

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN P. DUNNE,

Justice

ANDREA BANFIELD,

Plaintiff(s),

-against-

RRM, INC. and SCHERRON SCHALLER,

Defendant(s).

TRIAL/IAS, PART 13
NASSAU COUNTY

MOTION SEQ. No.
1 & 2

INDEX No. 10355/00

MOTION SUBMISSION
DATE: 1/25/02

The following papers read on this motion:

- Notice of Motion.....X
- Cross-Motion.....X
- Answering Affidavits.....XX
- Memorandum of Law.....X

Upon the foregoing papers, it is hereby ordered that plaintiff's motion for summary judgment on the issue of liability and defendant's cross-motion for summary judgment on the issue that plaintiff fails to meet the serious injury threshold requirement of Section 5102(D) of the New York State Insurance Law are decided as follows.

On June 23, 1999, at approximately 8:50 a.m., it is alleged that the plaintiff was operating her car on Nassau Road located in Roosevelt, New York. She stopped her car at its intersection with Pleasant Avenue and waited to make a turn on to Pleasant Avenue. Plaintiff states that while her car was stopped it was struck in the rear by a vehicle operated by Scherron

Schaller and owned by RRM, Inc.

A police report attached to plaintiff's papers describes the accident as a hit in the rear by defendant while plaintiff was stopped.

On the issue of liability, it has become black letter law that a rear-end collision with a stopped moving vehicle imposes a duty on the operator of the moving vehicle to explain how the accident occurred. (**Leal v Wolff**, 224 AD2d 392; **Rodriguez-Johns v Hunt**, ___AD2d___, 718 NYS2d 501; **Jones v Egan**, 252 AD2d 909.) Since there isn't a non-negligent explanation and the plaintiff's deposition testimony submitted by the defendant establishes that plaintiff was stopped for sixty seconds at the intersection before the accident, the plaintiff's motion for summary judgment on the issue of liability is granted.

As a result of the accident the plaintiff was driven to the Island Medical Center and treated in the emergency ward, x-rayed and physical therapy was recommended. The following day she started physical therapy with Dr. Massoff, a chiropractor. The plaintiff went three or four times a week for approximately two years, during which time she received electrical stimulation, cervical adjustment, hot and cold compresses to her shoulder; lower, middle and upper back.

On August 31, 1999, she went for an MRI of the cervical area and on December 19, 2001, she was examined by Dr. Goldman, an orthopedist retained by the plaintiff.

The plaintiff continues to complain of limitation of motion and pain in the affected areas.

The plaintiff, likewise, contends that as a result of the injury she was unable to work for six months after the accident and was confined to bed for three months and to her home for five months.

The plaintiff was examined by the defendant's IME doctor on July 10, 2001. Dr. Lewis,

in his affirmed report, wrote that the plaintiff complained that her initial injuries were to her neck with radiation to the right shoulder, mid and lower back. Her present complaints were neck pain with radiation into the right shoulder. She missed six months from work.

Dr. Lewis based his diagnosis on a review of the plaintiff's Verified Bill of Particulars dated November 17, 2000, and a review of unidentified medical records, a physical examination and history as provided by the plaintiff. Dr. Lewis agreed that the injuries were causally related to the accident. He, however, believed that at this time she had a resolved cervical thoracic and lumbar sprain/strain and there was no objective evidence of a causally related disability. He further contends that there is no objective evidence for continued physical therapy or treatment.

His physical examination of the plaintiff's spine; cervical, thoracic and lumbar, found no tenderness or muscle spasm. All compression tests were negative and the range of motion was completely normal. Both the lower and upper extremities were normal and had a full range of motion.

Plaintiff's response to defendant's cross-motion consists of an affidavit by Dr. Massoff, Dr. Goldman, and the plaintiff; and an MRI report dated August 31, 1999. The MRI report taken of the cervical spine identifies the following two impressions:

- (1) straightened cervical lordoses;
- (2) C2-C3 through C5-C6 bulging discs with cord flattening.

The plaintiff was seen by Dr. Goldman, an orthopedic surgeon, on December 19, 2001. According to the affirmed report of Dr. Goldman, the plaintiff complained of continued pain in the neck and back areas since the time of an accident on June 23, 1999. Dr. Goldman's review of records included the MRI of August 31, 1999, which described bulging disc and the flattening

of the cervical lordotic curve. He also examined the intake sheet from Island Medical Center and an x-ray of the cervical spine which reveals the reversal of the cervical lordotic curve. His final impression based upon the objective tests he administered and review of her records was cervical bulging discs at multiple levels; cervical derangement with right radiculopathy and lumbar derangement and fasciitis.

He refers to her prognosis as guarded and that she sustained a permanent orthopedic disability of cervical spine as demonstrated by the MRI. There is clinical evidence of cervical nerve radiculopathy. Considering there was both disc and nerve involvement the plaintiff sustained a painful, functional restriction of motion in excess of 20% with spasm, radiation and paresthesia in the right hand.

Her lumbar spine, also, sustained a permanent orthopedic disability with a restriction of motion in excess of 20%. These injuries were defined as causally related to her accident of June 23, 1999. Dr. Goldman recommended additional treatment together with the use of muscle relaxants, cervical collar and pillow.

The physical examination of the cervical spine reveals flexion as normal but extension was restricted and painful. Right rotation was restricted to 60 degrees, spasm to the right trapezial muscle and parathesis down the right hand.

To the lumbar spine he found spasm, pain on extension as was lateral bending, both left and right and pain on straight leg raising.

The plaintiff commenced her physical therapy the day following the accident. She was treated on the basis of 3-4 times a week by Dr. Massoff, a chiropractor. His affidavit and narrative report outline the objective tests including positive compression testing (Jackson's,

etc.), positive Kemp's test, Yeoman's test, Fabere's test and Ely's test. Range of motion testing also specifically defined the restrictions and limitations of the plaintiff. Dr. Massoff concluded plaintiff's injuries are serious and permanent and causally related to the automobile accident in question. He also concluded that the plaintiff suffered a significant limitation of use of a body function or system and a permanent consequential limitation of a body organ or member.

Although disc bulges alone are insufficient to establish serious injury, the need for objective proof of the extent or degree of the alleged physical limitations resulting from the disc injuries has been met. (**Ceglian v Chan**, ___AD2d___, 724 NYS2d 763.) It has been clearly established that the injuries resulted from the accident.


A physician's diagnosis of casually related chronic cervical strain and his opinion that the plaintiff suffered permanent and significant loss of range of motion based upon his own objective findings, as well as plaintiff's complaints was sufficient to establish serious injury under Insurance Law Section 5102(d). (**Weaver v Howard**, 206 AD2d 793.)

Plaintiff's proof of quantified loss of motion utilizing objective tests is sufficient to raise an issue of fact with regard to serious injury. (**Solomon v Val Leasing**, ___AD2d___, 722 NYS2d 808; **Ventura v Moritz**, 255 AD2d 506; **Torres v Micheletti**, 208 AD2d 519; **Grill v Keith**, ___AD2d___, 729 NYS2d 102.)

Therefore, the defendant's motion for summary judgment on the issue of serious injury is denied.

It is, so ordered.

Dated: February 8, 2002



J. S. C.

ENTERED

FEB 13 2002

NASSAU COUNTY
COUNTY CLERKS OFFICE