

Membrano v Morales

2007 NY Slip Op 30059(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0024600

Judge: John J.J. Jones

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impingement, cervical sprain/strain and other soft tissue injuries, and that as a result of the accident he was unable to work as a cabinet maker for two months.

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; *Brown v Stark*, 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (*Licari v Elliott, supra*, at 57 NY2d 238; *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined as 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 constitutes 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" (Insurance Law § 5102 [d]).

In support of the motion, defendant submitted the report of an orthopedist who examined plaintiff on June 28, 2006, and reviewed numerous medical reports, including the report of an MRI of the lumbar spine performed on June 8, 2004 which stated, in part, that there was "loss of disc signal at the L5-S1 level, on the T2 weighted sequence, which reflects premature disc desiccation and disc injury" as well "herniation of the disc into the ventral spinal canal, larger on the left side" at L5-S1. Active range of motion was observed and measured by goniometer as follows: cervical flexion 25/38; cervical extension 55/38; lateral flexion 35/43 bilaterally; cervical rotation 65/45 bilaterally; active shoulder abduction 150/170 bilaterally; active shoulder forward flexion 140/158 bilaterally; external rotation 95/90 bilaterally; internal rotation 65/70 bilaterally. Straight leg raising in the supine position was 80/80 bilaterally and pelvic roll was negative. The plaintiff reported some "mild discomfort on percussion of the lumbar spine but no radiation." Lumbar range of motion was not reported, but the doctor concluded that he found "no objective evidence of any residual of injuries . . . to the cervical spine, lumbar spine, to the chest, left shoulder or to the left knee." The defendant also submitted the report of a neurologist who examined the plaintiff on June 20, 2006, at which time it was reported that plaintiff was initially seen in the emergency room where x-rays revealed no fracture or dislocation. He subsequently underwent a course of physical therapy, chiropractic spinal care and acupuncture treatments for a period in excess of 24 months following the accident. At the time of the examination,

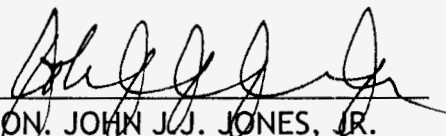
plaintiff continued to undergo chiropractic care once a month. Range of motion testing reportedly showed full range of motion of the shoulders, and the cervical and lumbar spine. Straight leg raising was “unlimited at 90 degrees.” There was no sciatic notch tenderness and the foraminal compression test and Kemp’s maneuver were negative. Sensation was intact to all primary and cortical modality testing and there was 5/5 power resistance in segmental motor evaluation. The doctor concluded that the plaintiff’s injuries had resolved and that there were no neurological deficits to correlate with subjective complaints of cervical, thoracic and lumbar discomfort. The defendant also submitted the report of a radiologist who reviewed the MRI of plaintiff’s lumbosacral spine taken June 8, 2004, which showed desiccatory changes at L5-S1, as well as “a bulging disc at L5-S1 compressing on the thecal sac as well as the originating S1 and exiting L5 nerve roots bilaterally” but no focal herniation. He concluded that the disc bulge was not post-traumatic but, instead, was “degenerative secondary to annular degeneration and/or ligamentous laxity” and that it was “not causally related to the injury of 04/25/04.”

In opposition to the motion, plaintiff submitted the sworn affidavit of his treating chiropractor, who first saw plaintiff on April 28, 2004, at which time there was muscle tension and spasticity in his cervical and lumbar paraspinal muscles with “severe” swelling. Range of motion was reportedly 15/30 lumbar extension, 20/30 left and right rotation, and 10/20 left and right lateral flexion, and the plaintiff received treatment three times a week for the remainder of the year, including chiropractic adjustments, manual traction, heat therapy and use of a back brace. He continued treatment up through the date of the report, and as of August 10, 2006, the Kemp’s test and the toe and heel walk tests were positive bilaterally. Lumbar range of motion testing showed 20/30 extension, 25/30 left rotation, 20/30 right rotation, 10/20 lateral flexion bilaterally. He concluded that the MRI report of a disc herniation at L5-S1 with left nerve root impingement was confirmed diagnostically and, given the length of time in which the symptoms have persisted, that the injury is permanent and causally related to the accident. While the plaintiff was entitled to rely on the unaffirmed MRI report of his lumbosacral spine because the defendant’s examining doctors referred to it (*see Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]; *see also Perry v Pagano*, 267 AD2d 290, 699 NYS2d 882 [2d Dept 1999]), plaintiff also submitted an affidavit from the radiologist attesting to the findings in the report.

Such evidence, coupled with the plaintiff’s affidavit, is sufficient to raise a triable issue of fact as to whether plaintiff sustained a permanent consequential or significant limitation of use of his lumbar spine as the result of the accident (*see Lim v Tiburzi*, ___ AD3d ___, 2007 NY App Div LEXIS 460 [2d Dept 2007], citing *Shpakovskaya v Etienne*, 23 AD3d 368, 804 NYS2d 767; *Clervoix v Edwards*, 10 AD3d 626, 781 NYS2d 690; *Acosta v Rubin*, 2 AD3d 657, 768 NYS2d 642; *Rosado v Martinez*, 289 AD2d 386, 734 NYS2d 622;

Vitale v Lev Express Cab Corp., 273 AD2d 225, 708 NYS2d 692).

DATED: 5 March '07


HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION