

**Fabian v New York City Tr. Auth.**

2019 NY Slip Op 30007(U)

January 2, 2019

Supreme Court, New York County

Docket Number: 156014/2014

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 156014/2014

ANGELA FABIAN and CARLOS GRULLON,

Plaintiff,

MOTION SEQ. NO. 003 and 004

- v -

NEW YORK CITY TRANSIT AUTHORITY, HERBERT PAULLING,
CBT PARATRANSIT, INC, RUBEN PIMENTAL-ESTRELLA, CITY
CAR & LIMOUSINE SERVICES INCORPORATED,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87,
88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 140, 142, 165, 166, 167,
168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 111, 112, 113, 114,
115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135,
136, 137, 138, 139, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158,
159, 160, 161, 162, 163, 164, 184, 185

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

Motion sequence nos. 003 and 004 are consolidated for disposition herein.

In motion sequence no. 003, defendants City Car & Limousine Services Incorporated and
Ruben Pimental-Estrella (Pimental-Estrella) (together, City Car) move, pursuant to CPLR 3212,
for summary judgment dismissing the complaint on the ground that neither plaintiff suffered a
"serious injury" as that phrase is defined in Insurance Law § 5102 (d). In motion sequence no.
004, defendants New York City Transit Authority (Transit Authority), CBT Paratransit, Inc. (CBT)
and Herbert L. Paulling (Paulling) (together, CBT Paratransit), also move, pursuant to CPLR 3212,

for summary judgment on the same ground. Plaintiffs oppose both applications. For the reasons set forth below, defendants' motions are granted in part.

### FACTUAL AND PROCEDURAL BACKGROUND

This personal injury action arises out of a motor vehicle accident that occurred on February 3, 2014 when the vehicle owned by City Car and operated by Pimental-Estrella, in which plaintiffs Angela Fabian (Fabian) and Carlos Grullon (Grullon) (together, plaintiffs) were passengers, was involved in a collision with a vehicle owned by the Transit Authority, operated as an Access-A-Ride vehicle by CBT Paratransit, and driven by Paulling.

According to the verified bill of particulars, Fabian alleges that she sustained injuries to her right shoulder, including a SLAP tear and torn rotator cuff, both of which required surgical intervention; bilateral wrist trauma, including carpal tunnel syndrome; bulging discs at L4-L5 and L5-S1; and trauma to the cervical spine and right knee (affirmation of Cary S. Nosowitz [Nosowitz], exhibit B [NY St Cts Elec Filing (NYSCEF) Doc No. 86], ¶ 11). Fabian alleges that she was substantially confined to her bed and home from the date of the accident until April 28, 2014, when she returned to her position as a machine operator, albeit on limited duty (*id.*, ¶ 13). She claims serious injury in the categories of significant disfigurement; 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 ("90/180") (*id.*, ¶ 20).

Grullon alleges that he sustained disc bulges at L4-L5; trauma to the cervical spine with reverse lordosis; and trauma to the thoracic spine, bilateral shoulders, hips and pelvis (Nosowitz affirmation, exhibit B [NYSCEF Doc No. 86], ¶ 11). He claims that he was substantially confined to his bed and home for six weeks, returning to work on March 16, 2014 (*id.*, ¶ 14). Grullon claims serious injury in the categories of 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 in the 90/180 category (*id.*, ¶ 20).

### THE PARTIES' CONTENTIONS

In support of its motion, City Car submits the pleadings; deposition transcripts for both plaintiffs; plaintiffs' medical records; and affirmed reports from Dr. Nicholas Caputo, a board-certified physician in emergency medicine, Dr. Michael N. Kang, a board-certified orthopedist, and Dr. Audrey Eisenstadt, a board-certified radiologist. CBT Paratransit relies on the same proof proffered by City Car as well as on affirmed reports from Dr. Naunihal Sachdev Singh, a board-certified neurologist, Dr. Jeffrey Passick, a board-certified orthopedist, and two unsworn biomechanical reports from Kurt Manal, Ph.D. (Manal).

Dr. Caputo affirmed that he reviewed the verified bill of particulars, the uncertified police accident report for the subject accident, prehospital care report summaries from the New York City Fire Department, and medical records from St. Luke's Hospital, where plaintiffs were taken by ambulance immediately after the accident (Nosowitz affirmation, exhibit G [NYSCEF Doc No. 91] at 2). Dr. Caputo noted that Fabian's chief complaint concerned pain in her right arm, although she also complained of pain in her right wrist and right shoulder (*id.*). Dr. Caputo opined that Fabian's claimed injuries are unsupported by the objective medical evidence because the physical

and neurological examinations revealed no evidence of a significant, acute injury to any body part (*id.*). Notably, there was full range of motion for the elbow and wrist, and she ambulated with a normal gait (Nosowitz affirmation, exhibit H [NYSCEF Doc No. 92] at 15]). Fabian was discharged the same day that she was admitted with a diagnosis of a forearm contusion (*id.* at 16).

At an orthopedic examination conducted October 28, 2015, Dr. Kang reported measuring range of motion of Fabian's right shoulder, and noted positive O'Brien's and impingement sign tests (Nosowitz aff, exhibit M [NYSCEF Doc No. 97] at 2). He recorded mild low back discomfort upon palpation and mild discomfort on a straight leg raising test on the right (*id.*). There was minimal knee effusion of the right knee along with joint line pain. He concluded, after reviewing the medical records and his examination, that Fabian's injuries were not causally related to the subject motor vehicle accident (*id.* at 3).

Dr. Passick conducted an orthopedic examination of Fabian on December 14, 2016, and reviewed her medical records (affirmation of Steven Johnson [Johnson], exhibit W [NYSCEF Doc No. 136] at 1-3). He reported that range of motion of the cervical and lumbar spine, bilateral wrists and right knee were normal across all planes of movement, and that additional clinical tests he performed yielded normal or negative results (*id.* at 4-7). Dr. Passick concluded that the strains to Fabian's cervical and lumbar spine and the contusions to her bilateral wrists and right knee had resolved (*id.* at 7). As for the right shoulder, Dr. Passick observed limitations on abduction (150/180 degrees), adduction (25/30 degrees), forward flexion (150/180 degrees), and extension (35/40 degrees), but internal rotation (80/80 degrees) and external rotation (90/90 degrees) were normal (*id.* at 5). He opined that Fabian was status post right shoulder arthroscopy (*id.* at 7). Dr. Passick concluded that no further orthopedic treatment was necessary and that Fabian could perform all her daily tasks without restriction (*id.*).

Dr. Singh performed a neurological examination of Fabian on November 14, 2016, during which he observed full range of motion of the cervical and lumbar spine (Johnson affirmation, exhibit V [NYSCEF Doc No. 135] at 1 and 4). Straight leg raising was negative bilaterally (*id.*). As for the right shoulder, Dr. Singh noted restrictions on flexion (100/180 degrees), extension (30/50 degrees), abduction (100/180 degrees), adduction (20/30 degrees), internal rotation (20/40 degrees), and external rotation (60/90 degrees) (*id.* at 3). Additional motor, muscle, sensory and reflex testing yielded normal results (*id.*). Dr. Singh opined that Fabian's cervical and lumbar spine strains had resolved and that there was no evidence of carpal tunnel syndrome (*id.* at 5).

Dr. Eisenstadt reviewed the MRIs of Fabian's right shoulder, right knee and lumbar spine taken within one month of the accident, and opined that the images showed no evidence of a recent traumatic injury (Nosowitz affirmation, exhibit Q [NYSCEF Doc No. 101] at 2 and 4-5). She determined that the conditions depicted in the right shoulder MRI, such as bony productive changes in the acromioclavicular joint, took years to develop, and that there was no evidence of a rotator cuff tear (*id.* at 2). Dr. Eisenstadt also described the presence of a paralabral cyst as a "classic radiographic manifestation of chronic intraarticular inflammation . . . [that] has no traumatic etiology" (*id.*) As for the right knee scan, Dr. Eisenstadt found evidence of degenerative joint disease based upon the presence of osteophytes, bone spurring, and thinning cartilage, as well as degenerative Grade II signal changes and hypoplasia of the posterior horn of the medial meniscus. However, such conditions were chronic and not traumatic in origin as evidenced by the presence of a parameniscal cyst (*id.* at 4). The lumbar spine image was normal with no evidence of posttraumatic disc changes causally related to the subject accident (*id.* at 4).

With regards to Grullon, Dr. Caputo opined that he did not sustain a serious injury as Grullon's complaints and the physical and neurological examinations performed at St. Luke's

Hospital did not support a finding of a significant acute injury to any area (Nosowitz affirmation, exhibit I [NYSCEF Doc No. 93] at 2). Notably, Grullon's chief complaint at the emergency room concerned his cervical spine, not his lower back (*id.* at 2). He was discharged the same day he was admitted with a diagnosis of "muscle strain, general, torticollis" (Nosowitz aff, exhibit J [NYSCEF Doc No. 94] at 9).

Dr. Kang conducted an orthopedic examination of Grullon on October 28, 2015 (Nosowitz aff, exhibit P [NYSCEF Doc No. 100] at 1). He observed a mildly positive straight leg raising test on the right (*id.* at 3). The right shoulder and bilateral hips exhibited full ranges of motion, and additional clinical tests performed yielded negative or normal results (*id.*). After reviewing the medical records, including the MRI reports, he opined that there was no direct causal relationship between Grullon's injuries and the subject accident (*id.*).

At Grullon's orthopedic examination on December 14, 2016, Dr. Passick found normal ranges of motion across all planes of movement for the cervical, thoracic and lumbar spine, bilateral shoulders, and hips and normal or negative results for all clinical tests performed (Johnson affirmation, exhibit O [NYSCEF Doc No. 128] at 4-6). He concluded that Grullon's various sprains and strains had resolved without any evidence of permanency (*id.* at 6).

Dr. Singh reported performing a normal neurological examination of Grullon on November 14, 2016, finding full range of motion in all parts of the body he examined (Johnson affirmation, exhibit N [NYSCEF Doc No. 127] at 3-4). Dr. Singh concluded that Grullon exhibited no evidence of a neurological disability (*id.* at 5).

Dr. Eisenstadt reviewed the MRIs of Grullon's cervical and lumbar spine taken 16 days after the accident (Nosowitz affirmation, exhibit R [NYSCEF Doc No. 102]). The lumbar spine scan was normal and showed no disc changes that were posttraumatic in origin (*id.* at 2). The

cervical spine MRI indicated cervical straightening, a finding Dr. Eisenstadt attributed to patient positioning or comfort, rather than a posttraumatic change (*id.* at 1).

At her deposition, Fabian testified that she complained of right shoulder and wrist pain after the accident (Nosowitz affirmation, exhibit D [NYSCEF Doc No. 88] [Fabian tr] at 30). X-rays at Dr. Perna's office revealed a tear in the shoulder, and a nerve test indicated carpal tunnel syndrome in the wrists (*id.* at 44-45). Despite administering treatment three times a week, Dr. Perna recommended surgical repair of the right shoulder injury (*id.* at 46). Dr. Sean Thompson, an orthopedic surgeon, performed arthroscopic surgery on Fabian on April 10, 2014 (*id.* at 48), and she resumed attending physical therapy one month later (*id.* at 51-52). She ceased all therapy five months after surgery (*id.* at 52). Fabian testified that she did not return to work as a machine operator until eight months after the accident (*id.* at 10-11). She also maintained that she could no longer carry laundry or grocery bags, visit the gym, the park or the beach, or walk more than two blocks because of pain (*id.* at 69-75).<sup>3</sup>

Grullon testified that his attorneys referred him to Dr. Perna, with whom he began treatment four or five days after the accident (Nosowitz affirmation, exhibit E [NYSCEF Doc No. 89] [Grullon tr] at 71). He was told that x-rays of his neck and lower back revealed a "deviation" and disc inflammation, for which he received massage therapy, electrical stimulation and acupuncture three times a week before treatment ended after two to three months (*id.* at 72-73 and 78). Grullon testified that he returned to work on March 11, 2014 (*id.* at 19). He also admitted that he felt no pain in his neck in the six months preceding his July 2015 deposition (*id.* at 86). He maintained that he could no longer run or play basketball or baseball after the accident, although he attributed his lack of participation in those activities, in part, to the fact that he was not a member of a sports team (*id.* at 87-88).

To the extent that City Car relies on Manal's biomechanical analyses, neither report is sworn to or notarized (*see* CPLR 2106). Thus, the court will not consider them (*see* *Lowe v Nbohn*, 2013 NY Slip Op 33956[U], \*2 [Sup Ct, Bronx County 2013]).

In opposition, plaintiffs tender affirmed reports from radiologists Dr. Amy Liebeskind and Dr. Paul B. Rolen, orthopedic surgeon Dr. Sean Thompson, treating physician Dr. Shan Sivendra; an affidavit from treating chiropractor David Perna, D.C.; and plaintiff's deposition transcripts and medical records.

Dr. Liebeskind interpreted Fabian's right shoulder MRI and observed mild supraspinatus tendinosis, a SLAP 2 superposterior labral tear, acromioclavicular joint arthrosis, joint effusion and bursitis (affirmation of Bartly L. Mitchell [Mitchell], exhibit 6 [NYSCEF Doc No. 172] at 3). Dr. Rolen noted reverse lordosis, cervical spondylosis, hypertrophic changes from C3 through C6 and multilevel discogenic disease with disc bulges at C4-C5 and C5-C6 in the cervical spine MRI (Mitchell affirmation, exhibit 7 [NYSCEF Doc No. 173] at 3). As for the lumbar spine scan, Dr. Rolen found mild scoliosis, facet arthrosis, and disc bulges at L4-L5 and L4-S1 (*id.* at 5). In his narrative report, Dr. Sivendra noted that a physical examination conducted four days after the accident revealed decreased ranges of motion of the cervical and lumbar spine and right shoulder, and several positive clinical tests (Mitchell affirmation, exhibit 5 [NYSCEF Doc No. 171] at 2-4). Fabian's last follow up was conducted on June 7, 2016, at which time range of motion of the neck was normal (*id.* at 5). Dr. Sivendra also observed unquantified limitations on two planes of movement of the lumbar spine and an unquantified limitation on one plane of movement of the right shoulder (*id.* at 5). Dr. Sivendra opined that Fabian's present condition was causally related to the subject motor vehicle accident.

Dr. Rolen stated that Grullon's lumbar spine MRI revealed a disc bulge at L4-L5 and that the cervical spine MRI revealed reverse lordosis (Mitchell affirmation, exhibit 14 [NYSCEF Doc No. 180] at 3 and 5). In similarly-worded reports, Drs. Sivendra and Perna documented Grullon's initial presentation to their office. They observed restricted motion of the cervical and lumbar spine across all planes of movement, but range of motion of the shoulders was normal bilaterally (Mitchell affirmation, exhibit 13 [NYSCEF Doc No. 179] at 2-4 and exhibit 15 [NYSCEF Doc No. 181] at 2-3). Dr. Sivendra also reported that Grullon last visited the facility on June 7, 2016, at which time range of motion of the neck was normal (Mitchell affirmation, exhibit 13 [NYSCEF Doc No. 179] at 4). An examination of the lumbar spine "revealed limitation and pain with [range of motion] for flexion and extension" (*id.*). Both concluded that Grullon sustained a permanent injury causally related to the motor vehicle accident.

### LEGAL CONCLUSIONS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212*). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie

showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*” (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

It has been said the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (*Dufel v Green*, 84 NY2d 795, 798 [1995], citing *Licari v Eliot*, 57 NY2d 230, 234-234 [1982]). As such, a claim for serious injury under Insurance Law § 5102 is compensable only upon the presentation of “a qualitative assessment that has an objective basis and compares [the] plaintiff’s limitations with normal function in the context of the limb or body system’s use and purpose, or a quantitative assessment that assigns a numeric percentage to [the] plaintiff’s loss of range of motion” (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002], *rearg denied sub nom. Manzano v O’Neil*, 98 NY2d 728 [2002]). To that end, a defendant moving for dismissal must provide an objective basis for concluding that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law (*see Christian v Waite*, 61 AD3d 581, 581 [1st Dept 2009]). A defendant may also rely on a plaintiff’s unsworn and uncertified reports and records to demonstrate the absence of a serious injury (*see Galarza v. J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488, 489 [1st Dept 2014], citing *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 881 [2d Dept 2010]).

Once a defendant has established that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to raise a triable issue of fact (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]), with the submission of objective medical evidence (*see Baez v Rahamatali*, 6 NY3d 868, 869 [2006]; *Rosario v Cablevision Sys.*, 160 AD3d 545, 546 [1st Dept 2018] [stating that an MRI constitutes objective medical evidence]; *Osborne v Diaz*, 104 AD3d 486, 487 [1st Dept 2013]

[concluding that a positive straight leg raising test constitutes objective evidence of a lumbar spine injury]; *Bonilla v Abdullah*, 90 AD3d 466, 467 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012] [finding that objective, quantitative range of motion deficits along with positive MRI findings are sufficient to defeat a summary judgment motion]). A plaintiff's subjective complaints of pain are insufficient (*Shaw v Looking Glass Assoc., L.P.*, 8 AD3d 100, 103 [1st Dept 2004] [concluding that the plaintiff's expert's findings of motion limitations were based on the plaintiff's subjective complaints of pain rather than objective medical tests]).

#### A. Fabian's Claim of Serious Injury

As an initial matter, Fabian has alleged that she sustained a significant disfigurement from the subject accident, but she failed to plead an injury in the nature of a permanent scar in her verified bill of particulars (*see Perez v Vasquez*, 71 AD3d 531, 532 [1st Dept 2010]). Accordingly, her claim of serious injury in the significant disfigurement category is dismissed.

With respect to the remaining categories, the court finds that defendants have met their prima facie burden of demonstrating that Fabian has not sustained a serious injury within the meaning of the Insurance Law through the submission of their medical experts' affirmed reports finding full ranges of motion and no evidence of a traumatic, causally related injury in the MRIs (*see Pastora L. v Diallo*, — AD3d —, 2018 NY Slip Op 08260, \*1 [1st Dept 2018]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 436-437 [1st Dept 2018]). Although Dr. Kang's report was deficient because he failed to set forth the normal standards used to assess ranges of motion (*see Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006]), Drs. Passick and Singh measured normal ranges of motion for the cervical and lumbar spine, bilateral wrists and right knee, and opined that Fabian's sprains had resolved (*see Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601, 601 [1st

Dept 2018]; *Rabolt v Park*, 50 AD3d 995, 995 [2d Dept 2008] [stating that sprains and strains do not constitute serious injuries within the meaning of the Insurance Law]). And while defendants' orthopedic and neurological experts observed diminished motion of the right shoulder, Drs. Eisenstadt and Caputo concluded that the injury was not consistent with a traumatic etiology (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 481 [1st Dept 2017]; *Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567, 567 [1st Dept 2014]).

In opposition, Fabian fails to raise a triable issue of fact concerning her permanent loss of use claim. An injury in the permanent loss of use category requires a "total loss of use" (*Oberly v Bangs Ambulance*, 96 NY2d 295, 297 [2001]), and the testimonial and medical evidence establish that she did not suffer a total loss of use of any body part (*see Swift v New York Tr. Auth.*, 115 AD3d 507, 509 [1st Dept 2014]; *Melo v Grullon*, 101 AD3d 452, 453 [1st Dept 2012]).

As to the permanent consequential limitation of use category, Fabian also fails to raise an issue of fact insofar as the claim relates to the cervical and lumbar spine, wrists and right knee. It is well settled that "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*Levinson v Mollah*, 105 AD3d 644, 644 [1st Dept 2013] [internal quotation marks and citation omitted]). Similarly, evidence of a tear in the knee (*see Taylor v American Radio Dispatcher, Inc.*, 63 AD3d 407, 408 [1st Dept 2009]) or shoulder "is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration" (*Choi Ping Wong v Innocent*, 54 AD3d 384, 385 [2d Dept 2008] [citations omitted]). Dr. Sivendra last assessed Fabian's condition in June 2016 but, less than six months later, Drs. Singh and Passick found full range of motion of her cervical and lumbar spine, wrists, and right knee. Moreover, at Fabian's last examination, Dr. Sivendra noted that range of motion of the neck

was normal. Although Dr. Sivendra found unquantified limitations on two planes of movement of the lumbar spine, he did not describe those limitations in qualitative terms “based on the normal function, purpose and use of the body part” (*Toure*, 98 NY2d at 353 [internal quotation marks and citation omitted]). Thus, Fabian failed to present objective evidence of limitations from a more recent examination to demonstrate the permanency of the injuries to her cervical and lumbar spine, wrists, and right knee (*see Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018] [dismissing the serious injury claim because the plaintiff failed to offer any recent evidence of limitations]; *De La Rosa v Okwan*, 146 AD3d 644, 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017] [same]).

As to the significant limitation of use category, Insurance Law § 5102 does not set forth a temporal requirement (*see Griffiths v Munoz*, 98 AD3d 997, 998 [2d Dept 2012]), and the injury need not be permanent to qualify as a significant limitation (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013] [citations omitted]). Dr. Sivendra’s report of the findings he made in June 2016 fails to qualify as either a quantitative or qualitative assessment of her cervical and lumbar spine, wrists and right knee injuries (*see Toure*, 98 NY2d at 353). Thus, Fabian has not demonstrated that the injuries to those body parts were significant within the meaning of the Insurance Law.

With regards to the 90/180 category, missing more than 90 days from work is not conclusive (*see Amamedi v Archibala*, 70 AD3d 449, 450 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]). Here, Fabian’s testimony that she was unable to complete housework, cook or shop for groceries without assistance is insufficient to demonstrate that her injuries restricted her from performing substantially all of her usual and customary daily activities (*see Reyes v Se Park*, 127 AD3d 459, 461 [1st Dept 2015] [concluding that the plaintiff’s 90/180 claim based on his “inability clean his house or play dominoes” failed]; *Johnson v KS Transp. Inc.*, 115 AD3d 425, 427 [1st

Dept 2014] [finding that the plaintiff's inability to go grocery shopping did not constitute substantially all of her daily activities]; *Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003] [dismissing the 90/180 claim based on the plaintiff's inability to "mop" or "walk like she used to"]).

Moreover, Fabian has failed to refute the opinions of defendants' experts as to the cause of the injuries to her cervical and lumbar spine, bilateral wrists, and right knee. Fabian presented contemporaneous evidence of measured restrictions of her cervical and lumbar spine and right shoulder, but she offered no contemporaneous evidence of limitations for the alleged wrist or right knee (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011] [stating that, at a minimum, the plaintiff must present either a quantified or qualified assessment of his or her condition shortly after the accident]; *accord Lee v Rodriguez*, 150 AD3d 481, 482 [1st Dept 2017] [concluding that the plaintiff failed to establish a causal connection between the accident and the claimed injuries with evidence of contemporaneous treatment]). Furthermore, Fabian's radiologists did not opine as to the etiology of her cervical and lumbar spine and right knee injuries (*see Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]), and they did not address the opinions of defendants' experts that those injuries were chronic or degenerative in nature (*see Franklin v Gareyua*, 136 AD3d 464, 465 [1st Dept 2016], *affd* 29 NY3d 925 [2017]). Notably, Fabian's experts failed to address the evidence of "DJD" (degenerative joint disease) and osteoarthritis in the right knee (Nosowitz affirmation, exhibit L [NYSCEF Doc No. 96] at 3; Mitchell affirmation, exhibit 5 [NYSCEF Doc No. 171 at 3]), conditions which were documented in her own treating physicians' records (*see Ogando v National Frgt., Inc.*, 166 AD3d 569, 569 [1st Dept 2018]). Dr. Sivendra's conclusion that the soft tissue spine injuries are of a "probable" posttraumatic pathology is "too equivocal" to

establish causation (*Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009], *affd* 14 NY3d 821 [2010] [internal quotation marks and citation omitted]).

Nevertheless, Fabian has raised a triable issue of fact regarding her permanent consequential and significant limitation of use claims as they relate to her right shoulder. Fabian's treating providers stated that she was in a good state of health when, upon the happening of the accident, she felt a sudden onset of pain in her right shoulder. Dr. Liebeskind did not specifically address Dr. Eisenstadt's conclusion that the right shoulder injuries were pre-existing, chronic and degenerative. But, when Dr. Liebeskind interpreted Fabian's right shoulder MRI, she observed a SLAP 2 labral tear, which Dr. Thompson confirmed observing in his operative report [Mitchell affirmation, exhibit 8 [NYSCEF Doc No. 153] at 6]. Additionally, Dr. Thompson recommended surgery only after conservative management of the shoulder injury had failed (*id.* at 4). At his last post-surgery examination in June 2014, Dr. Thompson observed mild improvement, but recommended that Fabian remain out of work for another month (*id.* at 9). Two years later, Dr. Sivendra observed that Fabian exhibited an unquantified limitation on abduction of the right shoulder, and Drs. Singh and Passick observed significant restrictions across nearly all planes of movement. The severity of these limitations cannot be deemed minor or slight (*see Feaster v Boulabat*, 77 AD3d 440, 440 [1st Dept 2010]). Last, Fabian's medical evidence suggests an alternative basis for causation, namely, the subject motor vehicle accident. Her experts' opinions are entitled to equal weight (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

## B. Grullon's Claim of Serious Injury

The court finds that defendants have met their burden of demonstrating that Grullon did not sustain a "serious injury" as the phrase is defined in Insurance Law § 5102 (d) based upon their medical experts' affirmed reports finding normal ranges of motion in all areas tested and the absence of a traumatic injury in the MRIs (*see Pastora L.*, 2018 NY Slip Op 08260, \*1). As with Fabian's permanent loss of use claim, the record does not support Grullon's allegation that he suffered a total loss of use of any body part (*Swift*, 115 AD3d at 509), and Grullon has not raised a triable issue of fact in opposition.

With regards to causation, Grullon failed to present a quantitative or qualitative assessment of his bilateral shoulders, hip, or pelvis contemporaneous with the accident (*see Perl*, 18 NY3d at 217-218). Significantly, four days after the accident, Dr. Sivendra found full range of motion in both shoulders. Moreover, Grullon's testimony that he never felt any pain in his hips refutes any claim of serious injury to that part of the body. Consequently, Grullon has not established that his shoulder, hip, or pelvis injuries were causally related to the accident. Furthermore, Dr. Rolen did not express an opinion as to the etiology of Grullon's cervical and lumbar spine injuries (*see Valdez*, 101 AD3d at 623), and the assertions from Drs. Sivendra and Perna that it was "probable" the spine injuries were of a posttraumatic pathology are "too equivocal" (*Linton*, 62 AD3d at 439 [citation omitted]).

Nor has Grullon provided evidence of more recent limitations to establish either the permanency of his cervical and lumbar spine injuries (*see Alston*, 159 AD3d at 576), or their significance. Because he was last examined in June 2016, Grullon failed to refute defendants' claims that the injuries to his spine had resolved. Additionally, at that time, Dr. Sivendra did not

examine Grullon's hips or pelvis (*see Antonio v Gear Trans Corp.*, 65 AD3d 869, 870 [1st Dept 2009]).

As to the 90/180 claim, Grullon failed to plead that he was incapacitated for the entire statutory period, and, thus, defendants are entitled to summary judgment (*see Tejada*, 166 AD3d at 437-438 [dismissing the 90/180 claim based on the plaintiff's allegation that "he was confined to home and bed for just eight weeks"]; *Brownie v Redman*, 145 AD3d 636, 637 [1st Dept 2016] [dismissing the plaintiff's "90/180-day claim by relying on her admission in the verified bill of particulars that she was confined to bed and home for just one week after the accident"]). In addition, Grullon's testimony that he resumed working at a beer distribution company approximately five weeks after the accident defeats the 90/180 claim (*see Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 544 [1st Dept 2018] [dismissing the 90/180 claim based on the plaintiff's averment that she missed one week from work]; *Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018] [finding that the plaintiff's testimony that she was confined to bed and home for five weeks insufficient]). Grullon has not raised a triable issue of fact in opposition.

In light of the foregoing, it is hereby:

ORDERED that the motion of defendants City Car & Limousine Services Incorporated and Ruben Pimental-Estrella for summary judgment (motion sequence no. 003) is granted to the extent of dismissing the complaint of plaintiff Carlos Grullon and dismissing the serious injury claim of plaintiff Angela Fabian except in the categories of permanent consequential limitation of

use of a body organ or member and significant limitation of use of a body function or system as they pertain to the right shoulder; and it is further

ORDERED that the motion of defendants New York City Transit Authority, CBT Paratransit, Inc. and Herbert L. Paulling for summary judgment (motion sequence no. 004) is granted to the extent of dismissing the complaint of plaintiff Carlos Grullon and dismissing the serious injury claim of plaintiff Angela Fabian except in categories of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system as they pertain to the right shoulder; and it is further

ORDERED that the complaint of plaintiff Carlos Grullon is dismissed; and it is further

ORDERED that the serious injury claim of plaintiff Angela Fabian is dismissed except in the categories of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system as they pertain to the right shoulder; and it is further

ORDERED that, within 20 days of entry of this order, counsel for the moving defendants are to serve this order, with notice of entry, upon plaintiff, as well as on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

1/2/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: