

El-Yamani v F.B.M. Cab Corp

2023 NY Slip Op 34138(U)

November 28, 2023

Supreme Court, New York County

Docket Number: Index No. 157302/2020

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

MOHAMED EL-YAMANI, Plaintiff, INDEX NO. 157302/2020, MOTION DATE 11/30/2022, MOTION SEQ. NO. 001

- v -

F.B.M. CAB CORP, HOUSSANY ZAGLOL Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendants for summary judgment and to dismiss the Complaint on the grounds that Plaintiff has failed to meet the serious injury threshold requirements under Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a December 9, 2017 motor vehicle accident. Plaintiff's Bill of Particulars alleges injures to his cervical spine, left shoulder, left knee and right knee and that those injuries fall within the categories set forth under Insurance Law 5102(d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (Love v Bennett, 122 AD2d 728[1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (see Lopez v Senatore, 65 NY2d 1017[1985]).

In support of their motion, Defendants rely on the affirmed independent examination reports of Dr. Pierce Ferriter and Dr. Scott Springer.

Dr. Springer reviewed the cervical spine Magnetic Resonance Image (MRI) examination which was performed on January 31, 2018 and noted mild degenerative changes at C3-C4, C4-C5, C5-C6 and C6-C7, a chronic process that could not have occurred in the interim after the accident. There was also disc desiccation with moderate loss of disc space heights at C3-C4, C4-C5, C5-C6 and no posttraumatic changes related to the December 9, 2017 incident. Dr. Springer concluded

that the spinal disc desiccation was degenerative in nature and not caused by the accident on December 9, 2017.

Defendant also relies on Dr. Ferriter's report dated June 20, 2022 after an orthopedic medical evaluation. Dr. Ferriter measured Plaintiff's range of motion using a hand-held goniometer. He performed Spurling's test, shoulder shrug, Hoffman's, atrophy of scapula, compression, Jackson's Soto-Hall's and they were all negative. He found normal range of motion in the left shoulder, left knee, and right knee. He concluded that Plaintiff's cervical spine sprain/strain, left shoulder sprain/strain and bilateral knees sprain/strain were resolved. He found a normal orthopedic examination on all objective testing. In his opinion, Plaintiff is capable of functional use of the examined body parts for normal activities of daily living, working without limitations and there is no disability or permanency.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102(d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). The burden therefore shifts to Plaintiff to produce prima facie evidence to support his claim of serious injury.

In opposition, Plaintiff relied on the treatment records and affirmation of Dr. Shan Nagendra, the affidavit and physical therapy records of Ibrahim Abdelfatah, and the affirmations of Dr. Ronald Synder, Dr. Siddharden Prakash, Dr. Harold Augenstein, Dr. Charles DeMarco, Dr. Don Heitman and Dr. Michael Carducci.

Dr. Carducci initially examined Plaintiff on December 14, 2017 and found limited range of motion as to Plaintiff's left shoulder, left knee, and right knee. Most recently, Dr. Carducci also examined Plaintiff on February 15, 2018 and April 19, 2018. Plaintiff was treated by Dr. Carducci from December 14, 2017 to December 27, 2018. Dr. Carducci found range of motion deficits using an inclinometer. Dr. Carducci reported that Plaintiff's injuries are a direct result of the subject accident and noted that this type of trauma invariably creates muscular and ligamentous instabilities with resultant acute asymmetrical misalignments and nerve irritation and damage resulting in premature hypertrophic degenerative changes that lead to further decreased range of motion and functional limitations.

Dr. Heitman examined Plaintiff on February 7, 2018. Dr. Heitman measured Plaintiff's range of motion with a goniometer, comparing the measurements to normal values as described in AMA Guidelines, and found limitation as to his left shoulder, left knee, and right knee. Dr.

Heitman recommended physical therapy. Dr. Heitman also examined Plaintiff and measured Plaintiff's range of motion on March 14, 2018 and April 4, 2018 and noted that the physical examination and MRI were consistent with bilateral knee patellofemoral chondral injuries. The MRI of the left shoulder performed on February 23, 2018 showed a posterior labral tear from superior to inferior. The MRI of the right knee performed on February 22, 2018 revealed a posterior horn medial meniscus tear. The MRI of the left knee performed on March 28, 2018 showed a posterior horn medial and lateral meniscal tear.

Plaintiff treated with Ibrahim Abdelfatah, physical therapist, from December 14, 2017 until April 27, 2018. He concluded that Plaintiff's injuries are causally related to the subject accident.

Dr. Augenstein, radiologist, read and interpreted the MRI of Plaintiff's cervical spine. He concluded the following: C2/3 posterior - central disc herniation focally impressing upon the ventral surface of the thecal sac; C3/4 posterior-central disc herniation impinging upon the midline ventral surface of the cervical spinal cord; C4/5 left posterolateral disc herniation impinging upon the cervical spinal cord and narrowing the left lateral recess; C5/6 posterior disc herniation approaching the ventral cord surface; C6/7 left posterolateral disc herniation impressing upon the ventral thecal sac and narrowing the left lateral recess; recumbent sequence - straightening of the upper cervical lordotic curvature, possibly be owing to muscle spasm; neutral sequences mild reduction of the cervical thoracic junction lordosis and accentuation of the ventral thecal sac impression at the C2/3 level.

Dr. Prakash, radiologist in his affirmation regarding his interpretation of the February 22, 2018 MRI of the right knee noted "...posterior horn medial meniscal tear; distal quadriceps tendinopathy; suprapatellar joint effusion; mild lateral patellar tilt and subluxation; mild medial and patellofemoral articular chondrosis." Dr. Prakash also affirmed that the February 23, 2018 MRI of the left shoulder showed posterior labral tear from superior to inferior. Dr. Prakash affirmed that the March 28, 2018 MRI of the left knee showed "...posterior horn medial and meniscal tears; distal quadriceps and diffuse patellar tendinopathy."

The submitted reports of the worker's compensation orthopedic surgeon, Dr. Ronald Synder included a signed certification that the record is "a full and truthful representation of the independent medical examiner's professional opinion with respect to the claimant's condition"(Workers Compensation Law 13-a[4][e][i]), substantially complying with Workers' Compensation Law 137 and is thus admissible evidence (*see Estanluards v American Museum of*

Natural History, 53 AD3d 991 [3rd Dept, 2008]). Dr. Synder did a physical examination of Plaintiff on July 7, 2020 and submitted a report dated July 11, 2020. Dr. Synder measured Plaintiff's range of motion using a goniometer and compared the measurements to normal values. Dr. Synder found limitation in Plaintiff's range of motion as to his left shoulder, left knee and right knee.

Dr. Synder's assessment was in accordance with the NYS Workers' Compensation Board Guidelines, NYS Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity as well as the NYS Workers' Compensation Guidelines for Determining Impairment. Dr. Synder concluded that the diagnosed injuries were causally related to the December 9, 2017 accident. Dr. Synder found 30% scheduled loss of use for the left shoulder, 35% scheduled loss of use for the left knee and 30% scheduled loss of use for the right knee.

Dr. Nagendra performed a nerve condition study (EMG) of the upper extremities on Plaintiff on March 2, 2018. Dr. Nagendra found demyelination of the right median nerve and evidence of a left C6 radiculopathy. Dr. Nagendra causally related his findings to the subject accident.

Dr. DeMarco initially examined Plaintiff on January 30, 2020 and then on December 29, 2022. His examination was the last examination of Plaintiff. He also reviewed the IME report of Dr. Ferriter dated June 20, 2022. He measured Plaintiff's range of motion with a combination of active and passive motion and by observation assisted by goniometric measurement and compared it to the contralateral side. The contralateral side range of motion was not applicable for the knees as both knees were injured. In his December 29, 2022 report, Dr. DeMarco found cervical derangement with strain/sprain and radiculopathy. He also found positive orthopedic testing and restrictions in range of motion.

Dr. DeMarco opined that his results were inconsistent with Dr. Ferriter's findings. However, Dr. DeMarco notes that his findings are consistent with the findings on the MRI and that the Plaintiff's injuries were causally related to the accident and permanent in nature. Dr. DeMarco found that Plaintiff still has significant loss of motion, has difficulty with activities of living, functional limitations of the cervical spine, right knee, left knee and left shoulder and is moderately partially disabled. He found range of motion on both knees to be 110 degrees and the left shoulder to be forward flex to 130 degrees, abducts to 110 degrees, external rotation over internal rotation is 80 degrees/50 degrees, extension is 30 degrees and abduction is 20 degrees with positive

impingement sign. Based on his evaluation, Dr. DeMarco gave the Plaintiff 15% schedule loss of use to both the right knee and left knee with 20% schedule loss of use to the left shoulder. Dr. DeMarco's examination along with the MRI reviews by Dr. Prakash makes his report sufficient to demonstrate continuing limitations (*De los Santos v. Basilio*, 176 AD3d 544, 545 [1st Dept 2019]; *Frias v Son Tien Liu*, 107 AD3d 589[1st Dept 2013]; *Mitchell v Calle*, 90 AD3d 584 [1st Dept 2011]).

With respect to the 90/180 days category of serious injury, Dr. DeMarco's reported permanency of Plaintiff's injury and limitation to some extent in activities of daily living is competent evidence that Plaintiff was unable to perform substantially all of his normal activities for at least 90 days of the first 180 days as a result of the accident. Plaintiff testified that he was confined to his bed for about one week and he was confined to his home for 9 months. He further testified that he worked as a driver, and he is unable to perform as a driver, so he did not return to that job. He testified that he is now employed as a phone operator. Further, Plaintiff testified that he can no longer exercise the same capacity as he used to or squat or kneel. Plaintiff's testimony as to his restrictions in conjunction with Dr. DeMarco's report raise issues of fact as to the 90/180 days category as well. Accordingly, it is,

ORDERED that the motion by Defendants F.B.M. CAB Corp. and HOUSSANY ZAGLOL for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102(d) is denied; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon the Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

11/28/2023
DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT		