At an IAS Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of December, 2004

P R E S E N T:

HON. RANDOLPH JACKSON,
Justice.

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VIHREEN A. PEEV,

Plaintiff,

- against - Index No. 45398/2001

SABRINA VEGA., ET ANO,

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Memo of Law	5

Upon the foregoing papers, defendants Sabrina Vega and Hilda Gryzbek move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Vihreen Peev on the ground that plaintiff did not suffer a serious injury as that term is defined by Insurance Law §§ 5102 (d) and 5014 (a).

This personal injury action arises out of a collision which took place on May 14, 2000 when the vehicle owned and operated by Vihreen A. Peev (Peev) collided with the vehicle owned by Hilda Gryzbek and operated by Sabrina Vega.

In their motion, defendants contend that plaintiff did not sustain a "serious injury" and therefore, the complaint should be dismissed. Defendants point to plaintiff's deposition testimony wherein he stated that he did not receive medical treatment until the day after the accident, was treated for about six months at an unnamed medical office and did not miss time from work.

Defendants note that, in his bill of particulars, plaintiff alleges that as a result of the accident he sustained posterior mid-line to left sided disc herniation at C2-3, indenting the thecal sac; anterior disc bulges at C5-6, C6-7; posterior bulges C3-4, C4-5; loss of curvature with straightening of the cervical and lumbar spines; disc bulge at L4-5; malalignment at L4-5 where there is Grade 1 spondylolisthesis; extensive mid-line to left-sided annular tearing at L4-5; bulge at T9-T10; posterior bulge T11-T12; left shoulder and elbow contusion/derangement; cervical and lumbar sprain/strain; and restricted ranges of motion in the cervical, lumbar and thoracic spines, left shoulder and left elbow.

In support of the motion, defendants submit the affirmed reports of Louis Kiwala, MTOM, MS, L.Ac., an acupuncturist who examined plaintiff on September 19, 2000; Dr. Abiola Familusi, a physician who performed an internist evaluation on September 25, 2000; Dr. Jasjit Singh, D.O., a neuorologist who examined plaintiff on

September 26, 2000; Dr. Joel Teicher, who performed an orthopedic examination of plaintiff on April 6, 2004; and Dr. Allan Hausknecht, a neurologist who examined plaintiff on April 16, 2004; all of whom examined the plaintiff at defendants' request.

Louis Kiwala conducted an independent acupuncture examination of plaintiff and in an undated affirmed report stated his findings. However, since a licensed acupuncturist is not authorized to submit an affirmation (*see* CPLR 2106), this court will not consider his report since it is not in admissible form.

In his affirmed report, Dr. Abioli Familusi noted that plaintiff did not have any pain as a result of the accident. He found that the neck examination was normal with full range of motion, the back examination was normal, and bilaterally in the upper extremities there was no area of tenderness, spasm, full range of motion and power. His impression was that plaintiff had sustained cervical and lumbar sprain which had completely resolved. Dr. Familusi opined that plaintiff had no need for treatment and had no disability.

In his affirmed report, Dr. Jasjit Singh, D.O. noted that plaintiff had no complaints at the time and found that plaintiff had a normal neurological examination and that the cervical and lumbar pains alleged were "subjective." He opined that no further neurological treatment was medically necessary and that plaintiff did not demonstrate any objective neurological disability and was neurologically stable and able to engage in active employment, as well as the full activities of daily living without restriction.

Dr. Joel Teicher, in his affirmed report, diagnosed plaintiff's condition as resolved acute cervical, thoracic, and lumbosacral sprain and resolved contusion and sprain to the left

elbow and shoulder. Dr. Teicher found no objective physical findings present at the time of the examination to suggest the presence of residual underlying orthopedic pathology causally related to the accident. Dr. Teicher opined that there were no objective physical findings present at the time of examination to suggest any residual functional deficit or permanency.

Dr. Allan Hauskneckt, in his affirmed report, found plaintiff had resolved cervical and lumbar sprain. Dr. Hauskneckt noted that plaintiff complained that he had occasional stiffness and soreness in his back which plaintiff himself related to weather changes or physical activity, but that overall plaintiff thought he had improved. Dr. Hauskneckt noted that plaintiff had not seen a doctor with these complaints since his last visit in 2000 and occasionally takes over-the counter analgesics. Upon examination, plaintiff was found to have full range of motion in the shoulders, cervical, thoracic and lumbosacral spines. There were no objective abnormalities and the examination was completely normal with no need for any further neurodiagnostic testing or treatment.

In opposition to the motion, plaintiff submits the affirmed report of Dr. Donald Goldman, the orthopedist who examined plaintiff on June 1, 2004; and an affirmation from Dr. John T. Rigney,[1] a radiologist who certified that certain cervical, thoracic and lumbar MRI examinations were performed on the plaintiff under his supervision on specific dates.

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[1] More specifically, the affirmation states that he supervised taking magnetic resonance imaging examinations of the plaintiff's cervical spine on May 27, 2000, thoracic spine on June 3, 2000, and lumbosacral spine on June 17, 2000.

Plaintiff also submits the affirmation of his attorney who maintains that Peev was treated for approximately five months at 1502 East 14th Street in Brooklyn. However, as a threshold matter, the court notes that no medical records have been annexed to the affirmation of plaintiff's counsel. Therefore, plaintiff's attorney's statement that Peev's "various injuries and complaints do not predate the accident," is without probative value as counsel's affirmation is not based on personal knowledge (*see Demacos v Demacos,* 142 AD2d 546, 546 [1988]).

Plaintiff further proffers the June 16, 2004 affirmation of Dr. Donald I. Goldman, an orthopedist, to support his contention that he suffered a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system. In his affirmed report, Dr. Donald Goldman noted that because of continued pain that failed to resolve, Peev was referred to his office for orthopedic surgical evaluation and treatment. Dr. Goldman reviewed plaintiff's medical records which referred to findings of unspecified MRIs of the cervical and lumbar spines and MRI reports of the lumbar, cervical and thoracic spines. Dr. Goldman stated he "saw both the cervical and lumbar MRI films in [his] office." Upon examination of plaintiff's cervical spine Dr. Goldman found that there was normal flexion and extension; right rotation was 50 degrees with trigger point spasm in the right trapezius; right lateral bending was intact; left lateral bending was intact; left cervical rotation to the left was complete; grip was normal; extremities were symmetrical; light touch was normal. Upon examination of the lumbar spine, Dr Goldman found a normal lordotic curve; the posture did not reverse; no spasm in the upright position; the spine was

midline; interspinous motion on flexion was complete; extension was restricted to 20 degrees with pain in the paralumbar area; right and left lateral bending had spasm in the paralumbar muscle; straight leg raising was not painful; and deep tendon reflexes were equal and symmetrical. In his affirmation, Dr. Goldman stated that he "agree[d] with the radiologist" and concluded that plaintiff suffered: (1) a herniation a C2-C3; (2) a tear of the L4-L5 lumbar annulus fibrosis; (3) spondyloslisthesis Grade I/ trauma- aggravated; and (4) resolved thoracic bulging disc T9-T10 and T11-12. He found that, as a result of the accident, plaintiff had pain with restriction of motion in both the cervical and lumbar spine for more than four years. He further stated that plaintiff sustained a permanent orthopedic disability, demonstrated by MRI revealing herniation at C2-3 and has a functional restriction of motion of 20% that only bothered him during repetitive motions. He found that there is a permanent orthopedic disability in the lumbar spine demonstrated by MRI which revealed a tear of the annulus fibrosis at L4-L5.

In reply, defendants argue that Dr. Goldman's opinions are speculative as there is no evidence that he treated or examined plaintiff prior to June 16, 2004, four years after the accident, and there is no explanation for the three and one-half year gap[2] since plaintiff last

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[2] There is no documentary evidence to support plaintiff's claim's of treatment. However, he testified at his deposition as follows:

Q: Is all of the treatment that you had related to this accident, all the same medical offices and at the same address?
A: Yes.
Q: At the end of six to seven months was your treatment completed, ended?
A: Yes, they said it was okay.
Q: Do you have any appointments today that are for the future for any treatment related to these injuries?

sought treatment. Defendant points out that no medical records are annexed to plaintiff's opposition papers, to support the claim that plaintiff received treatment and Dr. Goldman, and as well as plaintiff's counsel, repeatedly refer to MRI reports that are not annexed either to the motion papers or to plaintiff's opposition. Defendants state that Dr. Goldman found evidence that plaintiff had a pre-existing condition, but argue that Dr. Goldman's conclusion that plaintiff's injuries are causally related to the accident is also speculative as Dr. Goldman never examined plaintiff prior to the accident of May 14, 2000 or within four years since its occurrence. Defendants also point out that while Dr. Goldman states that he reviewed both the cervical and lumbar MRI films, there are several referred to in the list of materials reviewed, and Dr. Goldman does not distinguish which MRI films he personally reviewed nor does he name the radiologist with whom he agrees. Defendants also fault Dr. Goldman's report since he delineates percentage losses of ranges of motion without comparison to normal ranges of motion, and relies on the undocumented MRIs to support his claim that plaintiff sustained a permanent orthopedic disability.

A: Later on during the winter, I was having some pain in my elbow and some pain in my back.
Q: Did you go to see anybody about the pain?
A: No. I was just taking the medication.
Q. What medication were you taking?
A: Only pain relief.
Q: Is that prescription pain relief or over the counter:
A. Basically anything which you can get from the pharmacy around the corner.

DISCUSSION

Defendants have met their burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), given the medical reports of Drs. Familusi, Singh, Teicher and Hausknecht (*see generally Gaddy v Eyler*, 79 NY2d 955 [1992]; *Ocasio v Henry*, 276 AD2d 611 [2d Dept 2000]; *Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Accordingly, the burden shifts to plaintiff to come forward with sufficient evidence to raise a triable issue of fact (*Gaddy*, 79 NY2d 955; *Ocasio*, 276 AD2d 611; *Grossman*, 268 AD2d 79). In order to refute defendants' showing and to establish that he sustained a serious injury, plaintiff must submit "objective proof, 'such as an expert's designation of a numeric percentage of his [or her] loss of range of motion,' or '[a]n expert's qualitative assessment of his [or her] condition . . . , provided that the evaluation has an objective basis and *compares* his [or her] limitations to the normal function, purpose and use of the affected body organ, member, function or system'" (*Suarez v Abe*, 4 AD3d 288, 289 [1st Dept 2004]; quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]) [*emphasis added*]. Plaintiff has not made this showing.

As a threshold matter, an affirmation from counsel, based on incompetent evidence and without personal knowledge of plaintiff's injuries, is without evidentiary value and will not be considered (*see e.g. Feratovic v Lun Wah, Inc.*, 284 AD2d 368 [2d Dept 2001]; *Carpluk v Friedman*, 269 AD2d 349 [2d Dept 2000]; *Sloan v Schoen*, 251 AD2d 319 [2d Dept 1998]).

Dr. Goldman's report is insufficient to establish that plaintiff sustained a serious injury. To the extent that the affirmation of Dr. Goldman attempts to incorporate uncertified, medical records and reports, it lacks probative value (*see generally Claude v Clements*, 301 AD2d 554 [2nd Dept 2003]). Significantly, Dr. Goldman's opinions are based on undocumented MRIs, and his report states that he agrees with unspecified findings from and unknown radiologist whose report is not annexed. The absence of sworn reports from the radiologist, or identification of the MRI examinations to which Dr. Goldman refer renders such medical evidence inadmissible (*see generally Mahoney v Zerillo*, 6 AD3d 403 [2004][plaintiff's physician impermissibly relied upon the unsworn reports of other doctors]; *Dominguez-Gionta v Smith*, 306 AD2d 432 [2003][plaintiff's physician improperly relied upon an unsworn magnetic resonance imaging report of another physician]; *Claude v Clements*, 301 AD2d 554 [2003][the evidence submitted by plaintiff was insufficient to raise a triable issue of fact where the affidavit of his examining physician improperly relied upon medical reports prepared by other physicians]; *Delpilar v Browne*, 282 AD2d 647 [2001][plaintiff's physician improperly relied upon unsworn test results in reaching his conclusion]). Further, the affirmation of Dr. John Rigney, a radiologist, [3] appears to be a notice of intention to use certain MRI films at trial and is not probative on the issues raised herein.

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[3] See footnote 2.

After examining plaintiff, Dr. Goldman concluded that plaintiff sustained a permanent orthopedic disability in the cervical spine, which he claims is demonstrated by an MRI. Although Dr. Goldman's report refers to a physical examination of plaintiff and quantifies range of motion limitations in Peev's cervical spine, these measurements are not compared to normal measurements (*see Aronov v Leybovich*, 3 AD3d 511 [2nd Dept 2004]). Moreover, Dr. Goldman does not refer to his personal examination and observation, but relies on the MRI for his diagnosis, when, for example, with reference to the lumbar spine he concludes that plaintiff: "sustained a permanent orthopedic disability demonstrated by MRI . . and exhibits a painful functional restriction of motion." Further, mere subjective complaints of pain alone, as well as medical opinions clearly based upon such complaints, are insufficient to raise a triable issue of fact (*see e.g. Johnson v Burke & McCowen*, 7 AD3d 674 [2004]; *Mahoney v Zerillo*, 6 AD3d 403 [2004]; *Giordano v Ramos*, 2 AD3d 676 [2003]). Additionally, as there are no measurements taken contemporaneous with the accident, it is therefore insufficient to prove serious injury (*see Pajda v Pedone*, 303 AD2d 729 [2d Dept 2003][plaintiff's medical proof insufficient as he failed, *inter alia,* to submit medical proof that was contemporaneous with accident showing any initial range of motion restrictions]). In addition, although Dr. Goldman avers that Peev continues to suffer permanent impairments and significant restriction in mobility in his cervical and lumbar spine as a result of the subject accident, the doctor's opinion is without probative value in that, other than a straight leg raising test, he fails to identify the tests that he relied upon in making his conclusions (*see e.g. Finnegan v Gabriel*, 7 AD3d 663 [2d Dept 2004][the affirmation of

plaintiff's physician submitted in opposition to the defendants' motion was insufficient to raise a triable issue of fact where, *inter alia*, the physician failed to identify the objective tests he used to determine the limitations in the plaintiff's range of motion]; *Millar v Town of Oyster Bay*, 7 AD3d 588 [2nd Dept 2004] [the report of plaintiff's physician submitted in opposition to the defendants' motion was insufficient to raise a triable issue of fact where, *inter alia*, it did not identify the objective tests, if any, used to establish limitations in the plaintiff's range of motion]; *Ersop v Variano*, 307 AD2d 951 [2d Dept 2003][although plaintiff's treating physician asserted that plaintiff had a "moderate/marked limitation of motion of his cervical spine," he did not identify what objective tests, if any, he performed in arriving at his conclusions concerning the alleged restrictions in the plaintiff's motion, nor did he specify the degree of the limitation in motion]).

Moreover, "'[a]lthough a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102 (d), a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration'" (*Diaz v Turner*, 306 AD2d 241, 242 [2d Dept 2003], quoting *Monette v Keller*, 281 AD2d 523, 524 [2d Dept 2001]; *accord Lagois v Public Adm'r of Suffolk County*, 303 AD2d 644 [2d Dept 2003]; *Elfiky v Harris*, 301 AD2d 624 [2d Dept 2003]; *Duldulao v City of New York*, 284 AD2d 296 [2d Dept 2001]). Here, Dr.Goldman fails to provide any objective evidence of the extent or degree of the alleged physical limitations resulting from plaintiff's alleged disc injuries and their duration. Further, Dr. Goldman concluded that plaintiff had a pre-existing condition in his spine and failed to address the issue that the pre-

existing condition may be the cause of his current medical restrictions (*see Lorte v Adeyeye*, 306 AD2d 252 [2nd Dept 2003]).

Moreover, there is no explanation offered regarding the nature of any alleged short-term treatments received by plaintiff immediately after the May 14, 2000 accident, nor any explanation for the three and one-half year gap between the examination of June 14, 2004 after defendants moved for summary judgment and plaintiff's previous examination (*see Jiminez v Kambli*, 272 AD2d 581 [2d Dept 2002]).

Under the circumstances, it must also be concluded that plaintiff failed to refute movants' prima facie showing that he did not sustain an injury that prevented him from performing substantially all of his daily activities for not less than 90 of the first 180 days after the subject accident since he testified that he did not miss any time from work as a result of this accident and failed to discuss any other limitations in his activities after the accident (*see e.g. Medina-Santiago v Nojovits*, 5 AD3d 253 [2004][record lacked evidence raising an issue of fact as to whether, due to a medically determined injury or impairment, plaintiff was unable to perform substantially all of his usual and customary daily activities for at least 90 of the 180 days following his accident where plaintiff did not submit an affidavit attesting to the impact of his injuries upon his recreational, personal or home life, and his deposition testimony that he was unable to return to work for four weeks and was confined to his home for two months falls short of establishing the statutory threshold]; *Szabo v XYZ, Two Way Radio Taxi Assn.*, 267 AD2d 134 [1999][plaintiff failed to sustain her burden of proof where she alleged that she was absent from work on a full time basis for

two full weeks after the accident, but was thereafter able to work half days, with periodic days off, since this assertion, even when coupled with the limitations she asserted with respect to "detailed computer work" and her inability to "hold little things the way [she] used to," did not meet the "substantially all" standard, which requires a showing that the plaintiff's activities have been restricted "to a great extent rather than some slight curtailment"]; *Ingram v Doe*, 296 AD2d 530 [2002][in light of plaintiff's admission that she returned to work at two full-time jobs within two months of the accident, the conclusory allegation in her affidavit that she was forced to curtail recreational and household activities was insufficient to demonstrate that she sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts constituting her normal daily activities for not less than 90 of the first 180 days following the accident]; *Ocasio*, 276 AD2d 611 [plaintiff failed to sustain burden in light of her admission that she missed only two weeks of work and school]; *Bucci v Kempinski*, 273 AD2d 333 [2000][plaintiff failed to sustain his burden where he admitted that he missed approximately two weeks of work in his bill of particulars]; *Marotta v Mastroianni*, 273 AD2d 206 [2000][plaintiff's admission in her affidavit, bill of particulars, and deposition testimony that she missed only approximately two weeks of work as a result of the accident failed to raise a triable issue of fact]).

Conclusion

Defendants' motion is granted and plaintiff's complaint is dismissed.

The foregoing constitutes the decision, order, and judgment of this court.