SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 33

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DONALD WATSON,

Plaintiff,

- v -

M & S MECHANICAL SERVICES INC., ANTHONY COLLICA,

Defendants.

INDEX NO. 709400/2018

MOTION DATE 01/22/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY.

The above numbered documents were read on this motion by Defendants M&S MECHANICAL SERVICES, INC. ("MS Mechanical") and ANTHONY COLLICA ("Mr. Collica") (collectively "Defendants") for an Order pursuant to CPLR § 3212(b)(1) granting summary judgment in favor of Defendants, thereby dismissing plaintiff's Complaint against them on the ground that plaintiff has failed to satisfy the requisite serious injury threshold requirements set forth in New York Insurance Law Section § 5102(d) ("§5102(d)") and for such other and further relief as this Court deems just, proper and equitable.

Upon the foregoing papers, the motion is determined as follows.

Plaintiff DONALD WATSON ("Plaintiff"), an HVAC technician who was operating their employer's vehicle on June 17, 2015, alleges that defendant Mr.

Collica, an employee of defendant MS Mechanical, struck Plaintiff's vehicle in the rear while Plaintiff's vehicle was fully stopped in stop-and-go traffic on the Long Island Expressway near 97th Place.

Immediately after the accident, Plaintiff was taken by ambulance to New York-Presbyterian Queens Hospital for emergency treatment regarding complaints of pain in his head, neck, back and wrists. Plaintiff was ultimately discharged and, a few days later, sought treatment with Dr. Jamil Abraham, M.D., ("Dr. Abraham") and Dr. Rubin Cohen ("Dr. Cohen") board-licensed physicians (whose specialties are not immediately apparent in the motion papers), for treatment regarding complaints of headaches, dizziness, pain in his neck, low back, and numbness and tingling in the upper extremities bilaterally. Plaintiff missed approximately two weeks of work and returned with certain modifications. He received acupuncture and physical therapy. Plaintiff ultimately stopped treating after a few months in 2015 after Dr. Abraham opined that he had achieved optimal medical improvement, and that further treatment would only be palliative in nature.

At his deposition, Plaintiff testified that after the accident he became unable to partake in his usual and customary activities. He claimed to be unable to, without pain, ride his bike three times a week like he used to, play weekly games of basketball and football, do grocery shopping, take out the trash, dress himself, shower himself, clean up around his house, cook food, bend down, lift things

heavier than 15 pounds without pain, or sit/stand for longer than 10 minutes. Plaintiff also testified that he missed approximately two weeks of work and that when he returned, he could only continue working with modifications. For example, Plaintiff had to rely on apprentices to carry out certain tasks, could not lift objects heavier than 15 pounds, and had to use a wheeled dolly to move things around.

In 2023, more than seven years after the accident, Plaintiff underwent an independent medical examination ("IME") by Dr. Andrew Berman ("Dr. Berman") a board-licensed orthopedic surgeon. In 2024, Plaintiff was again seen by Dr. Abraham.

Plaintiff commenced the within action on June 18, 2018 to recover for personal injuries resulting from the accident.

Plaintiff alleges the following injuries in his verified bill of particulars:

CERVICAL SPINE:

- C3-4: Mild Endplate and Facet Joint Hypertrophy Narrowing the lateral neural foramina;
- C4-5: Posterior disc herniation impinging upon the anterior spinal canal; facet joint hypertrophy narrowing the left lateral neural foramina;
- C5-6: Disc bulging; facet joint hypertrophy; spondylosis;
- C6-7: Broad based osteophyte disc complex impinging upon the anterior spinal canal; spondylosis;
- Straightening of the usual cervical lordosis consistent with muscular strain or spasm;
- Severe bilateral carpal tunnel syndrome (median nerve entrapment at wrist) affecting sensory and motor components;
- Left cervical radiculopathy

- Left brachial plexopathy and/or double crush syndrome with coexisting left median nerve compression at the wrist;
- Cervical derangement;
- Whiplash syndrome
- Limited range of motion

LUMBAR SPINE:

- L1-2: Longitudinal posterior central tear of the annular fibers; left paracentral disc herniation indenting the thecal sac; left neuroforaminal stenosis;
- L2-3: Annular tear; left paracentral disc herniation with mild extension into the left neuroforamina causing mild-to-moderate left neural foraminal stenosis and mild right neuroforaminal stenosis;
- L3-4: Posterior disc protrusion indenting on the thecal sac causing mild central canal stenosis; moderate left and mild right neuroforaminal stenosis
- L4-5: Annular tear; posterior disc herniation with a right paracentral component causing moderate right and mild left neural foraminal stenosis; moderate facet arthropathy;
- L5-S1: Posterior disc bulge without significant central canal or neuroforaminal stenosis;
- Bilateral lumbar radiculopathies due to herniated lumbar discs
- Lumbar derangement
- Limited range of motion

OTHER:

- Cerebral concussion;
- Persistent post-concussion syndrome manifested by persistent headaches and memory impairments

Defendants now move for summary judgment dismissing Plaintiff's complaint on the grounds that Plaintiff's injuries do not meet the "serious injury" threshold of § 5102(d), which provides:

> "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically

> determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." ("90/180-day threshold") New York Insurance Law § 5102(d).

Defendants aver as follows. Plaintiff's injuries amount to soft tissue injuries from which, according to Dr. Berman's findings following the 2023 IME, Plaintiff has recovered. Dr. Berman opined, upon conducting range of motion tests using a goniometer, that Plaintiff's cervical and lumbar sprains/strains had fully resolved, that Plaintiff had reached maximum medical improvement, and that Plaintiff did not require any further treatment, surgery or diagnostic testing.

Regarding the "permanent consequential limitation of use of a body organ or member" element of § 5102(d), Defendants aver that Dr. Berman had opined that Plaintiff made a full recovery with no long-lasting orthopedic disability or impairment. Plaintiff responds by pointing to Dr. Abraham's examination that followed Dr. Berman's IME, in which Dr. Abraham had opined that Plaintiff demonstrated limitations in his cervical and lumbar spine.

Regarding the "significant limitation of use of a body function or system" element of § 5102(d), Defendants aver that there is no evidence of such significant limitation. Defendants argue that mere speculation that an injury which appeared in an MRI was caused by an accident is not sufficient to meet this element and that a treating physician must have an objective basis to opine on whether a significant

limitation exists. Plaintiff responds by pointing out that Dr. Abraham conducted multiple physical examinations of the Plaintiff, including objective range of motion tests of his lumbar and cervical spine, and found that his range of motion was restricted both in 2015 and in 2024. Dr. Abraham opined, upon reviewing Plaintiff's 2015 MRIs, that said limitations were the result of the accident and that Plaintiff sustained a permanent loss of his cervical and lumbar spine.

Regarding Plaintiff's condition during the first 90 out of 180 days immediately following the accident, Defendants aver that Plaintiff's testimony that he missed work for only approximately two weeks establishes he did not suffer an injury or impairment of a non-permanent nature which prevented him from performing substantially all the material acts constituting his customary daily activities. The fact that he continued to work, albeit with modifications, further indicates that he was not prevented from carrying out his usual activities. Defendants further argue that Plaintiff made only subjective complaints of pain, and that his alleged limitations in carrying out household chores, performing work duties, and engaging in recreational activities were the result of his own pain intolerance. Defendants point out that Plaintiff never underwent any surgical procedure or injections. Dr. Berman opined after the IME that Plaintiff made a full recovery with no long-lasting orthopedic disability or impairment.

In opposition, Plaintiff avers as follows. Dr. Berman's 2023 IME report does not discuss the limitations Plaintiff had in performing their daily activities during the first 90 days following the accident. Although Plaintiff was able to return to work approximately two weeks after the accident, his work was restricted for more than 90 days after the accident. Plaintiff could not lift objects heavier than 15 pounds without pain and utilized a dolly to transport equipment. Plaintiff also relied on apprentices to complete work duties that he could do on his own before the accident. When Dr. Abraham examined Plaintiff in 2015 and conducted range of motion tests using a goniometer, he opined that Plaintiff experienced diminished range of motion in his cervical and lumbar spine. Dr. Abraham also opined, upon reviewing Plaintiff's MRI films from 2015, that Plaintiff suffered various disc herniations, bulges and tears.

On a summary judgment motion on the issue of "serious injury," a defendant has the prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of § 5102(d) as a result of the accident (*Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Under the "90/180 threshold" of § 5102(d), a plaintiff need not show a limitation that is "significant" or "consequential," but must show, by objective evidence, the existence of a medically determined injury or impairment of a non-permanent nature that affected substantially all of the material acts that constitute

their daily activities for at least 90 days during the 180 days following the occurrence (*Toure* at 345; *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010); *Cummings v Jiayan Gu*, 42 AD3d 920, 839 NYS2d 663 (4th Dept 2007)). The curtailment of plaintiff's activities must be to a "great extent rather than some slight curtailment" (*Gaddy* at 955).

The "90/180-day threshold" is satisfied even where plaintiff resumed their daily activities if the plaintiff's ability to perform activities remained substantially impaired (*Judd v Walton*, 259 AD2d 1016, 703 NYS2d 845 (4th Dept 1999) (mere fact that plaintiff was able to return to work within statutory period did not preclude finding of serious injury, particularly in light of evidence that plaintiff relied on assistants to carry all but lightest objects); *Vasquez v Weiss*, 234 AD2d 658, 650 NYS2d 60 (3d Dept 1996) (mere fact that plaintiff was able to return to work in some capacity one month after injury does not preclude finding of serious injury); *Gibbs v Hee Hong*, 63 AD3d 559, 560 [1st Dept 2009] (plaintiff's statements that she could not run, go upstairs, or stand for very long do not constitute the loss of "substantially all" of plaintiff's usual activities required to make a showing of serious injury)).

Where Plaintiff submits expert medical evidence supporting the disability for the requisite period of time, the 90/180-day threshold can be met (*Blake* at 426; *Lanuto v Constantine*, 192 AD2d 989, 596 NYS2d 944 (3d Dept 1993); *Decker v*

Stang, 243 AD2d 1033, 663 NYS2d 448 (3d Dept 1997); *see Barrow v Dubois*, 82 AD3d 1685, 920 NYS2d 507 (4th Dept 2011) (nurse practitioner's diagnosis of cervical sprain, supported by nurse's observations that plaintiff had limited range of motion in his neck and objective evidence that plaintiff experienced crepitus in his neck, constituted objective evidence of plaintiff's claim of serious injury under the "90/180-day threshold")).

Here, Plaintiff raises a triable issue as to whether Plaintiff suffered a "permanent consequential limitation of use of a body organ or member," whether Plaintiff suffered a "significant limitation of use of a body function or system," and whether Plaintiff suffered a "medically determined injury or impairment of a non-permanent nature which prevent[ed] [him] from performing substantially all of the material acts which constitute [his] usual and customer daily activities for not less than 90 days during the 180 days following the occurrence" under § 5102(d). Defendant's IME doctor, Dr. Berman, and Plaintiff's treating doctor, Dr. Abraham, both made comparative determinations of Plaintiff's range of motion in his cervical and lumbar spine using objective testing. Each arrived at contravening results. Whereas Dr. Berman's results in 2023 indicated normal ranges of motion, Dr. Abraham's results in 2015 and 2024, which were based on objective goniometer testing, both indicated diminished ranges of motion. Furthermore, Dr. Abraham's findings in 2015 also indicated that Plaintiff was curtailed from performing their

usual work and personal activities to a great extent rather than some slight curtailment, and such findings supplemented Plaintiff's subjective assessment of same as he testified to during his deposition. For approximately 6 months after the accident, Plaintiff complained to Dr. Abraham of neck pain and back pain and that he was unable to, without pain, lift objects heavier than 15 pounds, walk long distances, sit or stand for longer than 10 minutes, engage in certain outdoor activities and perform various household chores. During those 6 months, Dr. Abraham noted decreases in the ranges of motion of flexion, extension, lateral flexion, and bilateral rotation of Plaintiff's cervical and lumbar spine.

For the foregoing reasons, Defendants' motion for summary judgment is denied. Accordingly, it is

ORDERED that Defendants shall serve notice of entry of this order within thirty (30) days of the date of this order.

Any other and/or further relief requested and not addressed is denied.

This constitutes the Order of the Court.

FILED
5/16/2025
COUNTY CLERK
QUEENS COUNTY

5/13/2025
DATE

LEONARD LIVOTE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE