

**American Tr. Ins. Co. v Acupuncture Works P.C.**

2019 NY Slip Op 34154(U)

December 17, 2019

Supreme Court, Westchester County

Docket Number: 58838/2018

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 122

To commence the statutory time period for appeals as of right (RECEIVED NYSCEF) 12/19/2019  
copy of this order, with notice of entry, upon all parties.

Disp \_\_x\_\_ Dec \_\_ Seq. Nos. 1,3,4 Type \_\_misc\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

Index No. 58838/2018

DECISION AND ORDER

-against-

ACUPUNCTURE WORKS P.C., ANDREW J. DOWD,  
M.D., WESTCHESTER PHYSICAL THERAPY GROUP  
DBA BETTY GAO PT PC, JOSE A. GONZALEZ, et al.,

Defendants.

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The following papers numbered 1 to 7 were read on these

motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Notice of Motion, Affirmation and Exhibits	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation and Exhibit	6
Notice of Motion, Affirmation and Exhibits	7

There are three motions before the Court in this action arising out of defendant Jose A. Gonzales' car accident. The first motion, filed by defendant Hackensack Radiology Group, PA ("HRG"), seeks to dismiss the complaint for lack of personal jurisdiction. The second motion, filed by defendant Gonzales, seeks to dismiss the complaint in its entirety or, in the alternative, summary judgment for

Gonzales. Gonzales also seeks a declaration that no fault insurance is primarily responsible for the coverage for the accident, and that plaintiff shall pay his medical bills until the coverage is exhausted. The last motion is filed by plaintiff. It seeks (1) a default judgment against HRG, and defendants New Jersey Healthcare Specialists, P.C. ("New Jersey Healthcare") and Peter J. Stewart, M.D., LLC ("Stewart"); (2) a declaratory judgment that the car accident occurred during the course of Gonzales' employment and that Workers' Compensation benefits are primary; (3) that plaintiff is under no obligation to provide any payments to any of these defendants; and (4) that these defendants are responsible for all costs and disbursements of this action.

The facts are as follows. Gonzales was a professional hire car driver who was in a five-car accident in New Jersey. There is no allegation that Gonzales caused the accident. He was insured by plaintiff.

When Gonzales filled out the form for Workers' Compensation, the NF2, he checked the box indicating that he was working at the time of the accident. To determine whether he was working or not working - and thus whether his medical bills would be covered by Workers' Compensation or plaintiff insurance company - Workers' Compensation held a hearing, at which counsel for plaintiff was present. Counsel for plaintiff submitted written questions to

the Workers Compensation Judge, who stated, on the Record, that he "basically covered those questions, I believe, sufficiently." Although counsel for plaintiff did participate in the hearing, he did not object when the Judge stated that he had asked all of plaintiff's questions. Counsel for plaintiff ensured that the NF2 was part of the Record. Nonetheless, Workers' Compensation determined that Gonzales was not working at the time of the accident. It thus declined to cover his medical bills. Plaintiff appealed that determination, and the appeal was denied. (Plaintiff was also fined \$250 for its failure to comply with the rules of the appeals process.)

The Court begins with the second motion, which seeks to dismiss the action in its entirety. A review of the complaint in this action shows that it turns on the issue of whether or not Gonzales was injured during the course of his employment. As stated above, the Workers' Compensation Judge found that he was not. Plaintiff challenged this finding, and lost its appeal. Thus, the determination stands. The Second Department has explained that "Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board. Where the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the

forum for the resolution of such questions. A plaintiff has no choice but to litigate this issue before the Board. Thus, the question of whether a particular person is an employee within the meaning of the Workers' Compensation Law is for the WCB to determine in the first instance. The findings of the WCB are final and conclusive unless reversed on direct appeal (see Workers' Compensation Law § 23), and are not subject to collateral attack in a plenary action." *Aprile-Sci v. St. Raymond of Penyafort R.C. Church*, 151 A.D.3d 671, 672-73, 55 N.Y.S.3d 421, 423 (2d Dept. 2017).

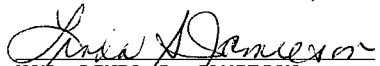
Although plaintiff argues that it was denied an opportunity to participate at the hearing, this is plainly not accurate. The Judge specifically mentioned on the Record that plaintiff had given him a list of written questions, which he addressed. Counsel for plaintiff addressed the Judge on the Record, ensuring that the relevant form was part of the Record. Yet plaintiff did not seek to question Gonzales or ask the Judge to ask any additional questions. This Court thus finds that plaintiff's action shall be dismissed, as it did have a full and fair opportunity to participate in the hearing, at which the Judge determined that Gonzales was not injured during the course of his employment. *Chiloyan v. Chiloyan*, 170 A.D.3d 943, 944, 96 N.Y.S.3d 314, 316 (2d Dept. 2019).

The remaining motions are moot. The Court notes that HRG's motion would have been denied because HRG failed to submit any

evidentiary support for its contentions that it had no meaningful contacts with New York, since the only thing it submitted was a non-evidentiary memorandum of law. See *Kellman v. Phelps Dodge Ref. Corp.*, 117 A.D.2d 651, 498 N.Y.S.2d 388, 389 (2d Dept. 1986).

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
December 17, 2019

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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