

SCAP

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

POLIXENI LIADIS,

Plaintiff(s),

- against -

SAMANTHA WAGNER and CYNTHIA COLAIACORO,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 21330/09

**MOTION SEQUENCE
NO. 1**

**MOTION SUBMISSION
DATE: September 6, 2011**

X X X

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendants for an Order granting summary judgment to defendants upon the ground that plaintiff did not sustained a serious injury as defined in Insurance Law §5102(d), is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on April 27, 2009 at the intersection of Woodfield Road and Cedar Street, West Hempstead, NY.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"The plaintiff, Polixeni Liadis sustained the following permanent and personal injuries which were caused, accelerated, precipitated, aggravated, exacerbated or otherwise enhanced by the defendant's negligence:

- Left L4-5, L5-S1 transforaminal epidural steroid injection under fluoroscopic guidance.

- L3/4 through L5/S1 disc hydration loss with minimally diminished disc space height.

- L3/4 posterior disc bulge flattening ventral thecal sac.
- L4/5 posterior disc herniation increasing on left with left thecal sac impression and extension into left recess with impression on traversing left L5 root at L4/5.
- L5/S1 posterior disc bulge.
- Left lumbar radiculopathy L5-S1 distribution with decreased left ankle jerk and sensory deficit in the L5-S1 distribution.
- Lumbago with lumbar spine sprain.
- History of hypercholesterolemia on crestor.
- Residuals lumbago.
- Left lumbar radiculopathy.
- Herniated L4-5 to the left with extension into the left neuroforamen.
- Compression of L5 nerve root.
- Degenerative changes L3-S1
- Lumbar herniated nucleus pulposus.
- Lumbar radiculitis.
- Limited range of motion of the lumbar spine.
- C4/5 and C5/6 diminished disc space height and schmorl's irregularity with anterior disc extension with anterior spurring.
- C4/5 disc adjacent fatty marrow change.
- C4/5 posterior disc bulge extending to abut ventral cord with uncinated productive change and ecentric, right foraminal narrowing.
- C5/6 posterior subligamentous disc bulge with uncinated productive change.
- C6 vertebral marginal irregularity with marginal schmorl's irregularities and mildly diminished height.
- C6/7 posterior disc bulge with ventral CSF impression.
- Lingual tonsillar hypertrophy.
- Straightening of cervical lordosis.

- Diffuse disc hydration loss.
- Limited range of motion of the cervical spine."

The defendants in support of the defendants' application submitted amongst others things an affirmed letter report dated February 11, 2011 of Chandra M Sharma, M.D., a neurologist of a neurological examination of the plaintiff conducted on February 11, 2011; an affirmed letter report dated February 23, 2011 of Alan J. Zimmerman, M.D., an orthopedist of an orthopedic examination of the plaintiff conducted on February 23, 2011; certain unsworn letter reports dated May 22, 2008; June 5, 2008; June 19, 2008 and February 9, 2009 together with attachments of Olin & Cohen Orthopedic Associates, LLP by Adam Hammer, MD., an orthopedist a treating physician of the plaintiff.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (**see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).**

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (**see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).**

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(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, ember, function or system; permanent consequential limitation of use of a body organ or member; significant 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."

The report of Dr. Sharma sets forth:

"PRESENT COMPLAINTS:

The only pain that bothers her is the left side of the neck. She states that this pain bothers her while watching television or a movie or during sleep. She does not take any prescription medication. She may take Advil off and on as need. At times the neck clicks when she turns her head from side to side. Her preexisting back pain was aggravated by this accident but now has improved to its previous level.

PAST HISTORY:

There is no prior history of motor vehicle accident but she had a job related back pain in 2008 and underwent lumbar epidural injections. The pains still bother her off and on since then.

JOB HISTORY:

The claimant is in sales and she continued to work.

EXAMINATION:

Age: 59-yrs. old, Height: 5'1", Weight: 127Lbs., Hair: Light Brown, Eyes: Brown, Right-handed female.

The claimant was given an explanation of the nature of the neurological examination, both at the beginning of the examination and as the examination proceeded through various steps. She was advised that she should do the testing only within her limitations.

MENTAL STATUS:

The claimant has normal comprehension and speech. She was able to cooperate with the examination. She is able to understand all questions and instructions. The information provided is appropriate and relevant. There is no impairment of mood or affect. The cognitive functions show no deficit.

CRANIAL NERVES:

The pupils are equal and reactive. The eyes show normal conjugate movements and normal visual fields. The face shows symmetry. The face shows symmetry. The nasolabial folds and palpebral fissures are symmetrical. The hearing is normal.

MOTOR SYSTEM:

The motor tone is normal in the arms and legs. There is no atrophy or deformity. The muscles in the hands show normal appearance. The grasping, opposition and manipulation of the fingers all show a normal pattern. Strength in the legs is normal. The claimant has good weight

bearing.

REFLEXES:

The deep tendon reflexes in the biceps, triceps, supinator, patellar and Achilles are normal. There is no spasticity or clonus.

SENSORY:

There are no areas of numbness reported. The Tinel's sign and Phalen's sign are negative.

GAIT AND COORDINATION:

The claimant has a normal gait. There is no limp or ataxia. She can stand on her toes and heels and was able to walk in tandem. She was able to squat. The rapid alternating movements and finger-nose testing are all done normally. The hands show normal grasp and coordination. The arms and legs are inspected and are symmetrical. There is no atrophy or deformity. The measurements of the forearms are 23 centimeters on the right and 22 centimeters on the left. The calves measured 35 centimeters bilaterally.

SCULL AND SPINE:

The skull and spine are normal. She has a normal posture. The movements of the cervical spine are as follows: Flexion 50 degrees (50 degrees normal), extension 60 degrees (60 degrees normal), right and left flexion 45 degrees (45 degrees normal) and right and left rotation 80 degrees (80 degrees normal). The movements of the lumbar spine are as follows: flexion 90 degrees (90 degrees normal), extension 25 degrees (25 degrees normal) and right and left rotation 30 degrees (30 degrees normal). Standing upright, she can bend forward and touch her feet.

In the supine posture, the elevation is 80 degrees on both sides. She was able to place the right foot on the left knee and the left foot on the right knee. The movements of the neck are normal in all directions without pain. The movements of the shoulders are normal without pain.

DIAGNOSIS:

1. Cervical and lumbar sprain, resolved.
2. Normal neurological examination.

DISABILITY:

There is no neurological disability. There are no neurological manifestations of disc bulges or disc herniations."

The report of Dr. Zimmeman provides:

"PHYSICAL EXAMINATION:

The claimant is no apparent distress. The claimant is cooperative, alert and oriented. The claimant ambulates without aide. The claimant is not wearing any braces or supports. Gait is normal and without a limp. The claimant is

able to walk on toes and heels and perform routine activities without difficulty and was able to get on and off the examining table, lie down, sit up and turn from side to side without difficulty.

Ranges of motion are measured with a hand held goniometer and are based on the New York State Workers' Compensation Board Medical Guideline, 1996 Edition.

Examination of the cervical spine: The claimant turns head freely to speak to me during this interview and shakes it up and down in response to my questions. Examination of the cervical spine reveals normal muscle contours without spasm or atrophy. There is no tenderness over the trapezii, paravertebral muscles or spinous processes.

Soto-Hall test -- for evaluation of vertebral bony pathology and injury	Negative
Tenderness Paraspinals	Negative
Tenderness Suprascapular	Negative

CERVICAL SPINE -- Range of motion:

	<u>Observed</u>	<u>Normal</u>
Flexion	45 degrees	45-60 degrees
Extension	45 degrees	45-60 degrees
Lateral Flexion (R)	45 degrees	30-60 degrees
Lateral Flexion (L)	45 degrees	30-60 degrees
Rotation (R)	60 degrees	45-60 degrees
Rotation (L)	60 degrees	45-60 degrees

These movements are carried out without complaints.

Examination of the lumbar spine: The following were tested and noted to be negative.

Supine Straight Leg Raise -- For evaluation of sciatic nerve inflammation and radiculopathy	Negative
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Reverse Seated Straight Leg Raise -- For evaluation of sciatic nerve and Inflammation and radiculopathy	Negative
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Lasegue Sign -- For evaluation of sciatic nerve Inflammation and radiculopathy	Negative
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There was no spasm or tenderness noted.

LUMBAR SPINE -- Range of motion:

	<u>Observed</u>	<u>Normal</u>
Flexion	90 degrees	90 degrees

Extension	30 degrees	30 degrees
Lateral Flexion (R)	30 degrees	30 degrees
Lateral Flexion (L)	30 degrees	30 degrees
Rotation (R)	30 degrees	30 degrees
Rotation (L)	30 degrees	30 degrees

These movements are carried out without complaints.

MUSCLE STRENGTH:

	<u>Left</u>	<u>Right</u>
Triceps	5/5	5/5
Biceps	5/5	5/5
Wrist extensors	5/5	5/5
Wrist flexors	5/5	5/5
Quadriceps	5/5	5/5
Hamstrings	5/5	5/5
Ankle extensors	5/5	5/5
Ankle flexors	5/5	5/5

SENSATION:

The claimant reports decreased response to pin over the left upper extremity for which there is no medical explanation.

REFLEXES:

Deep tendon reflexes, biceps, triceps, knee jerk, ankle jerk reflexes right and left all within normal limits.

IMPRESSION:

Cervical sprain, resolved.
 Lumbar sprain, resolve.
 Prior lower back injury with herniated disc.

There is no disability. There is no permanency.

COMMENT:

The claimant is presently working and may continue to do so without restriction.

The multiplicity of levels involved, from L3 through S1, the disc hydration loss, the multiple bulges and herniations, indicate that all of the MRI findings are degenerative, preexisting. There is no clinical support for a diagnosis of a lumbar radiculopathy. There was no sensory or reflex deficit on my examination. The claimant had sustained a prior lumbar injury with

herniations requiring epidural steroid injections in the past. All of the above allegations relate to the claimant's prior injury."

The defendants additionally contend that the plaintiff testified at the plaintiff's September 16, 2010 deposition that prior to the accident on issue, that plaintiff had injured her back in a work related accident. In this regard the plaintiff sets forth at the plaintiff's deposition:

- Q And prior to April 27 of '09 did you ever have any accident or incident involving your back?
A 2008.
Q What happened then?
A I hurt myself at work.
Q And how did you hurt yourself at work?
A I lift some heavy, something heavy.
Q Do you recall what you were lifting?
A I'm sorry?
Q. What were you lifting?
A Clothing.
Q And what happened when you lifted –
A I got the herniated disc in my lower back.
Q And also back to Dr. Orlan, have you finished - - when is the last time you saw him for any problems with your neck or shoulders before today?
A I saw him like a couple times after September 2009. I don't remember exactly.
Q Have you seen him in 2010?
A I saw him, yes, for my back.
Q But not for your neck?
A Not for my neck.
Q And Dr. Orlan treated both your back and your neck?
A Yes.
Q And for your back problem from the 2008 incident, did you make a workers' comp claim?
A Yes. I was out of work seven months.
Q Did you have any type of surgery?
A No. Only the injections.
Q How many injections did you have?
A Three.
Q And those were all before April of '09?
A Yeah. That was all in 2008.
Q And did you file a claim for with workers' compensation?
A Yeah. They paid me. They p aid me for - -
Q Okay. Did you get some kind of permanent award from them?
A No. They were just paying my - - paying my salary every week include - -
Q And your medicals?
A - - include my medical.
Q And is the claim over now or it's still pending?
A No. I'm working. I only was out seven months."

The treatment alluded to by the plaintiff is contained within the respective unsworn submissions of Orlin and Cohen which are properly considered herein as treating physicians of the plaintiff (*See Pagano v. Kensbury*, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992).

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (**see Gaddy v. Eyer, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the defendants' requested relief the plaintiff amongst other things submits an affidavit of Harvey Orlin, Md. Dr. Orlin's affidavit sets forth:

"I am a physician licensed by the State of New York, and am associated with the offices of Orlin and Cohen Orthopedic Associates, LLP.

I hereby affirm each and every statement contained in the reports of the examinations and testing of Liadis Polexini, conducted on May 22, 2008, June 5, 2008, June 19, 2008, July 15, 2008, August 5, 2008, September 04, 2008, October 17, 2008, October 20, 2008, November 3, 2008, November 10, 2008, December 29, 2008, February 9, 2009, March 9, 2009, April 29, 2009, May 26, 2009, June 23, 2009, July 21, 2009, August 25, 2009, October 20, 2009, March 10, 2010, October 4, 2010, June 17, 2011, and July 21, 2011, as if same were repeated in length.

I hereby state that on May 22, 2008, June 5, 2008, June 19, 2008, July 15, 2008, August 5, 2008, September 04, 2008, October 17, 2008, October 20, 2008, November 3, 2008, November 10, 2008, December 29, 2008, February 9, 2009, March 9, 2009, Ms. Liadis visited my office complaining of lower back pain as a result on jury she sustained at work.

Ms. Liadis submitted a Worker's Compensation Claim and was unable to work for approximately seven months.

By March of 2009 the symptoms Ms. Liadis suffered were almost fully resolved, to wit, she had returned to work and resumed most of her day-today activities.

On April 27, 2009, Ms. Liadis was involved in motor vehicle accident and as a result suffered an injury to her neck and aggravation of her back.

I hereby state that the conditions outlined in my reports dated April 29, 2009, May 26, 2009, June 23, 2009, July 21, 2009, August 25, 2009, October 20, 2009, March 10, 2010, October 4, 2010, June 17, 2011, and July 21, 2011 relate only to her motor vehicle accident.

On her most recent visit of June 27, 2011, which was for follow-up of a Magnetic Resonance Image scan it revealed a:

- a. Straightening of the cervical curvature;

- b. C3-4 posterior central and right sided disc bulge;
- c. C4-5, C5-6 diminished disc space heights are unaltered with schmorl's irregularities, anterior disc extension and anterior spurring;
- d. C4-5 disc adjacent fatty marrow change is again seen with posterior disc bulge impressing ventral CSF;
- e. C5-6 posterior disc herniation; and
- f. C6-7 posterior disc herniations with a right superior migration impressing the ventral CSF.

Prior to April 27, 2009, Ms. Liadis never complained of any neck pain, tenderness of spasms, and currently she has a limited range of motion in her neck.

During her range motion examination. Ms. Liadis exhibited diminished flexibility, extension, rotation and lateral bending, and complained of pain and muscle spasms.

I affirm based, on my professional experience and to a degree of medical certainty that Ms. Liadis injuries are serious, causally related to the motor vehicle accident and permanent in nature.

Copies of my records, which are kept by my office in the regular course of business, are annexed hereto."

A review of the respective reports of Dr. Cohen subsequent to the accident on issue set forth the following diagnosis:

DIAGNOSIS:

- 1. Cervical sprain superimposed on cervical degenerative disc disease C5-C7 with mild cervical spasm.
- 2. History of hypercholesterolemia.

A review of the respective reports of Dr. Cohen subsequent to the accident on issue set forth the following diagnosis:

DIAGNOSIS:

- 1) Resolving Cervicalgia.
- 2) Cervical spine sprain with reduced cervical spasm but still restricted range of motion in rotation.
- 3) Multi level disc degeneration and arthritic changes C5-C7.
- 4) History of hypercholesterolemia.

DIAGNOSIS:

- 1) Cervicalgia.
- 2) Cervical spine sprain.

DIAGNOSIS:

1. Cervicalgia with residual cervical spine sprain with cervical spasm.
2. Periodic cervical radiculopathy.
3. Multilevel disc degeneration with arthritis changes C5-C6 and C6-C7.
4. History of hypercholesterolemia.

DIAGNOSIS:

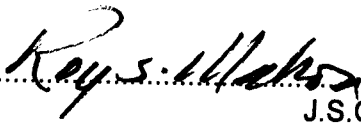
1. Residuals cervicalgia.
2. Cervical spine sprain with cervical spasm.
3. Multilevel disc degeneration with arthritic changes C5-C6 and C6-C7.
4. History of hypercholesterolemia."

In addition, the Court notes the said physician's reports do not set forth the tests and/or the degrees of limitation of the plaintiff's range of motion. As such the plaintiff has not established that the plaintiff suffered a serious injury pursuant to §5102 of the Insurance Law.

Based upon the foregoing, the defendant's application for an Order granting summary judgment to defendants upon the ground that plaintiff did not sustained a serious injury as defined in Insurance Law §5102(d), is granted.

SO ORDERED.

DATED: 11/2/2011


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J.S.C.

ENTERED
NOV 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE