

Verdon v Gleixner
2021 NY Slip Op 31858(U)
June 1, 2021
Supreme Court, Kings County
Docket Number: 505283/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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EUGENE A. VERDON,

Plaintiff,

- against -

Index No.: 505283/2018

Motion Date: 4/21/21

Motion Seq.: 04

DECISION AND ORDER

ERIC GLEIXNER, 5 BORO GREEN SERVICES, LLC
And HUB TRUCK RENTAL,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 04) 47-60, 72-90, and 93 were read on the defendants' motion seeking summary judgment.

The defendants, Eric Gleixner and 5 Boro Green Services, LLC, seek an order granting summary judgment pursuant to CPLR § 3212 based on Insurance Law § 5102(d), claiming that the plaintiff's injuries fail to meet the "serious injury" threshold as required by the statute. The plaintiff was granted summary judgment on the issue of liability by order dated March 20, 2019. For the reasons set forth below, the defendants' motion is denied.

The plaintiff commenced this action based on personal injuries he allegedly sustained in an automobile accident which occurred on September 14, 2016 when the defendants' vehicle collided into the rear of the rental vehicle operated by the plaintiff. In support of the motion the defendants submit the pleadings, the plaintiff's deposition transcripts of March 7, 2019 and June 17, 2019, the deposition transcript of defendant, Eric Gleixner, the court order of March 20, 2019, the police accident report, medical reports of Dr. Tuan Dean dated September 16, 2016 and May 9, 2017, and the medical reports of defendants' examining physicians Dr. Michael Carciente and Dr. Marc Chernoff.

The plaintiff's bill of particulars alleges injuries that include, inter alia, surgery involving anterior cervical discectomy and fusion at C6-C7 with opening of the posterior longitudinal ligament, C6-C7; bilateral medial facetectomies and foraminotomies, C6-C7; and resection of posterior osteophyte at C6 and C7; C6-C7 8 MM left paracentral disc extrusion at C6-7 with severe lateral recess narrowing and foraminal stenosis on the left; C5-C6 bulging disc and uncovertebral joint facet hypertrophy at C5-6 with severe foraminal stenosis bilaterally and symmetrically; C4-C5 bulging disc and uncovertebral joint hypertrophy at C4-5 with mild foraminal narrowing on the right; C3-C4 uncovertebral joint facet hypertrophy on the left at C3-4 with mild foraminal narrowing on the left; cervical radiculopathy; left C7 straightening of the normal cervical lordosis and torticollis. He also alleges left upper extremity pain, weakness,

numbness, loss of sensation, and tingling, throughout entire shoulder, arm, elbow, hand, and fingers.

The plaintiff's bill of particulars also alleges that he sustained serious injury as defined by §5102 of the Insurance Law of the State of New York including but not limited to a fracture; a significant disfigurement; permanent loss 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 plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury.

According to the plaintiff's deposition testimony, at the time of the accident the plaintiff and his brother were travelling on Interstate 95 south toward Florida when they exited the highway due to heavy traffic conditions. He testified that his vehicle was struck in the rear by the defendants' box truck while he was stopped at a yield sign at the end of the exit ramp. The plaintiff further testified that the impact was sudden and unexpected, and caused the plaintiff's head to forcefully move forward and back, causing him to immediately feel pain in the middle of his back. The plaintiff declined medical treatment at the scene and continued the drive to Florida.

Upon his arrival in Florida, the plaintiff attended a previously scheduled medical appointment on September 16, 2016 with Dr. Tuan Dean for a follow-up examination concerning a previously diagnosed medical condition. The medical report does not mention the motor vehicle accident. The plaintiff claims that he told Dr. Dean about the accident, and that he was experiencing neck and shoulder stiffness, and that Dr. Dean told him to "keep an eye on it" and to return if necessary. According to the plaintiff's affidavit, over the course of the next several months the plaintiff's symptoms worsened, and he engaged in self-treatment, however, by March of 2017 he was experiencing left shoulder and arm pain while driving, neck pain, weakness in his left arm and numbness in the fingers of his left hand. On May 9, 2017, the plaintiff presented to Dr. Dean and conveyed these complaints to him, and stated that he had been experiencing these symptoms for the past five months. After performing a physical examination, Dr. Dean diagnosed the plaintiff with, inter alia, cervicalgia, lower back pain and cervical region spinal stenosis. He ordered x-rays of the cervical spine, left shoulder, left elbow and thoracic spine. Dr. Dean's notes reflect an update on May 12, 2017 with respect to the cervical spine x-ray, which revealed disc space and bilateral neural foraminal narrowing at C5-C6 and C6-C7. Dr. Dean ordered a cervical MRI for neurosurgical evaluation based on the x-ray results.

According to the plaintiff's affidavit, Dr. Dean referred the plaintiff to a neurosurgeon, Dr. Harry Weiser. The plaintiff consulted with Dr. Weiser in June or July of 2017, and Dr. Weiser recommended that the plaintiff undergo surgery that included anterior cervical

discectomy and cervical fusion. Dr. Weiser performed the surgery on July 20, 2017, which required 16 surgical staples that the plaintiff claims has caused a disfiguring scar on the front of his neck. A photograph of the scar is attached to the plaintiff's submissions. The plaintiff last visited Dr. Weiser for a post-operative evaluation on July 31, 2017. In August of 2017 the plaintiff relocated to Thailand and sought medical treatment for persistent neck pain at Bangkok International Hospital and Piyavate Hospital in Bangkok. According to the plaintiff's affidavit, the physician from Piyavate Hospital prescribed physical therapy three times a week, and the plaintiff claims that he attended physical therapy from October of 2017 through February of 2018. In November of 2017 the plaintiff claims that he returned to Florida and came under the care of Dr. Vijay Babu on February 21, 2018, for chronic pain management involving his left shoulder, left elbow and cervical spine resulting from the motor vehicle accident. Thereafter, the plaintiff returned to Thailand, where he continued conservative treatment through December of 2018, which included muscle relaxants, physical therapy and epidural steroid injections, without relief. The plaintiff continued to experience pain from his cervical spine along the left side of his neck and into his left arm, which Dr. Babu told the plaintiff was permanent, and might require re-evaluation for further surgical options in the future. Dr. Babu last examined the plaintiff on July 16, 2020.

The defendants argue that the plaintiff did not sustain a causally-related serious injury within the meaning of Insurance Law § 5102 because he failed to submit medical evidence showing a limitation that is contemporaneous with the motor vehicle accident. They argue that Dr. Dean's medical notes concerning an examination for an unrelated medical condition two days after the accident, do not mention the car accident or any complaints relating to the plaintiff's neck, back or left arm. The defendants contend that the first time the plaintiff made such complaints was during a visit to Dr. Dean on May 9, 2017, eight months after the accident. According to the defendants, the eight-month gap between the accident and the plaintiff's complaints about his injuries to Dr. Dean was not contemporaneous with the accident, and the plaintiff has failed to establish a causal connection between his alleged injuries and the accident. The defendants assert that in the absence of causation there can be no finding of significant limitation, permanent consequential limitation or a 90/180 claim.

The defendants rely on the affirmed independent medical reports of their medical experts, Dr. Marc Chernoff and Dr. Michael J. Carciente, in arguing that the plaintiff has not sustained a serious injury. Dr. Chernoff, a board-certified orthopedic surgeon, examined the plaintiff on September 19, 2019, using a goniometer, and normal range of motion values were obtained from standard sources, including the American Medical Association Guidelines. An examination of the lumbar spine revealed flexion to be 90 degrees (normal lumbar flexion 90 degrees), lumbar extension at 30 degrees (normal extension 30 degrees), lumbar lateral bending at 25 degrees bilaterally (normal lateral bending 20 to 25 degrees), and lumbar lateral rotation at 45-degrees bilaterally (normal lateral rotation 45 degrees). The plaintiff offered no complaints related to the

lower back. Deep tendon reflexes and sensation testing in the lower extremities was found to be normal. Power testing revealed 5/5 strength in the quadriceps, hamstrings, tibialis anterior, extensor hallucis longus, and plantar flexors bilaterally. Straight leg raise was found to be normal bilaterally.

Examination of the cervical spine revealed a 6 cm. right transverse anterior incisional scar, which was noted to be well healed. Cervical flexion was 50 degrees (normal flexion 60 degrees), cervical extension at 25 degrees (normal extension 30 degrees), and cervical lateral bending at 35 degrees bilaterally (normal lateral bending 30 to 45 degrees). Cervical lateral rotation at 50 degrees to the right and 45 degrees to the left (normal lateral rotation 80 degrees). Dr. Chernoff noted that all measurements were obtained actively and were under the claimant's control, thus having a subjective component. Deep tendon reflexes and sensation was found to be intact in the C5, C6, C7, C8, and T1 distribution of the bilateral upper extremities to light touch. Power testing revealed 5/5 strength in the upper extremities bilaterally. Dr. Chernoff also reviewed the plaintiff's medical records, including those of Dr. Dean, the operative report of Dr. Weiser and related hospital records from Central Florida Health Alliance, diagnostic and radiographic reports, the medical reports of Dr. Eakopoj Kurddonfak, the plaintiff's treating physician in Bangkok, Thailand, as well as the EMG study conducted on January 25, 2018 by Dr. Pravit Premteerasomboon, and the office notes of Dr. Babu. Dr. Chernoff did not review the actual films from any of the radiographic tests that were performed.

Dr. Chernoff opined that there was no evidence that the MRI finding of May 25, 2017, noting a large left paracentral disc extrusion at C6-C7 or the cervical spine surgery performed in July of 2017 was related to the motor vehicle accident. He concluded that based on the fact that he had not reviewed any documentation from the months immediately following the accident, and there were no documented complaints or injuries that were noted to be attributed to the accident prior to the MRI of May 25, 2017, he was unable to establish any causal connection between the alleged injuries and the motor vehicle accident of September 14, 2016.

The plaintiff was also examined by Dr. Michael Carciente, a board-certified neurologist, on September 12, 2019. Dr. Carciente reviewed the plaintiff's medical records and diagnostic and radiographic reports, but not the actual images from the cervical x-ray and MRI taken in May of 2017. He opined that the neurological examination was normal despite subjective complaints by the plaintiff. He also opined that if the findings noted in the initial cervical MRI study had been related to trauma the plaintiff would have been symptomatic by September 16, 2016, when he presented to Dr. Dean for an office visit. Dr. Carciente concluded that there was no evidence of an ongoing neurological injury, disability or permanency.

The plaintiff opposes the motion and submits the pleadings, the plaintiff's deposition transcripts from March 7, 2019 and June 17, 2019, the plaintiff's affidavit dated October 28, 2020, the affidavits of Drs. Vijay Babu dated November 5, 2020 and Dr. Fernando Checo, dated November 9, 2020, the medical records of Dr. Tuan Dean and Internal Medicine Practice,

Central Florida Health Alliance, The Villages Hospital, Bangpakok International Hospital and Piyavate Hospital, Dr. Weiser's operative report of July 20, 2017, the MRI report relating to the cervical spine from Advanced Imaging Centers dated May 25, 2017, records from Florida Spine and Pain, which are incorporated into the affidavit of Dr. Babu, and photographs depicting the vehicles following the accident, and surgical scar photographs.

Dr. Babu's affidavit incorporates his treatment of the plaintiff from February 21, 2018 to August 22, 2018 for chronic pain management involving his left shoulder, left elbow and cervical spine pain which was "aching and shooting." He stated that he also reviewed the MRI films of the plaintiff's cervical spine and the EMG report conducted by the plaintiff's physicians in Thailand. On his first visit to Dr. Babu on February 21, 2018, the plaintiff told him that he had been involved in a motor vehicle accident on September 14, 2016, and that his cervical pain had been present for one year and three months. In addition to the pain, the plaintiff complained of continued numbness from his cervical region down into the fingers of his left hand and difficulty with activities of daily living. The plaintiff informed Dr. Babu that conservative treatment, such as physical therapy, did not alleviate his symptoms. Dr. Babu reviewed the plaintiff's MRI films and Dr. Weiser's operative report, as well as the medical records from the plaintiff's physicians in Thailand. After conducting an examination, Dr. Babu's impression was that the plaintiff was suffering from cervical radiculopathy and recommended an epidural steroid injection, and cervical spondylosis to be treated with conservatively. Thereafter, Dr. Babu treated the plaintiff on June 14, 2018, July 9, 2018 and August 22, 2018, and recommended that the plaintiff continue to be evaluated by his physicians in Thailand based on Dr. Babu's continued impression that the plaintiff was suffering from cervical disc disorder with radiculopathy and cervical spondylosis and facet joint syndrome.

Dr. Babu conducted an examination of the plaintiff on July 16, 2020, and the plaintiff presented with continued complaints of cervical spine pain along the left side of his neck with extension into the left arm. Dr. Babu conducted objective testing that included a positive Spurling's test, and left paraspinal musculature tenderness with limited cervical range of motion to the left. He opined that the residual symptoms from the injuries sustained in the accident resulted in an 11% whole body impairment, and that Mr. Verdon will likely require ongoing treatment in the future. Dr. Babu also concluded that the plaintiff's injuries were causally related to the motor vehicle accident of September 14, 2016, and resulted in a significant limitation of use of his cervical spine. He opined that the cervical spine surgery was medically necessitated by the injuries, and that the conservative treatment engaged in by the plaintiff prior to the surgery was consistent with the standard of care that would have been prescribed for the plaintiff's cervical spine and arm pain had he presented with those symptoms prior to surgery. He opined that the plaintiff will have continued aggravation and degeneration of his health. Dr. Babu noted that the expected medical consequences of the injuries sustained by the plaintiff are difficulty while sitting, standing or walking for extended periods of time, and inability to engage in recreational activities such as jogging and exercising or any forceful or strenuous activities.

The plaintiff also submits the affirmation of Dr. Fernando Checo, a board-certified orthopedic surgeon. Dr. Checo reviewed the plaintiff's medical records relating to the injuries he allegedly sustained in the accident, and he also reviewed the MRI images of the cervical spine from Advanced Imaging Centers of May 25, 2017. Dr. Checo opined that his impression of the MRI films was largely consistent with the report, and that the cervical injuries were traumatic in nature and caused by the motor vehicle accident. He further opined that the injuries sustained in the accident would have led to surgical intervention, including anterior cervical discectomy and fusion, irrespective of whether Mr. Verdon sought earlier intervention for his injuries. Dr. Checo noted that it is not uncommon for cervical spinal cord injuries to manifest symptoms later in time, despite the absence of clinical signs during the initial 48 hours after an accident. He also opined that Dr. Dean's treatment note of September 16, 2016, two days after the accident, was not medically significant to establish the absence of a serious injury. Finally, Dr. Checo stated that the "natural and probable progression of the cervical injuries seen on the cervical MRI would have caused Mr. Verdon to experience continued and progressing pain in his neck and shoulder...including radiating arm pain, that he believed to be a 'pinched nerve.'"

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendants' medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Moreover, the Court of Appeals has held that while a contemporaneous doctor's report is important to proof of causation, "a rule requiring contemporaneous numerical measurements of range of motion could have perverse results." *See Perl v Meher*, 18 NY3d 208, 218 (2011). Under the circumstances presented in *Perl*, where the medical expert opined that objective testing immediately after an accident is not always accurate, the Court discussed the contemporaneous requirement rule, and rejected "a rule that would make contemporaneous quantitative measurements a prerequisite to recovery." *Id.*

Once the defendants have made a prima facie showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eyler*, 79 NY2d 955 (1992).

The defendants have established their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident based on the reports of their medical experts, Drs. Chernoff and Carciente, each of whom determined that upon review of the medical records and examination of the plaintiff that the alleged injuries were not caused by the accident. In opposition, the plaintiff's submissions raise a triable issue of fact that the alleged injuries were caused by the motor vehicle accident of September 14, 2016, and resulted in a significant limitation of use of his cervical spine. The plaintiff's medical expert, Dr. Babu concluded that the injuries were causally related to the accident based on his examinations of the plaintiff from February of 2018 through August of 2018, and his review of the cervical spine MRI films of May 25, 2017, EMG studies performed in Thailand showing cervical radiculopathy, and the operative report of Dr. Weiser. Dr. Babu concluded that the plaintiff had suffered a significant limitation of use of his cervical spine that was permanent in nature.

Furthermore, an issue of fact is raised by the affidavit of Dr. Checo, who reviewed the cervical spine MRI films, as well as other medical records relating to the plaintiff's injuries, and concluded that he concurred with the findings in the MRI report. Dr. Checo opined that it was not medically significant to establish serious injuries that Dr. Dean's report of September 16, 2016 did not address the plaintiff's cervical injuries because the natural progression of cervical spinal cord injuries would not have manifested as intense two days after the accident, and become progressively worse over time. Moreover, Dr. Checo averred that his review of the plaintiff's medical records and testimony contain no history of any prior or subsequent accidents, injuries or complaints regarding the plaintiff's cervical region. He concluded that the plaintiff's injuries were traumatic in nature and caused by the motor vehicle accident, resulting in significant limitation in the cervical area of the plaintiff's spine.

Lastly, the defendants' argument that the plaintiff cannot prove causation because there is no proof of contemporaneous medical treatment of plaintiff's injuries is unpersuasive. Analogous to the facts in *Perl*, here the plaintiff has established through the submissions of his medical experts' affidavits, that the nature of the plaintiff's injuries were such that the symptoms were not immediately apparent two days after the accident, and were the type that gradually worsen over time. Indeed, Dr. Dean's report of May 9, 2017 stated that the plaintiff complained of worsening symptoms, including cervical spine and shoulder pain, and tingling and numbness extending down his left arm and into his fingers for five months preceding the visit. Plaintiff's evidence, "while hardly powerful," was sufficient to raise an issue of fact. *See Perl v Meher*, 18 NY3d at 219.

Based on the foregoing the defendant's motion must be denied, as the plaintiff has raised a triable issue of fact as to whether he sustained a serious injury under Insurance Law § 5102(d).

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: June 1, 2021

A handwritten signature in black ink, appearing to read "Lillian Wan", is positioned above a horizontal line.

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.