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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

THOMAS BEATTY,

Plaintiff,

-against-

FINEMAN FURNITURE COMPANY, INC., GUSTAVO YUNEZ, ARNOLD DAWSON, MO AZHIER MIAH and WEST CAB CORP., INC.,

Defendants.

Index No. 18513/06

DECISION/ORDER

Present:

HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to _3_ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	3
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' MO AZHIER MIAH and WEST CAB CORP., INC. ("West Cab") motion for an Order pursuant to CPLR § 3212 granting summary judgment on the grounds that Plaintiff did not sustain a "serious injury" under the Insurance Law; Defendants' FINEMAN FURNITURE COMPANY, INC. and GUSTAVO YUNEZ ("Fineman") motion for an Order pursuant to CPLR § 3212 granting partial summary judgment on liability; and Plaintiff's motion for an Order pursuant to CPLR § 3212 granting partial summary judgment on liability are all consolidated herein for Decision.

West Cab's motion for summary judgment on the grounds that Plaintiff did not sustain a "serious injury" under the Insurance Law is granted.

Fineman's motion is denied as moot.

Plaintiff's motion is denied as moot.

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Plaintiff claims that as a result of a motor vehicle accident he sustained: a herniated cervical disc; cervical hyper flexion extension; left shoulder derangement; lumbosacral derangement; and post-traumatic headache syndrome.

Serious Injury

> '[S]erious 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, 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; 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.

N.Y. Ins. Law § 5102(d).

The purpose of the statute is "to weed out frivolous claims and limit recovery to significant injuries." Dufel v. Green, 84 N.Y.2d 795, 798. As such, the Court has determined that the phrases "permanent loss of use," "permanent consequential limitation" and "significant limitation of use" must be interpreted in terms of "total loss." Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 299. Furthermore, the word "significant" as it relates to "limitation of use of a body function or system," refers to more than "a minor, mild or slight limitation of use." Licari v. Elliott, 57 N.Y.2d 230, 236. Also, the phrase "substantially all" as it relates to the 90/180, should be "construed to mean that the person has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment." Id. Although no-fault insurance is meant to allow plaintiffs to recover for non-economic injuries in appropriate cases, the Legislature also "intended that the court first determine whether or not a prima facie case of serious injury

has been established which would permit plaintiff to maintain a common-law cause of action in tort." Id. at 237.

Defendant's Evidence

Defendant proffered the July 9, 2008 neurological examination of Dr. Edward M. Weiland, who found that the ranges of motion in both of Plaintiff's shoulders were all within normal limits. The doctor also found a 10% limitation in the ranges of motion of the flexion, extension, and right and left lateral flexion of Plaintiff's lumbar spine. The doctor concluded that there was "no reason why the claimant should not be able to perform activities of daily living and continue his current course of employment."

Defendant also proffered the November 19, 2008 orthopedic examination of Dr. Michael J. Katz, who found that the ranges of motion in Plaintiff's cervical spine, lumbar spine and left shoulder were all within normal limits. The doctor concluded that Plaintiff was not disabled and capable of performing his activities of daily living.

Finally, Defendant proffered the January 15, 2009 radiological review of Dr. Robert Tantleff, who examined the February 20, 2008 MRI of Plaintiff's lumbar spine and found a "minimal degenerative disc protrusion of what appears to be L4/5 of no consequence." The doctor concluded that the "discogenic changes of the lumbar spine [were] consistent with the individual's age [and] of no definitive significance."

In addition to the above, Plaintiff claims in his Bill of Particulars that he was confined to his bed and home for approximately three (3) months, but then claims that he only missed one (1) day of work.

Where defendant establishes a prima facie case that Plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), the burden is then shifted to the

Plaintiff to overcome defendant's motion by demonstrating that she sustained a serious injury. Gaddy v. Eyler, 79 N.Y.2d 955.

Plaintiff's Evidence

Although Plaintiff presented evidence that he underwent a "percutaneous diskectomy" on June 20, 2008 that his surgeon causally relates to the underlying car accident, the Court finds that this surgery alone is insufficient to meet Plaintiff's burden. Plaintiff has proffered medical records from Harlem Hospital Emergency Room records, Murray Hill Chiropractic, Rockwell Medical, as well as Affirmations from Dr. Robert Marini, Dr. Shahid Mian and Dr. Alan Lubitz. The Court may not accept the various medical records, however, because they are neither certified nor affirmed. See, e.g., Henkin v. Fast Times Taxi, Inc., 307 A.D.2d 814-15; Charlton v. Almaraz, 278 A.D.2d 145, 146; McLoyrd v. Pennypacker, 178 A.D.2d 227. This leaves the Court with only the physicians' affirmations as a basis to gauge Plaintiff's opposition.

Dr. Marini's Affirmation

Dr. Marini examined Plaintiff on April 6, 2004, however, the first two paragraphs of his Affirmation refers to—and apparently relies on—the inadmissible records listed above, i.e., Harlem Hospital and Murray Hill Chiropractic. Nonetheless, the doctor found limitations in Plaintiff's cervical and lumbar spine during this examination, as well as in his left shoulder. The doctor referred him for physical therapy and suggested that he continue chiropractic treatment.

The Court is unmoved by these findings and recommendations given that the doctor fails to causally relate any of the limitations, complaints or alleged maladies to the accident in question. See Daisernia v. Thomas, 12 A.D.3d 998 (dismissing plaintiff's

complaint because she "fail[ed] to causally connect her . . . injury to the accident"); Foley v. Karvelis, 276 A.D.2d 666, 667 (dismissing plaintiff's complaint because "[h]er doctor failed to causally connect that injury to the subject accident"); Ray v. Ficchi, 178 A.D.2d 988, 989 (dismissing plaintiff's complaint because "the affidavit of plaintiff's chiropractor failed to connect causally plaintiff's alleged injury to the motor vehicle accident"). Also, the Affirmation fails to contain any physician-mandated restrictions, such as home confinement or the curtailment of physical activity. See Traugott v. Konig, 184 A.D.2d 765, 766 (granting summary judgment where plaintiff "did not submit a physician's affidavit substantiating the existence of a 'medically determined' injury producing the alleged impairment of his activities") (citations omitted). Additionally, there is no admissible evidence that Plaintiff underwent any of the recommended therapy—or any other treatment—until he visited Dr. Mian on December 6, 2007.

Dr. Mian's Affirmation

Plaintiff visited Dr. Mian on December 6, 2007 for an examination. The doctor's Affirmation refers to an ambulance call report, which was not provided, the aforementioned Murray Hill Chiropractic records, and Dr. Marini's April 2004 evaluation. The doctor also examined Plaintiff and found deficiencies in the range of motion of his cervical and lumbar spine. The doctor decided at that time to order an MRI of Plaintiff's lumbar, since one had never been done for the nearly three years since the alleged auto accident.

Plaintiff returned on January 15, 2008, and the doctor indicated that his condition was unchanged. At this session, Plaintiff complained of pain in his neck that radiated to his upper extremities with paresthesia and numbness, and pain in his lower back that

radiated to his lower extremities with paresthesia and numbness. The doctor reviewed the MRI films and found a broad based disc bulge. Consequently, the doctor recommended a percutaneous diskectomy at L4-L5 based on Plaintiff's "four year history of continued lumbar radiculopathy with complaints of paresthesia and numbness to the lower extremities."

The procedure was conducted on June 20, 2008, and Plaintiff returned on June 24, 2008 for a follow-up. At that visit, the doctor concedes that the procedure improved the range of motion in Plaintiff's lumbar spine to 70 out of 80% in the flexion, 20 out of 30% in the extension, 20 out of 25% in the right and left lateral flexion, and 20 out of 30% in the right and left rotation—findings almost identical to Defendant's experts discovered on July 9, 2008. The doctor closes this entry by stating that he prescribed therapy to Plaintiff. Once again, there is no indication in the record that Plaintiff underwent any therapy or treatment until visiting Dr. Mian for a follow-up—over a year later on July 14, 2009.

The doctor found limitations in the range of motion of Plaintiff's cervical and lumbar spine during this July 2009 examination. The doctor concluded that the L4-L5 bulge was permanent in nature, as well as Plaintiff's residual loss of range of motion. The doctor also causally related these conditions to the accident of March 20, 2004. The doctor further disagreed with Defendant's expert that the finding on the MRI was degenerative. Finally, the doctor added that Plaintiff also "sustained a cervical pain syndrome as a result of the accident which has left a minor residual loss of range of motion of the cervical spine."

Gap in Treatment

The Court finds Dr. Mian's Affirmation insufficient to carry Plaintiff's burden for several reasons. First, Dr. Mian fails to explain the over three-plus year gap in treatment from Dr. Marini's examination on April 6, 2004 until Plaintiff's December 6, 2007 visit, and the one year gap between Plaintiff's surgical procedure on June 20, 2008—which seemed to have alleviated the limitations in Plaintiff's range of motion of his lumbar spine—and the July 14, 2009 follow-up. Consequently, the doctor's "opinion as to permanence and significance [is] conclusory and speculative, and seemingly tailored to meet the statutory definition." Arjona v. Calcano, 7 A.D.3d 279, 280; see also Ayala v. Bassett, 57 A.D.3d 387, 389 (stating that "the unexplained gap in treatment . . . for each plaintiff undermined their respective claims of serious injury based on allegations of permanent injury"); Pitter v. Ceesay, 2009 NY Slip Op 51488U, **1 (stating that "[t]he failure of plaintiff . . . or her physicians to address or explain the gap in treatment is fatal to said plaintiff's serious injury claims under the 'significant limitation' and 'permanent consequential limitation' categories of Insurance Law § 5102(d)").

Lack of Objective Proof

Second, Dr. Mian's surgical recommendation was based on four-plus years of Plaintiff's complaints of pain. The record, however, is devoid of any admissible evidence of treatments, therapy or medical intervention which would have documented these purported complaints, other than the Affirmations of Dr. Mirini and Dr. Mian. Therefore, neither Dr. Mirini nor Dr. Mian may rely on the treatments or conclusions of other physicians contained in inadmissible records. See, e.g., Dominguez-Gionta v. Smith, 306 A.D.2d 432; Philippe v. Ivory, 297 A.D.2d 666; Merisca v. Alford, 243 A.D.2d

613. Thus, Dr. Mian may not rely on those inadmissible records to justify Plaintiff's need for surgery. See Merisca v. Alford, 243 A.D.2d 613, 614 (holding that "[c]onclusions, even of an examining doctor, which are unsupported by acceptable objective proof, are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury"). Furthermore, Plaintiff's subjective complaints of pain contained in his deposition and affidavit do not countenance a different result. See, e.g., Christian v. Waite, 61 A.D.3d 581, 582; Guadalupe v. Blondie Limo, Inc., 43 A.D.3d 669, 670; Park v. Champagne, 34 A.D.3d 274, 276.

Bulge Alone is Insufficient

Third, given the dearth of evidence regarding the extent of Plaintiff's limitations—which could have been substantiated by therapy records or lost time from work—the MRI showing the bulge at L4-L5 is insufficient to meet his burden. Although "[a] bulging or herniated disc may very well be a serious injury within the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition . . . a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury." Arjona v. Calcano, 7 A.D.3d 279; see also Pommells v. Perez, 4 NY3d 566, 574 (holding that "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury"); Howell v. Reupke, 16 A.D.3d 377 (holding that "[t]he mere existence of a bulging or herniated disc is not

conclusive evidence of a serious injury in the absence of any objective evidence of a related disability or restriction").

Inconsequential and Insignificant

Fourth, the limitations found in the ranges of motion of Plaintiff's lumbar during Dr. Mian's June 24, 2008 examination are too slight to be considered "significant" or "consequential." See, e.g., Granger v. Keeter, 23 A.D.3d 886 (finding that a 10% to 15% limitation in the cervical spine and a 20% limitation of the lower back was not "consequential"); Trotter v. Hart, 285 A.D.2d 772 (finding that "a 20% loss of use of [the] cervical spine and 10% loss of use of [the] lumbar spine establishes neither a significant nor consequential injury"); Baker v. Donahue, 199 A.D.2d 661 (finding that a 20% permanency in the thoracic spine was not "significant" or "consequential").

90/180

Finally, there is no evidence that Plaintiff was unable to engage in the usual and customary activities of daily living for 90 out of the ensuing 180 days after the accident. See Ryan v. Xuda, 243 A.D.2d 457-58. Although he claims in his Bill of Particulars that he was confined to his home and bed for three months, that averment is contradicted by his claim that he only missed one day of work. See Ariona v. Calcano, 7 A.D.3d at 280 (finding that "permanent problems in standing, sitting, bending and lifting" where "a minor, mild or slight limitation of use . . . insufficient to constitute a serious injury within the definition of the no-fault statute"); see also Alloway v. Rodriguez, 61 A.D.3d 591, 592 (holding that "subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on [the] usual and customary daily activities for at least 90 days of the 180 days following the accident").

Given the above, this Court finds that both Dr. Mirini and Dr. Mian's Affirmations lack sufficient objective and competent medical evidence to support the contentions therein—rendering those Affirmations "the mere parroting of language designed to tailor the claim to meet statutory requirements." Mastaccioula v. Sciarra, 11 A.D.3d 434, 435.

Since Plaintiff cannot meet his threshold burden, the Court has searched the record and is granting summary judgment to Fineman as well on this issue. See, e.g., Samedy v Sanabria, 2010 NY Slip Op 50230U; Abusbeih v. AKK, Inc., 2009 NY Slip Op 51774U; Thompson v. Etinoff, 2009 NY Slip Op 50104U.

The foregoing shall constitute the decision and order of this Court.

Dated: MAR 0 8 2010

J.S.C.