To: Chillemi, Michael (torourke@bodnerorourke.com)

Subject: U.S. TRADEMARK APPLICATION NO. 85497733 - FUNCTIONAL

EVALUATIONS - N/A

Sent: 11/25/2013 9:55:32 AM

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Attachments: Attachment - 1

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO) OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 85497733

MARK: FUNCTIONAL EVALUATIONS

85497733

CORRESPONDENT ADDRESS:

THOMAS A O'ROURKE BODNER & O'ROURKE LLP 425 BROADHOLLOW RD SUITE 120 MELVILLE, NY 11747-4701 CLICK HERE TO RESPOND TO http://www.uspto.gov/trademarks/teas/re

APPLICANT: Chillemi, Michael

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

torourke@bodnerorourke.com

OFFICE ACTION

ISSUE/MAILING DATE: 11/25/2013

THIS IS A FINAL ACTION.

This office action responds to the applicant's request for reconsideration filed on October 15, 2013. Upon further review of the application file, an identification issue has come to the attention of the examining attorney and requires issuance of this subsequent final action. This action makes final the requirement for an acceptable recitation of services in addition to continuing the final generic refusal under Trademark Act Section 23(c) originally issued on April 11, 2013.

Since a notice of appeal has already been filed, this application will be sent back to the Trademark Trial and Appeal Board to resume the appeal immediately following issuance of this subsequent final action.

RECITATION OF SERVICES - FINAL

On February 13, 2013, the applicant amended the recitation of services from "Medical diagnostic services, namely, testing, monitoring and reporting, for the legal and medical community," in International Class 44 to "Medical diagnostic services, namely, testing, monitoring and reporting, for the legal and medical community *acting as experts in legal matters*" with the added language shown in italics. This identification amendment is rejected as being outside the scope.

Notice was given that identifications of services can be amended only to clarify or limit the services; adding to or broadening the scope of the services is not permitted. 37 C.F.R. §2.71(a); see TMEP §§1402.06 et seq., 1402.07. Therefore, applicant may not amend the identification to include services that are not within the scope of the services set forth in the present identification.

The wording "acting as experts in legal matters" includes expert witness services in legal matters" which is a service classified in International Class 45. Appearing as an expert witness is outside the originally-

claimed medical diagnostic services in International Class 44. These added services are beyond the scope of the original identification. Applicant may substitute the following wording, if accurate: "Medical diagnostic services, namely, testing, monitoring and reporting, for the legal and medical community," in International Class 44.

The amendment is rejected and the requirement for an acceptable recitation of services is made final.

CONTINUED FINAL REFUSAL

MARK IS GENERIC - FINAL

Registration is refused on the Supplemental Register because the applied-for mark is generic and thus incapable of distinguishing applicant's services. Trademark Act Section 23(c), 15 U.S.C. §1091(c); see TMEP §§1209.01(c) et seq.

Determining whether a mark is generic requires a two-step inquiry:

- (1) What is the genus of services at issue?
- (2) Does the relevant public understand the designation primarily to refer to that genus of services?

In re 1800Mattress.com IP, LLC, 586 F.3d 1359, 1363, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)); TMEP §1209.01(c)(i).

Regarding the first part of the inquiry, the genus of the services is often defined by an applicant's identification of services. See, e.g., *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 1379, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 640, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991).

In the present case, the identification and thus the genus, is "medical diagnostic services, namely, testing, monitoring and reporting, for the legal and medical community."

The previously attached definitions show that the wording FUNCTIONAL means "affecting physiological or psychological functions but not organic structure," and EVALUATION is "to determine the significance, worth, or condition of usually by careful appraisal and study." Based on dictionary definitions, the wording FUNCTIONAL EVALUATIONS means a determination made on the condition of one's physiological or psychological function. This wording is used generically throughout the legal and medical community to identify testing to determine a person's level of ability to function. See attached and previously attached evidence. The applicant performs this type of medical testing service to determine a person's abilities. See attached website. Therefore, due to widespread generic usage of the mark FUNCTIONAL EVALUATIONS and the applicant's own usage, the relevant public would understand this designation to refer primarily to that genus of services.

In response, the applicant notes, "[W]e would like to point out that there is no definition of functional evaluations in the dictionary." The fact that the wording is not in the dictionary is not controlling. Any term that the relevant public understands to refer to a particular genus of goods and/or services is generic; thus there can be more than one generic term for a particular genus. *In re 1800Mattress.com IP, LLC*, 586

F. 3d 1359, 1364, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009).

The applicant argues, "The mark FUNCTIONAL EVALUATIONS does not describe these services and is not understood by the relevant public primarily to refer to medical diagnostic services for the legal and medical community." See Response.

The examining attorney disagrees. The attached and previously attached evidence demonstrates that the phrase FUNCTIONAL EVALUATIONS has an understood meaning in both the legal and medical community. See sample excerpts below.

On Findlaw.com for Legal Professionals in an article entitled "Functional outcome evaluation of the head injured: Its Effect on Legal Rights:" "In conclusion, the growing area of functional evaluation will validate rehabilitation efforts and greatly improve the legal rights of persons with head injury."

On Leadingedgephysio.com: "If you or your client has sustained an injury and are in need of return to work planning, work modification suggestions, legal interpretation of the impact of injury and/or recommendations regarding ongoing rehabilitation, perhaps a functional evaluation would be useful."

On ISR-institute.com: "ISR Institute provides nationwide, job specific, ADA compliant functional evaluations on employee applicants before job assignment...and for return to work of existing employees...following injury, illness or change in safe work capacity status."

On Phiphysio.com under Title "Functional Abilities Evaluation:" "Baseline Evaluation: This objective, functional evaluation is completed to establish a starting point for rehabilitation and allows each program to be specifically and accurately customized."

From the attached and previously attached evidence, it is clear that the mark is used in a generic fashion in both the legal and medical community and therefore, the relevant public would understand the designation to primarily refer to the genus of applicant's services.

The applicant's request for reconsideration presents no new issues or evidence and therefore, is denied. In its Request for Reconsideration, the applicant referred to and attached multiple copies of third party registrations containing either the term FUNCTIONAL or EVALUATION on the Principal Register to support its contention that the proposed mark should be registered. See Request for reconsideration filed October 15, 2013.

The fact that third-party registrations exist for marks allegedly similar to applicant's mark is not conclusive on the issue of descriptiveness. *See In re Scholastic Testing Serv.*, *Inc.*, 196 USPQ 517, 519 (TTAB 1977); TMEP §1209.03(a). An applied-for mark that is merely descriptive (or generic) does not become registrable simply because other seemingly similar marks appear on the register. *In re Scholastic Testing Serv.*, *Inc.*, 196 USPQ at 519; TMEP §1209.03(a).

It is well settled that each case must be decided on its own facts and the Trademark Trial and Appeal Board is not bound by prior decisions involving different records. *See In re Nett Designs, Inc.*, 236 F. 3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Lean Line, Inc.*, 229 USPQ 781, 783 (TTAB 1986); TMEP §1209.03(a). The question of whether a mark is merely descriptive is determined based on the evidence of record at the time each registration is sought. *In re theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1064 (TTAB 2011); TMEP §1209.03(a); *see In re Nett Designs, Inc.*, 236 F.3d at 1342, 57

USPQ2d at 1566.

The mark FUNCTIONAL EVALUATIONS is generic and therefore, refusal under Trademark Act Section 23(c) is maintained and made final.

Applicant cannot overcome this refusal by submitting a claim of acquired distinctiveness under Trademark Act Section 2(f). See 15 U.S.C. §1052(f). Such a claim would be insufficient because no amount of purported proof that a generic mark has acquired secondary meaning can transform it into a registrable trademark or service mark. See *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 1317 n.4, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990); *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989, 228 USPQ 528, 530 (Fed. Cir. 1986); TMEP §1212.02(i). A generic term cannot become a trademark or service mark under any circumstance.

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We guarantee each Functional Evaluation achieves the highest standard of excellence. Our dedicated full-time staff has received the most extensive training currently available for Functional Evaluations. Our computerized system applies technology to the standardized tests. This provides an increase in reliability, as well as ease of evaluator reporting. We deploy our exclusive technology--the only technology proven in thousands of examinations from our research--to deliver the most accurate information for sound claims and better decision making.

Valuable Results

Functional Evaluations are an excellent means of quantifying the effectiveness of treatment. Our diagnostic reports are a great resource for documentation. They serve in providing an accurate diagnosis of a patient's problem area(s), as well as an objective viewpoint for baseline and ongoing patient status. The value derived from Functional Evaluation testing is immeasurable.

Convenience of In-Office Testing

Physicians recognize the importance of Functional Evaluation testing in their offices but may be concerned with the negative reputation associated with non-professional "medical providers." We are committed to providing physicians with top-tier Functional Evaluation testing, while maintaining unmatched quality of patient care. No matter where you are located, FunctionalEvaluations.com will bring our testing services to your office. On-site testing serves as a convenience for physicians, as well as patients. These tests are non-invasive and patient friendly. Patients are, and should remain, our top priority.

Experience & Reputation

Since 2001, we have continued to deliver the most objective and comprehensive functional testing available. Our reputation is most important. We do not provide any other service that could compromise the integrity of our evaluations. We are dedicated to providing Functional Evaluation Services with the most advanced technologies and research available. We stake our reputation on each Functional Evaluation we perform.

Critical Information

To appropriately adjudicate a claim it is essential to use a Functional Evaluation that provides an accurate and unbiased clinical understanding of a patient's true physical ability. Without this objective information inappropriate claim decisions may result in an increased loss of time, unnecessary treatment, and an opportunity to abuse the claims process. This is unacceptable for all parties who expect an equitable resolution of a claim.

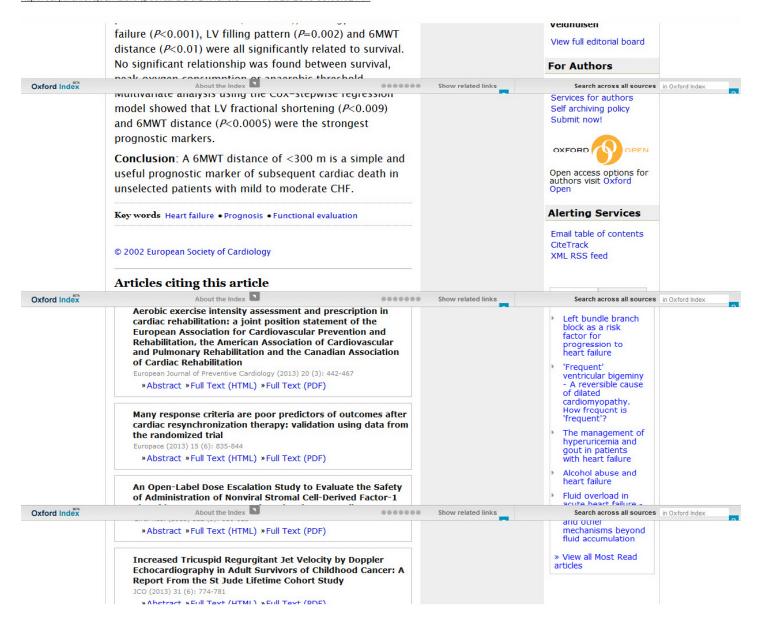
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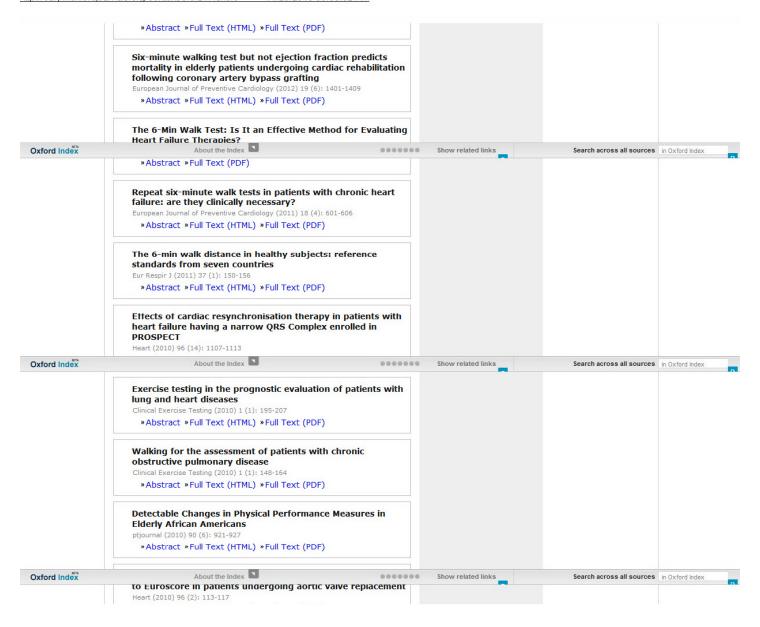
If it is not defensible, do not use it. With over a decade of research and development our technology delivers a defensible Functional Evaluation which consistently proves itself in the most litigious jurisdictions in the United States. This technology has been identified by and upheld in the court system.

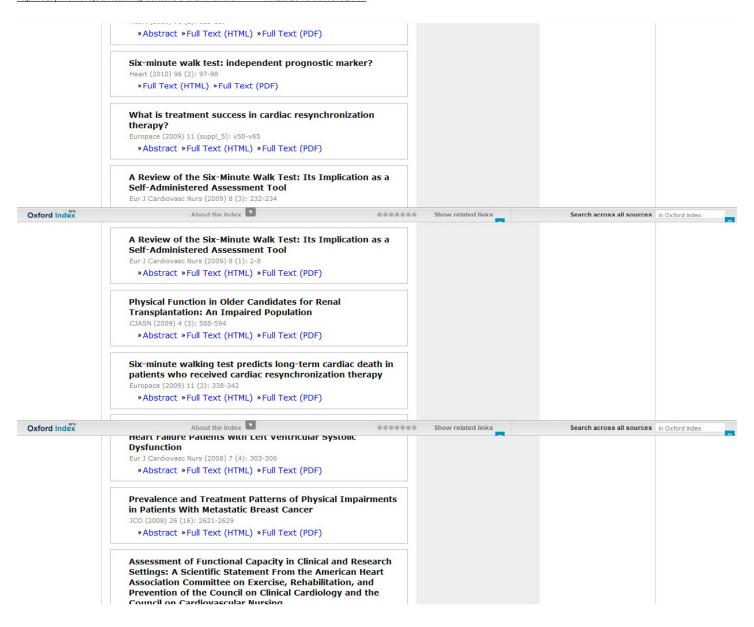
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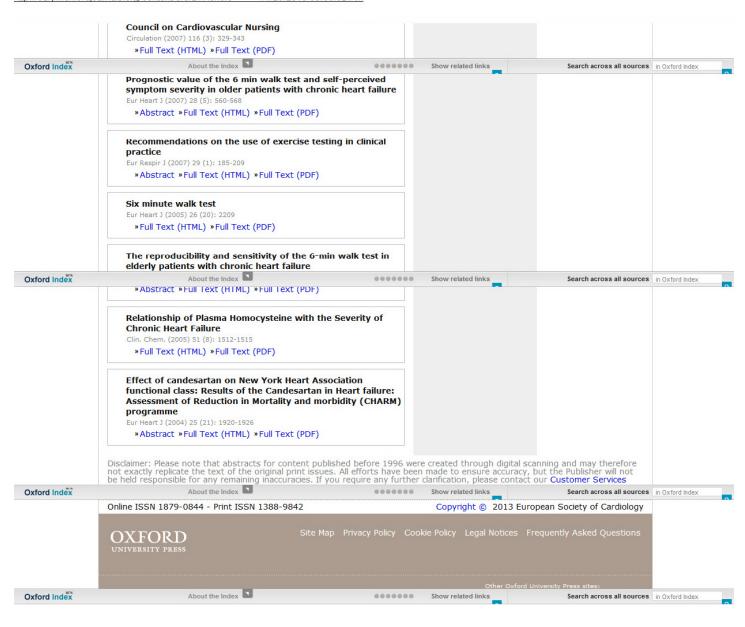








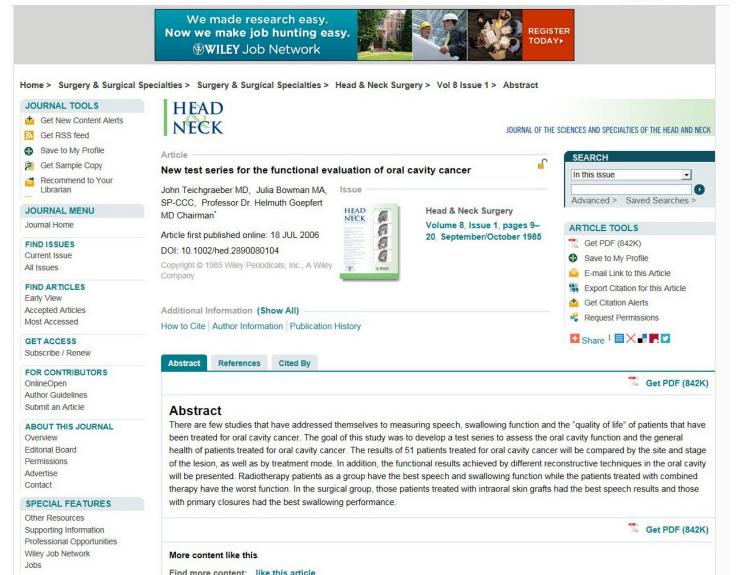




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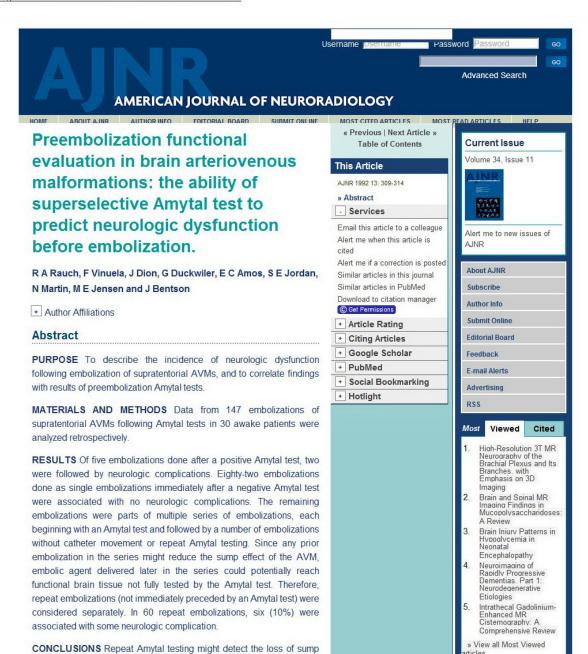
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effect as the AVM is embolized. We conclude that use of data from superselective Amytal tests adds to the safety of AVM embolizations and that repeat Amytal testing potentially could be valuable when serial embolization of a vessel is planned.

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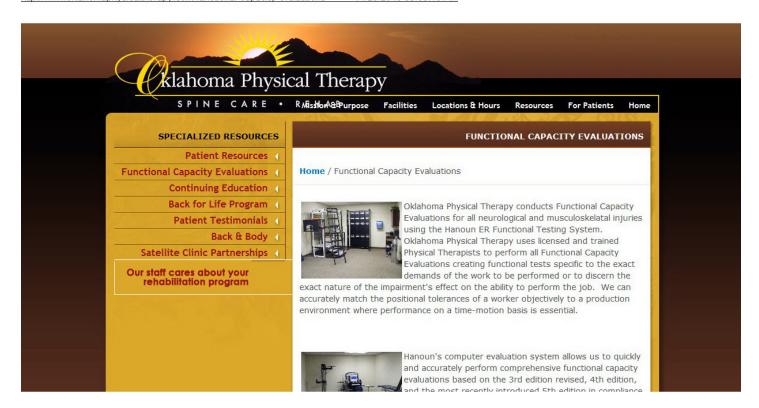
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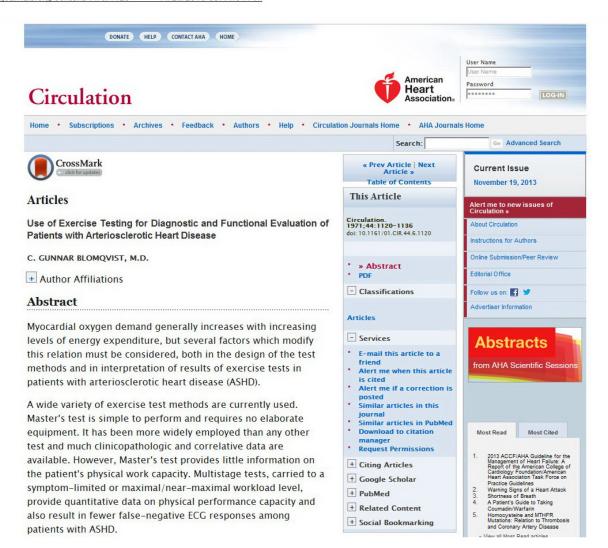
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Key Words:

- · Myocardial oxygen demand
- · Exercise methods and end points
- Latent coronary disease
- Occupational activities
- Chest pain
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A Pre-Clinical Test Platform for the Functional Evaluation of Scaffolds for Musculoskeletal Defects: The Meniscus

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F.IVI. MILDY CHAIL, OTTHOPAEUIC DIOMECHANICS

Russell F. Warren, MD

Attending Orthopaedic Surgeon, Hospital for Special Surgery Professor of Orthopaedic Surgery, Weill Cornell Medical College

Abstract

In an attempt to delay the progression of osteoarthritis from an index injury, early intervention via repair of injured musculoskeletal soft tissue has been advocated. Despite the development of a number of scaffolds intended to treat soft tissue defects, information about their functional performance is lacking. The goal of this study was to consolidate a suite of in vitro and in vivo models into a pre-clinical test platform to assess the functional performance of meniscal repair scaffolds. Our objective was to assess the ability of a scaffold (Actifit™; Orteq, UK) to carry load without detrimentally abrading against articular cartilage. Three test modules were used to assess the functional performance of meniscal repair scaffolds. The first module tested the ability of the scaffold to carry load in an in vitro model designed to measure the change in normal contact stress magnitude on the tibial plateau of cadaveric knees after scaffold implantation. The second module assessed the in vitro frictional coefficient of the scaffold against cartilage to assess the likelihood that the scaffold would destructively abrade against articular cartilage in vivo. The third module consisted of an assessment of functional performance in vivo by measuring the structure and composition of articular cartilage across the tibial plateau 12 months after scaffold implantation in an ovine model. In vitro, the scaffold improved contact mechanics relative to a partly meniscectomized knee suggesting that, in vivo, less damage would be seen in the scaffold implanted knees vs. partly meniscectomized knees. However, there was no significant difference in the condition of articular cartilage between the two groups. Moreover, in spite of the high coefficient of friction between the scaffold and articular cartilage, there was no significant damage in the articular cartilage underneath the scaffold. The discrepancy between the in vitro and in vivo models was likely influenced by the abundant tissue generated within the scaffold and the unexpected tissue that regenerated within the site of the partial meniscectomy. We are currently augmenting our suite of tests so that we can pre-clinically evaluate the functional performance at time zero and as a function of time after implantation

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This article appears in HSS Journal: Volume 7, Number 2.

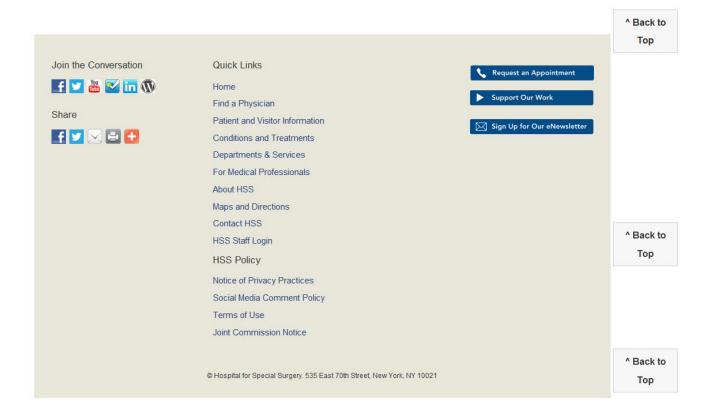
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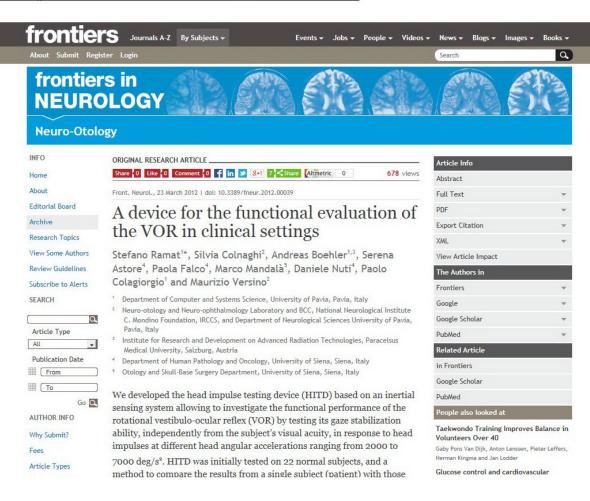
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method to compare the results from a single subject (patient) with those from controls was set up. As a pilot study, we tested the HITD in 39 dizzy patients suffering, non-acutely, from different kinds of vestibular disorders. The results obtained with the HITD were comparable with those from the clinical head impulse test (HIT), but an higher number of abnormalities was detectable by HITD in the central vestibular disorders group. The HITD appears to be a promising tool for detecting abnormal VOR performance while providing information on the functional performance of the rotational VOR, and can provide a valuable assistance to the clinical evaluation of patients with vestibular disorders.

Keywords: VOR testing, head impulse test, semicircular canals, rVOR, dynamic visual acuity Citation: Ramat S, Colnaghi S, Boehler A, Astore S, Falco P, Mandalà M, Nuti D, Colagiorgio P and Versino M (2012) A device for the functional evaluation of the VOR in clinical settings. Front. Neur. 3:39. doi: 10.3389/fneur.2012.00039

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FAI - What is it & why we are seeing more of it?

REHAB OF THE ATHLETE

Screening Faulty Movement Patterns

By Craig Liebenson On September 25, 2011 - 2 Comments

In the Faulty Movement Pattern courses functional evaluation is a key

What is unique about the functional paradigm?

We base treatment of functional not structural pathology

We distinguish pain and dysfunction & focus treatment on dysfunction

The goal of care is resumption of activities, not pain relief

There are no protocols only principles

Therefore, each patient or athlete's routine is customized

"Dan John" said, "Your training should, in some manner or form, lead you, at some level, to achieving your goals."

In the functional paradigm we not only want to know about our patient's pain, but how it limits their activities.

Dr Lewit has taught for 50 years that structural pathology is often coincidental while functional pathology of the motor system is basis for manual medicine & rehabilitation

Pr Janda said "time spent in assessment will save time in treatment"

He taught 6 basic movement pattern tests. This can be compared with Gray Cook's influential functional movement screen (FMS)

Functional-Pathology-of-the-Motor-System

Faulty Movement Patterns as a Cause of Articular Dysfunction

Our courses begin with a simple movement pattern screen called the – Mag 7 $\,$

Lumbar ROM

Wall Angel

OH Squat

1 leg balance

1 leg squat

Dynamic inline lunge or 1 leg bridge

Breathing

How Chosen:

Basic attributes needing to be evaluated -

mobility - Lumbar ROM/Thoracic ROM/Shoulder ROM/Hip ROM/Ankle ROM

 $posture-slumped/round\ shoulderered/head\ forward/shrugged\ shoulders/knock\ kneeed/sway\ back$

functional strength - squat/inline lunge/1 leg squat

balance-1 leg stance/inline lunge/1 leg squat/deep squat

respiration - upright/recumbent/inhalation/forced exhalation

All 3 Planes of Motion need to be addressed -



All 3 FIAIRS OF MOROIDI REED TO DE AUGUESSEU -

Sagittal - Wall Angel, OH Squat, Respiration/IAP

Frontal - 1 leg Balance, 1 Leg Squat

Transverse - 1 Leg Bridge

Scoring:

Distinguish PAIN VS DYSFUNCTION

For pain think McKenzie or Orthopedic evaluation

Any pain found is to be used as a post-treatment re-assessment or audit to show patient progress in acute/subacute care

For dysfunction think Janda or abnormal motor control

The "key link" is usually a painless dysfunction

Gray Cook's numerical scale 0-3 is a big step forward

Pain vs discomfort is well discussed in Gray's book Movement.

When in doubt score down - this is important for the sake of reliability in the exam

Importance of asymmetry

Lumbar ROM

Angel

Balance

1 leg squat

Inline lunge

Priorities:

Some tests are fundamental traits ("hard-wired") while others are skills (learned)

If Fundamental deficit (0/1) is present correct that before Skill deficit

Skills require stability which has to be trained

Fundamentals

1 leg balance

Respiration

Mobility - Lumbar/Angel

Skills

Squat - sagital stability

1 leg squat - frontal stability

Inline lunge - balance stability

Break outs:

When a "key link" or painless dysfunction is found there are certain specific "go to" moves we use to facilitate it.

1 leg balance - rocker board/Vele/calf & hip stretches/front plank/1 leg stance track/B dogs

Respiration

- a) Inhalation dysfunx band/belly breathing/T4
- b) Exhalation dysfunction Brugger/Plank/Jumping plyos

Mobility - Hips/T4/supported squats/bridges/side bridges/bird dogs

Typically, this will groove the skills, but this does not mean the skills are not trained. When any training is performed the cues should be external rather than internal meaning they should be goal oriented or "reactive" than cortical.

Additional Tests:

My book "Rehabilitation of the Spine" comes with a DVD that covers over 20 key functional assessments including -

Janda's Hip Abduction

Vele's test for intrinsic toe flexors

Here is a short list of key exercises we covered

Core Training - McGill Big 3

Squats (dowel, hip hinge, 2 x 4)

Piriformis stretch supine

Psoas stretches

Sunnarted Functional Reach

Supported Functional Reach Angle Lunge with Reach Dying Bug off Wall Foam Vertical T4 Sphinx T4 Rotation Clam Shell Monster Walk Lateral Band Walk Micr0-Breaks Push-Up w/ Plus Baby Get Up







My new DVD series covers -







"Flexibility/Yoga/Ergonomics & Posture Advice"

"Core Training"

"Functional Performance Training"

Treatment Planning

Start patient with exercises targeted to painless dysfunction

Use the Clinical Audit Process (CAP) to progress patients towards their functional goals

"Progressing Patients"

Here is a write up on Yoga sans "Down Dog" type exercises as a treatment for sciatica.

Here is a write up on Yoga sans "Down Dog" type exercises as a treatment for sciatica.

Yoga Journal - Back Builders





2 Responses to Screening Faulty Movement Patterns

Craig's Liebenson's DVDs says: October 1, 2011 at 7:06 pm [...] released his new 3-DVD set that answers just that. But as always, we must first start with a functional evaluation. Because without this, as Dr. Liebenson says, "any training flexibility, stability, or [...] Reply



Jason Brown, DC says:

I was just watching the Flexibility Training & Yoga DVD earlier this week. I have all 3 DVDs and they are a great refresher for those familiar with this paradigm and these exercises or can be an exceptional introduction for those looking to expand their clinical tools.

Reply

Leave a Reply

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To: Chillemi, Michael (torourke@bodnerorourke.com)

Subject: U.S. TRADEMARK APPLICATION NO. 85497733 - FUNCTIONAL

EVALUATIONS - N/A

Sent: 11/25/2013 9:55:33 AM

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Attachments:

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