

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

EDMUND SCHWARTZ,

Plaintiff,

-against-

WALTER F. DREYER and PATRICIA A.
DREYER,Defendants.
-----TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 5934/2005**DECISION AND ORDER**

Defendant PATRICIA DREYER moved at the end of plaintiff's case and at the conclusion of all testimony to dismiss Plaintiff EDMUND SCHWARTZ's Complaint due to his failure to establish that he suffered a serious injury pursuant to Insurance Law 5102(d) as a matter of law. Defendant WALTER DREYER joined in both applications and Plaintiff opposed same.

The Court reserved decision on the motions as to the threshold issue of a "significant limitation of use of a body function or system". Insurance Law 5102(d)(viii). Thereafter, defendant PATRICIA DREYER and Plaintiff submitted Memoranda of Law.

After deliberations, the jury found that Plaintiff had met the serious injury threshold and awarded \$50,000 to plaintiff for past pain and suffering to date. No award was made for future pain and suffering.

Plaintiff testified at trial as to the accident, his injuries, treatment, and complaints of pain. He returned to work within ten days of the accident and did not testify as to any limitations at work, although he did state he worked with pain. His testimony as to limitations in his daily activities was somewhat conclusory and inconsistent, but he did testify that he is limited in certain activities more so than before this accident.

Plaintiff's treating doctors, Dr. Thomas Jan and Dr. Scott Silverberg testified. Dr. Jan, an osteopath, testified that he is a physiatrist, who also does pain management. He first saw Plaintiff on March 3, 2005. His impression after that examination was an injury to the cervical spine and traumatic arthropathy to the right shoulder. As early as April 16, 2005, plaintiff reported that his shoulder had improved but there still was pain at the extremes of his range of motion.

Other than at his first examination, Dr. Jan did not testify as to measurements on Plaintiff's shoulder or back to establish a quantitative or qualitative limitation or disability. He testified mainly as to his treatment plan, including chiropractic, physical therapy, and medication and injections (including trigger-point injections), for plaintiff's pain.

Dr. Jan had also treated plaintiff after his 2002 motor vehicle accident. At that time, plaintiff had pain in his right shoulder (AC joint), cervical spine, and thoracic spine. However, within weeks his right shoulder was pain free, but there was "creaking". Treatment continued for Plaintiff's complaints of spine pain.

In 2007, Plaintiff had surgery on his right shoulder performed by Dr. Silverberg, an orthopedic surgeon, who first examined Plaintiff on July 31, 2007, and reviewed an MRI report from April 21, 2005. The report showed that the AC joint was inflamed and

swollen and there was impingement on the rotator cuff. His examination found that the AC joint was not fully separated, but there was "impingement syndrome", which he explained as joint arthritis causing inflammation and pain around the rotator cuff. He testified this was an objective finding since it was based on his manipulation of the shoulder and the result could be replicated. He also stated that this type of inflammation can resolve by itself or by surgery. Dr. Silverberg did testify that range was normal, with pain at the extremes.

On November 9, 2007, Dr. Silverberg performed arthroscopic acromioplasty surgery and resected the shoulder. After 6 weeks of physical therapy, Dr. Silverberg found plaintiff had full range of motion but still had "crepitus" or creaking and subjective complaints of pain.

Plaintiff continued to treat with Dr. Jan after the surgery for his spine and shoulder pain. Dr. Jan continued to administer medication and injections to all areas. There was no testimony of any testing or measurements taken by Dr. Jan post-surgery.

The Insurance Law §5104(a) provides that in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence of use of a motor vehicle in this State there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

Serious injury is defined in §5102 as "a personal injury which resulted in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member, function or system; permanent, consequential, limitation or the use of body organ or a member; significant limitation of use of a body function or system; or 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Plaintiff claimed that he suffered two types of serious injuries under the Insurance Law. The first is permanent consequential limitation of use of a body organ or member. In order to satisfy this standard, a plaintiff must present medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system."

Since neither treating doctor offered testimony and any opinion on a permanent consequential limitation of use, the Court declined to charge that theory of serious injury to the jury.

Plaintiff also claims he has suffered a significant limitation of use of a body function or system. The Court reserved decision on this issue at the close of Plaintiff's case and the close of all evidence.

Subjective complaints of pain are generally insufficient to establish a serious injury. *Scheer v. Konbek*, 70 NY2d 678; *Matra v. Raza*, 53 AD3d 570. To establish significant limitation of use, a plaintiff must demonstrate...something more than 'a mild, minor, or slight limitation of use.'" *Licari v. Elliot*, 57 NY2d 230, 237 (1982).

A determination of whether a loss of use is "significant" (or "consequential") relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the system. *Toure v. Avis Rent A Car*, 98 NY2d 345. Objective clinical quantitative or

qualitative test results are required, especially where limitation of movement from cervical injury is at issue. *Toure, supra*; *Scudera v. Mahbubur*, 39 AD3d 620.

As to the cervical and thoracic spine injuries alleged herein, the Court finds there is no objective clinical quantitative or qualitative test results to establish a significant limitation of use as a matter of law.

As to plaintiff's right shoulder injury, however, the plaintiff's evidence is sufficient, if believed, to satisfy the 'serious injury' threshold. Plaintiff's surgeon testified that based on his examination plaintiff suffered an injury to his AC joint, which was not fully separated, consisting of impingement syndrome around the rotator cuff. He stated this was not due to a pre-existing condition. He also stated that his test was objective qualitative evidence since it was based on his manipulation of plaintiff's shoulder and the results could be replicated.

This surgeon performed a right shoulder acromioplasty, distal clavicle resection and a tissue graft. One of the defendant's experts testified that as a result of the surgery there remained a gap in the AC joint due to the resection and that there was continuing tenderness and residual irritation and bone to bone contact in the joint. He described this as a "minimal impairment" not causing any limitations and not causally related to the accident. While it is not for this Court to resolve conflicting opinions or credibility, it is significant that post-surgery defendant's expert found impingement syndrome and bone to bone contact in the joint (even if he disagreed with plaintiff's theory of causation).

Contrary to defendant's position that there are only subjective complaints of pain, plaintiff argues that Dr. Silverberg objectively verified the injury. Further the Court notes

that defendant's orthopedist found objective proof of tenderness and bone to bone contact to support plaintiff's complaint of shoulder pain. Thus, taken together, there is sufficient evidence of limitations of movement and activities beyond plaintiff's subjective complaints to allow this case to go to the jury. *Larrabee v. State of New York*, 216 AD2d 772; *Contra, Gillick v. Knightes*, 279 AD2d 752; *Gaddy v. Eyler*, 79 NY2d 955, 957. Unlike the surgeon in *Jockimo v. Abess*, 304 AD2d 999, Dr. Silverberg identified the objective test and "crepitus" or creaking he used to confirm his diagnosis.

Plaintiff's injury is confirmed by objective testing and, therefore, satisfies the threshold. See, e.g., *Hackett v. Driver*, 278 AD2d 914 (4th Dept. 2000); *Bouchama v. S & R Truck Rental*, 9 Misc.3d 1110(A); *Byrd v. J.R.R. Limo*, 21 Misc.3d 1109(A); cf. *Borino v. Little*, 273 AD2d 262. Further, the injury required surgery and impairment and pain continued post-surgery .

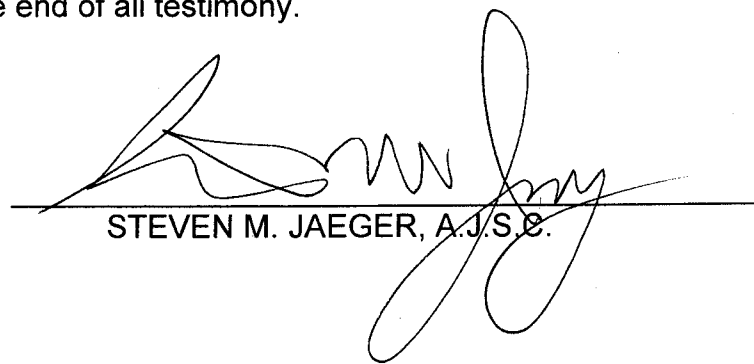
The Second Department has found that prolonged bursitis which may require surgery (and left the plaintiff unable to kneel) constituted a significant limitation of use. *Gonzalez v. Brayley*, 199 AD2d 1013. In addition, proof of a limited range of motion that might require arthroscopic surgery is sufficient. See, *Duarte v. Ester*, 247 AD2d 356; *but see, Matra v. Raza*, 53 AD3d 570.

Moreover, "permanent pain, even of an intermittent character, may form the basis of a serious injury" if supported by medical evidence. *Dwyer v. Tracey*, 105 AD2d 476; *Cole v. United States*, 1986 WL 5805 at 8 (S.D.N.Y. 1986); *Van DeBogart v. Vanderpool*, 215 AD2d 915 (3d Dept. 1995). But, other courts have not found "serious injury" where permanent pain alone does not result in a significant limitation of use.

See *Booker v. Miller*, 258 AD2d 783, 785, 685 NYS2d 837, 838 (3d Dept. 1999); *Wiley v. Bednar*, 689 NYS2d 550, 552, 261 AD2d 679, 680 (3d Dept. 1999).

Accordingly, the Court denies the defendants' motions to dismiss both at the close of plaintiff's case and at the end of all testimony.

Dated: March 31, 2011



STEVEN M. JAEGER, A.J.S.C.

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