SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

JULIET R. TUDOR,

INDEX NO.: 17439/08

Plaintiff,

MOTION DATE:5-10-10
SUBMIT DATE:8-26-10
SEQ. NUMBER - 002

-against-

PAUL A. YETMAN, PAUL Q. YETMAN,
Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 4-9-10.....1
Affirmation in Opposition, dated 8-4-10.....2
Reply Affirmation, dated 8-20-10.....3

Motion by defendants, Paul A. Yetman and Paul Q. Yetman (collectively referred to herein as "Yetman"), for an Order, awarding them summary judgment dismissing plaintiff's complaint on the grounds that Juliet R. Tudor's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted. The complaint is dismissed in its entirety.

This action arises out of a motor vehicle accident that occurred on May 13, 2008 at approximately 8:45 p.m. at the intersection of May Street and Grand Avenue in Nassau County, New York. The plaintiff was traveling on May Street when her vehicle came into

contact with the defendants' vehicle making a left turn from May Street onto Grand Avenue.

Following the accident, plaintiff presented to Mercy Medical Center with complaints of pain in her left shoulder and neck. The attending physician sent the plaintiff for an x-ray of her left shoulder which was found to be negative. Plaintiff was diagnosed with shoulder contusion and cervical sprain and discharged the same day. The emergency room records indicate that plaintiff was permitted to return to work 1 to 2 days after the accident occurred. Following her discharge from Mercy Medical Center, plaintiff then was under the care of several different physicians, undergoing arthroscopic surgery on the left shoulder on January 8, 2009 and conservative treatment of the spine over the next year.

At her sworn examination before trial, plaintiff testified that she had pre-existing back problems. She stated that she saw a chiropractor for her low back problems mainly resulting from her 23 year job as a nurse. She admitted that her position as a nurse involves lifting patients, and because of this, she has had constant spasm and low back pain for at least the past 10 years. Due to her constant back pain, she stated that she received about six months of physical therapy between 2007 and early 2008 (24 visits). Plaintiff admitted she was sent for MRIs of her back which stated that she had a "degenerative disc" and that she was told she had a herniation at level "five."

At the time of the accident, the 48-year old plaintiff was employed full time at Beth Israel Medical Center as a registered nurse. At her deposition, plaintiff testified that as a result of this accident, she missed one day of work and then returned to her usual 3 day per week, 12-hour shifts that week. She stated that after working her usual shift that week, she missed work for the next four weeks, or 12 work days. She states in her bill of particulars that

as a result of this accident, she was confined to her bed "for intermittent days" and to her home for twenty seven days (*Verified Bill of Particulars*, ¶6). She also clearly states that she is "not totally disabled after the accident" (*Id*). Plaintiff claims that as a result of this accident, she is unable, without assistance from others, to do many of the things that she once was able to do on her own including lifting heavy objects, pushing heavy doors and swimming.

In her bill of particulars, plaintiff alleges that as a result of this accident, she sustained: herniation at C5-C6 level; disc bulging from C3-C4 through C5-C6; C5-C6 radiculopathy; straightening of the normal cervical curve; disc bulging at L3-L4 with foraminal narrowing; disc bulges at L5-S1 with foraminal narrowing; L4-5, L5-S1, radiculopathy; sprain/strain of the lumbar spine; left shoulder derangement with impingement; left hip derangement necessitating trigger point injections; and, pain to the left shoulder and hip (*Id.* at ¶5). In her supplemental verified bill of particulars, plaintiff also alleges that she additionally sustained: left shoulder arthroscopy; debridement of labral tear; subacromial decompression of the left shoulder; and, distal clavicle resection of the left shoulder. Notably, in neither her bill of particulars nor in her supplemental bill of particulars, does plaintiff allege that she sustained an aggravation of any pre-existing conditions and/or injuries.

She claims that her injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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.

Initially, it is noted that inasmuch as the plaintiff has failed to allege and claim that she has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d). *Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 (2001). Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is also contradicted by her own testimony and sworn statements wherein she states that she missed only thirteen days from work as a result of this accident and that she is not curtailed in her usual activities "to a great extent rather than some slight curtailment." *Licari v. Elliott*, 57 NY2d 230, 236 (1982).

Moreover, in the absence of any proof that her alleged "disability" curbing her daily activities was "a medically determined injury or impairment of a non-permanent nature," this Court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion. *Joseph v. Forman*, 16 Misc.3d 743 (Sup. Ct. Nassau 2007). Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, "permanent consequential limitation of use of a body organ or member"; and, "significant limitation of use of a body function or system."

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor,

mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyler*, 79 NY2d 955 (1992); *Licari v. Elliot*, *supra*; *Scheer v. Koubeck*, 70 NY2d 678 (1987). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute. *Licari v. Elliot*, supra; *see also Grossman v. Wright*, 268 AD2d 79, 83 (2nd Dept. 2000).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. *See Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Id.*

In support of their motion for summary judgment on the issue of "serious injury," the defendants submit, *inter alia*, plaintiff's emergency room records from Mercy Medical Center; the unsworn, unaffirmed electrodiagnostic studies dated August 6, 2008 of the plaintiff's lumbosacral spine; the unsworn, unaffirmed MRI report of plaintiff's left hip dated June 19, 2008 by plaintiff's radiologist Dr. Clifford Beinart, M.D., a Board Certified Radiologist; the sworn affirmed MRI reports of plaintiff's cervical spine, lumbar spine and left shoulder, each dated September 28, 2009 ,by defendants' examining physician, Dr.

Steven L. Mendelson, M.D.; and, the sworn affirmed report of Dr. S. Farkas, M.D., who performed an independent orthopedic examination of the plaintiff on September 23, 2009.

Initially, the Court notes that while defendants' are clearly permitted to rely upon plaintiff's unsworn, unaffirmed MRI reports such as that of her left hip dated June 19, 2008 in support of their *prima facie* showing of entitlement to judgment as a matter of law (albeit at the risk of permitting the plaintiff to do the same in opposition to defendants' prima facie showing; *see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]), said report cannot be considered in support of defendants' *prima facie* showing here. Dr. Clifford Beinart's MRI report does not constitute competent medical evidence. It is unclear from Dr. Beinart's report as to whether he had the MRI taken under his supervision and thereafter read the MRI scans or whether he merely reviewed plaintiff's "MRIs."

It is well settled that in order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI. *Fiorillo v. Arriaza,* 24 Misc.3d 1215(A) (Sup. Ct. Nassau 2007); *Sayas v. Merrick Transportation*, 23 AD3d 367 (2nd Dept. 2005). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to causality. *Collins v. Stone*, 8 AD3d 321 (2nd Dept. 2004); *Betheil-Spitz v. Linares*, 276 AD2d 732 (2nd Dept. 2000). In this case, there is no indication in his report that Dr. Beinart directed the MRI of plaintiff's left hip. Dr. Beinart also fails to report an opinion as to the causality of his findings.

MRI reports may also be admissible if another radiologist, *i.e.*, not the radiologist who performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician. *Dioguardi v. Weiner*, 288 AD2d 253 (2nd Dept. 2001); *Beyel v. Console*, 25 AD3d 636 (2nd Dept. 2006); *Porto v. Blum*, 39 AD3d 614 (2nd Dept. 2007). If, however, another physician avers that he personally reviewed the prescribing radiologist's sworn reports (not the MRI films), then in order to constitute competent medical evidence, that physician must also pair his findings with a recent physical examination. *Silkowski v. Alvarez*, 19 AD3d 476 (2nd Dept. 2005). In this case, Dr. Beinart does not aver one way or the other that he read either the actual MRI films or the sworn MRI reports of another radiologist; his MRI report therefore will not be considered by this Court in support of defendants' motion for summary judgment.

In contrast with Dr. Beinart's MRI report, the sworn reports of Dr. Mendelsohn, who states that he reviewed the actual MRI images of plaintiff's cervical spine, lumbar spine and left shoulder constitute competent medical evidence. *Id.* In his reports, Dr. Mendelsohn concludes the following:

MRI of the Cervical Spine
Mild multilevel cervical degenerative changes, greatest extent C5-6 level.

> This MRI reveals no evidence of focal disc herniation or any abnormality causally related to trauma of 5-13-08.
>
> MRI of the Lumbar Spine
> Small left posterior foraminal L5-S1 herniation.

Mild degenerative changes, L4-5 and L5-S1 levels.

MRI of the Left Shoulder
Moderate acromioclavicular degenerative changes producing mild supraspinatus degenerative impingement.

Otherwise normal MRI of the left shoulder with no evidence of a rotator cuff tendon tear.

Dr. Mendelsohn's findings confirm that with the possible exception of plaintiff's left shoulder, plaintiff sustained nothing more than disc herniations and that she had degenerative changes in her cervical and lumbar spine. With respect to her left shoulder, Dr. Mendelsohn finds that plaintiff again has degenerative changes which produced mild impingement in her shoulder. Plaintiff's electrodiagnostic studies taken on August 6, 2008, less than three months following the date of her accident, also confirm the existence of a degenerative condition. Dr. Ahmed Ehab Elelmam, M.D. summarizes his findings of the electrodiagnostic studies as follows:

Summary of Findings:
Motor and sensory nerve conduction studies revealed normal distal latencies, amplitudes and conduction velocities for all nerves tested in the lower extremities. F-wave and H-reflex studies were within the normal range with no significant side to side differences.***

Conclusion:
The above electrodiagnostic study reveals no evidence of lumbosacral radiculopathy at this time. Abnormal large motor units and increased insertion activity of the lower leg musculature is suggestive of Wallarian degeneration.

Taken together with plaintiff's own sworn testimony that her pre-existing conditions were also in fact symptomatic before the accident, this Court finds that the defendants have established *prima facie* that the plaintiff did not sustain a "serious injury" as a result of this

accident. *Passaretti v. Yung*, 39 AD3d 517 (2nd Dept. 2007). Defendants' remaining proof also establishes their *prima facie* entitlement to judgment as a matter of law.

The independent orthopedic examination by Dr. Farkas which included objective range of motion testing of plaintiff's lumbar spine, cervical spine, left shoulder and hip confirms Dr. Farkas' findings and diagnoses as follows:

> Diagnoses: The claimant presents with diagnoses of:
> 1. Resolved cervical sprain.
> 2. Resolved lumbar sprain.
> 3. Status post arthroscopy, left shoulder.
> 4. Resolved hip sprain.
> ***
> DISABILITY: I find no orthopedic disability based on the physical examination at this time. The claimant may carry out the daily activities of living, without restriction.

It is well settled that sprains/strains are not serious injuries within the meaning of Insurance Law §5102(d). *Washington v. Cross*, 48 AD3d 457 (2nd Dept. 2008); *Hasner v. Budnik*, 35 AD3d 366 (2nd Dept. 2006). Dr. Farkas's diagnoses of the plaintiff – resolved cervical, lumbar and hip sprains – and his conclusion that the plaintiff was not disabled and capable of performing the activities of daily life without restriction, coupled with defendants' remaining proof evidencing a prior degenerative condition in her back, shoulder and hip, establishes defendants' *prima facie* burden of showing that the plaintiff's alleged injuries do not satisfy the "permanent consequential limitation of use of a body function or system" or "significant limitation of use of a body organ or member" categories of Insurance Law §5102(d). *See, Franchini v. Palmieri*, 1 NY3d 536 (2003); see *also Luciano v. Luchsinger*, 46 AD3d 634 (2nd Dept. 2007). The burden thus shifts to the plaintiff to come forward with

evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. *See Pommels v. Perez,* 4 NY3d 566 (2005); *see also Grossman v. Wright, supra.*

In opposition, plaintiff submits: her affidavit; the sworn affirmed report of Dr. Donald I. Goldman, M.D., dated May 11, 2010; the sworn affirmed report of Dr. Ahmed Ehab Elelmam, M.D. PM&R, dated June 18, 2008; the sworn affirmation of radiologist Michael D. Green, M.D. who performed services for Vista Diagnostic Imaging where plaintiff presented for an MRI of her lumbosacral and cervical spine on July 18, 2008; the sworn affirmation of radiologist Clifford Beinart, M.D., who also performed services for Vista Diagnostic Imaging where plaintiff presented for an MRI of her left shoulder on June 13, 2008; the sworn affidavit of chiropractor, Jason T. Birnhak, D.C. who first treated the plaintiff on May 28, 2008; and the sworn affirmed operative report dated January 9, 2009 of Dr. Paul Ackerman.

Based upon the plaintiff's proof submitted in opposition to defendants' motion, it is clear to this Court, that while competent, the medical evidence nevertheless fails to present an issue of fact with respect to whether the plaintiff sustained a "permanent consequential limitation of use of a body function or system" or a "significant limitation of use of a body organ or member."

Initially, the Court finds that none of the reports of plaintiff's experts address the findings of defendants' expert, Dr. Mendelsohn, or the plaintiff's own testimony that she had pre-existing degenerative changes that were not caused by the subject accident. The fact that

no physician relates any of his or her findings to plaintiff's admitted pre-existing conditions renders plaintiff's proof as speculative and is fatal to plaintiff's claim for serious injury herein. *Giraldo v. Mandanici*, 24 AD3d 419 (2nd Dept. 2005; Collins *v. Stone*, 8 AD3d 321 (2nd Dept. 2004). That is, the Court cannot find any objective basis for concluding that plaintiff's present physical limitations and continuing pain as documented by her physicians are attributable to the subject accident, rather than to the degenerative conditions admitted to by the plaintiff herself and as documented by the defendants' expert. *Kaplan v. Vanderhans*, 26 AD3d 468 (2nd Dept. 2006). For this reason alone, defendants' motion must be granted. Further, as plaintiff has failed to plead or allege "aggravation or exacerbation" of pre-existing conditions in her bill of particulars or supplemental bill of particulars, the Court cannot consider any such claim. *Behan v. Data Probe International, Inc.*, 213 AD2d 439 (2nd Dept. 1995).

In any event, plaintiff's remaining proof is insufficient to raise an issue of fact with respect to plaintiff's "serious injury." In his report of an examination dated June 18, 2008, approximately one month following the date of the accident, plaintiff's treating physician Dr. Elelmam notes, in pertinent part, the following:

> REVIEW OF RECORDS:
> X-ray of the cervical spine showed degenerative changes at C5-C6 and there is straightening of the curvature. X-ray of the thoracic spine showed thoracic levoscoliosis and degenerative spurring.
> ***
> Shoulders:
> The range of motion of the left shoulder is within functional limit with discomfort in internal rotation. Tenderness on the supraspinatus and infraspinatus muscles. Impingement sign is negative.

It is plain from Dr. Elelmam's report that as early as within one month post accident, he found that the plaintiff had full range of motion of the left shoulder. Moreover, Dr. Elelmam's report notes that plaintiff's x-rays of the cervical and thoracic spine showed degenerative changes, supporting the findings of defendant's expert, Dr. Mendelsohn. Indeed, the fact that Dr. Elelmam does not account for the degenerative changes in his ultimate diagnoses is fatal to plaintiff's opposition. *Giraldo v. Mandanici, supra; Collins v. Stone, supra.*

Furthermore, plaintiff's expert, Dr. Goldman, states that he first saw the plaintiff on May 11, 2010, two years post accident. In his report Dr. Goldman also fails to make note of the pre-existing degenerative changes of the left shoulder or the fact that plaintiff's treating physician, Dr. Elelmam, found that the plaintiff had full range of motion of the left shoulder on June 18, 2008, about one month post accident. *Cantanzano v. Mei*, 11 AD3d 500 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 AD3d 325 (2nd Dept. 2005). This renders Dr. Goldman's findings speculative as to causation, and, in addition, he does not report any initial range of motion restrictions in her spine or hip. This is insufficient, particularly where the plaintiff's treating physician, Dr. Elelmam, found full range of motion within the first month after the accident. *Ramirez v. Parache*, 31 AD3d 415 (2nd Dept. 2006); *Knijnikov v. Mushtag*, 35 AD3d 545 (2nd Dept. 2006).

The affirmation of plaintiff's radiologist, Dr. Michael D. Green, M.D. also falls short of raising a triable issue of fact. Dr. Green confirms that plaintiff's MRI of her lumbosacral spine dated July 18, 2008, approximately two months after the date of the subject accident,

revealed, *inter alia*, disc bulging at the L5-S1 disc space and at the L3-L4 level. He also notes that plaintiff's cervical spine MRI revealed, *inter alia*, disc bulging from the C3-C4 through the C5-C6 level with a superimposed central disc herniation at the C5-C6 disc space. However, Dr. Green does not offer any objective evidence of the extent of the alleged physical limitations resulting from the disc injuries and its duration, and it is well-established the existence of a bulging or herniated disc, standing alone, is not evidence of any serious injury. *Cerisier v. Thibiu*, 29 AD3d 507 (2nd Dept. 2006); *Mejia v. Derose*, 35 AD3d 407 (2nd Dept. 2006). In addition, Dr. Green fails to associate the findings on the cervical spine and lumbar spine MRI studies with the subject accident. His report fails to pass muster to rebut the showing that the plaintiff had not suffered a "serious injury".

Similarly, Dr. Beinart also fails to state or demonstrate that his findings with respect to the left shoulder MRI dated June 13, 2008 were causally related to the subject accident. Therefore, neither Dr. Green's nor Dr. Beinart's affirmation supports a finding of a causally related "serious injury" to a reasonable degree of medical certainty, the standard expert opinion evidence is required to meet. *Simon v. Econocraft Worldwide Mfg.*, 38 AD3d 303 (1st Dept. 2007).

The affidavit from plaintiff's chiropractor, Jason T. Birnhak also fails to raise any question of fact. Initially, it is noted that although Dr. Birnhak sets forth range of motion of the plaintiff's cervical, thoracic, and lumbar spine, he fails to set forth what objective testing was used to determine such measurements. Failure to indicate what objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure*

v. Avis Rent A Car Systems, supra. It renders the expert's opinion as to any purported loss without probative value. *Id; Powell v. Alade*, 31 AD3d 523 (2nd Dept. 2006).

Finally, plaintiff's reliance upon the operative report of Dr. Paul Ackerman, who performed her left shoulder arthroscopy, is misplaced. While Dr. Ackerman details the procedure of plaintiff's surgery, he fails to note that the torn labrum in the left shoulder was caused by the subject accident. *Simon v. Econocraft Worldwide Mfg., supra.*

Accordingly, in view of plaintiff's failure to raise any triable issue of fact, defendants' motion for summary judgment is granted and the complaint is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 7, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
OCT 12 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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