

Crespo v Aparicio

2007 NY Slip Op 32931(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0024313/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-15-07
ADJ. DATE 7-27-07
Mot. Seq. # 001 - MG
002 - XMotD

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| JOSE CRESPO, ADONIS SEGOVIA and | : | CANNON & ACOSTA, LLP |
| RUTILIO SEGOVIA, | : | Attorneys for Plaintiffs |
| | : | 1923 New York Avenue |
| Plaintiffs, | : | Huntington Station, New York 11746 |
| | : | |
| - against - | : | ESCHEN, FRENKEL & WEISMAN, LLP |
| | : | Attorneys for Defendant Aparicio |
| | : | 20 West Main Street |
| PABLO E. APARICIO, STEVEN D. | : | Bay Shore, New York 11706 |
| SEBASTOPOLI and S.A. SEBASTOPOLI, | : | |
| | : | RICHARD T. LAU & ASSOCIATES |
| | : | Attorneys for Defendants Sebastopoli |
| Defendants. | : | P.O. Box 9040 |
| -----X | | |
| | : | Jericho, New York 11753-9040 |

Upon the following papers numbered 1 to 58 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers 18 - 27; Answering Affidavits and supporting papers 28 - 49; Replying Affidavits and supporting papers 50-52; 53-55; 56-58; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Pablo E. Aparicio for partial summary judgment dismissing the complaint as to plaintiffs Jose Crespo and Adonis Segovia on the basis that they did not sustain a “serious injury” as defined in Insurance Law § 5102 (d), is granted; and it is further

ORDERED that the cross motion by defendants Steven D. Sebastopoli and S. A. Sebastopoli for summary judgment dismissing the complaint as to plaintiffs Jose Crespo, Adonis Segovia and Rutilio Segovia on the basis that they did not sustain a “serious injury” as defined in Insurance Law § 5102 (d), is granted as to plaintiffs Jose Crespo and Adonis Segovia only and is withdrawn as to plaintiff Rutilio Segovia.

This is an action to recover damages for serious injuries allegedly sustained by plaintiffs Jose Crespo, Adonis Segovia and Rutilio Segovia as a result of a motor vehicle accident that occurred on

Route 25 approximately 200 feet west of the intersection of Townline Road and Route 25, Town of Huntington, Commack, New York on June 7, 2005. The accident allegedly occurred when the vehicle owned by defendant S. A. Sebastopoli and operated by defendant Steven D. Sebastopoli impacted the vehicle owned/operated by defendant Pablo E. Aparicio, and in which plaintiffs were riding at the time of the accident. Defendant Aparicio now moves for summary judgment dismissing the complaint on the ground that plaintiffs Jose Crespo and Adonis Segovia did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Defendants Sebastopoli cross move for summary judgment dismissing the complaint on the ground that plaintiffs Jose Crespo, Adonis Segovia and Rutilio Segovia did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Initially, the Court notes that the branch of the cross motion by defendants Sebastopoli, which seeks dismissal of the third cause of action on behalf of plaintiff Rutilio Segovia, has been withdrawn pursuant to the representations of counsel in their reply dated July 25, 2007.

Insurance Law § 5102 (d) defines “serious injury” 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 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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion and with respect to plaintiff Jose Crespo, defendant Aparicio submits, inter alia, the complaint and his answer thereto; Mr. Crespo's verified bill of particulars; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant's examining orthopedist, Joseph P. Stubel, M.D.; the two affirmed reports of defendant's examining radiologist, Steven L. Mendelsohn, M.D.; and plaintiff's deposition testimony. At the outset, the Court notes that this motion is procedurally deficient to the extent that defendant has not supplied a copy of all pleadings served in this action (*see*, CPLR 3212 [b]), however, as defendants Sebastopoli's answer has been annexed to the cross motion, the main motion has been considered.

Mr. Crespo claims, in his bill of particulars, that he sustained, cervical and lumbar disc bulges; straightening of the lumbar lordosis; and an aggravation of all pre-existing conditions. Plaintiff also claims that he was confined to his home and bed for approximately one week. Additionally, plaintiff claims that he was incapacitated from his work for about three months, and that he has been totally disabled to date. Additionally, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated August 16, 2006, Dr. Pearl states that he performed an independent neurological examination of Mr. Crespo on that date, and his findings include intact cranial nerve functions; a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; an intact sensory system; a normal gait; and a normal straight leg raising test. He also observed that there was a normal/full range of motion of the cervical and lumbar spine. Dr. Pearl opined that plaintiff had sustained sprains of the cervical and lumbosacral spine, but that there were no objective findings to indicate a neurological injury or disability.

In his report dated August 16, 2006, Dr. Stubel states that he performed an independent orthopedic examination of Mr. Crespo on that date, and his finding include a normal/full range of motion of the cervical and lumbar spine with no palpable muscle spasms or reported tenderness. He also observed that there was no swelling, erythema or ecchymosis in the cervical or lumbar spine area. Dr. Stubel opined that plaintiff had sustained sprains of the neck and back, but that there were no objective signs of an orthopedic injury or disability. He also concluded that plaintiff was capable of performing the usual activities of his daily living and his usual occupation.

In one of his reports dated August 22, 2006, Dr. Mendelsohn states that he performed an independent radiological review of the MRI studies of Mr. Crespo's lumbar spine dated June 30, 2005, and his findings include a well-maintained lordotic curve; normal paravertebral soft tissue structures; no evidence of diffuse bulging or focal disc herniation; no evidence of impingement of existing nerve roots; and no compression deformities. Dr. Mendelsohn opined that these studies showed a normal lumbar spine. In his other report dated August 22, 2006, Dr. Mendelsohn states that he performed an independent radiological review of the MRI studies of Mr. Crespo's cervical spine dated June 30, 2005, and his findings include normal paravertebral soft tissue structures; some mild desiccation with minimal circumferential degenerative bulging at C5-6; no evidence of diffuse bulging or focal herniation at other levels; and no evidence of impingement of existing nerve roots. Dr. Mendelsohn opined that these studies showed minimal age related degenerative changes at C5-6 with no evidence of any focal disc herniations or trauma related abnormalities.

Mr. Crespo testified at his deposition to the effect that, as a result of the impact, he was immediately taken by ambulance to St. Catherine of Sienna Medical Center, however, he was not bleeding from any part of his body. The next day, he went to Village Medical where he received medical attention and physical therapy treatments. He continued these treatments for about seven months, but then stopped them when his no-fault benefits were denied. Plaintiff did not work for about three months after the accident, but was reimbursed for his lost wages by insurance. He admitted, however, that his employment as a landscaper was seasonal. Plaintiff also worked in a factory printing job for one month sometime shortly after the accident, but stopped because it was at nighttime and because it required him to lift heavy rolls of paper. He presently works 37 hours per week as a landscaper, planting, cutting grass, and sprinkling mulch. Plaintiff is no longer able to lift heavy objects weighing more than 100 pounds, but acknowledged that he is approximately 5' 4" and weighs 123 pounds. He also has difficulty playing soccer with his friends. Plaintiff further testified that he has no future appointments to see any medical providers.

In support of this motion and with respect to plaintiff Adonis Segovia, defendant Aparicio submits, inter alia, plaintiff's verified bill of particulars; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant's examining orthopedist, Joseph P. Stubel, M.D.; the two affirmed reports of defendant's examining radiologist, Steven L. Mendelsohn, M.D.; and plaintiff's deposition testimony. Mr. Segovia claims, in his bill of particulars, that he sustained, cervical and lumbar disc herniations; T10-11 vertebral interior wedging; and an aggravation of all pre-existing conditions. Plaintiff also claims that he was confined to his bed for approximately four weeks and to his house for about three months. While plaintiff claims that he was incapacitated from his work for three months and one week, he makes no claim for lost wages. Additionally, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated August 16, 2006, Dr. Pearl states that he performed an independent neurological examination of Mr. Segovia on that date, and his findings include intact cranial nerve functions; a motor examination that was "5/5" in all extremities; DTR's that were "2+" and symmetrical; an intact sensory system; a normal gait; and a normal straight leg raising test. He also observed that there was a normal/full range of motion of the cervical and lumbar spine. Dr. Pearl opined that plaintiff had sustained sprains of the cervical and lumbosacral spine, but that there were no objective findings to indicate a neurological injury or disability.

In his report dated August 16, 2006, Dr. Stubel states that he performed an independent orthopedic examination of Mr. Segovia on that date, and his findings include a normal/full range of motion of the cervical and lumbar spine with no palpable muscle spasms or reported tenderness. He also observed that there was no swelling, erythema or ecchymosis in the cervical or lumbar spine area. Dr. Stubel opined that plaintiff had sustained sprains of the neck and back, but that there were no objective signs of an orthopedic injury or disability. He also concluded that plaintiff was capable of performing the usual activities of his daily living and his usual occupation.

In one of his reports dated August 24, 2006, Dr. Mendelsohn states that he performed an independent radiological review of the MRI studies of Mr. Segovia's lumbar spine dated June 30, 2005, and his findings include normal paravertebral soft tissue structures; moderate desiccation; mild

degenerative bulging/osteophyte formation; no evidence of diffuse bulging or focal herniations; no evidence of existing nerve root impingement; and no evidence of compression deformities. He opined that these studies showed moderate age related degenerative changes of the lower lumbar spine without any evidence of focal disc herniations or any trauma related abnormalities. In one of his reports dated August 24, 2006, Dr. Mendelsohn states that he performed an independent radiological review of the MRI studies of Mr. Segovia's cervical spine dated June 30, 2005, and his findings include normal paravertebral soft tissue structures; moderate desiccation with mild loss of height; mild to moderate degenerative bulging/osteophyte formation; no evidence of focal herniations; no evidence of existing nerve root impingement; and no evidence of compression deformities. He opined that these studies showed moderate degenerative changes of the cervical spine with no evidence of focal disc herniations or any trauma related abnormalities.

Mr. Segovia testified to the effect that, as a result of the impact, his neck and back were affected, but he was not bleeding and he did not receive any lacerations, fractures, bruises. He was taken by ambulance to Good Samaritan Hospital where he was treated and released the next day. Shortly thereafter, he then went to Village Medical where he treated for about eight months. He stopped treating because his benefits were terminated and because he had to work to support himself. Mr. Segovia also testified that he was out of work for about four months after the accident due to his injuries. While he testified that he went back to work in February 2006, he also admitted that he had been looking for, but could not find, suitable employment. He is currently working 40 hours per week as a landscaper performing maintenance such as grass mowing and planting. He is able to handle normal jobs which do not require heavy lifting. Mr. Segovia further testified that, while he does not feel the same as before the accident, he now has no difficulty performing his daily activities.

In support of the cross motion, defendants Sebastopoli submit, among other things, the affirmation of counsel which adopts the factual and legal arguments set forth in the affirmation of counsel in support of the main motion. Counsel argues that defendants Sebastopoli should be granted partial summary judgment dismissing the first cause of action on behalf of Jose Crespo and the second cause of action on behalf of Adonis Segovia on the grounds that these plaintiffs did not sustain a serious injury as defined in Insurance Law § 5102.

By their submissions, defendants made a prima facie showing that plaintiffs Jose Crespo and Adonis Segovia did not sustain a serious injury (*see, Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Defendants' examining neurologist opined that plaintiffs had each sustained sprains of the cervical and lumbosacral spine, but that there were no objective findings to indicate a neurological injury or disability. Similarly, defendants' examining orthopedist opined that plaintiffs had each sustained sprains of the neck and back, but that there were no objective signs of an orthopedic injury or disability. He also concluded that plaintiffs were each capable of performing the usual activities of their daily living including their usual occupations. Defendants' examining radiologist opined that the MRI studies of Mr. Crespo's lumbar spine were normal and that the MRI studies of Mr. Crespo's cervical spine showed minimal age related degenerative changes at C5-6. Defendants' examining radiologist opined that the MRI studies showed moderate degenerative changes of Mr. Segovia's lumbar and cervical spine, but that there was no evidence of any focal disc herniations or any trauma related abnormalities.

Defendants' remaining evidence, including plaintiffs' deposition testimony and their bill of particulars, also supports a finding that they did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by Jose Crespo and Adonis Segovia, the Court turns to plaintiffs' proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to these motions, plaintiff Jose Crespo submits, inter alia, the two affirmed reports of plaintiff's treating radiologist, Robert Diamond, M.D.; the affirmation of plaintiff's treating physician, Joseph Perez, M.D.; the affidavit of plaintiff's treating chiropractor, Patrick Hannan, D.C.; authenticated copies of two checks/payment stubs from defendant Aparicio's no-fault carrier, AutoOne Insurance; and Mr. Crespo's personal affirmation. Initially, the Court notes that the affidavit of Dr. Hannan, which merely references one examination of Mr. Crespo conducted on June 8, 2005, has no probative value in the absence of a more examination (*see, Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]; *Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Elgandy v Nieradko*, 307 AD2d 251, 762 NYS2d 275 [2d Dept 2003]), and as such it has not been considered.

In one of his reports dated July 1, 2005, Dr. Diamond states that he performed MRI studies of Mr. Crespo's lumbar spine on June 30, 2005, and his findings include posterior disc bulges at L3-4 and L5-S1; flattening of the ventral thecal sac at L3-4 and L4-5; and straightening of the lordosis. In his other report dated July 1, 2005, Dr. Diamond states that he performed MRI studies of Mr. Crespo's cervical spine on June 30, 2005, and his findings include a posterior disc bulge at C-5/6 and no significant protrusions into the neural canal, recesses or foramina.

In his affirmation, Dr. Perez avers that he first treated Mr. Crespo on June 28, 2005 in connection with his motor vehicle accident, and his findings on that date include significant range of motion limitations in the cervical and lumbar spine. Plaintiff treated with Suffolk Wide Medical Group until February 3, 2006 at which time his insurance benefits had been terminated. Upon re-evaluation, Dr. Perez determined plaintiff had reached maximum medical improvement and he discharged him from his care. Dr. Perez most recently re-evaluated plaintiff on May 9, 2007, and his findings include cervical and lumbar paraspinal muscle spasm and positive test results for cervical spine nerve root involvement. He also found that plaintiff's cervical extension was restricted at 50 degrees with 60 degrees being normal, and that his lumbar flexion was restricted at 34 degrees, with normal being 60 degrees. Dr. Perez opined that the MRI studies of plaintiff's cervical and lumbar spine do not show any significant degenerative changes. Dr. Perez also opined that plaintiff sustained a significant limitation in the use of his cervical and lumbar spine, lumbar disc bulges and bilateral muscle spasms as a result of the trauma from the accident. Dr. Perez also concludes that plaintiff's stated difficulties with certain activities comport with his injuries which are "expected to be" permanent.

Mr. Crespo's no-fault records show that he was reimbursed by AutoOne Insurance Company for lost wages for the period of June 8, 2005 through to July 8, 2005, and for the period of July 11, 2005 through to September 6, 2005, for a total of 89 days. Plaintiff avers in his affidavit that he was unable to work in his usual line of employment as a landscaper for three months after the accident. During this period of time, he was found disabled and insurance reimbursed him for his lost wages. He treated with Dr. Perez shortly after the accident until February 2006, at which time his no-fault benefits were discontinued. Plaintiff further avers that he no longer plays soccer, an activity he once enjoyed, and that

he is unable able to lift heavy items.

Mr. Crespo has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, plaintiff has failed to present admissible medical proof that was contemporaneous with the accident showing any initial, quantified and qualified range of motion restrictions for the affected body parts (*see, Berkts v McMillan*, 40 AD3d 563, 835 NYS2d 388 [2d Dept 2007]; *Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]). Even though the report of Dr. Perez references a recent exam, his diagnosis of cervical muscle spasm, lumbar myofascitis and cervical/lumbar disc bulges is not sufficiently explained, defined, or in any manner connected to plaintiff's limitations, symptoms or loss of functions, and its significance is not delineated (*see, Davis v Evan*, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Also, plaintiff has not claimed that he sustained lumbar myofascitis in his bill of particulars (*see, Robinson v Schiavoni*, 249 AD2d 991, 672 NYS2d 560 [4th Dept 1998]). Additionally, the report of Dr. Perez as well as plaintiff's deposition testimony, tends to show that his injuries were mild, minor or slight (*see, Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; *Moore v County of Suffolk*, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]). In any event, plaintiff has failed to explain, by submission of sufficient objective medical evidence, the lengthy gap since his last treatment in February 2006 and his most recent medical examination on May 9, 2007, shortly after defendant's motion was filed (*see, Philips v Zilinsky*, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]). Since Dr. Perez last saw Mr. Crespo more than one year prior to his last re-evaluation, his suggestion that plaintiff had reached "maximum medical benefit" is purely speculative (*see, Mullings v Huntwork*, 26 AD3d 214, 810 NYS2d 443 [1st Dept 2006]). Nor has plaintiff demonstrated, or even alleged, that he could not afford additional treatment after no-fault terminated his benefits (*c.f., Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Thus, plaintiff's gap in treatment was, in essence, a complete cessation of treatment (*see, Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]).

Additionally, the proof submitted by Mr. Crespo is insufficient to raise a triable issue of fact that he sustained a medically-determined injury or impairment, rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Drexler v Melanson*, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]). Plaintiff has not asserted that he was advised by a medical practitioner to curtail his work or other activities for 90 or more days during the statutory period, nor has he presented sufficient contemporaneous evidence of a medically-determined injury which caused his extensive absence from seasonal employment (*see, Sougstad v Meyer*, 40 AD3d 839, 835 NYS2d 722 [2d Dept 2007]; *Ersop v Variano*, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]). In any event, plaintiff's submissions demonstrate that he was reimbursed for his lost wages for 89 days, one day short of the minimum statutory period.

In opposition to these motions, plaintiff Adonis Segovia submits, inter alia, the two affirmed reports of plaintiff's treating radiologist, Robert Diamond, M.D.; the affirmation of plaintiff's treating physiatrist, Sima Anand, M.D.; the affirmation of plaintiff's treating physician, Joseph Perez, M.D.;

authenticated copies of two checks/payment stubs from defendant Aparicio's no-fault carrier, AutoOne Insurance; and Mr. Segovia's personal affirmation.

In one his reports dated July 1, 2005, Dr. Diamond states that he performed MRI studies of Mr. Segovia's cervical spine on June 30, 2005, and his findings include posterior disc herniations; a right-sided osseous ridge at C-2/3; loss of disc hydration at C2-3 through C6-7; uncinat changes at C3-4 through C6-7; and no significant protrusions into the neural canal. In his other report dated July 1, 2005, Dr. Diamond states that he performed MRI studies of Mr. Segovia's lumbar spine on June 30, 2005, and his findings include posterior disc herniations at L3-4 through L5-S1 which narrow the foramina; an impingement upon the existing L-5 nerve root; T10-11 vertebral wedging; and no soft tissue masses or osseous edema.

In her report dated July 7, 2005, Dr. Anand states that she performed a physiatric examination of Mr. Segovia on that date, and her findings include tenderness and paravertebral muscle spasm in the cervical, thoracolumbar and lumbar spine. She also noted that plaintiff reported that he had not returned to work. Dr. Anand opined that plaintiff sustained, among other things, herniated discs of the cervical and lumbar spine. In her report dated August 4, 2005, Dr. Anand states that she performed a follow-up examination of Mr. Segovia on that date, and her findings include, among other things, cervical paravertebral muscle spasm; tenderness over the lumbar paraspinal lumbarum; and DTR's that were symmetrical. She again noted that plaintiff had not returned to work at that time and concluded that he was partially/moderately disabled.

In his affirmation, Dr. Perez avers that he personally examined Mr. Segovia on September 16, 2005, and his findings include significant range of motion limitations in the cervical, thoracic and lumbar spine, as well as paraspinal muscle tenderness in the cervical and lumbar spine. Dr. Perez re-examined plaintiff on December 30, 2005, January 27, February 28 and March 28, 2006, at which time he discharged plaintiff from his care after determining that he had reached maximum medical benefit. Dr. Perez re-examined plaintiff on February 8, 2007, and his findings include significant range of motion limitations in the cervical, thoracic and lumbar spine upon computerized testing. On May 11, 2007, Dr. Perez re-evaluated plaintiff and his findings include cervical, thoracic and lumbar muscular spasms with complaints of neck pain radiating into the left trapezium. He opined that the MRI studies of plaintiff's cervical and lumbar spine, which he reviewed showed disc herniations and vertebral wedging at T10-11. He avers that he disagrees with Dr. Mendelsohn's conclusions that there are no cervical/lumbar herniations, and opined that degenerative changes are not playing a role in plaintiff's symptomology. Dr. Perez also opined that plaintiff sustained herniated cervical/lumbar discs, muscular spasms and significant limitations as a result of the accident and that his condition is permanent. Dr. Perez further opines that plaintiff was completely disabled from June 7, 2005 through September 16, 2005, and that his current symptomology is not due to any underlying degenerative conditions.

Mr. Segovia's no-fault records show that he was reimbursed by AutoOne Insurance Company for lost wages for the period of June 8, 2005 through to July 8, 2005, and for the period of July 11, 2005 through to September 6, 2005, for a total of 89 days. Plaintiff avers in his affidavit that he was unable to work for four months following the accident due to his injuries and that he received payment from no-fault for approximately four months. He received treatment at Village Medical and Rehab until March

2006. Plaintiff further avers that he still has difficulty lifting heavy objects or performing heavy labor.

Mr. Segovia has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see, Rodriguez v Cesar*, 40 AD3d 731, 835 NYS2d 438 [2d Dept 2007]; *Picott v Lewis*, *supra*). Initially, plaintiff has failed to present admissible medical proof that was contemporaneous with the accident showing any initial, quantified and qualified range of motion restrictions for the affected body parts (*see, Garcia v Solbes*, 41 AD3d 426, 838 NYS2d 146 [2d Dept 2007]; *Quagliarello v Paladino*, 40 AD3d 836, 835 NYS2d 724 [2d Dept 2007]). Even though the report of Dr. Perez references a recent exam, his diagnosis of herniated cervical/lumbar discs and spinal spasms is not sufficiently explained, defined, or in any manner connected to plaintiff's limitations, symptoms or loss of functions, and its significance is not delineated (*see, Davis v Evan*, *supra*). Further, the mere existence of herniated discs is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and their limitation (*see, Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). Additionally, plaintiff's deposition testimony, tends to show that his injuries were mild, minor or slight (*see, Parks v Milette*, 41 AD3d 1107, 838 NYS2d 717 [3d Dept 2007]). In any event, plaintiff has failed to adequately explain, by submission of sufficient objective medical evidence, the lengthy gap since his last treatment in March 2006 and his most recent medical examination on May 11, 2007, shortly after defendant's motion (*see, Bestman v Seymour*, 41 AD3d 629, 838 NYS2d 645 [2d Dept 2007]; *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]). Since Dr. Perez last saw Mr. Segovia more than one year prior to his last re-evaluation, his suggestion that plaintiff had reached "maximum medical benefit" is purely speculative (*see, Brown v City of New York*, 29 AD3d 447, 815 NYS2d 88 [1st Dept 2006]). Nor has plaintiff demonstrated, or even alleged, that he could not afford additional treatment after no-fault terminated his benefits (*c.f., Francovic v Senekis Cab Corp.*, 41 AD3d 643, 838 NYS2d 635 [2d Dept 2007]).

Additionally, the proof submitted by Mr. Segovia is insufficient to raise a triable issue of fact that he sustained a medically-determined injury or impairment, rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Gordon-Silvera v Long Island R.R.*, 41 AD3d 431, 837 NYS2d 324 [2d Dept 2007]; *Gavin v Sati*, 29 AD3d 734, 815 NYS2d 250 [2d Dept 2006]; *Sainte-Aime v Suwai Ho*, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Plaintiff has not asserted that he was advised by his physician to curtail his work or other activities for 90 or more days during the statutory period, nor has he presented sufficient contemporaneous evidence of a medically-determined injury which caused his extensive absence from his seasonal employment (*see, Sougstad v Meyer*, *supra*; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]). While Dr. Perez speculated that Mr. Segovia was completely disabled from June 7, 2005 through to September 16, 2005, he did not personally examine plaintiff until September 16, 2005, and is not competent to discuss his activities prior to that date (*see, Tuna v Babenderde*, 32 AD3d 574, 819 NYS2d 613 [3d Dept 2006]). Furthermore, the observations of Dr. Anand that Mr. Segovia was not working at the time of her examination are based upon plaintiff's own statements rather than medically-imposed work restrictions (*see, Parks v Milette, Jr.*, 41 AD3d 1107, 838 NYS2d 717 [3d Dept 2007]; *Drexler v Melanson*, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]; *Watt v Eastern Investigative Unit, Inc.*, 273 AD2d 226, 708 NYS2d 472 [2d Dept 2000]). In any event, plaintiff's submissions demonstrate that he was reimbursed for his lost wages for 89 days, one day short of the minimum statutory period.

