

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

WARREN TAYLOR and DELIA TAYLOR,

Plaintiffs.

-against-

GEORGE HILDEBRANDT INC. and
MARTIN A. WEINER,

Defendants.

Index No: 1162/03

Motion Date: 6/9/04

Motion Cal. No: 23

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing the complaint on the grounds that plaintiffs have not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is granted and the complaint is dismissed.

Defendants have submitted competent medical evidence including the affirmed reports of their examining orthopedist, portions of plaintiffs' medical records including, inter alia, the cervical MRI reports of plaintiffs' radiologist and the plaintiffs' deposition testimony which establish, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. (See, Gaddy v. Eyler, 79 NY2d 955 [1992]; Jackson v. New York City Tr. Auth., 273 AD2d 200 [2000]; Greene v. Miranda, 272 AD2d 441 [2000]). Thus, the burden shifts to the plaintiffs to demonstrate the existence of a triable issue of fact by submitting competent medical proof. (see, Gaddy v. Eyler, supra; Licari v. Elliott, 57 NY2d 230, 235 [1982]; Lopez v. Senatore, 65 NY2d 1017 [1985]). This the plaintiffs failed to do.

The competent medical evidence, i.e. plaintiffs' treating chiropractor, Dr. Snyder, the sworn cervical MRI reports prepared by Dr. Rizzuti submitted by the plaintiffs are insufficient to raise a material issue of fact as to whether plaintiffs sustained a serious injury within the meaning of the insurance law. The narrative reports of Dr. Tuncel, Dr. Futoran, a physiatrist, including the nerve conduction studies, and Amy Shapiro, an Assistant Psychologist, were not considered since they were not submitted in admissible form. (see, CPLR 2106; Grasso v. Angerami, 79 NY2d 813 [1991]).

The plaintiffs, Warren and Delia Taylor, who were 77 and 74 years old respectively, on May 7, 2001, the day of the accident, first sought treatment with Mr. Taylor's chiropractor, Dr. Snyder who had previously treated him for injuries to his neck back and left shoulder as a result of an accident in 1999. Plaintiffs received chiropractic treatment for approximately one year following the instant accident and returned to Dr. Snyder on June 1, 2004 for an examination to determine his present status. (see, Giordano v. Ramos, 2 AD3d 676 [2004].)

In opposition to the defendants' motion plaintiffs submitted Dr. Rizzuti's affirmed reports of plaintiffs' cervical MRIs performed on June 27 and 27, 2001 and the affidavits of Dr. Snyder sworn to on June 1, 2004 which are insufficient in several respects. Dr. Rizzuti reported that Mr. Taylor's cervical MRI revealed herniations at C4-5 and C7-T1 which were not present in 1999, but did not opine that they were causally related to the accident. While Dr. Snyder opines that the herniations are a result of the accident, he fails to set forth any objective medical basis for his opinion or for his diagnosis. (see, Napoli v. Cunningham, 273 AD2d 366[2000]; Grossman v. Wright, 268 AD2d 79[2000]; Vitale v. Carson, 258 AD2d 647[1999]; Nadrich v. Woodcrest Country Club, 250 AD2d 827[1998]; Weaver v. Derr, 242 AD2d 823[1997]). Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law, a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration. (Espinal v. Galicia, 290 AD2d 528[2002]; Monette v. Keller, 281 AD2d 523, 523-24[2001]; see, Duldulao v. City of New York, 284 AD2d 296, 297[2001]). The extent or degree of physical limitation may be established by designating a numeric percentage of a plaintiff's loss of range of motion or by a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compares the plaintiff's limitations to the normal use of the affected body system or function (see Toure v. Avis Rent A

Car Systems, Inc., 98 NY2d 345, 350-351[2002]; Dufel v. Green, 84 NY2d 795, 798[1995]). However, Dr. Snyder did not set forth any initial range of motion restrictions contemporaneous with the accident.(see, Ifrach v. Neiman, 306 AD2d 380[2003]; Pajda v. Pedone, 303 AD2d 729[2003]; Claude v. Clements, 301 AD2d 554 [2003]; Kassim v. City of New York, 298 AD2d 431[2002]; Merisca v. Alford, 243 AD2d 613[1997]). In any event, the limitations of motion of plaintiff's cervical spine reported and quantified by the Dr. Snyder in his June 1, 2004 affidavit were of an insignificant nature (see Melvin v. Metropolitan Suburban Bus Auth, 4 AD3d 343[2004]; Lorenzo v. O'Keefe, 1 AD3d 411[2003]; Trotter v. Hart, 285 AD2d 772[2001]; Williams v. Ciaramella, 250 AD2d 763[1998]; Cabri v. Myung Soo Park, 260 AD2d 525[1999]; Medina v. Zalmen Reis & Assocs., 239 AD2d 394 [1997]), based upon the plaintiff's subjective complaints of pain (see Barrett v. Howland, 202 AD2d 383 [1994]; LeBrun v. Joyner, 195 AD2d 502 [1993]) and tailored to meet statutory requirements. (see, Lopez v. Senatore, supra at 1019; Castano v. Synergy Gas Corp., 250 AD2d 640 [1998]). Plaintiff at his deposition and in his affidavit stated that the only thing he couldn't do after the accident and at the present time is lift objects weighing 50 pounds or more. Such testimony is ample evidence that he did not sustain a serious injury as a result of the accident. (see, Attanasio v. Lashley, 223 AD2d 614 [1996]; Winkler v. Lombardi, 205 AD2d 757 [1994].)

Dr. Snyder's June 15, 2002 report and the June 1, 2004 and affidavit Dr. Rizzuti's MRI report are also insufficient to raise a question of fact as to the plaintiff, Delia Taylor. Dr. Rizzuti does not opine that the posterior disc herniation at C5-6 was causally related to the accident or that there is any neurological involvement. The opinions expressed in Dr. Snyder's report and the affidavit as to causation and as to permanence were stated in wholly conclusory terms, tailored to meet statutory requirements (Lopez v. Senatore, supra at 1019) without providing an objective medical basis for the opinions, and are thus without evidentiary value .(see, Franchini v. Palmieri, 1 NY3d 536 [2004]; McHaffie v. Antieri, 190 AD2d 780 [1993]; Gaddy v. Eyler, 79 NY2d 955; Lopez v. Senatore, supra; Cannizzaro v. King, 187 AD2d 842 [1992]; Flater v. Brennan, 173 AD2d 945 [1991]). Although Dr. Snyder in his affidavit quantified the alleged limitation in the plaintiff's cervical range of motion, he failed to compare the limitations to the normal use of the affected body system or function (see Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, 350-351[2002]; Dufel v. Green, 84 NY2d 795, 798[1995]) and appear to be based upon plaintiff's subjective complaints of pain (Oquendo v New York City Transit Authority, 246 AD2d 635 [1998]; Almonacid v. Meltzer, 222 AD2d

631 [1995]). In addition, plaintiff testified at her deposition that after the accident she was unable to perform heavy housework, but now she can do everything although she has occasional pain. Claims of intermittent or transitory pain alone, however, are insufficient as a matter of law. (See, Scheer v. Koubek, 70NY2d 678 [1987]; Licari v Elliot, supra; Craft v. Brantuk, 195 AD2d 438 [1993]; Leschen v. Kollartis, 144 AD2d 122[1989]; Garson v. Dowd, 143 AD2d 113[1988]; Gootz v. Kelly, 140 AD2d 874[1988].)

It is apparent that the plaintiffs suffered nothing more than sprains and strains as a result of the accident which do not constitute serious injury within the meaning of the insurance law. (See, Scheer v. Koubek, supra; Meaenza v. Lefkajornsook, 172 AD2d 500 [1991]; Konco v. E.T.C. Leasing Corp., 160 AD2d 680 [1990]; Stadler v. Findley, 148 AD2d 600 [1989]; Palmer v. Amaer, 141 AD2d 622 [1988].)

Dated: June 21, 2004
D#16

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J.S.C.