At an IAS Term, Part SCP 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 29th day of October, 2007.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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BRODERICK FOUCHONG,

Index No. 34391/2004

Plaintiff,

- against -

JEFFERSON GORDON,

Defendant.

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The following papers numbered 1 to 6 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)	3,4
Reply Affidavits (Affirmations)	5, 6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Jefferson Gordon (defendant) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as

asserted against him on the ground that plaintiff Broderick Fouchong (plaintiff) failed to sustain a serious injury as that term is defined under § 5102 (d) of the Insurance Law.[1]

This action arose from a motor vehicle accident involving a motor vehicle owned and operated by plaintiff and an automobile owned and operated by defendant. The accident occurred at or near the intersection of Nostrand Avenue and Lincoln Road in Brooklyn, New York, on July 19, 2004.

Thereafter, plaintiff commenced the instant action to recover damages for personal injuries allegedly sustained as a result of the accident. Plaintiff filed the note of issue on or about September 21, 2006. On or about October 3, 2006, defendant then timely moved to strike plaintiff's note of issue (22 NYCRR 202.21) and extend his time to move for summary judgment. By short form order, dated October 24th, 2006, this court granted defendant's motion to the extent of, among other things: (1) directing all parties to appear for examinations before trial on or before November 31, 2006; (2) directing plaintiff to appear for an independent medical examination within thirty days of his deposition; and (3) extending plaintiff's time to move for summary judgment to February 21, 2007. The case remained on the trial calendar. The instant motion for summary judgment was served on

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[1] 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 and eighty days immediately following the occurrence of the injury or impairment."

February 21, 2007 and approved by the Motion Support Office of this court on February 23, 2007.

As an initial matter, the court will address plaintiff's objections to the timeliness of the instant motion. A review of the court's records indicates that plaintiff filed the note of issue and certificate of readiness on September 21, 2006, prior to the completion of discovery. Defendant then timely moved to vacate the note of issue and extend his time to move for summary judgment on October 3, 2006. This court's October 24, 2006 short form order permitted discovery to continue while allowing the action to remain on the trial calendar. Pursuant to Local Rule 13 of the Uniform Civil Trial Rules of the Supreme Court, Kings County, a motion for summary judgment shall be made no later than sixty days after the filing of the note of issue unless the court sets an earlier date (*Bevilacqua v City of New York*, 21 AD3d 340 [2005]). Defendant has the burden of establishing "good cause" for the delay (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; CPLR 3212 [a]). In his affirmation in reply, defendant's counsel points out that the relief to extend the time to move for summary judgment was requested in his prior motion even though the October 24, 2006 short form order only refers to plaintiff's time to move for summary judgment. According to defendant's counsel this language was inadvertently overlooked by the attorney appearing on behalf of his firm on the instant motion. Furthermore, defendant could not move for summary judgment prior to the completion of the parties' depositions (CPLR 3116 [a]) or plaintiff's independent medical examinations because the records generated as a result

thereof was necessary in order for him to be able to do so. As such, the court will deem the instant motion timely.

The court will now turn to the merits of the instant motion. In the complaint, plaintiff alleges that he sustained serious injuries as a result of the accident. More specifically, plaintiff alleges, in his bill of particulars, that he suffered, among other things, diffuse herniated nucleous pulposus at L3-L4, L4-L5, L5-S1, C5-C6; radiculopathy; and an anterior superior wedge compression fracture of the C5 and C6 vertebral body. Plaintiff further claims that these injuries constitute a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and an impairment within the 90/180 days category of the Insurance Law. At his deposition, plaintiff testified that he missed three days of work and that he underwent treatment for a period of approximately three months following the accident. Plaintiff further testified that he can no longer play soccer or engage in long periods of exercise at the gym and also that he currently experiences pain after sitting for long periods of time.

In support of the motion, defendant submits the affirmed report of Dr. Edward A. Toriello, an orthopedist, based upon an independent medical examination of plaintiff conducted on January 9, 2007, at defendant's request. During his examination of plaintiff, Dr. Toriello conducted, among other things, objective tests and range of motion tests of plaintiff's cervical spine, lumbosacral spine and right and left shoulders. Dr. Toriello compared the results to the normal range of motion and determined that plaintiff exhibited

full range of motion of the shoulders, cervical spine and lumbar spine. Dr. Toriello obtained negative results for the impingement sign and straight leg raising test. In his report, Dr. Toriello related plaintiff's alleged injuries to the subject accident but determined that they are not permanent and have since resolved. Dr. Toriello opines that plaintiff requires no further treatment. In addition, Dr. Toriello opines that plaintiff's alleged injuries are not permanent. Dr. Toriello is of the opinion that the "compression fracture reported at C5-C6 are not significant or related to the motor vehicle accident of July 19, 2003."

In addition, defendant submits the affirmed medical report of Dr. Michael J. Carciente, a neurologist, based upon an independent medical examination of plaintiff conducted on January 9, 2007, at defendant's request. During his examination of plaintiff, Dr. Carciente conducted, among other things, objective tests and obtained negative results for the straight leg raising test, Romberg test, Hoffman sign. In his report, Dr. Carciente determined that there "was no objective evidence of a causally related neurological injury, disability, or permanency."

In further support of the motion, defendant proffers the August 27, 2004 affirmed report of Dr. Roger A. Berg, a radiologist, based upon his review of the films of the MRI of plaintiff's lumbar spine and cervical spine. Dr. Berg characterizes the impressions of plaintiff's MRI as being degenerative in nature. Dr. Berg further opines that, based upon his review of the MRI films, plaintiff suffers from no "permanent orthopedic or neurological impairment" as a result of the subject accident. In his report, Dr. Berg also states that "the

diagnosis of two cervical spine compression fractures, as suggested by Dr. Schepp, is ludicrous and may be discounted entirely."

In opposition, plaintiff submits the affirmed report of Dr. Robert Scott Schepp. In his report, Dr. Schepp notes that he "took and/or supervised the taking of the MRI films of" plaintiff's cervical spine and lumbosacral spine on August 4 and August 26, 2003, respectively. Dr. Schepp noted, among other things, that plaintiff suffered:

> Diffuse herniated nucleus pulposus C5-C6 deforming the thecal sac and spinal cord diffusely Central subligamentous herniated nucleus pulposus C6-C7 deforming the thecal sac Slight anterior superior wedge compression fracture of the C5 and C6 vertebral body Diffuse herniated nucleus pulposus L3-L4 deforming the thecal sac and bilateral L4 nerve roots Tendinitis.

Plaintiff further argues that defendant's experts failed to address his claim with respect to the 90/180 days category of the threshold law. Plaintiff points to his deposition testimony that he is currently unable to engage in his usual and customary daily activities and also alleges that he was incapacitated for 90 out of 180 days immediately following the accident. In this regard, plaintiff contends that defendant has failed to satisfy his initial burden of proof thus preventing an award of summary judgment.

In reply, defendant maintains that plaintiff fails to submit a medical report contemporaneous with the time of the accident demonstrating an initial loss of range of

motion. Defendant further argues that Dr. Schepp's report is insufficient to raise a triable issue of fact as the existence of a herniated disc or bulging disc in and of itself, without objective evidence of a loss of range of motion, is insufficient to demonstrate a serious injury. Defendant asserts that Dr. Schepp failed to relate plaintiff's "wedge compression fracture" to the subject accident. Defendant also points to Dr. Berg's finding that the MRI of plaintiff's cervical spine and lumbosacral spine indicates degenerative changes.

In his affirmation, defendant's counsel avers that Dr. Jeffrey Schwartz, the physician who treated plaintiff and referred him to Dr. Schepp, is no longer permitted to practice medicine in the state of New York. The New York State Department of Health revoked Dr. Schwartz's license to practice medicine on April 1, 2006. Jeffrey Schwartz's motion for Article 78 review of the determination of the New York State Department of Health's revocation of his medical license was denied by the Appellate Division, Third Judicial Department. Defendant submits a copy of said decision with notice of entry, dated May 19, 2006, in the matter entitled *In the Matter of Jeffrey S. Schwartz, M.D. v New York State Department of Health* (Case No. 500381) as well as the underlying agency determination. Jeffrey Schwartz was charged with knowingly stealing money from the Medicaid and Medicare systems for a period of over six years and it was found that the "evidence" demonstrated that, despite being listed as the only provider of EMG and NCV for patients referred to in the decision, Jeffrey Schwartz "did not perform the NCV'S, and furthermore that he did not even supervise the technician who performed these tests." The patients

referred to in the agency's determination were reportedly treated by Dr. Schwartz on July 8th, July 10th and July 22nd, 2003.[2]

In response to plaintiff's assertion that his experts did not address plaintiff's 90/180 day claim, defendant counters that plaintiff failed to submit any medical evidence that he was unable to perform substantially all of his usual and customary daily activities for at least 90 out of the 180 days immediately following the subject accident.

In further opposition to the motion, plaintiff an affidavit from Dr. Schwartz in which he avers that he is he was "formerly a physician" who was "authorized to practice medicine in the State of New York" and that he was the medical director of Prairie Medical, P.C., where plaintiff received treatment commencing on July 24, 2003. Jeffrey Schwartz swore to the contents of the medical records maintained by Prairie Medical, P.C. in relation to treatment rendered to plaintiff. In his affidavit, the former Dr. Schwartz states that he "determined that [plaintiff] was only partially able, if at all, to perform, many of his usual and customary tasks, such as playing soccer, exercising as comprehensively as he was able to prior to the accident, and sitting for extended periods of time."

Plaintiff also submits: EMG/NCV reports purportedly conducted and prepared by the former Dr. Schwartz; range of motion tests of, among other things, plaintiff's cervical spine, lumbar spine and shoulder; reports of the MRI of plaintiff's cervical spine, lumbar spine and head; acupuncture reports of treatment of plaintiff at Quick Shot Acupuncture P.C.

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[2] A review of the record submitted by the parties indicates that plaintiff was first treated by Dr. Schwartz on July 24, 2003.

In a supplemental affirmation of reply, defendant argues that Jeffrey Schwartz is prohibited from offering evidence, pursuant to Education Law §§ 6512 and 6521, because his license to practice medicine has been revoked and any attempt to do so would be the unauthorized practice of medicine. Specifically, defendant asserts that plaintiff failed to submit an affirmation by a qualified medical provider. Defendant maintains that even if Jeffrey Schwartz's affidavit was accepted by the court none of his narrative reports of July 19, August 28, October 2, and November 3, 2003 discuss "soccer playing, prior exercise routines, or sitting for extended periods of time." Defendant further contends that Jeffrey Schwartz offers no explanation for his conclusion that the compression fractures were causally related to the subject accident. Defendant argues that the range of motion tests of plaintiff's cervical spine and lumbar spine taken by Jeffrey Schwartz indicate impairment by percentages which are too minimal to establish either a "permanent consequential limitation of use" or a "significant limitation of use." In addition, defendant argues that plaintiff failed to submit a recent medical examination. With respect to plaintiff's 90/180 days claim, defendant points to plaintiff's deposition testimony that he missed about three days of work as a result of the accident and asserts that he submitted no proof that he suffered a medically determined injury or impairment that satisfied the 90/180 days category of the Insurance Law.

Once the defendant has established a prima facie case that the plaintiff did not sustain a "serious injury," the burden shifts to the plaintiff to "come forward with admissible proof

to raise a triable issue of fact" (*Napoli v Cunningham*, 273 AD2d 366 [2000]). If the plaintiff is unable to meet this burden, summary judgment will be granted to defendant (*see e.g. Ginty v MacNamara*, 300 AD2d 624, 625 [2002]; *Sotirhos v Pinello*, 209 AD2d 687, 687-88 [1994]).

In order to establish a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the plaintiff must show more than "a mild, minor or slight limitation of use" and is required to provide objective evidence in addition to opinions of the extent or degree of the limitation and its duration (*see Grossman v Wright*, 268 AD2d 79, 83-84 [2000]; *Booker v Miller*, 258 AD2d 783, 784 [1999]). This determination relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*see Toure v Avis Rent-a-Car Sys., Inc.*, 98 NY2d 345, 353 [2002]).

Furthermore, it is well settled that "[t]o establish . . . a significant limitation, the medical evidence must provide either a quantitative or qualitative assessment to differentiate serious injuries from mild and moderate ones" (*Clements v Lasher*, 15 AD3d 712, 713 [2005]). Accordingly, it is also well established that "[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case

that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)" (*Kearse v New York City Transit Authority*, 16 AD3d 45, 49 [2005]).

Under the 90/180 day category of serious injury, a plaintiff can demonstrate that he or she has suffered a serious injury by providing evidence of a medically determined injury or impairment of a non-permanent nature which prevented the injured person from performing "substantially all of the material acts which constituted his or her 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" (*see* Insurance Law § 5102[d]).

Based upon a review of the record submitted by the parties, the court finds that plaintiff has raised a triable issue of fact as to whether or not he sustained a serious injury as a result of the subject accident. First, the court notes defendant's contention that plaintiff's expert, Jeffrey Schwartz (formerly licensed to practice medicine in the State of New York), is not qualified to offer an expert opinion and is engaging in the unauthorized practice of medicine. While, Jeffrey Schwartz's license to practice medicine has been revoked by the New York State Department of Health, he may be qualified to testify from actual experience, from observation, or from study (Prince, Richardson on Evidence § 7-304 [Farrell, 11th Edition]). Furthermore, he may offer a medical opinion based upon his treatment of the plaintiff (Prince, Richardson on Evidence § 7-315) [Farrell, 11th Edition; 2005 Supplement]). The lack of a medical license goes to the weight of the expert's testimony (*id.*). Jeffrey

Schwartz's affidavit submitted in opposition to the instant motion merely is acceptable insofar as he is attesting to the contents of the medical records prepared by him and/or maintained in the normal course of business at Prairie Medical, P.C., where plaintiff was treated. To the extent that the records submitted by plaintiff are unsworn they are inadmissible (namely, the records of plaintiff's treatment at Quick Shot Acupuncture, P.C.).

The court also notes defendant's contention that for the first time in his affidavit, Jeffrey Schwartz addresses plaintiff's inability to play soccer and sit for long periods of time. However, this statement by Jeffrey Schwartz in his affidavit, merely an opinion based upon what he thought at the time of his treatment of plaintiff but neglected to put in his report. Jeffrey Schwartz opined in his final report that plaintiff's injuries "interfere to a significant degree with [his] working ability and in his usual and customary activity of daily living." In addition, Jeffrey Schwartz noted plaintiff's difficulty in performing certain tasks such as "walking, bending, lifting more than 5 lbs., reaching, pulling, transferring and carrying. The patient is working as an accountant with difficulties due to injuries."[3] As such, the court finds that plaintiff has raised a triable issue of fact as to whether he sustained a serious injury under the 90/180 day category of the Insurance Law. Furthermore, defendant's experts failed to address plaintiff's claim that he sustained a medical injury or impairment of a non-permanent nature which prevented him from performing substantially all of his material acts which constituted his usual and customary daily activities for not less than ninety days during the

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[3] Excerpt from the Initial Examination Report, dated July 24, 2003, prepared by Jeffrey Schwartz.

one hundred and eighty days immediately following the accident (*Joycelyn v Singh Airport Service*, 35 AD3d 668 [2006]; *Lopez v Geraldino*, 35 AD3d 398 [2006]).

Moreover, in his report, Jeffrey Schwartz related plaintiff's compression fracture to the subject accident. The fact that defendant's experts disagree raises a question of fact as to whether or not plaintiff suffered serious injuries as a result of the subject accident.

Accordingly, defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT