Alonso v Hernandez
2012 NY Slip Op 30903(U)
April 5, 2012
Supreme Court, New York County
Docket Number: 100302/2009
Judge: George J. Silver
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[* 1] SCANNED ON 4/9/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice PART 22

MERCEDES M. ALONSO, HENNESSY BARCIA, RAUL BARCIA and JILSON BARCIA, an infant by his mother and natural guardian Mercedes Alonso

vs.

JOSE HERNANDEZ

INDEX NO. 100302/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for SUMMARY JUDGMENT

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits, Cross Motion	3

Cross-Motion: ☐ Yes ■ No

FILED
APR 06 2012
NEW YORK COUNTY CLERKS OFFICE

Upon the foregoing papers, it is ordered that this motion

Defendant Jose Hernandez ("Defendant") moves to vacate the note of issue and extend time to file for summary judgment and pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Mercedes Alonso, Hennessy Barcia, Raul Barcia and Jilson Barcia's (collectively "Plaintiffs") complaint on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

All discovery was deemed to be complete and Note of Issue was filed on May 27, 2011. However, on August 5, 2011, Defendant received records from Plaintiffs' No Fault Provider, Geico Insurance Company. These records indicated that Plaintiffs Mercedes Alonso and Raul Barcia received acupuncture treatment and Plaintiff Mercedes Alonso received medications from previously undisclosed providers. Further, the records included IMEs conducted by Geico finding no disability. Defendant thus moves to vacate Note of Issue and extend his time to file a serious injury motion. Given the record as stated, Note of Issue is not vacated, but Defendant's summary judgment motion is deemed timely.

Under New York Insurance Law §5102(d), a "serious injury" is defined as 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.

1. Check one: ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____ FOR THE

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden 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 within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff Mercedes Alonso

Plaintiff Mercedes Alonso alleges in her Verified Bill of Particulars that, as a result of the July 26, 2008 accident, she sustained a serious injury including C5-C6, C6-C7, L3-L4, L4-L5, L5-S1 and T12-L-1 disc herniations, cervical and lumbar radiculopathy, cervical and lumbar sprain/strain and neuropathy. In support of his motion, Defendant submits the independent orthopedic examination of Dr. Raghava Polavarapu conducted at the request of Plaintiff's No Fault Carrier. Dr. Polavarapu examined Plaintiff on November 5, 2008 and conducted range of motion testing. He determined that Plaintiff had full range of motion of her cervical spine, including a 5 degree limitation in extension and right lateral flexion. Dr. Polavarapu found limitations in Plaintiff's lumbar spine, but concluded that these limitations were due to a lumbar spine sprain/strain and contusion, which were resolving. Additionally, Dr. Polavarapu categorized these limitations as mild disability and recommended continuing physical therapy.

At Defendant's request, Dr. Daniel Feuer conducted a neurological examination of Plaintiff on June 3, 2010. He conducted range of motion testing using a goniometer and found no limitations in Plaintiff's cervical spine. Dr. Feuer noted limitations of 10 degrees in flexion and 5 degrees in lateral flexion of Plaintiff's lumbosacral spine. He concluded that there was no evidence of any neurological disability and that her examination was normal. Dr. George Unis examined Plaintiff on July 1, 2010. He conducted range of motion testing and did not find any limitations in Plaintiff's motion when compared to normal. Dr. Unis concluded that Plaintiff's cervical and lumbosacral strains had resolved. Dr. Alan Greenfield reviewed Plaintiff's lumber spine MRI films and concluded that there were no findings attributable to the accident. He stated that Plaintiff had diffuse degenerative disc disease with degenerative body osteophytes at all lumbar levels. Dr. Greenfield also reviewed Plaintiff cervical spine MRI film and concluded that there were no findings attributable to the accident. He stated that Plaintiff has degenerative disc disease as shown by disc desiccation and dehydration throughout. Dr. Greenfield did note a small disc herniation at C5-C6, which he attributes to longstanding degenerative discopathy. Defendant has satisfied his burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits her affidavit stating that she wore a back brace for a year after the accident and that she treated for five months then stopped because her insurance would not cover further treatment. Plaintiff also submits the affirmations of Dr. Ramkumar Panhani and Dr. Thomas Kolb. Dr. Panhani first examined Plaintiff on August 5, 2008. He conducted range of motion testing using an inclinometer and found limitations to Plaintiff's cervical and lumbar spine range of motion. Dr. Panhani recommended physical therapy and continued to treat Plaintiff until December 15, 2008 when her no fault benefits ran out. He stated that Plaintiff's MRI films indicated lumbar disc herniations and foraminal narrowing at T12-L1, L3-4, L4-L5 and L5-S1 as well as cervical disc herniations at C5-C6 and C6-C7. Dr. Panhani recently examined Plaintiff on November 4, 2011. He conducted range of motion testing using an inclinometer and found lumbar limitations to flexion of 20 degrees and extension of 5 degrees. Dr. Panhani did not comment on Plaintiff's cervical range of motion.

Dr. Kolb interpreted Plaintiff's cervical and lumbar spine MRI films taken on September 18, 2008.

He determined that there were disc herniations at C5-C6, C6-C7, T12-L1, L3-L4, L4-L5 and L5-S1 that impinged upon the thecal sac. Dr. Kolb also noted narrowing of the L4-L5 and L5-S1 neural foramina. However, Dr. Kolb did not opine as to causation and as such his report is insufficient to rebut Defendant's *prima facie* case (*Nieves v Castillo*, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; *Gibbs v Hee Hong*, 63 AD3d 559, 559, 881 NYS2d 415 [2009]).

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). Range of motion results for Plaintiff's most recent examination with Dr. Panhani revealed limitations in range of motion ranging from 5 to 20 degrees. As such, Plaintiff's limitations are minor and insufficient to counter Defendants' *prima facie* showing (*see Sone v Qamar*, 68 AD3d 566, 889 NYS2d 845 [1st Dept 2009]; *Ikeda v Hussain*, 2011 NY Slip Op 01057 [1st Dept 2011]).

Further, Plaintiff simply did not address the affidavit of Defendant's radiologist stating that the disc herniations revealed on an MRI films were the result of a degenerative condition unrelated to the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). In any event, even if Plaintiff's alleged limitations were attributable to disc herniations that are not degenerative in nature, "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" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], *citing Pommells*, 4 NY3d at 574). Plaintiff offered no such objective evidence, nor did she offer medical evidence to corroborate her statements regarding her back pain and use of a back brace (*see Hospedales v "John Doe,"* 79 AD3d 536, 913 [App Div 1st Dept 2010]).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars indicates that she was confined to bed and home for two weeks. However, Plaintiff does not submit any evidence to show that any of her alleged limitations in activity or confinements were medically determined. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff Hennessy Barcia

Plaintiff Hennessy Barcia alleges in her Verified Bill of Particulars that, as a result of the July 26, 2008 accident, she sustained a serious injury including cervical and lumbar sprain/strain, C6-C7, L4-L5 and L5-S1 disc bulges and cervical and lumbar radiculopathy. Dr. Brian Wolin, a chiropractor, examined Plaintiff at the request of Plaintiff's No Fault Carrier, on November 5, 2008. He conducted range of motion testing of Plaintiff's cervical and lumbar spine and found no limitations when compared to normal. Dr. Wolin also performed straight leg raising and various other tests, which were all negative. He concluded that there was no evidence of disability and no further treatment was necessary.

At Defendant's request, Dr. Feuer conducted a neurological examination of Plaintiff on June 3, 2010. He conducted range of motion using a goniometer and found no limitations in Plaintiff's cervical and lumbar spine range of motion when compared to normal. Dr. Feuer concluded that she did not suffer from any disability and had a normal neurological examination. Dr. Unis examined Plaintiff on July 1, 2010. He conducted range of motion testing and found no limitations in Plaintiff's range of motion for her cervical and lumbosacral spine and right shoulder. He concluded that her cervical and lumbosacral strains had resolved. Defendant also submits treating records that pre-date the accident from chiropractor Rocco Tetro. The records indicate that Plaintiff began treating in January 2008 for neck and back pains she was found to have limitations in cervical range of motion and was referred to physical therapy. She continued treatment until February 2008, when she was discharged. Defendant has satisfied his burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits her own affidavit stating that she treated for five months before stopping because her insurance would not cover further treatment. Plaintiff further states that she had to wait two months before finding another chiropractor to continue treatment. She contends that she continued treatment for a year from that point onward until her insurance stopped covering treatment. Additionally, Plaintiff submits affirmations from Dr. Rajkumar Panhani and Dr. Jacob Lichy. Dr. Panhani first examined Plaintiff on August 5, 2008. He performed cervical spine range of motion testing using an inclinometer and found limitations of 11 degrees in flexion, 19 degrees in extension, 11 degrees in lateral flexion, 38 degrees in left rotation and 44 degrees in right rotation. Dr. Panhani also found limitations in Plaintiff's lumbar spine range of motion. He recommended physical therapy and recommended MRI films which revealed L4-L5 disc bulge, L5-S1 herniation, C6-C7 disc bulge and secondary straightening. Plaintiff was recently reexamined on November 11, 2011. Dr. Panhani conducted range of motion testing on Plaintiff's lumbar spine and found limitations in her range of motion as follows: 15 degrees in flexion, 5 degrees in extension, 5 degrees in left lateral flexion and 10 degrees in right lateral flexion. He did not conduct cervical range of motion testing and also found straight leg raising to be positive at 60 degrees. Dr. Lichy interpreted Plaintiff's MRI films taken on September 26, 2008 and found C6-C7 and L4-L5 disc bulges and a L5-S1 herniation. However, Dr. Lichy did not opine as to the causation of these findings and as such his report is insufficient to rebut Defendant's *prima facie* case (*Nieves v Castillo*, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; *Gibbs v Hee Hong*, 63 AD3d 559, 559, 881 NYS2d 415 [2009]).

In light of Defendant's evidence of a prior neck and back injury, Plaintiff has not provided any medical explanation for Dr. Panhani's conclusion that the injury was caused by the accident, as opposed to other possibilities evidenced in the record. As such, Dr. Panhani's conclusion that Plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists" (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Diaz v Anasco*, 38 AD3d 295 at 295-296 [1st Dept 2007]). Therefore, Plaintiff's experts fail to refute Defendant's evidence of pre-existing back pain unrelated to the accident.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars does not state any period of confinement. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff Raul Barcia alleges in his Verified Bill of Particulars that, as a result of the July 26, 2008 accident, he sustained a serious injury including L4-L5 and L5-S1 disc herniations, cervical and lumbar radiculopathy and neuropathy. In support of his motion, Defendant submits the independent orthopedic examination of Dr. Raghava Polavarapu conducted at the request of Plaintiff's No Fault Carrier. Dr. Polavarapu examined Plaintiff on November 5, 2008 and conducted range of motion testing. He determined that Plaintiff did not have any limitations in motion of his cervical and lumbar spine and that there was no evidence of orthopedic disability. Further, Dr. Polavarapu concluded that no further treatment was necessary.

At Defendant's request, Dr. Daniel Feuer conducted a neurological examination of Plaintiff on July 12, 2010. Dr. Feuer's report is unsigned and incomplete as indicated by misnumbered pages. As such, this report is inadmissible. Dr. George Unis conducted a neurological examination of Plaintiff on July 1, 2010. He conducted range of motion testing and found no limitations in Plaintiff's range of motion, nor did he find any evidence of radiculopathy. Dr. Unis concluded that Plaintiff's claims of cervical and lumbosacral strains had resolved and that he was not disabled. Dr. Alan Greenfield reviewed Plaintiff's lumbar spine MRI films and concluded that there were no findings attributable to the accident. He stated that Plaintiff had longstanding degenerative findings and no herniations.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys*., Inc., 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

In opposition, Plaintiff submits his affidavit stating that he treated for 5 months before stopping due to his insurance denying coverage. Plaintiff additionally submits the medical affirmations of Dr. Rajkumar Panhani and Dr. Thomas Kolb. Dr. Panhani first examined Plaintiff on August 5, 2008. He conducted range of motion testing using a inclinometer and found limitations in Plaintiff's cervical and lumber spine range of motion. Dr. Panhani also stated that Plaintiff's MRI films revealed L4-L5 and L5-S1 disc herniations. Dr. Panhani recently examined Plaintiff on November 11, 2011. He conducted range of motion testing and determined that Plaintiff had limitations in his cervical spine motion of 20 degrees in flexion and 30 degrees in extension, straight leg raising positive at 60 degrees and minimal limitations of the lumbar spine motion. Dr. Kolb reviewed Plaintiff's lumbar spine MRI film and found L4-L5 and L5-S1 disc herniations. However, Dr. Kolb did not opine as to causation and as such, his report is insufficient to raise a question of fact.

Further, though Dr. Panhani found limitations in Plaintiff's cervical spine, he only found minor limitations in Plaintiff's lumbar spine. As Plaintiff's Bill of Particulars asserts lumbar spine injuries, Plaintiff's submissions are insufficient to raise a question of material fact. Additionally, Plaintiff simply did not address the affidavit of Defendant's radiologist, Dr. Greenfield, stating that the lumbar spine MRI films revealed longstanding degeneration and no herniations (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). In any event, even if Plaintiff's alleged limitations were attributable to disc herniations that are not degenerative in nature, "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" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], *citing Pommells*, 4 NY3d at 574). Plaintiff offered no such objective evidence, nor did he offer medical evidence to corroborate his statements regarding his neck and back pain (*see Hospedales v "John Doe,"* 79 AD3d 536, 913 [App Div 1st Dept 2010]).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars does not state any period of confinement. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff Jilson Barcia

Plaintiff Jilson Barcia alleges in his Verified Bill of Particulars that, as a result of the July 26, 2008 accident, he sustained a serious injury including cervical and lumbar radiculopathy and cervical and lumbar disc disorder. In support of his motion, Defendant submits the independent orthopedic examination of Dr. Raghava Polavarapu conducted at the request of Plaintiff's No Fault Carrier. Dr. Polavarapu examined Plaintiff on November 5, 2008 and conducted range of motion testing. He found no limitations in Plaintiff's range of motion and concluded that there was no evidence of orthopedic disability. At Defendant's request, Dr. Unis examined Plaintiff on July 1, 2010. Dr. Unis's report is missing the second page and therefore does not contain any statements regarding objective testing or Dr. Unis's final impression.

In opposition, Plaintiff submits his affidavit stating that he treated for 5 months until his insurance would not cover any further treatment. Plaintiff also submits the medical affirmation of Dr. Rajkumar Panhani. Dr. Panhani first examined Plaintiff on August 5, 2008. He conducted range of motion testing and determined that Plaintiff had limitations in range of motion of his lumbar spine. Dr. Panhani then recommended physical therapy, which Plaintiff continued with for 5 months until his no fault benefits ran out. Plaintiff was recently examined on November 4, 2011. Dr. Panhani conducted range of motion testing using an inclinometer and noted only a 20 degree limitation in lumbar flexion.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102[d], Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 50 A.D.3d 460 [1st Dept 2008] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). Range of motion results for Plaintiff's most recent examination with Dr. Panhani revealed one limitation of 20 degrees in Plaintiff's lumbar spine flexion. As such, Plaintiff's limitations are minor and insufficient to counter Defendants' *prima facie* showing (*see Sone v Qamar*, 68 AD3d 566, 889 NYS2d 845 [1st Dept 2009]; *Ikeda v Hussain*, 2011 NY Slip Op 01057 [1st Dept 2011]).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars does not state any period of confinement. Therefore, this

evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

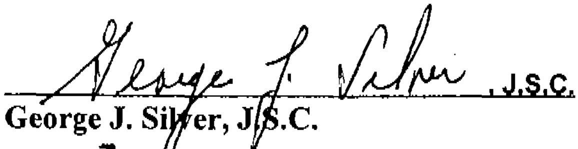
Accordingly, it is hereby,

ORDERED that Defendant's motion for summary judgment is granted as to all Plaintiffs and Plaintiffs' complaint is dismissed in its entirety with costs and disbursements to Defendant as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant is to serve a copy of this order upon Plaintiffs with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.

Dated: APR 0 5 2012
New York, New York



, J.S.C.
George J. Silver, J.S.C.

GEORGE J. SILVER

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