A. I am.

5 Q. Okay. And my understanding is Unum was
6 later sent a list of modifiers showing that Dr.
7 Nylander had only assisted those surgeries; do you
8 recall that?

9 A. Correct. I do recall that.

10 Q. Now, after Unum got that, did it do any
11 analysis of Dr. Nylander's income for the purposes
12 of determining what duties were deriving what
13 revenues?

14 A. Can I look for a second?

15 Q. Sure.

16 A. I just don't remember off the top of my
17 head. So I know Matt spoke with her on December
18 11th and asked her about these and asked her about
19 the modifiers. I'm getting there.

20 Q. All right.

21 A. Okay, so bates stamp 1064, Matt asked
22 her --

23 Q. Asked Dr. Nylander?

24 A. Yes, I'm sorry. Asked Dr. Nylander if

1 her office manager would be the best person to
2 discuss with this. Basically if there's the
3 modifiers because billing codes that we received
4 showed that she was doing similar procedures post-
5 and pre-disability. And Dr. Nylander indicated that
6 her office manager stated that she forgot to put the
7 modifier on there. Okay, so then there was going to
8 be a follow-up discussion. Then it looks like
9 Andrea Cerrachio spoke with the office manager to
10 discuss the CPT modifiers.

11 Q. Is any analysis that Unum would have
12 done after receiving the CPT modifiers -- any
13 analysis of the revenue from particular duties that
14 Unum did after it received CPT modifiers, Ms. Walsh,
15 would those be in the claims file?

16 A. Yes. And I believe Andrea did because
17 I believe I saw that.

18 MR. WARNOCK: Do you want her to
19 keep looking?

20 MR. PEPPER: If she can find it
21 quickly.

22 (BY MR. PEPPER)

23 Q. I haven't seen it, ma'am, that's why
24 I'm asking.

1 A. Oh, so the office manager confirmed
2 that Dr. Nylander was just assisting in surgeries
3 and was not performing them. And she had been
4 reimbursed 20% of the actual total charges of the
5 procedure as it was stated in her contract. So then
6 Matt indicated he sent a letter to Dr. Nylander
7 indicating they would need three more months of CPT
8 codes and they asked if she would be omitting the
9 modifier again in these months. Caroline stated
10 that she could do whatever was easiest for us. So
11 Matt had asked Caroline to put the modifier in there
12 so we could determine which ones she was doing
13 herself and which ones she was assisting in.

14 Q. Okay, that's very good. You've
15 answered my question.

16 A. Okay.

17 Q. If I can get that back, I want to put
18 that over here so it's not in your way.

19 A. Okay.

20 Q. If we can go back to --

21 A. I'm sorry, I just need a tissue.

22 Q. Sure, we can try to get you some.

23 Ms. Walsh, can you take a look at
24 Exhibit number 4 again?

1 A. Sure.

2 Q. Are you looking at Exhibit number 4?

3 A. Yes.

4 Q. Okay. This is, is it not, an analysis
5 of the CPT codes of Dr. Nylander?

6 A. Correct.

7 Q. Okay. Now, if you look, bates pages
8 936 through most of 937 contain a CPT analysis for
9 January 2015, correct?

10 A. Correct.

11 Q. Okay. And there are various different
12 procedures on here with various different revenues,
13 correct?

14 A. Correct.

15 Q. Which of these procedures -- what are
16 you comfortable calling these; procedures or duties?

17 A. I would say both. I'm comfortable with
18 both.

19 Q. Okay.

20 A. Duties may be better because some of
21 them aren't actual procedures per se.

22 Q. Okay. Which of these did Unum
23 determine were material and substantial duties of
24 Dr. Nylander's occupation?

1 A. Can I look at Andrea's review again for
2 a second?

3 Q. Sure. Which exhibit is that?

4 MR. WARNOCK: It's 987 to 989 in
5 the claims file. I can show her just those
6 pages if you don't object to her seeing things
7 that are highlighted.

8 MR. PEPPER: No, that's fine.

9 A. Could you repeat your question again,
10 please?

11 Q. Sure, let me break it down. Looking at
12 Exhibit 4, bates page 936, can you do that? Do you
13 see it looks like Unum broke these into different
14 categories. And the first category is surgical
15 procedures including GYN, correct?

16 A. Correct.

17 Q. Which of those under that surgical
18 procedures including GYN did Unum determine were
19 material and substantial duties of Dr. Nylander's
20 regular occupation?

21 A. I think -- it looks to me from Andrea's
22 review, so bates stamp number 988, she indicated the
23 duties -- which I would take this to mean the
24 important duties -- were seeing patients for

1 gynecological checkups and presenting problems,
2 ordering and reviewing diagnostic tests, performing
3 procedures in the office, I.e. excisions,
4 destruction of lesions, colposcopy -- I'm not sure
5 how to pronounce that -- endo/cervical biopsies, et
6 cetera. Performing procedures in the OR, I.e.
7 laparoscopy, hysterectomy, hysteroscopy, repairs,
8 pelvic floor procedures, et cetera. Handling all
9 the scheduled and charting.

10 Q. Okay. Now, if you could look at
11 Exhibit 4, please, ma'am.

12 A. Sure.

13 Q. And that category you have surgical
14 procedures including GYN, do you see that category?

15 A. Yes.

16 Q. Which of these, if any, did Unum
17 determine were material and substantial duties of
18 Dr. Nylander's regular occupation?

19 A. I think they concluded they all were.
20 I don't see any sort of -- I don't see any sort of
21 notation in here by our vocational consultant saying
22 that some of these procedures weren't material and
23 substantial.

24 Q. Okay. I want to be sure, I don't want

1 you to speculate because you are here today as
2 Unum's representative.

3 A. Right.

4 Q. Are you testifying that Unum determined
5 that all of these procedures under the column
6 surgical procedures including GYN were determined to
7 be material and substantial duties of Dr. Nylander's
8 regular occupation?

9 A. Well, first, I think they needed
10 clarification about these codes first because they
11 weren't sure which one of these Dr. Nylander herself
12 performed or which ones of these she had assistance.

13 Q. Let's not worry about whether she was
14 assisting or --

15 A. Okay.

16 MR. WARNOCK: Well, if the company
17 worried about it then you worry about it.

18 MR. PEPPER: That's not an
19 objection, Tim.

20 MR. WARNOCK: Objection. If the
21 company worried about it, then --

22 MR. PEPPER: What's the basis of
23 the objection?

24 MR. WARNOCK: She is giving you an

1 answer to your question and you are changing
2 her answer through your next question.

3 (BY MR. PEPPER)

4 Q. Okay, let me -- I'm not trying to trick
5 you, ma'am. I'm just trying to figure out --
6 looking at this on Exhibit 4, this column that says
7 surgical procedures including GYN, which of those
8 itemized -- Unum itemized these procedures, correct?

9 A. Mm-hmm.

10 Q. Can you say yes? She can't pick up the
11 "mm-hmm".

12 A. Oh, I'm sorry, yes.

13 Q. Which of those did Unum consider to be
14 material and substantial duties of Dr. Nylander's
15 regular occupation?

16 MR. WARNOCK: Objection. She has
17 answered that question.

18 A. As I stated before, they didn't
19 specifically say, you know, biopsy of uterus
20 wasn't -- there's so many different procedures.
21 What Unum ultimately concluded was that her surgical
22 duties, her office exams, it was all material and
23 substantial to the performance of her occupation.
24 So they didn't --

1 Q. Well -- are you finished?

2 A. They didn't actually come out and say
3 some of these duties weren't material and
4 substantial.

5 Q. Okay. Well, did Unum determine that
6 all of these items under the column surgical
7 procedures including GYN were material and
8 substantial duties of Dr. Nylander's regular
9 occupation, is that what you're saying?

10 A. I'm not saying that. I actually don't
11 know. I can only speak to what the file reflects.

12 Q. What does the file reflect?

13 A. The file reflects they put all of these
14 surgical procedures into a spreadsheet and then the
15 vocational consultant indicated she was doing
16 surgeries, noted that surgical charges accounted for
17 30% on average. They were decreased in the
18 post-disability time period. And it just says the
19 available information substantiates her occupation
20 as a gynecologist while her production decreased.
21 She continued to perform seeing patients for
22 gynecological checkups -- I won't go through it
23 again because I just stated that on the record.

24 Q. Going through the claim file, what you

1 are looking at now, can you tell me in this column
2 surgical procedures including GYN which specific
3 duties Unum considered to be material and
4 substantial duties? They are itemized on Exhibit 4.
5 Can you tell me which Unum considered to be material
6 and substantial and which they didn't?

7 A. I don't think they made that
8 determination. The way I read Andrea's report is
9 they considered all surgical duties to be material
10 and substantial as well as all office visits, both
11 pre and operative as well as even charting. They
12 looked at everything. They didn't come out and say
13 that any of these duties wouldn't have been material
14 and substantial. So I can only speak to what is in
15 the claim file.

16 Q. Okay. With respect to the things that
17 are itemized underneath surgical procedure on
18 Exhibit 4, what you're saying is Unum never
19 determined which of those were not material and
20 substantial duties; is that fair to say? That's
21 what I think you just said.

22 A. Yeah.

23 MR. WARNOCK: Object to the form.

24 A. Yeah, I believe what Unum has stated is

1 that as a gynecologist she performed surgeries.
2 Here's a list of the types of surgeries she
3 performed. As a gynecologist she did path and lab
4 work, these are a list of the ones she performed.
5 She had visits with her patients and these are how
6 she billed them. It appears to me when I'm reading
7 this is they are not indicating any of these duties
8 wouldn't be important to how she performed her
9 occupation. So I think they considered them all and
10 they are not stating that any of them are immaterial
11 to the duties of her occupation.

12 Q. Okay. If we go to the next column down
13 on Exhibit 4, it says path/lab, do you see that?

14 A. Yes.

15 Q. And there are one, two three, four --
16 five categories that Unum came up with for path/lab
17 work, correct?

18 A. Well, I don't think Unum came up with
19 them. I think these were actually listed in her
20 billing code. So Unum is just basically -- or our
21 billing analysis takes them from her billing codes
22 and she's separating them so it's easier to follow
23 and understand.

24 Q. Okay. I understand what you're saying.

1 But there are five columns there, right, under
2 path/lab?

3 A. Yes.

4 MR. WARNOCK: Rows.

5 Q. Five --

6 MR. WARNOCK: Rows.

7 A. Rows, yes.

8 Q. Which of those did Unum determine were
9 material and substantial duties of Dr. Nylander's
10 regular occupation?

11 MR. WARNOCK: Object to the form.

12 A. I think my answer for -- if we go
13 through all of these, my answer is going to be the
14 same.

15 Q. What would that be?

16 A. Unum did not break out each specific
17 procedure and noted whether they would be material
18 and substantial. They indicated surgeries were
19 material and substantial as well as seeing patients,
20 you know, inpatient, outpatient. And that's all I
21 can really say on that topic.

22 Q. All right. Under path/lab there is a
23 column for vaginal litmus test, do you see that?

24 A. Mm-hmm.

1 Q. Can you say yes? She can't pick that
2 up.

3 A. I'm sorry, yes.

4 Q. Did Unum determine whether or not
5 vaginal litmus test were a material and substantial
6 duty of Dr. Nylander's regular occupation?

7 MR. WARNOCK: Object to the form.
8 Asked and answered.

9 A. Again, I think I answered that. If we
10 go through every single one of these, there's no
11 analysis in the file of -- they did not break out
12 each one of these specific procedures and say
13 whether or not it was material and substantial.
14 When I read the file as a whole and Andrea's review
15 as a whole, it appears to me that they are
16 considering all of these to be material and
17 substantial.

18 Q. All of the things from January 2015; is
19 that fair to say?

20 A. Yes.

21 Q. Okay. So that I don't have to go
22 through the questions about important, the same
23 thing would apply, Unum's determination was that all
24 of the things listed for January 2015 in Exhibit 4

1 would be considered important duties; is that fair
2 to say?

3 A. That's fair to say, yes.

4 Q. Okay, very good. All right, we can put
5 this one away. What steps did Unum take to
6 determine what surgical instruments Barbara Nylander
7 was able to use pre-disability that she was not able
8 to use post-disability?

9 A. I believe that the instruments came
10 into a play on appeal and I think Dr. Groves
11 summarized that in his review.

12 Q. Would any steps that Unum took to
13 determine what instruments Dr. Nylander used in her
14 practice pre-disability -- would any steps Unum took
15 to determine what instruments those were that she
16 used pre-disability, would that be in the claims
17 file?

18 A. Yes. And I believe it came up after
19 the financial -- I mean the functional capacity
20 evaluation because it talked about the instruments.
21 And that's when -- this was all as part of the
22 appeal. Actually, I take that back. I think the
23 benefit center's physician, Dr. Saks, looked at it.
24 I can't remember if they exactly talked about the

1 instruments. But I do know Dr. Groves did in his
2 reviews. He actually talked about specific
3 instruments like stapling. I can't remember, I'd
4 have to look at his review. But he really -- he did
5 dive into instruments, how she would perform them,
6 the way she could perform them, so on and so forth.

7 Q. Okay. Any steps that Unum took to
8 determine what surgical procedures Dr. Nylander was
9 performing pre-disability that required suturing --
10 any steps Unum took to determine, that would be in
11 the claims file, correct?

12 A. Correct.

13 Q. Okay. Any steps Unum took to determine
14 how often during surgery Dr. Nylander had to apply
15 pressure to something that was bleeding
16 pre-disability, that would be in the claims file,
17 correct?

18 A. I'm not sure it talks about how long
19 she would need to apply pressure. I do remember Dr.
20 Nylander stating she would need to apply pressure
21 and I remember Dr. Groves commenting on that. And I
22 think Dr. Martin may have commented on it in his
23 independent medical examination as well.

24 Q. Okay, I wasn't asking you how long. My

1 question was any steps Unum took to determine how
2 often Dr. Nylander had to apply pressure to bleeders
3 during surgery pre-disability, that would be in the
4 claims file, correct?

5 A. If it was done, yes, but I don't think
6 it was done.

7 Q. Okay.

8 A. Because I think it's a -- I don't know
9 if we could obtain that information. She would have
10 had to have noted on every single patient's chart
11 that this person bled and she had to apply pressure,
12 so I am not sure that that's information we could
13 obtain.

14 Q. Okay.

15 MR. WARNOCK: You doing okay?

16 THE WITNESS: Yeah.

17 Q. What steps did Unum take to determine
18 the difference in income that a gynecologist with a
19 surgical practice would have versus a gynecologist
20 who just had a clinical office practice?

21 A. I think Unum only looked at Dr.
22 Nylander's income. They didn't make any steps to
23 determine what another gynecologist would make, if
24 that's your question. I'm not sure I answered that.

1 Q. Well, is it fair to say that any steps
2 Unum took to determine the difference in income
3 between a gynecologist who just had an office
4 practice versus a gynecologist who had an office and
5 surgical practice, any steps Unum took to determine
6 that would be in the claims file; is that fair to
7 say?

8 A. If they did do that, it would be, but I
9 don't believe that they did.

10 Q. Okay.

11 A. I believe they looked at -- because
12 we're only looking at Dr. Nylander's claim, we're
13 only looking at what her practice was and what
14 income she generated as a result of that. So I
15 don't think it would be necessary to look at what
16 another gynecologist would make. One who was just
17 performing, you know, a practice based -- I mean an
18 office based practice as opposed to one who did
19 surgery and office based. So again, we just looked
20 to her specific duties and income.

21 Q. Any steps Unum took to determine what
22 percentage of surgeries performed by Dr. Nylander
23 pre-disability required suturing would be in the
24 claims file; is that fair to say?

1 A. If they did that analysis, I would
2 think it would be in the file, yes.

3 Q. All right.

4 A. I also think Dr. Groves talked about
5 that in his report about suturing.

6 THE WITNESS: Is it okay if I use
7 the restroom really quick?

8 MR. PEPPER: Oh, sure.

9 (A recess was taken)

10 (BY MR. PEPPER)

11 Q. I'm going to hand you back -- can you
12 verify you're looking at Exhibit number 1 there?

13 A. Yes, this is Exhibit 1.

14 Q. All right. Looking at Exhibit number
15 1, policy page 4, which is bates page 0006.

16 A. Mm-hmm, yes.

17 Q. Let's go back to where it says,
18 "Regular occupation means the Insured's occupation
19 at the time the Elimination Period begins. If the
20 insured engages primarily in a professionally
21 recognized specialty at that time, his occupation is
22 that specialty." Do you see that?

23 A. Yes.

24 Q. Okay. Why would it be unreasonable for

1 Dr. Nylander to interpret professionally recognized
2 specialty as gynecological surgery?

3 MR. WARNOCK: Object to the form.

4 Q. Or would it be? Maybe I'm presuming
5 something. Do you believe it's unreasonable for Dr.
6 Nylander to interpret professionally recognized
7 specialty to include gynecological surgery?

8 MR. WARNOCK: Object to the form.

9 That's outside the scope of your notice. You
10 can answer if you have an answer but it's not
11 binding on the company -- companies.

12 A. I'm not sure what Dr. Nylander, you
13 know, interprets this to mean. I don't know if the
14 company made a determination of what -- if she had a
15 professionally recognized specialty. I believe the
16 company concluded she was a gynecologist who did
17 perform surgery but I don't think they concluded
18 that her specialty was surgery. I don't think that
19 determination had ever been made during the claims
20 evaluation process.

21 Q. Okay. Thank you for that information,
22 but here's my question. Do you believe it was -- it
23 is unreasonable for Dr. Nylander to conclude based
24 on your policy language that professionally

1 recognized specialty includes gynecological surgery?

2 MR. WARNOCK: Objection. That's
3 outside the scope of the notice. So the
4 witness can answer if she has an answer, but
5 it's not binding on the company.

6 A. I don't believe I can answer --

7 Q. You can't answer the question?

8 A. -- what Dr. Nylander would consider
9 reasonable or unreasonable.

10 Q. Well, that's not my question. My
11 question is do you believe it would be unreasonable
12 for her based on the policy language this company
13 issued -- you are representing a company today. Do
14 you believe it would be unreasonable for Dr.
15 Nylander to conclude based on this policy language
16 that gynecological surgery was a professionally
17 recognized specialty?

18 MR. WARNOCK: Objection. The
19 witness is representing the companies in
20 connection with the categories listed in your
21 notice.

22 Q. Can you answer that question yes or no?

23 A. Again, I don't believe I can speak to
24 the reasonableness for how Dr. Nylander interprets

1 this provision. I can say that I don't believe her
2 specialty was a gynecological surgeon. I believe
3 she was a gynecologist who did do surgeries. So I
4 don't think it was a professionally recognized
5 specialty as being a gynecological surgeon. I'm not
6 sure that that was what the company, you know, made
7 a decision about.

8 Q. You believe it would be unreasonable
9 for her to interpret this language to mean that
10 gynecological surgery was a professionally
11 recognized specialty; is that your answer?

12 MR. WARNOCK: Objection.

13 A. I think I gave my answer. I can't add
14 anything else to it.

15 Q. Is that your answer? You think it
16 would be unreasonable for her to conclude this
17 professionally recognized specialty includes
18 gynecological surgery?

19 MR. WARNOCK: Objection.

20 A. I don't think I can say whether it
21 would be unreasonable or reasonable, because that's
22 her own opinion. I can say what the company has
23 concluded, but what she -- how she interprets the
24 policy and how we believe the policy reads, it may

1 be two different things. So I can't determine if
2 whether or not her opinion is reasonable or
3 unreasonable.

4 Q. And that is because the phrase
5 "professionally recognized specialty" is subject to
6 various interpretations; is that fair to say?

7 MR. WARNOCK: Objection to the
8 form of the question. The question is outside
9 the topics that you've listed in your notice.

10 Q. You can answer that question.

11 A. My answer would be no.

12 Q. It's not subject to various
13 interpretations?

14 A. No.

15 Q. Okay. Is it unreasonable for Dr.
16 Nylander to have the position that she should be
17 able to determine what were the important duties of
18 her regular occupation?

19 MR. WARNOCK: Object to the form
20 of the question. And that is outside the
21 topics that you've contained in your notice.
22 The witness can answer but her answer is not
23 binding on the companies.

24 A. I can answer that with a yes. I would

1 think it would be unreasonable for her to believe
2 she would be the one to determine that. I think the
3 policy is clear that the company would make that
4 determination.

5 Q. Okay. You believe that's in the
6 policy?

7 MR. WARNOCK: Same objection.

8 A. I don't believe the policy says Unum
9 will make this determination but the policy also
10 says that the insured is required to provide proof
11 of loss. And it's the insurer that actually makes
12 the evaluation, not the insured.

13 Q. Okay. When Unum goes to determine what
14 are the important duties of someone's occupation,
15 does it use the same factors -- let me strike that.
16 When Unum goes to interpret one of these Paul Revere
17 policies that has the phrase "important duties",
18 does Unum use the same criteria for determining what
19 are important duties as it uses to determine what
20 are material and substantial duties?

21 MR. WARNOCK: Objection, asked and
22 answered. She answered that this morning and
23 that's outside the scope of the topics in your
24 deposition notice.

1 Q. You can answer the question.

2 A. I did answer that previously.

3 Q. What was the answer?

4 A. I don't remember, I'd have to have her
5 read it.

6 Q. Answer again, please.

7 MR. WARNOCK: Same objection.

8 A. I don't believe I need to answer it. I
9 believe I stated it previously.

10 Q. Well, I think you have to answer it.

11 MR. WARNOCK: Well, she did.

12 Q. You're at a deposition. What's the
13 answer? Do you use the same criteria to determine
14 what are important duties as you use to determine
15 what are material and substantial duties?

16 MR. WARNOCK: Same objection.

17 Q. It's a yes or no.

18 A. I don't think it's a yes or no. I can
19 say what I stated before. I don't think there's any
20 specific criteria, but I think we evaluate important
21 and material and substantial in the same fashion.
22 We obtain the same information. But again, as I
23 stated previously, there's no specific criteria of
24 what we would get.

1 Q. In determining what are important
2 duties, what criteria does Unum use?

3 MR. WARNOCK: Objection to the
4 form of the question. That's outside the
5 scope of the topics that you have included in
6 your notice. The witness can answer but her
7 answer is not binding on the company --
8 companies.

9 MR. PEPPER: We can argue about
10 that later.

11 MR. WARNOCK: I'm not arguing, I'm
12 just making an objection.

13 MR. PEPPER: Sure.

14 A. I was asked that question this morning
15 and I already testified to it so I don't believe
16 there's anything else --

17 Q. You weren't asked about it. You were
18 asked about material and substantial. And what I
19 just told you -- I just asked if you used the same
20 criteria and you said you didn't think you could
21 say. In determining what are important duties, what
22 criteria does Unum use?

23 A. I thought we did discuss that this
24 morning.

1 Q. We did not. So please tell me what
2 criteria Unum uses to determine what are important
3 duties?

4 MR. WARNOCK: Same objection.

5 A. My answer would be exactly the same as
6 with regards to substantial and material.

7 Q. It uses the exact same criteria?

8 A. No, that there isn't specific criteria.
9 There's guidelines of what we would obtain. I mean,
10 guidelines of what processes we should take but
11 there's no specific criteria, as you're putting it,
12 on what information we would obtain to determine
13 someone's important duties. It's going to vary
14 depending on what someone's occupation is.

15 Q. Okay.

16 A. Basically our claims manual indicates
17 that we need to gather information to verify what
18 someone's job duties are or occupational duties.
19 There's no certain -- there's nothing set in stone
20 that in each case this is what you are going to
21 obtain. Because each fact -- each specific claim
22 file is going to dictate what steps we need to take.
23 It depends on what someone's occupation is.

24 Q. Okay. And you mentioned that some of

1 the guidelines you used to determine what are
2 important duties, are those guidelines the
3 guidelines contained in the Unum claims manual?

4 A. Yes.

5 Q. Are there any guidelines anywhere other
6 than in the Unum claims manual? Written guidelines?

7 A. Not that I am aware of.

8 Q. Okay. In determining what are
9 important duties, does Unum consider the amount of
10 revenue the duties create for a claimant?

11 MR. WARNOCK: Object to the form
12 of the question. Asked and answered and
13 outside the scope of the topics that you've
14 listed in your notice, but you can answer.

15 Q. You can answer.

16 A. We already talked about previously
17 about the income and that's when we took out the CPT
18 codes and whatnot, so my answer would be the same.

19 Q. Well, we talked about material and
20 substantial and CPT codes. I didn't ask that
21 specific question. Does Unum consider revenue
22 generated by duties when it tries to determine what
23 are important duties?

24 MR. WARNOCK: Same objection.

1 Q. That's a yes or a no.

2 A. But you had also put on the record that
3 when we are talking about important and substantial
4 and material, we are going to be talking about the
5 same. So my answer would be exactly the same as
6 what I said for substantial and material as it would
7 be for important, it's exactly the same.

8 Q. Okay, what is the answer?

9 A. I already stated the answer. I feel
10 like I've --

11 Q. Is it a yes or a no?

12 A. No, I feel like I've stated it several
13 times.

14 Q. I want you to state it again, please.

15 A. It's not a yes or a no.

16 MR. WARNOCK: Do we need to call
17 the Judge?

18 Q. It's not a yes or a no?

19 A. No. I've already stated it and I don't
20 believe I need to restate it.

21 Q. We've gone through a lot today so this
22 will take you maybe 30 seconds. When determining
23 what important duties are, does Unum consider how
24 much revenue the duties generate; yes or no?

1 MR. WARNOCK: Objection. Asked
2 and answered and it's outside the scope of
3 your notice.

4 A. I believe you're asking me the same
5 questions over and over again and I've already
6 answered them.

7 Q. Ma'am, I'm trying not to do that.

8 MR. WARNOCK: But you are doing
9 that.

10 Q. I sometimes may do that. Can you
11 answer that question, yes or no?

12 MR. WARNOCK: She's testified that
13 she's already answered the question. Please
14 ask her a new question. We can sit here and
15 have the same three-way dialogue.

16 MR. PEPPER: I'll sit here until
17 5:00 until I get a yes or no answer.

18 (BY MR. PEPPER)

19 Q. Does Unum consider the amount of income
20 generated by a duty when it tries to determine what
21 are important duties? It's a yes or a no.

22 MR. WARNOCK: Objection. Asked
23 and answered.

24 A. I stated previously that --

1 Q. Did you state yes or no?

2 A. I stated yes, we do look at the income.

3 Q. Okay, thank you very much.

4 A. I just don't feel that it's necessary
5 to keep --

6 Q. In this case, what weight did -- in
7 determining the important duties of Dr. Nylander's
8 occupation, what weight did Unum give to the amount
9 of revenue her duties brought in?

10 MR. WARNOCK: Objection. Asked
11 and answered.

12 A. This is another question I already
13 answered. And as I stated previously, we gave it
14 equal weight.

15 Q. Equal to what?

16 A. Equal -- again, I mean, I feel like
17 you're asking me the same questions over and over
18 again. I don't remember what I said previously
19 because now it's been a couple of hours but I
20 believe I had indicated we gave it no more weight
21 and no less weight than every other fact of her
22 case.

23 Q. Okay. When Unum is trying to determine
24 important duties, what factors does it consider

1 besides the income generated by the duties?

2 A. Can you repeat the question, please?

3 Q. Sure. When Unum is considering trying
4 to determine what are the important duties in
5 occupation, what factors does Unum consider besides
6 the amount of income generated by the duties?

7 MR. WARNOCK: Objection. It's
8 outside the scope of your topics. You can
9 answer.

10 Q. You can answer.

11 MR. WARNOCK: But it is not
12 binding on the company -- companies.

13 A. In determining somebody's important
14 duties, we --

15 Q. What are the factors?

16 MR. WARNOCK: You want her to list
17 them again?

18 A. What do you mean by factors?

19 Q. What factors? Do you understand what
20 the word "factor" means?

21 A. Yes, but I feel like you're asking me
22 similar questions and just using different words to
23 ask a question a different way. I don't know what
24 you mean by factors. I mean, when we're determining

1 the important duties of someone's occupation, we
2 obtain information from an insured to verify those
3 duties. And it's -- like I stated previously, it's
4 going to vary depending on what somebody's
5 occupation is. We are going to ask a physician to
6 provide us different information than we are an
7 attorney or -- like I said, everyone's occupation is
8 different, how they perform it is different.

9 Factors, I can tell you what factors we used to
10 determine Dr. Nylander's case, but I --

11 Q. What factors were those?

12 A. I believe I stated that previously.
13 You asked me that before.

14 Q. We were talking about material and
15 substantial duties. Did you use the same factors to
16 determine her important duties as you did to
17 determine her material and substantial duties?

18 A. Yes.

19 MR. WARNOCK: Objection. Asked
20 and answered.

21 Q. All right. What investigation or work
22 did Unum do to determine what gynecological surgical
23 procedures are considered major procedures versus
24 minor procedures?

1 A. I'm not sure. I'd have to look at
2 the -- look back at Andrea's review. And I don't
3 know if she stated that. I think she just stated
4 she performed some major and some minor, but I don't
5 know if they actually identified which were which.

6 Q. Would any steps Unum took to determine
7 what gynecological surgical procedures were
8 considered major or minor procedures be in the
9 claims file?

10 A. If they did that, I guess it would be
11 expected to be in the claim file.

12 Q. Do you guess or do you know?

13 A. I don't recall if that determination
14 was made.

15 Q. Where would you go to find out whether
16 Unum took steps to find out what gynecological
17 surgical procedures or major procedures or minor
18 procedures, where would you look besides the claims
19 file?

20 A. I would only look in the claims file.

21 Q. Okay. And if you didn't find anything
22 in the claims file, would you conclude that Unum did
23 not take any steps in that regard?

24 A. Not necessarily. I would say if -- I

1 would have to look to see if they asked for any
2 information and anything was outstanding. I can sit
3 here and say that I don't think they made that
4 determination but I don't know the reason for why
5 they didn't make that. I don't know if they were
6 waiting for information or it was just not necessary
7 to their review.

8 Q. What steps were taken by Unum to
9 determine what gynecological surgical procedures pay
10 the most?

11 A. I think that there was -- I'm not sure
12 if there was analysis what pays the most. Their
13 analysis looked at which procedures generated the
14 most charges. So if we look back at exhibit --

15 Q. Before you do that, I think I can save
16 you some time here. Other than looking at the CPT
17 and surgical revenue information Dr. Nylander sent
18 you, did Unum look to any other resource to
19 determine what gynecological cases, surgical cases
20 pay the highest?

21 A. They looked at her financial records
22 but that's not going to give us a breakdown of what
23 procedures pay the highest. It's going to just tell
24 us what her income was. I know we also looked at

1 what her salary was. I know that -- the billing
2 codes are the most accurate way to determine what
3 procedures generate the highest charges. And that
4 analysis was performed. Not in this Exhibit 4, but
5 the pages that we identified previously that weren't
6 attached to this. There was actually like a
7 spreadsheet that showed each procedure and which one
8 had the highest charges.

9 Q. If Unum took steps to try to find out
10 what other gynecologist practicing who had surgical
11 practices, what cases generated the most income for
12 them, that would be in the claims file; is that
13 correct?

14 A. If they did that, yes, but they didn't
15 do that.

16 Q. Okay. If we can go back to number 4
17 here, please, ma'am. Are you looking at Exhibit
18 number 4?

19 A. Yes, I am.

20 Q. If you'll go to -- do you see the page
21 that ends in 936? Do you see that one, bates page
22 936?

23 A. Yes.

24 Q. All right. Follow me down to almost

1 the bottom of that column where it says the CPT code
2 is 58558, hysteroscopy; do you see that?

3 A. No, I'm sorry.

4 MR. WARNOCK: May I help her?

5 MR. PEPPER: Sure.

6 A. Oh, 58558.

7 Q. Right.

8 A. Okay, yes.

9 Q. And you see where you broke out that
10 there were five units and the total charges were
11 \$3,250.00, correct?

12 A. Correct.

13 Q. And you've already testified that Unum
14 determined that everything listed here was both an
15 important duty and a material and substantial duty.

16 MR. WARNOCK: Objection. If she's
17 already testified to it, it's asked and
18 answered it.

19 MR. PEPPER: Well, I'm just
20 restating her testimony.

21 MR. WARNOCK: I know, that's why
22 I'm objecting.

23 MR. PEPPER: Okay. That's a new
24 one on me.

1 (BY MR. PEPPER)

2 Q. Now, in determining that this
3 procedure, which is 58558, was a material and
4 substantial and important, did Unum give more weight
5 to the fact it was -- to the number of units or to
6 the total charges?

7 A. I don't know that that was done. I
8 think everything was looked at and they concluded
9 surgery wasn't an important duty of her occupation.
10 I don't think they looked at each surgical procedure
11 and broke it out, as stated previously. It's clear
12 some she did more than others, but.

13 Q. Okay. Well, for procedure 58558, are
14 you saying you can't say whether Unum gave more
15 weight to the fact there were five units or more
16 weight to the total charges? Is that what you're
17 saying?

18 A. Well, I mean, we have to also
19 understand this is just for one month. So they
20 looked at a year's worth of information. So she may
21 have done, you know, generated thirty -- whatever it
22 was, \$3,250 in that month, but then, you know, if
23 you look at February --

24 Q. Well, for whatever period --

1 A. February it was only \$1,950. So it's
2 an average what the company had looked at, not just
3 one month. Because she may do more of something in
4 one month and less of it in another or she may do
5 none of it in another month, which --

6 Q. Okay. So I understand what you are
7 saying is you averaged it out over a number of
8 months, correct?

9 A. Correct.

10 Q. Okay. When looking at the average,
11 then you would have had an average of units and an
12 average of total charges, correct?

13 A. Correct.

14 Q. Which did you give more weight to in
15 determining whether something was material and
16 substantial or important, the units or the total
17 charges?

18 A. I don't think either was given more
19 weight, I think they were both considered.

20 Q. Equally?

21 A. To be honest, I'm not sure. I did not
22 perform that analysis. I would have to ask,
23 you know, Andrea Cerrachio on that. I can only,
24 you know, testify to what is written in her report.

1 Q. Well, you're here testifying for Unum
2 today. Do you believe that -- to your knowledge,
3 did Unum give more weight to either units or total
4 charges? I think you're saying, to your knowledge,
5 no, if I understand you?

6 A. The only thing I know that they did was
7 they indicated surgery was -- she performed
8 surgeries, the amount of surgeries she performed.
9 But they didn't -- like I said, they didn't break
10 them out and say, you know, this duty was more
11 important than the other and this charge was more
12 important than the other. I think the report speaks
13 for itself. Andrea Cerrachio's report speaks for
14 itself.

15 Q. As you sit here today, do you know
16 whether Andrea Cerrachio gave more weight to the
17 number of units or to the total charges?

18 A. I think I already answered that.

19 Q. I don't think you did. But, yes? No?
20 I don't know?

21 A. Well, you said the company and I
22 consider Andrea -- she works for the company so I
23 don't think my answer is any different. I can only
24 tell you what Andrea said, I haven't spoken to her

1 about the case. So if she had a conclusion about
2 it, I would expect it to be in her report.

3 Q. Well, I was asking for the company and
4 I thought you said -- you indicated to me that you
5 didn't know but maybe somebody else knew. As you
6 sit here today, do you know whether the company gave
7 more weight to the units or to the total charges in
8 determining important and material and substantial
9 duties?

10 MR. WARNOCK: Objection. Asked
11 and answered.

12 A. I already answered that I think three
13 times.

14 Q. What was the answer?

15 A. I answered it three times, I'm not
16 going to answer it again.

17 Q. Ma'am, what was the answer?

18 MR. WARNOCK: We can go back and
19 look at the transcript.

20 Q. You are not giving me a straight
21 answer. I'm not trying to harass you. It's a
22 really easy question. It's a yes, no, or I don't
23 know. Could you tell me?

24 MR. WARNOCK: She has referred you

1 to the report that you've examined her about
2 already.

3 MR. PEPPER: She can refer me to
4 the report, I'm asking her a yes, no, or I
5 don't know question.

6 (BY MR. PEPPER)

7 Q. In determining material and substantial
8 duties and important duties, did Unum give more
9 weight to units or more weight to total charges or
10 equal weight?

11 MR. WARNOCK: Object to the form
12 of the question.

13 A. I think Andrea's report speaks for
14 itself. I do not -- there was no comment made in
15 her report about giving weight to more than the
16 other. Her report just indicated -- gave a
17 breakdown of these are what the procedures were,
18 these are what the charges were. And then indicated
19 these are what the procedures were in the
20 pre-disability period and these were what they were
21 in the post-disability period. She noted
22 percentages, she noted a decrease, but there's no
23 mention of your terminology of weight. So I can't
24 answer that. I guess if you want me to answer it

1 yes or no, my answer is, no, I do not see that that
2 analysis was done, at least based upon Andrea's
3 report.

4 Q. Okay, thank you. Going back to Exhibit
5 number 3. Can you confirm you're looking at Exhibit
6 number 3?

7 A. Yes, I am.

8 Q. Okay. And you're looking at policy
9 page 4, correct? Policy page 6, correct?

10 A. Correct.

11 Q. Section 1.10, do you see that?

12 A. Yes.

13 Q. It says, "You are unable to perform the
14 important duties of your occupation." Do you see
15 that?

16 A. Yes.

17 Q. Does Unum interpret that to be all
18 important duties or some important duties?

19 MR. WARNOCK: Object to the form
20 of the question. That's outside the scope of
21 your notice. You may answer it, if you can
22 answer it.

23 A. I would say it's the important duties.

24 Q. All of the important duties?

1 MR. WARNOCK: Same objection.

2 Also, you've asked her for a legal conclusion.

3 A. Can you repeat the question, please?

4 Q. Sure. Your job at Unum is to review
5 policy language and apply it to facts of claims,
6 right?

7 A. Mm-hmm.

8 Q. Can you say yes?

9 A. Yes, sorry.

10 Q. And then you decide whether someone is
11 entitled to total disability or not, right?

12 A. Correct.

13 Q. And you look at the policy language and
14 the facts of the case, right?

15 A. Right.

16 Q. When Unum looks at the words "important
17 duties", do you consider that to be all important
18 duties or some important duties?

19 MR. WARNOCK: Object to the form
20 of the question. It's outside the scope of
21 your notice. But you may answer.

22 A. I think it varies. But I think where
23 it says the important duties, it would be primarily
24 all of the important duties. If they are able to

1 perform some and not others, they may be eligible
2 for residual disability benefits. But in this case
3 we had concluded that Dr. Nylander could perform all
4 of the important duties of her occupation.

5 Q. Okay. You just said whether you
6 interpret important duties to be all important
7 duties or some important duties varies. What causes
8 that to vary? What causes your interpretation to
9 vary?

10 MR. WARNOCK: Object to the form
11 of the question. That question falls outside
12 the scope of your topics. You can answer, if
13 you know the answer.

14 A. It depends on what someone's duties
15 are, what their occupation is and what the important
16 duties are. Each case is different. Each case is
17 handled on its own individual merit so I can only
18 speak to this case, what the important duties of Dr.
19 Nylander's occupation was and that we concluded she
20 could perform them.

21 Q. Okay. You concluded she could perform
22 all important duties, correct?

23 A. Correct, with some modifications.

24 Q. And at the time you denied the claim,

1 you had also concluded that she could perform all of
2 the surgical procedures she performed pre-disability
3 with some modifications; fair to say?

4 A. Yes.

5 Q. Okay.

6 MR. WARNOCK: Before you get
7 into -- are you moving into a new area?

8 MR. PEPPER: Yes. Do you want to
9 go do your deal down there?

10 MR. WARNOCK: Yeah.

11 MR. PEPPER: All right, why don't
12 we take 10 minutes.

13 (A recess was taken)

14 (BY MR. PEPPER)

15 Q. So Ms. Walsh, you testified earlier
16 that at the time Unum denied the claim it determined
17 that Dr. Nylander could perform all of the material
18 and substantial duties of her occupation -- all the
19 duties of her occupation. She might need some
20 accommodations for some of them; is that fair to
21 say?

22 A. Yes.

23 Q. So it was not necessary then for Unum
24 to ever do an analysis to determine whether or not

1 Dr. Nylander would be totally disabled if she could
2 not perform surgery; is that fair to say?

3 A. Could you repeat that again?
4 I'm sorry.

5 Q. Sure. It never was necessary for Unum
6 to do an analysis of whether Dr. Nylander would be
7 totally disabled under the policy if she could not
8 perform surgery?

9 A. Correct.

10 Q. Okay.

11 A. Because they concluded she could
12 perform surgery.

13 Q. Gotcha, all right.

14 (Exhibit 5, Plaintiff's Initial Rule 26
15 Disclosures, marked for identification)
16 (BY MR. PEPPER)

17 Q. All right, Ms. Walsh, what we asked for
18 a representative to do today was to testify as to
19 any errors we may have made in our calculations of
20 total and residual disability. I assume you read
21 the Rule 30(b)(6) notice that was sent to Unum,
22 correct?

23 A. Yes, I did.

24 Q. Okay. If you can take a look now at

1 Exhibit 5.

2 MR. WARNOCK: I understand you and
3 Kathy have had substantial discussions about
4 these two topics in the notice?

5 MR. PEPPER: We've had
6 discussions.

7 (BY MR. PEPPER)

8 Q. Have you seen Exhibit 5 before today?

9 A. No.

10 Q. Okay. If you would turn to Exhibit A
11 to Exhibit 5.

12 A. Turn to -- I'm sorry, what was it?

13 Q. Exhibit 5 has on the back something
14 called Exhibit A.

15 A. Oh.

16 Q. Let me try to shortcut it here instead
17 of going through all of these because I think I may
18 know the answer. We submitted, and what you're
19 looking at, as Exhibit A is our calculations of what
20 we believed if Dr. Nylander was entitled to both
21 residual and total disability, what she would be
22 entitled to plus any COLA payments. Have you gone
23 through or anybody at Unum gone through and done a
24 calculation to determine any errors we may have made

1 in our calculations?

2 A. No.

3 Q. Why was that not done?

4 A. My understanding is --

5 MR. WARNOCK: Well, your
6 understanding is based on what the lawyers
7 told you.

8 Q. Yeah, I don't want to know anything the
9 lawyers told you.

10 A. Okay.

11 Q. Other than what the lawyers have told
12 you, any reason it wasn't done?

13 A. I don't think it can be done.

14 Q. Why not?

15 A. Well, we don't know -- for total
16 disability we don't know what the COLA would be
17 because that's based upon consumer price index.
18 Residual disability benefits, my understanding is
19 there's still outstanding financial information so
20 we can't -- we couldn't complete that evaluation.

21 Q. Who told you that?

22 A. I heard that from legal.

23 Q. Okay. Are you aware that we have
24 submitted information on Dr. Nylander -- for the

1 period for which we made our calculations, are you
2 aware that we have submitted information regarding
3 her net income and her expenses and we have given
4 you her tax returns?

5 MR. WARNOCK: Anything you know
6 because a lawyer told you, please don't repeat
7 that.

8 THE WITNESS: Okay.

9 MR. WARNOCK: So if you have any
10 independent knowledge of what the plaintiff
11 has produced --

12 Q. Well, that's not exactly right. You
13 can't testify about anything a lawyer has told you.
14 But if I ask if you have knowledge about something,
15 wherever you got the knowledge, you can tell me. I
16 don't want to know about your communications with
17 counsel.

18 A. I do know that you have submitted some
19 information but that's as much as I know.

20 Q. Who would be the department or person
21 at Unum to check our math, for lack of a better
22 word, on our calculations? Would it be you or would
23 it be some other department?

24 A. It wouldn't be me.

1 Q. Who would it be?

2 A. As far as total disability benefit
3 calculations, to calculate the COLA, that is usually
4 calculated by our financial consultant team. If we
5 don't know what the specific COLA amount is or if it
6 was in the future that I don't know if anybody could
7 calculate that. So it may be an estimate.

8 Typically, also, our computer system
9 calculates it for us. It plugs in all the figures.
10 As far as residual, I don't know what was submitted
11 and I don't know what's outstanding. That would
12 also go to our financial consultants. They would
13 look at it and determine if there's enough
14 information. Because for residual benefits, it's
15 not just based upon the net income. If someone is a
16 business owner, there's a number of different
17 factors that the policy indicates we have to
18 include. So it's not just based on what someone's
19 net income is.

20 Q. What department would do the residual
21 calculations?

22 A. Our financial consultant department.

23 Q. Okay. Did you ever go to -- you
24 received this Rule 30(b)(6) notice, correct?

1 A. I received the 30(b)(6) but I did
2 not -- I haven't looked at this, what you just gave
3 me right now.

4 Q. Did you ever ask financial to look at
5 it?

6 A. No.

7 Q. Why not?

8 MR. WARNOCK: Well, don't answer
9 yet. Objection. Her answering your question
10 would require her to divulge communications
11 that she's had with inside counsel and outside
12 counsel.

13 Q. Were you instructed not to by counsel?

14 MR. WARNOCK: Same objection.
15 Answering that question would -- your quarrel
16 about whether we have a duty to critique your
17 calculations is something that you're going to
18 have to resolve with Kathy or with the court.
19 This witness has no knowledge about -- she can
20 tell you what she's already told you about
21 what department would be the department to
22 perform the calculations. But in terms of
23 honoring categories 19 and 20 of your current
24 notice, this witness has no knowledge specific

1 to this.

2 Q. You did not undertake to have anyone at
3 Unum to look at our calculations to determine
4 whether or not we made errors; is that fair to say?

5 A. Yes. Because I don't think that would
6 be our responsibility to check your calculations.

7 Q. Okay.

8 A. If she was eligible for benefits, we
9 would do the calculations ourselves.

10 Q. All right. In your claims manual it
11 states -- and I'm looking at the section "Occupation
12 evaluation." It says, "We consider how the
13 occupation is generally performed as described by
14 vocational resources." What vocational resources
15 did you use in Dr. Nylander's case to determine the
16 material and substantial duties of her
17 pre-disability occupation?

18 A. I think that was asked and answered
19 already.

20 Q. Would those vocational resources be
21 referenced in the claims file?

22 A. Yeah. And it was Andrea Cerrachio, as
23 stated previously.

24 Q. Okay. It would not be the case that

1 you would consult or use a vocational resource in
2 determining someone's material and substantial
3 duties and not note that in your claims file; is
4 that fair to say?

5 A. Yes.

6 Q. All right.

7 MR. PEPPER: If you all want to
8 give me about 10 minutes, I think it will save
9 us time so I can kind of go through this.

10 (A recess was taken)

11 (BY MR. PEPPER)

12 Q. It looks like in reviewing the file
13 you had two medical doctors review this claim, Dr.
14 Joel Saks and Dr. Groves; is that correct?

15 A. Correct.

16 Q. Both of those were orthopedic doctors?

17 A. Dr. Saks is an orthopedic surgeon and
18 Dr. Groves is also an orthopedic surgeon but he
19 specializes in hand. He was an orthopedic hand
20 surgeon.

21 Q. Okay. I assume Unum has gynecological
22 doctors and OBGYNs that it has used in the past to
23 do IMEs and consult on cases; is that fair to say?

24 A. I'm not sure.

1 Q. Okay. It would have been possible for
2 Unum to find a gynecologist to have review this
3 file; can we agree on that?

4 A. If we felt it was necessary we could
5 have, but we didn't feel it was necessary.

6 Q. Okay. Let's talk first about the --
7 I'm going to give you a hypothetical and he's going
8 to object, but you're going to need to answer the
9 question anyway.

10 Let's talk first about the provisions
11 of the Unum policy. What if post-disability Barbara
12 Nylander could work the same number of hours as
13 pre-disability but her income fell 95% because she
14 could not perform the task she could perform
15 pre-disability, would she have been entitled to
16 total disability?

17 MR. WARNOCK: I object to the form
18 of the question. It's outside the scope of
19 your notice. You can answer, but your answer
20 is not binding on the companies.

21 Q. Do you need to take a look at a copy of
22 the Unum policy?

23 A. No. Because I don't think I could
24 answer the question without having the specific

1 facts. I think -- it's a hypothetical.

2 Q. What specific facts would you need to
3 answer that? I tried to give you all the facts in
4 the hypothetical. What other facts would you need?

5 A. It depends. I mean, just because
6 someone's income drops doesn't necessarily mean that
7 it's a compensable claim. We would have to look at,
8 you know, why the income dropped, if it was
9 medically reasonable that she couldn't perform
10 specific duties. So there's a number of facts that
11 would -- you know, we would need.

12 Q. Well, what if you knew the fact was
13 that her post-disability income dropped 95%?

14 MR. WARNOCK: I'm sorry, could you
15 read that back?

16 Q. What if you knew that her
17 post-disability income dropped 95% but she could
18 still work the same number of hours at her regular
19 occupation. Would she be entitled to total
20 disability under the Unum policy?

21 MR. WARNOCK: Object to the form
22 of the question. It's a hypothetical question
23 and outside the scope of the topics in your
24 30(b)(6) notice.

1 Q. You can answer.

2 A. Not necessarily because the loss still
3 has to be due to an injury or sickness. So we would
4 have to take a look at that. We would have to look
5 at the medical lease. And if she did, in fact, have
6 a 95% loss of earnings and it was due to her injury,
7 then we would take that into consideration.

8 Q. But it's possible that could happen? I
9 understand you're saying that's not necessarily the
10 result, but it's possible?

11 MR. WARNOCK: Same objection.

12 A. If she satisfies the definition of
13 total disability, then it's possible she could
14 receive total disability benefits.

15 Q. Well, I understand that. But the
16 definition of total disability, it has its own
17 factors. And so what I am asking you is, is it
18 possible that if her post-disability income fell 95%
19 but she was still able to work at her regular
20 occupation for the same amount of time that she
21 would qualify for total disability?

22 MR. WARNOCK: Object to the form
23 of the question. It's obviously a
24 hypothetical and it's outside the scope of the

1 categories contained in your notice.

2 Q. You understand the question, don't you?

3 A. I do, and I think I already answered
4 it. If --

5 Q. Is it possible?

6 MR. WARNOCK: Let her finish.

7 A. Only if the loss was due to injury or
8 sickness.

9 Q. Okay. But when you say "only", that
10 implies that it is possible, correct?

11 MR. WARNOCK: Same objection.

12 A. It is possible for someone to receive
13 total disability benefits if they have a loss of
14 earnings of 95% or more and that loss is due to
15 injury or sickness. But again, it's going to vary
16 depending on what the duties were previously and
17 what they are doing now. It's not just a loss of
18 income. We would have to look at what duties
19 they were performing. And that's why it's important
20 to notice that the loss has to be due to injury or
21 sickness and not due to any other factors.

22 Q. All right. Let me see if I can get
23 you a copy of the claim file here. Okay, if you'll
24 look at -- are you looking at the claims file at the

1 document that's bates number 990?

2 A. Yes.

3 Q. Okay. And it looks like on -- see if
4 you agree with me. This note was taken on December
5 11, 2015?

6 A. Yes.

7 Q. Taken by someone who worked at Unum, I
8 assume; is that fair to say?

9 A. Yes, Matt LaRotonda.

10 Q. Okay. If you go to page 990, I guess
11 it's about three-fourths of the way down. It says,
12 "The EE" -- and EE stands for?

13 A. Employee.

14 Q. Employee, okay. Which would be Barbara
15 Nylander, Dr. Nylander?

16 A. Yes.

17 Q. Okay. Do you see where it says, "The
18 EE stated that all of her procedures typically
19 require suturing"; do you see that?

20 A. How far down are you?

21 Q. About three-fourths of the way down.

22 MR. WARNOCK: When you finish
23 reading that, please pass it over so I can
24 take a look at it before you answer the

1 question.

2 A. I see it.

3 MR. WARNOCK: Where are you?

4 THE WITNESS: (Indicating).

5 MR. WARNOCK: Okay.

6 Q. Where it says, "The EE stated that all
7 of her procedures typically require suturing", do
8 you see that? Does Unum have any reason to dispute
9 that statement?

10 A. Oh, I'm sorry, I'm looking at something
11 else. I'm looking at, "The EE agreed that she can't
12 suture and doesn't feel comfortable performing these
13 surgeries on her patients. She is doing some
14 D&Cs" --

15 Q. This one is 19 lines up from the
16 bottom.

17 A. Oh, I see it, yes.

18 Q. "The EE stated that all of her
19 procedures typically require suturing", do you see
20 that?

21 A. Yes.

22 Q. Does Unum have any reason to dispute
23 that statement?

24 MR. WARNOCK: The statement that

1 all of her procedures typically require
2 suturing?

3 MR. PEPPER: Correct.

4 A. Except for D&Cs. Yeah, I don't have
5 reason to believe that these procedures that she
6 listed here require suturing.

7 Q. You don't have any reason to dispute
8 the statement?

9 A. To dispute that, correct.

10 Q. Okay, you don't have any reason to.

11 MR. PEPPER: Okay, that's all I
12 have.

13 MR. WARNOCK: Thank you, we have
14 no questions.

15 (Deposition concluded at 2:31 p.m.)
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COMMONWEALTH OF MASSACHUSETTS

I, ELIZABETH P. DUFFY, a Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that there came before me on November 17, 2017, at the offices of Hilton Garden Inn, 35 Major Taylor Boulevard, Worcester, Massachusetts, the following named person, to wit: MELISSA WALSH, As 30(b)(6) Designee of Unum Life Insurance Company of America and Paul Revere Life Insurance Company, who was by me duly sworn to testify to the truth and nothing but the truth as to her knowledge touching and concerning the matters in controversy in this cause; that she was thereupon examined upon her oath and said examination reduced to writing by me; and that the statement is a true record of the testimony given by the witness, to the best of my knowledge and ability.

I further certify that I am not a relative or employee of counsel/attorney for any of the parties, nor a relative or employee of such parties, nor am I financially interested in the outcome of the action.

WITNESS MY HAND NOVEMBER 27, 2017.

Elizabeth P. Duffy
Notary Public

My Commission expires:
November 11, 2023

November 27, 2017

Tim Warnock, Esq.
RILEY WARNOCK AND JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203

Re: BARBARA J. NYLANDER, M.D. v. UNUM, et al

Dear Counselor:

Enclosed is a copy of the deposition of
MELISSA WALSH taken on NOVEMBER 17, 2017 in the
above-entitled action.

According to Rule 30(e) of the Massachusetts
Rules of Civil Procedure, the deponent has thirty
days to sign the deposition from the date of its
submission to the deponent, which is the above date.

Please have the deponent sign the enclosed
Signature Page/Errata Sheet and return it to the
offices of J. Ross Pepper, Esq. whereupon it will be
attached to the original deposition transcript, and
a copy thereof to all counsel of record.

Thank you for your cooperation in this matter.

Elizabeth P. Duffy

cc: J. Ross Pepper, Esq.

