

Barnes v Porter

2007 NY Slip Op 33054(U)

September 18, 2007

Supreme Court, Suffolk County

Docket Number: 0017413/2005

Judge: Robert W. Doyle

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among other things, plaintiff's verified complaint; defendant's answer; plaintiff's verified bill of particulars; plaintiff's deposition transcript; the affirmed report dated March 28, 2005 of defendant's examining radiologist, Sheldon P. Feit, M.D. (Dr. Feit); the affirmed report dated August 22, 2006 of defendant's examining orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on his examination of plaintiff on August 14, 2006; the affirmed report dated August 22, 2006 of defendant's examining neurologist, Mark J. Zuckerman, M.D. based on his examination of plaintiff on said date; plaintiff's employment records; and the affidavit of service of the motion.

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 "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see, Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see, 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]).

Here, defendant made a prima facie showing that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) by submitting affirmed medical reports demonstrating that plaintiff's injuries were not permanent and were of a degenerative nature, predating the subject accident (*see, Bartley v Trans Car & Limo, Inc.*, 41 AD3d 624, 836 NYS2d 892 [2d Dept 2007]). In his affirmed report, defendant's examining radiologist, Dr. Feit, indicated that he reviewed an MRI of the cervical spine that was performed on May 7, 2004, two and a half weeks after the subject accident, and found multilevel disc disease with bulging discs at C3-4, C4-5, C5-6 and C6-7 levels; degenerative spondylosis with associated stenosis; and associated central herniation at C5-6. Dr. Feit opined that the MRI revealed pre-

existing degenerative change and that disc bulges are not post traumatic but are degenerative secondary to annular degeneration and/or ligamentous laxity. In addition, he stated that the associated central herniation at C5-6 was also degenerative since it was seen in association with disc bulge and osteophyte formation. On that basis, Dr. Feit concluded that the findings were therefore not posttraumatic and unrelated to the subject accident.

Defendant's examining orthopedist, Dr. Bernhang, reported upon examining plaintiff two years and almost four months after the subject accident that plaintiff had complaints of daily neck pain in the area of C7 but that there was no radiation of the pain to his head or to his shoulders and had complaints of a lot of pain in his lower back that radiated down the right leg to his foot. According to plaintiff, his chest was "okay." Dr. Bernhang provided active range of motion findings measured by goniometer as compared to the Average Range of Joint Motion (ARJM). Among his findings were cervical extension of 35 (ARJM 38); lateral flexion of 30/35 (ARJM 43); and cervical rotation of 60/65 (ARJM 48). In addition, he recorded negative Spurling's test for cervical radiculopathy; negative provocative tests for median carpal tunnel or ulnar nerve neuropathy; palpation of the C7 spinous process non-tender; and no palpable fibromyalgia, trigger point or spasm around the muscles of the neck or shoulders. Also, Dr. Bernhang found that plaintiff's sitting straight leg raising was normal and that lying supine, straight leg raising was 70/70 (normal being 55 degrees and above). Dr. Bernhang noted that plaintiff was able to keep both legs extended off of the examining table thereby ruling out active lumbar discogenic disorder; plaintiff's pelvic roll was negative; FABER and FADIR tests were negative; and that lying prone, plaintiff had no paraspinal spasm of the lumbar musculature and no reported pain on percussion of the lumbar spine. In conclusion, Dr. Bernhang opined that whatever causally related soft tissue injuries plaintiff had sustained to his cervical spine, lumbar spine and chest as a result of the subject accident, appeared to have resolved without residual. He added that the mild loss of cervical rotation that he measured would be consistent with the pre-existing degenerative changes of the cervical spine noted in the x-ray and MRI reports submitted by plaintiff for review. According to Dr. Bernhang, the changes in plaintiff's neck did not appear to have been materially or substantially affected by the subject accident. Dr. Bernhang reported that plaintiff was not under any active medical care and was working full time at his former occupation and opined that plaintiff was not disabled.

Defendant's examining neurologist, Dr. Zuckerman, examined plaintiff two years and four months after the subject accident and also noted plaintiff's complaints to be neck stiffness localized in the low cervical area with no radiating pain in his arms or numbness or tingling; and low back discomfort in the mid lumbar area that sometimes radiated to the lateral right thigh, especially when attempting to sleep. In addition, Dr. Zuckerman recorded that plaintiff was receiving no physical treatment at the time and described himself as feeling 60 percent better. With respect to plaintiff's motor examination, Dr. Zuckerman found that plaintiff's upper extremities had no focal weakness and no atrophy, fasciculations or abnormal movements and that for the lower extremities, plaintiff's strength was intact. Dr. Zuckerman indicated that as part of his sensory examination, plaintiff's Romberg test was negative. As for the results of his musculoskeletal examination, Dr. Zuckerman indicated that plaintiff's cervical range of motion was 70 degrees out of 80 degrees to the right and 80 degrees out of 80 degrees to the left and that plaintiff's lateral flexion was 30 degrees out of 45 degrees to the right and to the left and that there was some tenderness over the C7 vertebra but no muscle tenderness or spasm. Dr. Zuckerman diagnosed "cervical sprain with underlying degenerative disc changes, as per Dr. Feit" and lumbosacral sprain with no clinical evidence of clinical radiculopathy or lumbosacral radiculopathy. He concluded that there was a causal

relationship between the subject accident and the cervical and lumbar sprain injuries but that there was no neurologic disability, noting that plaintiff had returned to his pre-accident occupation and physical activities.

Reviewing defendant's submissions on the motion, the Court initially notes that the affirmed report of defendant's examining orthopedist contained deficiencies. Although he provided range of motion measurements, without a comparative quantification of those findings as to what is normal, it cannot be concluded that the ranges of motion in plaintiff's cervical spine were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see, McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]). The standard of comparison used, ARJM, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *see also, Somers v Macpherson*, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]). In addition, defendant's examining orthopedist failed to render a specific opinion on the significance and cause of plaintiff's lateral flexion measurement restrictions even though he did so regarding plaintiff's cervical rotation measurements. Nevertheless, the affirmed report of defendant's examining neurologist remedied said deficiencies by providing range of motion findings as compared to normal and rendering an opinion based on those as well as other findings. Notably, defendant's examining orthopedist found negative bilateral straight leg raising in both the sitting and supine positions and any restrictions in plaintiff's cervical range of motion were attributed by defendant's examining neurologist to pre-existing degenerative changes noted on radiologic films, and were not causally related to the subject accident. This evidence was sufficient to establish, prima facie, that plaintiff did not sustain a serious injury as a result of the accident (*see, Lea v Cucuzza*, ___ NYS2d ___, 2007 WL 2669900 [NYAD 2 Dept Sep 11, 2007]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]; *Bernabel v Perullo*, 300 AD2d 330, 751 NYS2d 314 [2d Dept 2002]).

Moreover, defendant demonstrated that plaintiff was able to perform substantially all of his daily activities for more than 90 days of the first 180 days subsequent to the accident (*see, Bartley v Trans Car & Limo, Inc., supra; Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005] citing *Taber v Skulicz*, 265 AD2d 902, 695 NYS2d 810 [4th Dept 1999]). During his deposition on March 24, 2006, plaintiff testified that he went to work right after the accident but went to Brookhaven Memorial Hospital's emergency room the evening of the accident and that he was diagnosed with a sprain and released. In addition, plaintiff testified that the day after the subject accident he went to his attorney who referred plaintiff to Patchogue Medical and Rehabilitation and that plaintiff began treatment there three days after the subject accident and underwent physical therapy five days a week for seven months. Plaintiff also testified that at the time of the deposition he had pain in his neck, his lower back and his right leg and that he could no longer lift fifty pounds and could no longer jog three miles every day as he used to prior to the accident¹. Plaintiff further testified that he underwent hernia surgery in October 2002 and that he did not have health insurance². Plaintiff explained that he had been working for the County Library System for 11 years, without benefits, that his title was "maintenance worker," that his job duties included sorting books and that

¹Plaintiff added in the signed errata sheet attached to his deposition transcript that he could no longer lift his grandchildren, shovel snow or lift grocery bags weighing over 30 pounds.

²There is no indication in the reports of the examining physicians that plaintiff informed them of the October 2002 hernia surgery.

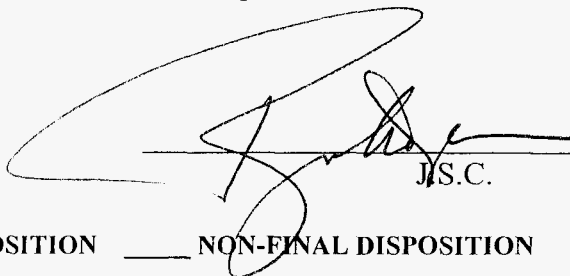
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his hours were five hours per day, five days per week. Plaintiff stated that as a result of the subject accident, he did not lose any time from work, his pay did not change, and that other than not being able to lift 50 pound bags of books, his job had not changed since the accident. He added that lifting the 50 pound bags of books delivered by the drivers out of the truck and into the building was not a job requirement but was simply something that he had taken upon himself to expedite the functioning of the system and that now he sorts the books on a table after others bring the bags inside the building.

Plaintiff failed to submit any opposition to the instant motion (see, *Cruz v Brite Office Cleaning Corp.*, 284 AD2d 366, 725 NYS2d 890 [2d Dept 2001]; *Sundack v Power Test Petro Corp.*, 150 AD2d 440, 541 NYS2d 47 [2d Dept 1989]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: SEP 18 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION