

<b>Downer v Maliszewska</b>
2021 NY Slip Op 33495(U)
April 23, 2021
Supreme Court, Orange County
Docket Number: Index No. EF010675-2018
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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PETROLINA DOWNER,

Plaintiff,

-against-

BARBARA MALISZEWSKA and MARIUSZ
MALISZEWSKI,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF010675-2018
Motion Date: March 29, 2021

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The following papers numbered 1 to 7 were read on Defendants' motion for summary
judgment based upon the alleged absence of a serious injury per Insurance Law §5102(d):

- Notice of Motion - Affirmation / Exhibits - Physician Affirmations (2) ..... 1-4
Affirmation in Opposition - Physician Affirmations (2) ..... 5-7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Petrolina Downer as
the result of a motor vehicle accident that occurred on September 4, 2017 when her vehicle was
rear ended by the defendant Maliszewskis' vehicle.

A. Bill of Particulars

Plaintiff's Bill of Particulars asserts that in consequence of the accident Plaintiff sustained
"serious injury" within the meaning of Insurance Law §5102(d) to her right shoulder and cervical

spine. Concerning the right shoulder, the Bill of Particulars alleges that Plaintiff sustained:

Partial-thickness tears of the rotator cuff; tear of the glenoid labrum; impingement syndrome; bursitis; pain, swelling, tenderness, range of motion limitations....

Concerning the cervical spine, the Bill of Particulars alleges that Plaintiff sustained:

Distortion of spinal cord contour at C4-C5, C5-C6 and C6-C7; C4-C5 disc bulging; lateral recess narrowing at C3-C4; reversal of normal cervical spine lordosis; spinal nerve root encroachment/stenosis; peripheral neuropathy; peripheral nerve entrapment; post-traumatic nerve injury; ain, radiculopathy, range of motion difficulties, muscle spasms....

Plaintiff claims that by virtue of the foregoing she suffered *inter alia* a “permanent consequential limitation of use” and a “significant limitation of use” of her right shoulder and neck.

#### **B. Defendants’ Threshold Motion**

Defendants move for summary judgment based upon the purported absence of a serious injury per Insurance Law §5102(d).

The defense neurologist, Dr. Deborah Ann Pollack, evaluated Plaintiff on February 19, 2020. Dr. Pollack’s diagnosis was “cervical sprain and strain, resolved” and “cervical radiculopathy, bilateral C5-6, resolved.” She concluded that “from a neurological perspective, there is no disability or permanency with regards to the accident of September 4, 2017.” However, “upon instructions” she performed no range of motion testing, and she rendered no opinion with regard to Plaintiff’s right shoulder.

The defense orthopaedist, Dr. Edward M. Mills, evaluated Plaintiff on November 27, 2019. Upon ROM testing conducted with a hand-held goniometer, Dr. Mills found substantial limitations in the range of motion of Plaintiff’s right shoulder and cervical spine. He nevertheless diagnosed “right shoulder sprain – resolved” and “cervical spine sprain – resolved”,

commenting that “[s]ubjective complaints of pain and decreased ranges of motion were not supported by any positive, objective, correlative findings.” However, he failed to take any account of (1) an October 2, 2017 MRI of the right shoulder revealing partial-thickness tears of the rotator cuff and a possible tear of the glenoid labrum, or (2) an October 2, 2017 MRI of the cervical spine revealing *inter alia* diffuse disc bulging, or (3) EMG/NCV testing on October 30, 2017 which revealed evidence of bilateral C5-6 radiculopathy.

### C. Plaintiff’s Medical Evidence

From shortly after the accident in September 2017 continuing up to 2021, Plaintiff’s treating orthopaedists, Dr. Gabriel Dassa and Dr. Aditya Patel, and her pain management physician, Dr. Sukdeb Datta, upon evaluation consistently found substantial limitations in the range of motion of her right shoulder and cervical spine, supported by objective findings.

#### 1. September 26, 2017: Dr. Dassa

Cervical spine: Substantial limitations in range of motion; tenderness on palpation over C1-C7 with myospasm to upper border of trapezius muscle; positive Spurling test, right side

Right shoulder: Substantial limitations in range of motion; tenderness on palpation over subdeltoid and subacromial region; positive impingement sign; positive speed test

#### 2. October 2, 2017 MRI’s

Cervical spine: Multi-level disc pathology

Right shoulder: Tears

#### 3. October 24, 2017: Dr. Dassa

Right shoulder: Substantial limitations in range of motion; swelling; tenderness over subacromial bursa and supraspinatus; positive impingement sign

**4. October 30, 2017: Dr. Datta**

Cervical spine: Substantial limitations in range of motion; right trapezial muscle tenderness; myospasm of bilateral paraspinal muscles, right greater than left, from C2-C6; positive Spurling test, right side; EMG/ NCV testing revealed evidence of bilateral C5-C6 radiculopathy

Right shoulder: Substantial limitations in range of motion; tenderness on palpation over subdeltoid and subacromial region; positive impingement sign; positive speed test

**5. November 22, 2017: Dr. Dassa**

Right shoulder: Substantial limitations in range of motion; swelling; tenderness over subacromial bursa, supraspinatus; positive impingement sign

**6. March 18, 2018: Dr. Patel**

Cervical spine: Substantial limitations in range of motion; myospasm of bilateral paraspinal muscles, right greater than left, from C2-C6; positive Spurling test, right side

Right shoulder: Substantial limitations in range of motion; tenderness on palpation over subdeltoid and subacromial region; positive impingement sign; positive speed test

**7. December 22, 2020: Dr. Dassa**

Cervical spine: Substantial limitation in range of motion; myospasm from C1-C7; positive Spurling test, right side

Right shoulder: Substantial limitation in range of motion; swelling; positive impingement sign; positive O'Brien test; positive speed test

**8. February 3, 2021: Dr. Datta**

Cervical spine: Substantial limitation in range of motion; myospasm of bilateral paraspinal muscles, right greater than left, from C2-C6; right trapezial muscle tenderness; positive Spurling test, right side

Right shoulder: Substantial limitations in range of motion; tenderness on palpation over subdeltoid and subacromial region; positive impingement sign; positive speed test

Following his December 22, 2020 evaluation of Plaintiff, Dr. Dassa diagnosed musculo-ligamentous injury to the cervical spine, multilevel cervical disc displacement with mass effect, right shoulder partial rotator cuff tear and labrum tear, and adhesive capsulitis. He opined:

The patient presents today for followup evaluation with complaints of radiating neck pain as well as pain in the right shoulder. Today's exam revealed restricted range of motion to the neck and right shoulder. Today's exam revealed findings of persistent cervical nerve root compression as evidenced by positive Spurling test. Today's exam also revealed findings of adhesive capsulitis and rotator cuff tear with labrum. It is my professional opinion, with a reasonable degree of medical certainty, that today's evaluation and findings represent objective evidence of persistent orthopedic impairment to the patient's neck and right shoulder. It is also my opinion, if the history provided in the medical record is true and accurate that the accident as outlined above is a competent cause of the patient's injuries and orthopedic impairments.....Disability status: Permanent.

Following his February 3, 2021 evaluation of Plaintiff, Dr. Datta diagnosed multi-ligamentous injury of the cervical spine, right shoulder internal derangement, cervical disc herniation and bilateral C5-C6 radiculopathy. He opined that "[t]he symptoms and clinical findings are consistent with the above diagnosis and were directly caused by the accident."

He continued:

Based on the medical history presented by the patient and on review of medical records and physical examination findings it is my professional opinion to a reasonable degree of medical certainty that the above-mentioned accident is the causative factor of the patient's symptomatology and pain, which are of a permanent nature.

#### **D. Conclusion**

Plaintiff's medical evidence demonstrates that she sustained "serious injury" to her cervical spine and right shoulder that was causally related to the September 4, 2017 motor vehicle accident. The defense experts did not reply to Plaintiff's evidence, they do not dispute causation, and Dr. Mills, the defense orthopaedist, found substantial limitations in range of

motion of Plaintiff's neck and right shoulder. Although Dr. Mills opines that "the decreased ranges of motion were not supported by any positive, objective, correlative findings," he nowhere takes account of the results of the October 2, 2017 MRIs or of the October 30, 2017 EMG/NCV testing, and his conclusion is in any event contradicted by Plaintiff's treating physicians. Hence, there are triable issues of fact whether Plaintiff sustained causally-related "serious injury" per Insurance Law §5102(d) which require the denial of Defendants' motion for summary judgment.

It is therefore

ORDERED, that Defendants' motion for summary judgment is denied, and Plaintiff is awarded motion costs in the amount of \$100.00.

The foregoing constitutes the decision and order of the Court.

Dated: April 23, 2021  
Goshen, New York



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HON. CATHERINE M. BARTLETT, A.J.S.C.