SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN W. BURKE

Justice

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HAROLD ROMAN and IRENE GONZALEZ-ROMAN,

Plaintiffs,

-against-

JOSEPH R. CREIGHTON,

Defendant.

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TRIAL/I.A.S. PART 1
NASSAU COUNTY

INDEX NO.03990/01

MOTION DATE:5/16/03

MOTION NO.002

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Upon the foregoing papers the defendant's motion for summary judgment on the grounds that the injured plaintiff did not suffer a "serious injury" under Insurance Law 5102(d) is denied.

The accident occurred on August 1, 2000, when the defendant ignored a yield sign and struck the plaintiff's car. The defendant's testimony is that the force of the collision caused the plaintiff's vehicle to "bounce off," "continue north" and "went over the service road divider." The defendant's car spun 360 degrees as a result of the impact.

The plaintiff testified that the accident caused him to lose consciousness and he did not remember how the accident occurred. His first memory after the accident is waking up in the emergency room of Nassau Hospital. He did not return to work until October 24, 2000 and missed another eight days in January 2001. He was employed as an electrician for the New York City Transit Authority doing repairs, installation and electrical wiring. These are obviously tasks which require skilled manual labor. He stated that he was placed on maintenance, "the closest thing to light duty on my job."

The defendant conducted independent medical examinations of the plaintiff in April 2002, some 21 months after the accident. The IME's, conducted by a neurologist and an orthopedist, found that the soft tissue injuries incurred by the plaintiff had subsided.

The affirmed reports provided by the plaintiff's physicians found that he suffered a permanent consequential limitation with respect to the use of his lumbar and cervical spine based on objective testing, MRI's and EMG's. Further, the plaintiff's claims are supported by his treating doctors' affirmed reports that he had a medically based disability preventing him from performing substantially all of the material acts that constitute his usual and customary daily activities, including attending work, for more that 90 days of the 180 days following the occurrence. The findings of his physicians are sufficient to raise triable issues of fact in this action (Adetunji v. U-Haul Company of Wisconsin, Inc., 250 AD2d 483; Trebing v. Jeffrey, 226 AD2d 592).

MRI's have been held to be objective evidence providing an ample medical foundation in support of a patient's subjective complaints of pain (see, e.g., Hawkey v. Jefferson Motors, 245 AD2d 785; Hassam v. Rock, 290 AD2d 625; Anderson v. Persell, 272 AD2d 733; Boehm v. Estate of Mack, 255 AD2d 749; Hawkey v. Jefferson Motors, 245 AD2d 785; cf., Mikl v. Shufelt, 285 AD2d 949; Rose v. Furgerson, 281 AD2d 857, lv denied 97 NY2d 602; Guzman v. Paul Michael Mgt., 266 AD2d 508).

In Chaplin v. Taylor, 273 AD2d 188, the court held: "A disc herniation may constitute a serious injury within the meaning of the Insurance Law (see, Flanagan v. Hoeg, 212 AD2d 756, 757; Boehm v. Estate of Mack, *supra*. The defendant failed to demonstrate that the herniation was not causally related to the subject accident."

Finally, the facts of this case must be applied to the ruling in Toure v. Avis Rent-A-Car, 98 NY2d 345. In the preface to the decision on three separate cases all dealing with the sufficiency of proof in establishing "serious injury" under Insurance Law 5102, the court said:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (see, e.g., Dufel v. Green, 84 NY2d 795, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see, Dufel, 84 NY2d at 798). When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be

> wholly speculative, thereby frustrating the legislative intent of the No Fault Law to eliminate statutory-insignificant injuries or frivolous claims."

The Court of Appeals in effect has established a four-pronged test for sufficiency in meeting the "serious injury" threshold:

> 1. An expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury.
>
> 2. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.
>
> 3. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact.
>
> 4. An expert's unsupported opinion not having an objective basis may be wholly speculative and worthy of dismissal.

The failure of the defendant to make a *prima facie* case, that is, his experts' opinions did not have an objective basis and thus were wholly speculative and worthy of dismissal, coupled with plaintiff having a triable issue of fact as to the length of time he was unable to work and the MRI findings, are sufficient to defeat this motion for summary judgment.

The Second Department has held that in order for defendants to establish a *prima facie* case that the injured plaintiff did not sustain a serious injury within the meaning of the Insurance law, the defendant must proffer the plaintiff's treating physicians' reports.

In Connors v. Center City, Inc., 291 AD2d 4786, the court held:

> "The defendant... failed to make a *prima facie* showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). In support of his motion for summary judgment (defendant) submitted the affirmed medical evaluations of

his physicians, which were based on examinations performed more than 1½ years after the accident. Those physicians concluded that the injured plaintiff was not disabled at the time of their examinations. However, this proof was insufficient to establish that the injured plaintiff did not sustain a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident (see, Frier v. Teague, 288 AD2d 177, 732 NYS2d 428; DePetres v. Kaiser, 244 AD2d 851, 665 NYS2d 221). Moreover, the injured plaintiff's affidavit, the affidavit of her treating physicians, and other medical evidence in the record, raise a triable issue of fact as to whether the injured plaintiff sustained a medically-determined injury which prevented her from performing his usual activities 'to a great extent rather than some slight curtailment' for the statutory period (Licari v. Elliott, 57 NY2d 230, 236, 455 NYS2d 570, 441 NE2d 1088; see, Krakofsky v. Fox-Rizzi, 273 AD2d 277, 709 NYS2d 856; Shifren v. Scheiner, 269 AD2d 381, 702 NYS2d 377; Kaywood v. Pumillo, 264 AD2d 382, 693 NYS2d 441; Ryan v. Xuda, 243 AD2d 457, 663 NYS2d 220)."

In the instant case, the IME's were not conducted until 21 months after the subject accident. The plaintiff has raised sufficient triable issues of fact concerning the seriousness of his injuries to defeat this motion for summary judgment (Berkly v. Emma, 291 AD2d 517; Urbanski v. Mulieri, 287 AD2d 710).

The defendants' motion for summary judgment is denied.

Plaintiffs are directed to serve a copy of this order upon the defendants within 10 days of the date hereof.

Dated: JUN 05 2003

ENTERED

J. S. C.

JUN 11 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE