SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

MATTHEW BEYER & MARILYN BEYER,

Plaintiff(s),

INDEX No. 11334/97

-against-

MOTION DATE: 9/14/00

PORT MOTORS DAILY RENTAL, INC., CATHERINE FLYNN, ADELWERTH BUS & CAROL ANN HUNTER,

Defendant(s).

MOTION SEQ. No. 3, 4

The following papers read on this motion:

Adelwerth Notice of Motion/Affirmation/Exhibits
Port Motors/Notice of Motion/Affirmation/Exhibits A-G
Affirmation in Opposition/Exhibits A-G
Reply Affirmation

Defendants seek Orders granting them summary judgment. Plaintiff opposes.

In this action plaintiff MATTHEW BEYER seeks money damages for injuries allegedly received in an automobile collision on September 8, 1995 with defendant PORT MOTORS DAILY RENTAL INC. and CATHERINE FLYNN. He claims that he received additional injuries as a result of a second automobile collision on March 8, 1998 involving defendants ADELWERTH BUS CORP. and CAROL ANN HUNTER. Plaintiff alleges that as a result of the first accident he sustained injuries to his neck and back In his Bill of Particulars, dated July 30, 1997, the plaintiff claims that as a result of the first collision he suffered cervical

sprains and strains with related restriction of motion. He also claimed lost earnings in the sum of $85,000.00.

The plaintiff alleges that these injuries were worsened and re-injured as a result of the second accident. In his Bill of Particulars relating to the second collision, plaintiff claims that he again suffered cervical and lumbar strains and sprain, restriction of motion and exacerbations of his earlier injuries. He again claimed that he missed work and lost earnings.

The moving defendants seek summary judgment dismissing all of the claims, contending that the plaintiff has failed to demonstrate that he suffered serious physical injuries as defined by the Insurance Law, the threshold necessary to maintain this action in Supreme Court. CPLR § 3212, Insurance Law §§ 5102, 5104.

Defendants offer affirmations from both a neurologist and an orthopedist who examined plaintiff and found that he suffered no permanent serious limitations or disabilities.

Plaintiff underwent an independent neurological examination by Dr. Marina Neystat on July 1, 1999. Dr. Neystat examined plaintiff and noted his complaints of headaches, lower back, neck pain, arm and wrist pain. She noted his medical history. The neurologist examined the plaintiff and found the motion, sensory and reflexes in his neck and back were normal, and that his motor power was good. Dr. Neystat diagnosed plaintiff with having suffered a fibromuscular sprains, and headaches, but found normal neurological results. She found no need for any further neurological treatment with no disability.(Motion, Exh. G).

Plaintiff was further examined by Dr. Joseph Paul, an orthopedist, on July 1, 1999. Dr. Paul reviewed plaintiff's medical history. Plaintiff complained of occasional headaches, neck pain, lower back pain, and arm, hand and leg pain. The orthopedist performed several tests and found his lordotic and cervical curve was normal, there were no signs of muscle spasm, tenderness, and that rotation and flexion was normal. He found that his reflexes and sensation were normal. He found a normal range of motion. He found no orthopedic abnormality to plaintiff's hands. Dr. Paul diagnosed the plaintiff as having suffered cervical and lumbar spine sprains, leg, arm and hand sprains, all of which had resolved. He stated that he could not find objective clinical evidence that plaintiff currently suffered any orthopedic disability. (Motion, Exh. F).

Based on his examination, Dr. Paul concluded that plaintiff was orthopedically stable and did not demonstrate any objective signs of residual or permanent disability. (Motion, Exh. F).

In opposition plaintiff offers an affirmation from plaintiff's treating osteopath, which counsel argues raises a triable issue of fact with respect to whether plaintiff suffered serious physical injuries. The Court finds that the statement from this physician, Dr. Gregorace, D.O., is insufficient to establish plaintiff suffered serious physical injuries. This affirmation relies on unsworn medical records which have no probative value and are not properly considered by the Court. *Pagano v. Kingsburry*, 182 A.D.2d (2nd Dept. 1992); *Merisca v. Alford*, 243 A.D.2d 613 (2nd Dept., 1997). The records of tests not personally performed by this physician are not properly before the Court. *Ventura v. Moritz*, 255 A.D.2d 506 (2nd Dept. 1998).

On the merits, a review of the doctor's affirmation shows little objective proof to confirm plaintiff's subjective complaints of pain and continued injury. His stated findings are merely conclusory and mirror the language of the statute is wholly insufficient. *Giannadis v. Paschilidou*, 212 A.D.2d 502 (2nd Dept. 1995). The doctor does not state with any specificity any activities which plaintiff's injuries prevented him from engaging in, nor does he state any medical limitations the plaintiff has sustained. *Kauderer v. Penta*, 261 A.D.2d 365 (2nd Dept. 1999).

There is no indication that any of the tests referenced by the physician were performed after 1998, two years ago. There is no indication of any more recent objective tests. Medical proof not predicated upon a recent examination is insufficient to demonstrate serious injuries to meet the threshold as set forth in the Insurance Law. *Guitterrez v. Metropolitan Bus Authority*, 240 A.D.2d 469 (2nd Dept. 1997); *Kauderer v. Penta, supra.*

The doctor fails to state that the plaintiff currently suffers any permanent or serious disability. Finally his reliance on other medical examinations in 1998, two years ago, does not demonstrate a permanent significant limitation or disability. His conclusion that the plaintiff suffered spasms and restricted motion does not meet the threshold requirements. The doctor fails to state any recent objective tests he performed on the plaintiff. He states forth no diagnosis he made in light of any sworn reports or objective tests performed. His

Report from his examination is not verified and is based primarily on subjective complaints of pain. (Opposition, Exh. A, B). The Court notes however, that this physician states in his Report that as of July 2000 plaintiff was neurologically intact and had full range of motion in his cervical spine. He notes that plaintiff's lumbar spine limitations is "symptomatic" and his findings are largely based on complaints of pain. (Opposition, Exh. B).

An unsworn report from the plaintiff's chiropractor is also not properly before the Court. (Plaintiff, Exh. E). It is not an affidavit or otherwise sworn to and not properly considered. CPLR § 2106, *Young v. Ryan*, 265 A.D.2d 547 (2nd Dept 1999). Again, on the merits it fails to demonstrate that plaintiff suffered serious physical injuries as required by the Insurance Law. Again, many of the conclusions of the doctor are based on tests performed by others, more than two years before the current examination. His report indicates that the plaintiff denied radiating pain or numbness, but merely complained of occipital headaches with occasional wrist and lower back pain. The report concludes in finding mere strains and sprains, stating nothing of either permanence or significance. Although there is language stating a finding of restriction of motion, there is no indication of any current objective test by this chiropractor performed to support that conclusion.

Plaintiff also offers unsworn medical records and reports. The plaintiff's reliance on unsworn medical records to support his claims, is inappropriate. Unsworn medical reports are not in admissible form and alone are insufficient to establish serious physical injury. *Valencia v. Lui*, 239 A.D.2d 339 (2nd Dept. 1997); *Feintuch v. Grella*, 209 A.D.2d 377 (2nd Dept. 1994). In addition, the records show no recent treatment or diagnosis, none more recent than mid-1999. Plaintiff's statements that he was otherwise limited due to his own subjective complaints of pain are insufficient to defeat summary judgment.

As the Second Department most recently noted, the proof in the form submitted by the plaintiff is insufficient to meet the threshold standards. The plaintiff has failed to adequately explain the current gap in treatment over the past year. The plaintiff has failed to submit quantitative objective findings form current examinations to support the physician's opinion of serious injury. There is a lack of evidence in proper form presented from persons who personally performed objective examinations of the plaintiff to support the

conclusions of significant limitations of motion. *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2nd Dept. 2000).

Although plaintiff alleges that his injuries prevented him from performing all of his normal activities for 90 of the 180 days immediately following the accident, his proof supporting that contention is insufficient. Plaintiff testified at his deposition that he only missed a few weeks of work, and thereafter returned. There is no evidence that there were any specific activities that he was unable to perform after that time. There is no indication of any customary daily activity at or outside of work, which he could not perform due to his injuries.

In any event, a plaintiff's testimony that he was out of work for at least six months while under active medical care, did not, in the absence of a physician's affidavit substantiating that his alleged impairment was attributable to a medically determined injury, suffice to raise a triable issue of fact. *Sigona v. NYCTA*, 255 A.D.2d 231 (1st Dept. 1998). A plaintiff must show that the restrictions alleged were medically indicated or that the curtailed activities comprised a significant portion of plaintiff's usual daily activities. *Below v. Randall*, 240 A.D.2d 439 (3rd Dept. 1997).

The term "serious injury" is defined for the purposes of this action in Insurance Law 5102(d). "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. In order to bring the present action, plaintiffs must set forth evidence that they have incurred serious injuries in accordance with this definition.

Courts have consistently held that conclusory allegations that the plaintiffs injuries are "permanent" are insufficient to make out a prima facie claim of serious injury to defeat a motion for summary judgment.

Licari v. Elliot, 57 N.Y.2d 678(1987); *Gaddy v. Eyler*, 79 N.Y.2d 955 (1992). Conclusions of even an examining physician which are unsupported by acceptable medical evidence are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury. *Georgia v. Ramautar*, 180 A.D.2d 713 (2nd Dept. 1992). Mere sprains and strains do not constitute serious physical injury. *DeFilippo v. White*, 101 A.D.2d 801 (2nd Dept. 1984). Further, mere minor limitation of motion or range is insufficient.

A doctor must cite the objective tests performed on the injured plaintiff or specify not only the extent and degree of any limitation of movement of the cervical or lumbar spine, but also its duration. *Giannakis v. Paschlidou*, 212 A.D.2d 502 (2nd Dept. 1995); *Weber v. Harbus*, 212 A.D.2d 525 (2nd Dept. 1995). Thus, the medical opinions such as those expressed by the chiropractor and doctor examining plaintiff do not constitute competent evidence of a continued permanent "serious injury" for the purposes of Insurance Law § 5102(d). *Scheer v. Koubek*, 70 N.Y.2d 678 (1987); *Marshall v. Albano*, 182 A.D.2d 614 (2nd Dept. 1992).

In order to find that an injury constitutes a permanent loss of a use of body part or organ, or function or system, the Courts have determined that a plaintiff must establish that the loss is permanent and more than a mere limitation. It must be permanent and consequential. *Oberly v. Bangs Ambulance*, 2000 WL 893301 (3rd Dept. 2000). There must be a medical showing that the limitation is significant.

It is the burden of the plaintiff to establish his or her serious physical injury by providing the Court with objective medical evidence, that there is a degree and extent of limitation of use and or function, which is permanent. Such objective proof must be more than an attorney's affirmation or plaintiff's affidavit. It must be a medical opinion supported by objective tests, such as x-rays, MRIs, Laseque tests or other recognized tests with quantitative results. Such tests, to be considered by the Court must be provided in admissible form. *Grasso v. Angerami*, 79 N.Y.2d 813 (1991); *Friedman v. U-Haul Truck Rental*, 216 A.D.2d 266 (2nd Dept. 1995); *Paganop v. Kingsbury*, 182 A.D.2d 268 (2nd Dept. 1992). Uncertified medical records and reports containing diagnoses and opinion of persons who are not the affirmed, lack probative value and cannot be relied upon to defeat a motion for summary judgment. *Ventura v. Moritz*, 255 A.D.2d 506 (2nd Dept. 1998); *McGuirk v. Vedder*, 2000 NY SLIP OP 3406, 706 N.Y.S.2d 485 (3rd Dept. 2000).

The Courts required objective medical findings and diagnostic tests to support a plaintiff's complaints of pain and limitation. Such shall include: (1) a detailed percentage of loss of range of motion; (2) objective orthopedic or neurological tests and results; (3) a medical opinion relating to those test results to the injuries claimed; (4) proof establishing that the injuries were caused by the accident; and (5) a sworn medical opinion that the injuries are permanent. *Barbarulo v. Allery*, 707 N.Y.S.2d 268 (3rd Dept. 2000).

The Courts insist on the plaintiff providing verified medical findings to support plaintiff's claims of permanent injuries. The objective medical evidence must: (1) be based on a recent examination; (2) must explain any lapse or discontinuance of treatment; (3) must contain quantitative objective findings; and (4) must state opinions as to the significance and permanency of the injuries. *Grossman v. Wright,* 268 A.D. 79, 707 N.Y.S.2d 233 (2nd Dept. 2000).

Based on the foregoing and the evidence presented, defendants' motion for summary judgment pursuant to CPLR § 3212 is Granted, as plaintiffs failed to set forth the necessary proof establishing that either plaintiff has suffered serious injury as required under the Insurance Law as is a necessary threshold requirement to state a cause of action.

It is, SO ORDERED.

Dated: Dec 18, 2000

HON. GEOFFREY J. O'CONNELL, J.S.C.