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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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WALTER WALDVOGEL,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 3949/07

**MOTION DATE: 5-29-08
SUBMIT DATE: 9-10-08
SEQ. NUMBER - 001**

**RICHARD CURCIO, BUDGET RESIDENTIAL
& COMMERCIAL CONTRACTORS, INC., AND
BRYAN R. SULLIVAN,**

**MOTION DATE: 6-26-08
SUBMIT DATE: 9-10-08
SEQ. NUMBER - 002**

Defendants.
-----X

The following papers have been read on this motion:

- Notice of Motion, dated 5-6-08.....1**
- Notice of Cross Motion, dated 6-3-08.....2**
- affirmation in Opposition, dated 7-10-08.....3**

The motion by defendants, Richard Curcio and Budget Residential & Commercial Contractors, Inc. (collectively referred to herein as the "Curcio Defendants"), and identical cross-motion by defendant, Bryan R. Sullivan, for an Order of this Court, awarding each of them, summary judgment and dismissing the complaint on the grounds that plaintiff has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d), are denied.

This action arises out of an accident that occurred on March 17, 2006, at approximately 8:30 pm near the intersection of East Sunrise Highway and Buffalo Avenue in Freeport, New York. The plaintiff, while driving his car on Sunrise Highway was rear-ended by a vehicle.

Plaintiff, 42 years old at the time of his accident, claims that as a result of the subject accident, he sustained: acute denervation in left C7 nerve root consistent with bilateral median neuropathy at or distal to the wrist consistent with clinical diagnosis of CTS; EMG impression consistent with chronic denervation in left S1 nerve root; moderate central broad based disc herniation at L4-5; bilateral L5 root compression; L5-S1 moderate central and left disc herniation; herniated lumbar disc with left sciatica to the left foot; marked focal left S1 root compression; central disc herniation at T8-9, T9-10 and T10-11; disc bulge indenting thecal sac at T2-3; herniated cervical disc; left C7-C8 radiculopathy; radiating pain down the left upper extremity to fingers; occipital headaches; numbness in both arms, hands, neck and left leg (*Verified Bill of Particulars*, ¶4).

Plaintiff contends in his verified bill of particulars that the injuries he sustained fall within the following categories of "serious injury" as defined in the Insurance Law:

"significant disfigurement;"

"permanent loss of use of a body organ, member, function or system;"

"permanent consequential limitation of use of a body organ or member;"

"significant limitation of use of a body function or system;" and

"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" (*Motion*, Ex. C, ¶6).

The burden of proof on this threshold issue is initially on the defendants to establish as a matter of law that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. *See Pommels v. Perez*, 4 NY3d 566 (2005); *see also Grossman v. Wright*, 268 AD2d 79, 84 (2nd Dept. 2000).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). In addition, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits. *Michaelides v. Martone*, 186 AD2d 544 (2nd Dept. 1992); *Covington v. Cinnirella*, 146 AD2d 565, 566 (2nd Dept. 1989).

In support of their claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of their examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dept 1992). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or a chiropractor are not sufficient to defeat a motion for summary judgment. *Grasso v. Angerami*, 79 NY2d 813 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 NY2d 345, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. *Toure v. Avis Rent A Car Sys.*, supra at 353. Additionally, the sworn MRI and CT scan tests and reports must also be paired with the doctor's observations during his physical examination of the plaintiff. See *Toure v. Avis Rent A Car Systems*, supra. Unsworn MRI reports can constitute competent evidence but only if both sides rely on those reports. See *Gonzalez v. Vasquez*, 301 AD2d 438 (1st Dept. 2003).

Where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, supra, that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury. *Id.*

Defendants' sole submission in support of their instant motion is the sworn affirmed report of Dr. Issac Cohen, M.D., a board certified orthopedic surgeon, who performed an independent orthopedic examination of the plaintiff on March 5, 2008. Dr. Cohen's independent orthopedic examination, conducted almost two years following the date of the accident, concludes, in pertinent part, as follows:

PHYSICAL EXAMINATION:

Cervical Spine: On inspection, there is maintenance of the normal cervical curvature noted. On palpation, there is no evidence of muscle spasms or trigger point noted in the paravertebral muscles which are supple, non-tender. Range of motion is satisfactory normal in active fashion with flexion and extension of 45 degrees (normal up to 45 degrees), left and right lateral bending in the 45-degree range (normal up to 46 +/- 6.5), and rotational motion to the right and left in the

80-degree range (normal up to 78+- 15). Compression test and Spurling test are negative. Percussion test was negative.

Upper Extremities: Measurement of biceps in both upper extremities is 13 1/4" on the right, 13" on the left compatible with a right hand dominant person. Examination is satisfactory normal with present, equal and symmetrical reflexes in both biceps, triceps and brachioradialis. Tinel sign is negative in both wrists. Phalen test is negative bilaterally. Hand grip, pinch and grasp are strong in both upper extremities. Sensation is intact.

Lumbosacral Spine: On inspection, there is maintenance of the normal lordotic curvature noted. Range of motion demonstrates flexion to 90 degrees (normal up to 66 +- 15), extension to 30 degrees (normal up to 33 +- 5.5), right and left lateral bending to 25 degrees (normal up to 29 +- 6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30). Straight leg raising is negative bilaterally to 90 degrees in the sitting position. There is no tenderness, muscle spasms or trigger points noted on palpation of the paravertebral muscles.

Lower Extremities: Measurement of both quadricepses is 17", equal and symmetrical. Measurement of both calves is equal and symmetrical at 16 1/2". No evidence of sensorial deficit or motor weakness is present. Mr. Waldvogel walks with a normal heel/toe gait and is able to stand on heels and toes without difficulty. Reflexes are present, equal and symmetrical in both knee jerks and heel cords. Muscle power in both lower extremities is 5/5 on a clinical basis.

* * *

DIAGNOSIS:

1. Status post motor vehicle accident
2. Cervical and lumbosacral strains, resolved

DISCUSSION:

* * *

In summary, the claimant sustained mild soft tissue injuries to his neck and back, but during the work up, he was found to have a possible tumor in the spine. He was aggressively worked up for this condition. From the orthopedic viewpoint, the claimant has a completely normal functional capacity of the cervical spine area and lumbosacral spine area, and the minor degenerative changes noted in the cervical and lumbosacral spine are not of clinical significance.

At the time of this evaluation, the claimant is working on a full time basis in

an unrestricted fashion and may continue to do so. No clinical indication exists of any evidence of sequelae, disability or permanency related to this accident.

The defendants have established their prima facie case for summary judgment on the categories of "significant disfigurement," "permanent loss of use of a body organ, member, function or system," "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system," thereby shifting the burden to the plaintiff.

However, in the absence of any transcripts or other proof, defendants have been unable to demonstrate that the plaintiff was not prevented from performing substantially all of his daily activities during 90 of the first 180 days following the occurrence of the accident. Accordingly, the Court finds that they have not made out a *prima facie* showing that would serve to shift the burden to the plaintiff on this "90/180" claim, mandating denial of the motion for that reason, without regard to the strength of the opposing papers. *See, Breland v Karnak Corp.*, 50 AD3d 613 (2d Dept. 2008); *cf.*, *Camacho v Dwelle*, AD3d, 2008 WL 4170389, 2008 NY Slip Op 06789 (2d Dept.).

In any event, the plaintiff has met his burden with regard to other categories of injury. As to the remaining categories of serious injury law, in opposing defendants' motion, plaintiff submits his own affidavit; the sworn affidavit of George Mitzman, D.C., a chiropractor; the sworn affirmation of Dr. Elizabeth P. Maltin, M.D., a Diplomate of the American Board of Radiology; the sworn affirmed report, dated June 23, 2008, of Dr. Itzhak C. Haimovic, M.D. F.A.A.N., a neurologist; the sworn affirmation of Richard

Silvergleid, M.D., a Diplomate of the American Board of Radiology; and, the sworn affirmation of Dr. Lawrence W. Shields, M.D., a Diplomate of the American Board of Neurology.

Based upon a reading of chiropractor, George Mitzman's affidavit, it has become clear that plaintiff was involved in a prior workplace accident on 6/3/1997 for which he was treated by the chiropractor for approximately two years for sciatica. Mr. Mitzman notes that his diagnosis as a result of this prior accident was left posterior disc herniation at L5 and that his range of motion in his lower back had returned to functionally normal (*Mitzman Affidavit*, ¶3). Dr. Mitzman's initial treatment of the plaintiff as a result of the subject accident on March 20, 2006, discloses that the quantified value to the range of motion testing of plaintiff's cervical spine revealed a discrepancy in the right and left rotations as well as the right and left lateral flexion. Similarly, the quantified value of plaintiff's lumbar-sacral range of motion of the spine was also decreased and painful. The chiropractor also attests that he performed several identified tests all of which were positive. He also noted that muscle spasms were palpable and referred the plaintiff for MRI scans of his cervical and lumbar spines.

The chiropractor consistently treated the plaintiff. His most recent examination took place on June 9, 2008 at which point he noted:

17. My re-examination on June 9, 2008, of the cervical-thoracic range of motion of the spine of Walter Waldvogel was decreased and painful as follows:

Cervical	Objective	Normal	Pain
Flexion	45°	45°	
Extension	45°	45°	
Rt. Rotation	45°	60°	
Lt. Rotation	45°	60°	
Lt. Lat. Flexion	30°	45°	+
Rt. Lat. Flexion	30°	45°	

18. My re-examination on June 9, 2008, of the lumbar-sacral range of motion of the spine of Walter Waldvogel was decreased and painful as follows:

Lumbar-Sacral	Objective	Normal	Pain
Flexion	70°	90°	
Extension	30°	30°	
Lt. Rotation	20°	20°	+
Rt. Rotation	20°	20°	
Rt. Lat. Flexion	35°	35°	
Lt. Lat. Flexion	35°	35°	

Positive orthopedic tests included: Straight leg raise, 88° on the right (90 degrees normal); 75° on the left (90 degrees normal); Kemp's test, on the left, Milgram's test; Yeoman's test, on the right; Bechterew's test, bilaterally. Muscle spasm was palpable, especially over left and right paravertebral muscles.

19. These examinations also indicated the presence of permanent muscular ligamentous injury as a result of the accident of March 17, 2006.
21. Based upon my observations, Walter Waldvogel will continue to suffer and have episodes of pain and/or spasm for an indefinite period of time in the future. The current loss of range of motion that I found in the cervical and lumbar spine of Mr. Waldvogel is a result of this type of soft tissue injury.
22. Mr. Waldvogel can expect continued, periodic symptomology. Given the chronicity of his complaints and the presence of residual objective findings almost two years after the accident, I am of the opinion that he has a permanent disability. His condition can only deteriorate with time. No further objective or subjective improvement is expected.

* * *

24. It is also my opinion within a reasonable degree of chiropractic certainty that Walter Waldvogel aggravated his previously dormant sciatica condition.

* * *

26. The clinical history of Mr. Waldvogel indicates that he had suffered a back injury, sciatica and L5 disc herniation in 1997 which had completely resolved after chiropractic treatment and was asymptomatic prior to the accident of March 17, 2006 without the need for any diagnostic testing.

* * *

28. In any event, the accident of March 17, 2006 was the competent producing cause of plaintiff's past and current complaints about his neck and back and his current loss of range of motion in the cervical and lumbar spine based upon my re-examination of June 9, 2008. This condition is considered permanent as plaintiff achieved maximum medical improvement with chiropractic treatment and physical therapy and the cervical and lumbar spine of the plaintiff will continue to degenerate. Any chiropractic treatment would be merely palliative. (*Aff in Opp.*, Ex. C).

Dr. Maltin, a radiologist, in her affirmation, accompanied by the MRI reports of plaintiff's lumbar and thoracic spine, *Passaretti v. Yung*, 39 AD3d 517 (2nd Dept. 2007), states that after receiving a referral from Dr. Mitzman, her office conducted MRI scans of the lumbar spine and the thoracic spine of the plaintiff on March 29, 2006 and April 3, 2006. She states, in pertinent part, as follows:

4. ... there is a large diffuse disc bulge with disc material bulging into the neural foramina bilaterally, causing, right neural foraminal encroachment and moderate spinal stenosis; 5) at L5-S1, there is disc desssication and a centra/left paracentral disc herniation encroaching upon the left neural foramen and contracting the exiting left nerve root and 6) multiple enhancing masses within the thecal sac as noted causing significant

narrowing of the thecal sac. These are worrisome for dropped metastases and further evaluation for primary CNS neoplasm is recommended. In addition, evaluation for other primary neoplasm is recommended.

* * *

7. In the within MRI report of the thoracic spine I found 1) at T2-3 there is disc bulge indenting thecal sac; 2) there are similar findings present at T3-4 on the right and T6-7 on the left; 3) there is a small central disc herniation at T8-9 and T9-10 as well as small central disc herniation at T10-11; 4) there is no cord compression or spinal stenosis; 5) no enhancing masses within the thoracic spinal canal.
(*Aff in Opp.*, Ex. C)

While these findings are confirmed by the neurological examination of Dr. Haimovic, plaintiff's unexplained 25-month gap in treatment renders Dr. Haimovic's affirmation insufficient. *Pommels v. Perez*, supra; *Moore v. Sarwar*, 29 AD3d 752 (2nd Dept. 2006).

Plaintiff also submits the affirmation of Dr. Silvergleid, a radiologist, together with a CT report, of plaintiff's lumbar spine. In his affirmation, Dr. Silvergleid notes, in pertinent part, as follows:

4. In the within CT report of the lumbar spine I found an impression of 1) moderate central broad based disc herniation, L4-5; right sided bony productive change and asymmetric left nodular inferior extension is seen; in conjunction with facet arthritis, marked spinal stenosis and bilateral L5 nerve root compression is seen; 2) Moderate central and left sided herniated disc, L5-S1; marked focal left S1 root compression is seen; 3) No bony destructive lesions or paraspinal masses; two small areas increased density are seen within the thecal sac at L5-S1 level (left sided and posterior/central); these may represent small areas of calcification within the intradural lesions seen on prior MRI; no discrete soft tissue mass within the spinal canal is identified and no foraminal extension or areas of bone erosion are seen. (*Aff in Opp.*, Ex E).

Finally, plaintiff submits the affirmation of Dr. Shields, a neurologist, who evaluated the plaintiff on April 11, 2008, almost two years following the date of plaintiff's accident. To the extent that Dr. Shield's affirmation does not provide any competent medical evidence that is contemporaneous with the subject accident, his report is insufficient to raise a triable issue of fact. *Ranzie v. Abdul-Massih*, 28 AD3d 447 (2nd Dept. 2006); *Bell v. Rameau*, 29 AD3d 839 (2nd Dept. 2006). Within the context of back injuries, including cervical and lumbar sprains, strains, herniation bulges, etc, the projection of permanent limitations has no probative value in the absence of a recent examination. *Evans v. Mohammad*, 243 AD2d 604 (2nd Dept. 1997); *Mohammed v. Dhanasar*, 273 AD2d 451 (2nd Dept. 2000).

In totality, however, plaintiff has presented consistent and recent ample medical proof in admissible form that there exists a triable issue of fact with regard to "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." The Mitzman affidavit constitutes *objective* evidence of the extent of plaintiff's alleged physical limitations resulting from the disc injury. *Kearse v. New York City Tr. Auth.*, supra. The chiropractor substantiates plaintiff's claim of a serious injury by ascribing a percentage to the degree of limitation and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Toure v. Avis*, supra; see also *Dufel v. Green*, 84 NY2d 795, 798 (1995). Additionally, plaintiff's radiologists, Dr. Silvergleid and Dr. Maltin, confirm the findings reached by the chiropractor. Accordingly, this Court finds that


plaintiff has raised a triable issue of fact with regards to the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories.

Accordingly, defendants' motion for summary judgment dismissal of plaintiff's complaint on the grounds that plaintiff has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 2, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

OCT 07 2008

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