

SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 28
NASSAU COUNTY

DAVID SALERNO,

Plaintiff,

-against-

Index #: 09601/00

Motion Seq. #: 002

Motion Date: 01/08/03

ELISABETE DASILVA,

Defendant.

The following paper read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

The motion by defendant, Elisabete Dasilva, for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212 on the ground that plaintiff, David Salerno, did not sustain a serious injury within the purview of Insurance Law §5102(d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on July 13, 1997.

In his bill of particulars, plaintiff alleges that he sustained the following injuries:

- Disc bulge at C6-7 with marked hypertrophic change of the right unvertebral joints with marked narrowing of the right neural foramen
- Moderate foraminal enroachment/narrowing of the vertebral foramen causing bony impingement of the spinal nerves on the right side at C5-7, and moderate nerve impingement on the left side at C6-7
- Bilateral neural foraminal narrowing at C5-6
- Bilateral cervical radiculopathy
- Vertebral subluxation complex with marked subluxation at C2-7, and moderate subluxation at T1-4 vertebrae
- Acute severe post traumatic cervical disc disorder and cervical nerve root irritation associated with cervical sprain/strain and cervical

myofascitis and
tension headaches

-Acute severe post traumatic nerve root irritation associated with thoracic myospasm and thoracic sprain/strain secondary to thoracic segmental dysfunction

-Straightening of the normal lordosis of the cervical spine

-Cervical sprain with left cervical radiculitis

-Reduced range of motion and parathesia in the shoulders on the left side

-Muscle weakness in the deltoids and trapezius muscles in the left arm

-Paracervical and trapezius tenderness and spasm as well as left parascapular pain

Defendant seeks summary judgment dismissing the complaint predicated on the contention that plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d).

The motion is supported by the affirmed report of orthopedic surgeon, Vartkes Khachadurian, M.D., indicating that his examination revealed "[s]tatus post cervical sprain, left shoulder contusion, posttraumatic, resolved." Dr. Khachadurian further opines, that plaintiff did not demonstrate any objective signs of ongoing orthopedic disability, or functional impairment in connection with the motor vehicle accident on July 13, 1997.

The affirmed medical report and other relevant material submitted by defendant made out a *prima facie* case that plaintiff did not sustain a serious injury within the ambit of Insurance Law §5102(d). (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955). Consequently, the burden shifts to plaintiff to come forward with admissible proof establishing a triable issue of fact with respect to the existence of a serious injury.

Plaintiff has met the burden of producing evidence of physical limitations. In this regard, the opposing affidavit submitted by plaintiff's treating chiropractor, Philip N. Epstein, D.C., is based on objective medical observation, as well as objective testing. The chiropractor details

plaintiff's symptoms, including recurring pain and limitation of movement in his cervical and left shoulder area and further concludes that the condition is permanent. The chiropractor also describes a percentage to the degree of limitation, and provides a qualitative assessment of plaintiff's condition setting forth the objective basis of his opinion, which in addition, compared the plaintiff's limitations to the normal function, purpose and use of his neck and left shoulder (**Toure v Avis Rent A Car Systems, Inc.**, 98 N.Y.2d 345, see also **Vitale v Lev Exp. Cab Corp.**, 273 AD2d 225). Specifically, the chiropractor performed an orthopedic examination and found the following:

1. Jackson's compression test for nerve root compression was positive on the left producing moderate pain with radiation into the left shoulder;
2. Soto Hall test for vertebral trauma was positive producing moderate pain with radiation into the left neck.
3. Range of motion testing with a goniometer evidenced multiple areas of restrictions, altered motions and weakness, which were quite high, especially in excess of five (5) years post accident.

The range of motion studies also displayed:

- Cervical ranges of motion were diminished 20% in Flexion, diminished 16% in Extension, diminished 33% in Right Lateral Flexion, diminished 22% in left lateral flexion, diminished 37% in Right Rotation and diminished 44% in Left Rotation;
- Left Shoulder ranges of motion were diminished: 50% in Flexion, 29% in extension, 22% in exterior rotation, 44% in interior rotation and 66% in adduction.

In addition, the cervical MRI findings were narrowing of the neural foramina at C5-6 (bilaterally;) and at C6-7 (on the right) with a bulging disc at C6-7.

Inasmuch, as the cervical and thoracic strain / sprain has been shown to result in a permanent / significant limitation, the medical evidence presented was sufficient to raise a triable

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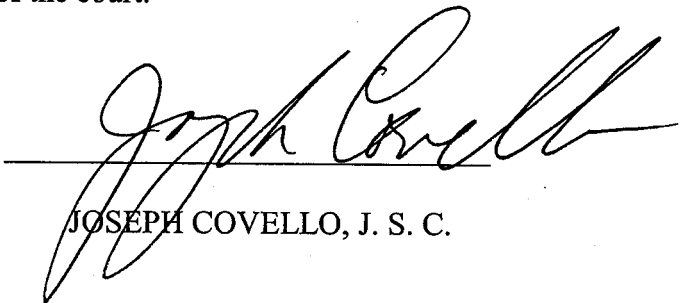
issue of fact, as to whether plaintiff sustained a serious injury within the ambit of Insurance Law §5102(d). (See **Ferguson v Ozog**, 288 AD2d 833; **Mangano v Sherman**; 273 AD2d 836; **Dixon v LaMorticella**, 286 AD2d 951).

In view of the foregoing, this court need not address whether plaintiff established that he sustained a serious injury under the 90 / 180 day category.

Accordingly, the motion is denied.

This constitutes the decision and order of the court.

Dated: April 8, 2003



JOSEPH COVELLO, J. S. C.

ENTERED

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COUNTY CLERK'S OFFICE