SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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JERMAINE BECK,

Plaintiff,

-against-

COINMACH CORP., ET. AL.,

Defendants.

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Index No.: 18507/2011

Motion Date: April 5, 2013

Seq. No.: 1

The following papers numbered 1 to 7 were read on the motion by the defendants, seeking an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint on the ground plaintiff has failed to sustain a serious injury pursuant to Insurance Law 5102.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Exhibits.....	4 - 5
Reply Affirmation - Exhibits.....	6 -7

Plaintiff's injuries arise out of a motor vehicle accident that occurred on September 8, 2010. Defendants now move, seeking an order dismissing plaintiff's complaint on the ground that plaintiff has failed to establish that he sustained a serious injuries as contemplated by Insurance Law 5102.

The issue of whether plaintiff has made a prima facie showing of serious injury as a matter of law, is to be determined in the first instance by the court. (*Licari v Elliott*, 57 NY2d 230 [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481[2d Dept. 1988].) A defendant can establish that the 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. (See

Grossman v Wright, 268 AD2d 79 [2d Dept. 2000]; *Turchuk v Town of Wallkill*, 255 AD2d 576 [2d Dept. 1998].)

Defendants submit the affirmed medical reports as required by the no-fault provider: Thomas Rahill, D.C., a chiropractor, Harvey Fishman, M.D., an orthopedist, and Kuldip Sachdev, M.D., a neurologist. Also submitted was the affirmed report of Isaac Cohen, M.D., an orthopedist. Defendants have not submitted copies of their curriculum vitae, or otherwise set forth their qualifications to opine as experts in their respective fields in this matter. Dr. Rahill's report lists the objective tests he performed along with his findings of normal range of motion for plaintiff but fails to identify the objective means of measurement used to determine same. Dr. Fishman also provides range of motion findings and comparisons to normal but offers no information with regard to what objective means was utilized to determine same.(see *Martin v Pietrzak*, 273 AD2d 361[2d Dept.2000]; *Vomero v Gronrous*, 19 Misc.3d 1109A[Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff (*Rodriguez v Schickler,* 229 A D2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997]). Further, neither Dr. Rahill nor Dr. Fishman offered any medical determination with regard to plaintiff's complaint of injury to his left shoulder. Dr. Sachdev's report was the only one of the three no-fault examinations wherein the physician identified the objective means of measurement, a goniometer, along with comparisons to normal, to determine that plaintiff's cervical and lumbar spines were normal. With regard to plaintiff's left shoulder, Dr. Sachdev's report specifically referred opinion with regard to left shoulder injury to an orthopedist. Also submitted was the affirmed report of Steven L. Mendelsohn, a radiologist, who determined that plaintiff's MRIs of the cervical spine and lumbar spine are normal, adding further, that he disagreed with the determination of plaintiff's radiologist finding bulging of the L5-S1 disc in plaintiff's lumbar spine. Of note is defendants' failure to submit any radiological review and affirmed report of plaintiff's MRI of the left shoulder by a radiologist.

Defendants also submit a second orthopedist's report, that of Dr. Cohen, with regard to plaintiff's cervical spine, lumbosacral spine, and left shoulder. Dr. Cohen detailed plaintiff's unaffirmed medical reports that he examined as well as his own testing using objective means of measurement, a goniometer, and comparisons to normal, in his concluding that plaintiff had cervical and lumbosacral spine strains, resolved as well as a left shoulder contusion, resolved. In evaluating the plaintiff's MRI of the left shoulder, he noted no impingement or rotator cuff tear, but did note that there was a mild labrum separation documented of a chronic nature. With regard to the MRI of the cervical spine, he stated that the area was unremarkable with some bulging discs of no clinical significance and similar findings at L5-S1 were noted on the MRI of plaintiff's lumbar spine, also of no clinical significance. He concluded that it was his opinion, based upon plaintiff's records, that the plaintiff sustained mild soft tissue complaints as a result of the accident that resolved uneventfully.

None of the reports proffered by the defendants address the necessity or indications for the plaintiff's spinal manipulations under anesthesia, nor do they address findings with regard to plaintiff's left shoulder, other than Dr. Cohen's conclusory statement noting the labrum

separation but finding it "of a chronic nature." Nor do any of the affirmed reports address whether such findings and/or treatments are causally related to the injuries sustained in the underlying accident. The court also notes that many of the normal range of motion findings to which Drs. Fishman and Sachdev refer to, as compared to those of Dr. Cohen, differ significantly enough, leaving this court to speculate as to which doctor is applying the correct normal range of motion for the cervical, thoracic, and lumbar spines, and raising further factual issue which preclude summary judgment.

Although Dr. Cohen states in his affirmed report that plaintiff advised him of a subsequent accident, he does note that plaintiff stated he had suffered no injury from same. The defendants do not argue, or submit any evidence on their motion for summary judgment to establish that the alleged injuries were caused by the subsequent accident. Additionally, although Dr. Cohen referred to a subsequent event, of note is that his examination was a little more than two years after the underlying accident and makes no mention as to when the subsequent accident occurred. Thus, the defendants did not make a prima facie showing that those alleged injuries were caused by the subsequent accident (see e.g., *Hightower v Ghio*, 82 AD3d 934 [2d Dept. 2011][no evidence with regard to a prior accident that occurred five years before].)

Even if the court were to consider defendants' submissions as sufficient to establish that plaintiff had not sustained injuries sufficient to satisfy the threshold requirement of Insurance Law 5102, plaintiff, in opposition has submitted evidence to raise a question of fact as to the issue. In opposition, plaintiff submits the affirmed reports of his treating physician, Dr. Dantes Theodore, Dr. Harold S. Parnes, Dr. Robert Solomon, and Dr. Allen Rothpearl, radiologists who reviewed plaintiff's MRI films of his left shoulder, cervical spine and lumbar spine. Plaintiff also submitted the sworn affidavit of Dr. Galati, his treating chiropractor who performed spinal manipulation under anesthesia. Also submitted was the affirmed medical report of Dr. Donald I. Goldman, an orthopedist. None of the expert reports submitted on behalf of the plaintiff contain a curriculum vitae establishing same as experts in their respective fields. However, inasmuch as the court considers defendants' reports as to plaintiff's injuries, the court shall consider the plaintiff's reports.

At the outset, defendants argue that the court should not consider the report of Dr. Goldman inasmuch as plaintiff failed to timely identify the orthopedist pursuant to CPLR 3101(d). However, CPLR 3101(d)(1) does not require disclosure of expert witnesses prior to the filing of the note of issue. The statute allows disclosure near the eve of the trial, albeit for "good cause shown." Furthermore, the Second Department has repeatedly affirmed that preclusion is a matter of the court's discretion. Where it has not been established that noncompliance was willful, and further, where no prejudice has been alleged, the court can consider the testimony offered. (See, *Jacobs v Nussbaum*, 100 AD3d 702 [2d Dept. 2012]; *Rivers v Birnbaum* 102 AD3d 26 [2d Dept. 2012].)

Both Dr. Theodore and Dr. Goldman submit affirmed reports indicating plaintiff's range of motion, comparisons to normal as well as the objective means of measurement utilized by

both physicians to arrive at such conclusions. Dr. Parnes affirms that the MRI of plaintiff's left shoulder indicates that plaintiff had a partial separation of the anterior glenoid labrum; joint fluid; fluid surrounding the bicipital tendon within the bicipital groove and impingement. Dr. Solomon affirmed his determination that as to plaintiff's cervical spine, there was a reversal of the cervical lordosis and as to C3-C4 and C4-C5, there were disc bulges. Dr. Rothpearl affirmed his findings of straightening of the usual lordosis and a disc bulge at the L5-S1 level where disc material is seen to approximate the ventral epidural fat. Dr. Galati's sworn affidavit stated that he performed manipulation under anesthesia to plaintiff's cervical and lumbar spines and further, that the need for such procedure was causally related to his accident of September 8, 2010.

Dr. Theodore addressed not only his contemporaneous findings of serious injuries to plaintiff, and causally related same to the underlying accident, but he also addressed the issue as to plaintiff's alleged gap in treatment. Dr. Theodore affirmatively stated that plaintiff stopped receiving physical therapy because his no-fault insurance stopped, and further, he confirmed plaintiff's own affidavit and testimony that plaintiff did not have private health insurance nor could he continue to pay for treatment out-of-pocket. He also affirmed that although plaintiff stopped treatments, he was still experiencing pain in his left shoulder, cervical and lumbar spines. Dr. Goldman's affirmed report established that plaintiff had a glenold labral tear of the left shoulder with bicipital tendonitis, lumbar bulging Disc L5-S1 and lumbar derangement.

The court finds that the conflicting medical affirmations and affidavits considered on this motion demonstrate the existence of triable issues of fact as to whether the alleged injuries sustained by the plaintiff are serious in nature as required by statute. Where the court is presented with contradictory medical opinions as to the nature and extent of a plaintiff's injuries and limitations, the motion must be properly denied. (*Estevez v Mantos*, 264 AD2d 754 [2d Dept. 1999]; *Florez v Diaz*, 243 AD2d 607 [2d Dept. 1997].)

As to defendants' assertions that plaintiff's testimony with regard to where he lived and how he was supported differ from his affidavit, to the extent there is any discrepancy, it is for a jury to determine such credibility issues. As to plaintiff's claims that he was incapacitated from substantially performing his activities of daily living for a period of ninety days in the 180 days following the accident, the defendants have not sufficiently established that plaintiff was not disabled during that statutory period. The no-fault examinations provided by the defendants, five months after the date of the accident, acknowledge plaintiff's statements with regard to his disability and pain, but determine that there was no permanency to such injuries. However, having never examined plaintiff in the first ninety days after the date of the accident, and failing to set forth the objective means of determining that plaintiff had fully recovered, or satisfactorily addressing plaintiff's left shoulder injuries, the court finds that defendants have not established that plaintiff did not satisfy the 90/180 requirement. (see *Blanchard v Wilcox*, 283 AD2d 821 [3d Dept 2001]; see *Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268 [1st Dept 2005]; *Delayhaye v Caledonia Limo& Car Service, Inc.*, 61 AD3d 814 [2d Dept 20091].)

Accordingly, reference to plaintiff's own deposition, affidavit and bill of particulars sufficiently refute the "90/180" category under Insurance Law § 5102(d). (See, *Jack v Acapulco Car Serv., Inc.*. 63 AD3d 1526 [4th Dept 2010]: *Bleszcz v Hiscock*, 69 AD3d 639 [2d Dept 2010]: *Lopez v Abdul-Wahab*, 67 AD3d 598 [2d Dept 2009]; *Kuchero v Tabachnikov*, 54 AD3d 729 [2d Dept 2008].) Therefore, it is the order of this court that the defendants' motion is denied.

Dated: May 8, 2013

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SIDNEY F. STRAUSS, J.S.C.