

Reardon v Matles

2021 NY Slip Op 33277(U)

April 1, 2021

Supreme Court, Orange County

Docket Number: Index No. EF005864-2018

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X
KEVIN REARDON,

Plaintiff,

- against -

JANICE MATLES and JUDITH CHARLESTON,
Defendants.
-----X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF005864-2018

DECISION and ORDER

Motion Date: November 25, 2020

The following papers numbered 1 to 6 were read and considered on a motion by the Defendants, pursuant to CPLR § 3212, for summary judgment dismissing the complaint on the ground that the Plaintiff did not suffer a “serious injury” within the meaning of section 5102 of the New York Insurance Law.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted in part and denied in part.

Factual/Procedural Background

The Plaintiff commenced this action to recover damages allegedly arising from a rear end motor vehicle accident that occurred on February 9, 2016.

The following background facts do not appear in dispute.

At his examination before trial, the Plaintiff testified that the impact caused his body to

rock forwards and back. However, no part of his body came into contact with the interior of his vehicle. Further, he was able to, and did in fact, exit his vehicle after the accident unassisted. Further, he drove his vehicle from the scene, and proceeded to the Ramada Inn, where he attended an 8-hour continuing education class.

The balance of the allegations are in dispute.

In his bill of particulars, the Plaintiff alleged, *inter alia*, (1) injuries to his head, including a concussion, with blurred vision, dizziness, cognitive impairments, memory loss and vertigo; (2) injuries to his cervical spine, including pain, radiculopathy and loss of range of motion; (3) injuries to his lumbar spine, including pain and loss of motion; (4) injuries to his right shoulder, including a slap tear and loss of motion; (5) injuries to his right elbow, including a severe strain and loss of motion; (6) injuries to his right wrist, including severe strain and loss of motion; and (7) injuries to his left wrist, including severe strain and loss of motion. The Plaintiff also alleged depression and anxiety.

The Defendants move for summary judgment seeking dismissal of the complaint on the ground that the Plaintiff did not suffer a “serious injury” within the meaning of the no-fault law.

In support of the motion, the Defendants submit an affirmation from counsel, Samantha Cruzado.

Cruzado asserts that the following is a summary of the relevant facts as drawn from the Plaintiff’s medical records, and from examinations, etc. performed by the Defendants’ experts.

The first time the Plaintiff sought medical treatment was 2 days after the accident, at Middletown Medical. At that time, the Plaintiff complained of elbow pain, chest pain and upper back pain. He reported no other orthopedic injuries.

Upon physical examination, the Plaintiff exhibited a normal gait and station; a normal range of motion, strength, tone, and joint stability in his neck; a normal range of motion, strength, tone, and joint stability in his thoracic spine, and a normal range of motion, strength, tone, and joint stability in his lumbar spine. A neurologic examination was normal.

X-rays of the Plaintiff's chest and a CT scan of his cervical spine did not reveal an acute injury.

The Plaintiff was advised to rest, apply heat, and to take anti-inflammatories.

The Plaintiff was offered medications at that time, but declined the same.

The Plaintiff was discharged in stable condition, and advised to return should his symptoms persist.

The final diagnoses were "neck pain" and "sternal pain."

The Plaintiff returned to Urgent Care at Middletown Medical two weeks later complaining of right shoulder and right elbow pain. At that time, the Plaintiff reported a past medical history of right shoulder pain that he failed to treat.

X-rays of the Plaintiff's right shoulder and right elbow revealed osteoarthritis without evidence of an acute fracture or dislocation.

The Plaintiff was diagnosed with a right shoulder sprain and a right elbow strain.

He was directed to obtain an MRI of his right shoulder, and given pain killers and a referral to follow up with an orthopedist.

The Plaintiff followed up with an orthopedist and began physical therapy.

He went to physical therapy three times a week for a few months, where he received treatment for his neck, back, shoulder and arm.

The Plaintiff did not undergo any surgical procedures, and did not receive an injections to any part of his body.

Sometime in 2017, the Plaintiff presented to Dr. Belasco (an osteopath) complaining of dizziness and balance issues that began around June of 2016.

The Plaintiff also sought treatment with a number of providers for sleep apnea and resultant cognitive issues that were occurring both before and after the accident.

In his bill of particulars in this case, the Plaintiff alleges that he sustained a serious injury to his head, cervical spine, lumbar spine, right shoulder, right elbow, and bilateral wrists; a significant disfigurement; a permanent loss of use of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or, in the alternative, a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

However, Cruzado argues, there is no evidence of any contemporaneous injury from the accident which resulted in any of these conditions. Rather, she asserts, the evidence establishes that the Plaintiff's complaints all arise from pre-existing conditions, none of which were exacerbated by the accident.

Cruzado argues that the following are the relevant conclusions to be drawn from the medical evidence.

When the Plaintiff presented to Middletown Medical two days following the accident complaining of pain in his elbow, neck, chest, and upper back, he denied a decrease in cognitive

function, or any difficulty speaking, or any disorientation, memory loss, injury to his head, headaches, dizziness, weakness, and/or abnormal balance. Further, his physical examination and diagnostic imaging were normal.

Overall, she argues, the visit revealed no acute, traumatic injury to the Plaintiff's body, or to his neurocognitive function. Rather, she asserts, at best, the Middletown Medical reports "do nothing more than document the Plaintiff's subjective complaints of pain."

For this reason alone, she argues, it is clear there is no causal relationship between the Plaintiff's complaints and the accident at issue, and the complaint should be dismissed.

In addition to the lack of contemporaneous evidence of injury, Cruzado asserts, there is also evidence of substantial pre-accident complaints and conditions affecting the body parts and systems that the Plaintiff claims were injured in the accident.

First, with respect to the Plaintiff's right shoulder, his medical records reveal that he was previously diagnosed with chronic osteomyelitis in his shoulders. This chronic condition was confirmed in subsequent imaging of his right shoulder, to wit: the MRI of the Plaintiff's right shoulder revealed osteoarthritic changes of the acromioclavicular joint, and an x-ray revealed that such osteoarthritic changes were "severe."

Indeed, she notes, the Defendants' expert, Dr. Hendler, reviewed the Plaintiff's diagnostic imaging and concluded that the Plaintiff's right shoulder complaints were attributable to his preexisting conditions. Dr. Hendler also opined that, given the presence of the paralabral cyst on the imaging, and the time between the accident at issue and the date of the study, the "possible" torn labrum seen on the right shoulder MRI was a pre-existing condition.

Cruzado argues that this evidence establishes the absence of traumatic injury, and "shows

the persistent presence of preexisting and progressive degenerative conditions.”

Similarly, she asserts, the Plaintiff has a “significant and persistent past medical history of lower back problems,” dating back to at least early March 2014, at which time the Plaintiff complained of “a lot” of lower back pain that radiated down his right leg, and that seemed to be getting worse.

She notes that an MRI taken of his lower back in March or April 2014 revealed degenerative disc disease, and bilateral disc protrusions with neuroforaminal narrowing at L2-3, and L3-4.

Imaging of his lower back taken on June 18, 2014, revealed that the degenerative disease had progressed— showing arthrosis at L2-3, L3-4, L4-5, and L5-S1.

Cruzado asserts that the Plaintiff’s primary care provider, Dr. Shah, reviewed the study, concluded that the Plaintiff had several herniated discs, and referred the Plaintiff to a neurosurgeon.

Cruzado contends that imaging of the Plaintiff’s lumbar spine obtained after the accident revealed pathologies at the same disc levels, L2-3, L3-4, and L4-5, which suggests that the Plaintiff’s degenerative condition has continued to progress, and establishes that there is no causal connection between his complaints of lumbar spine pain and the accident at issue.

Similarly, Cruzado asserts, diagnostic imaging of the Plaintiff’s neck similarly revealed only degenerative changes. “Tellingly,” she argues, comparison of a post-accident July 2016 study to a prior June 2010 study, reveals no significant changes.

Moreover, she asserts, a CT scan of the Plaintiff’s cervical spine taken on February 11, 2016, revealed no acute issues.

Indeed, she notes, this conclusion is confirmed by one expert for the Defendants, Dr. Rene Elkin, a neurologist.

Dr. Elkin, after reviewing the Plaintiff's extensive medical records and diagnostic imaging of his spine, concluded that there was no evidence of acute traumatic injury to the cervical or lumbar spines resulting from the accident, and that the Plaintiff's complaints of the same were attributable to degenerative conditions.

Cruzado notes that the Plaintiff also claims that he sustained cognitive deficits related to the accident. However, she asserts, the Plaintiff admitted at his examination before trial that he had been experiencing and getting treating for cognitive issues prior to the accident.

Moreover, she argues, the Plaintiff's treating providers causally related his cognitive issues to sleep apnea, citing a lack of oxygen to his brain.

Indeed, she assert, this is substantiated by Plaintiff's prior treatment records, to wit: In late 2014, the Plaintiff presented to Dr. Jaeger at Crystal Run Healthcare, complaining of substantially the same symptoms that the Plaintiff presently attributes to the accident; namely, forgetfulness. Dr. Jaeger ultimately concluded that the Plaintiff possessed mild cognitive impairment, and that it was likely caused by the Plaintiff's sleep apnea. Dr. Jaeger ordered bloodwork and an MRI of the Plaintiff's brain to confirm the same.

After completing the diagnostic tests, the Plaintiff returned to Dr. Jaeger, at which time Dr. Jaeger "strongly suspect[ed] [the Plaintiff's] sleep apnea [was] affecting his cognition."

In addition, Cruzado argues, there exists no contemporaneous objective evidence of a traumatic injury to the Plaintiff's brain from the accident. Rather, an MRI of the Plaintiff's brain, taken September 27, 2016, revealed no traumatic injury.

A repeat MRI, taken in November 2016, similarly revealed no evidence of traumatic injury. Notably, she asserts, immediately following the accident, the Plaintiff denied a loss of consciousness, or a head injury, headaches, dizziness, weakness, a decrease in cognitive skills, or a decrease in difficulty speaking.

Cruzado notes that another expert for the Defendants, Richard DeBenedetto, Ph.D, a neuropsychologist, had reviewed the Plaintiff's medical records and had concluded, consistent with the Plaintiff's own providers, that the Plaintiff's reported cognitive difficulties are not related to the accident, but rather are causally related to Plaintiff's hypoxia, secondary to chronic obstructive sleep apnea and COPD.

Dr. DeBenedetto also identified a correlative pattern between the Plaintiff's CPAP compliance and his neurocognitive issues, to wit: the Plaintiff's neurocognitive issues presented themselves when the Plaintiff was non-compliant with his CPAP regimen, and resolved when he was compliant.

Cruzado notes that Dr. DeBenedetto's conclusions are supported both by the Plaintiff's own treating providers and by the Plaintiff's own subjective complaints, to wit: the Plaintiff himself, on August 31, 2016, reported substantial improvement in his cognitive ability with regular use with his CPAP machine.

Cruzado notes that the Plaintiff's treating provider, Dr. Ferguson, also attributed the Plaintiff's vestibular issues and his neurocognitive deficits to his COPD.

Finally, she notes, Dr. Elkin opined that, given the absence of any contemporaneous symptoms at the Plaintiff's February 11, 2016, appointment at Middletown Medical, there was no indication for post concussion syndrome or traumatic injury to the brain. Dr. Elkin also

concluded that the Plaintiff's reported improvement in cognitive function was inconsistent with an acute traumatic incident or acute traumatic injury resulting from the accident at issue.

Dr. DeBenedetto echoes this conclusion, noting that traumatically-induced neurocognitive deficits would have emerged immediately – within days – rather than 3 months later, as the Plaintiff reported.

In sum, Cruzado argues, the evidence demonstrates the absence of traumatic injury to the Plaintiff's cervical spine, lumbar spine, right shoulder, right elbow, or to his neurocognitive system, and that his complaints are causally related only to his preexisting and degenerative conditions, rather than the accident at issue.

Further, she asserts, Dr. DeBenedetto, after reviewing the Plaintiff's extensive medical records, concluded that there was no evidence that the Plaintiff's extensive preexisting neurocognitive conditions were aggravated, accelerated, or exacerbated by the accident.

Indeed, she notes, the Plaintiff's own treating providers, despite having awareness of the accident, declined to opine as to aggravation, acceleration, or exacerbation arising from the same in assessing the Plaintiff.

As to the Plaintiff's preexisting neck and shoulder conditions, she asserts, the Plaintiff's bill of particulars does not allege exacerbation of the same, and accordingly, the Defendants need not address the issue of exacerbation.

In any event, Cruzado argues, even if the Court finds injuries causally related to the accident, all such injuries are minor, insignificant and inconsequential, and do not otherwise constitute "serious injuries" within the meaning of the Insurance Law.

Further, Cruzado asserts, although alleged, the Plaintiff clearly did not sustain a

significant disfigurement in the accident. Rather, she notes, upon his first visit with Middletown Medical following the accident, healthcare providers observed “no noticeable bruising or swelling.” Similarly, a physical examination revealed no rashes, ecchymosis, edema, bruising, lesions, or foreign bodies on his body.

Further, Cruzado asserts, the Plaintiff did not sustain a total, permanent loss of use of any of his body organs, members, functions, or systems.

Rather, she notes, at his examination with Dr. Hendler, the Plaintiff was noted to have a full range of motion in his cervical spine, lumbar spine, wrists and hands, and right shoulder.

Moreover, she asserts, the Plaintiff did not sustain a total loss of his neurocognitive system. Rather, she argues, while the Plaintiff testified to limitations of his memory and comprehension, he did not testify to a complete and total loss or inability to remember or understand things.

Further, she asserts, none of the Plaintiff’s claimed injuries are permanent. Indeed, she notes, after examining the Plaintiff, Dr. Hendler ultimately concluded that, while the Plaintiff “may have” sustained a “temporary” exacerbation of his degenerative disease, and similarly might have “possibly” sustained a “mild” sprain or contusion, all such conditions had resolved.

Dr. Hendler also concluded that, because his examination of the Plaintiff was normal, “there [was] no objective evidence of any permanency” in his neck, lower back, right shoulder, right elbow, or either wrist.

Similarly, she argues, the Plaintiff’s neurocognitive complaints have all resolved with the consistent use of his CPAP machine.

In any event, she asserts, all such claimed injuries are insignificant, inconsequential, and

are otherwise not “important.” That is, as of his October 17, 2019, examination with Dr. Hendler, the Plaintiff possessed a full range of motion in all of the body parts he complains of.

Indeed, she contends, a mere two days following the accident, the Plaintiff exhibited a full range of motion in all of his purportedly injured body parts.

Dr. Hendler also conducted a number of other objective tests during his examination which revealed no objective evidence of injury, to wit: With respect to the cervical and lumbar spines, Dr. Hendler noted the absence of spasm, atrophy, or pain on palpation. With respect to the lumbar spine, Dr. Hendler performed objective tests, including the straight leg raising test, and the Bragard’s test, all of which were negative.

Indeed, she asserts, the Plaintiff’s own treating providers diagnosed him with nothing more than subjective pains, strains, and sprains.

Further, she argues, although diagnostic imaging revealed herniations and bulges in the discs in the Plaintiff’s back, the same are insignificant and inconsequential in light of the Plaintiff’s full range of motion, observed both at the time of the accident, and at the time of Dr. Hendler’s examination.

Moreover, she asserts, there is no objective evidence of a significant, consequential, or important limitation of the Plaintiff’s neurocognitive ability, as diagnostic imaging of his brain was unremarkable.

Finally, she argues, the Plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for at least 90 days during the 180 days immediately following the Subject Accident.

Here, she notes, the Plaintiff claims that, for at least 90 days (the period between February 9, 2016, and August 7, 2018), he was curtailed from his daily activities.

However, she asserts, as a preliminary matter, this claimed period of incapacity was not “medically determined.” Indeed, she notes, following examination of the Plaintiff two days after the accident, the Plaintiff’s medical providers declined to recommend that the Plaintiff refrain from any specific activities.

At a follow-up examination 14 days later, she notes, the Plaintiff, again, was not directed to refrain from any activities or to otherwise curtail his daily activities to any extent.

“Tellingly,” she argues, immediately following the accident, the Plaintiff proceeded to a continuing education class, where he remained for the full 8 hours.

Simply put, Cruzado asserts, there is no evidence that the Plaintiff sustained a medically determined impairment that curtailed him from his usual activities to a great extent, and that he therefore sustained a serious injury under the 90/180 category of serious injury.

In sum, she argues, the complaint should be dismissed.

Appended to the Defendants’ motion papers are the affirmed reports of the Defendants’ experts.

Dr. Bruce Hendler, an orthopedic doctor, concluded as follows:

From my physical examination and review of the rather extensive submitted medical records, and if the history stated by Mr. Reardon is correct, it is my opinion that he may have sustained a cervical and lumbosacral sprain, with temporary exacerbation of pre-existing degenerative joint disease and degenerative disease in the neck and lower back areas, a possible mild sprain or contusion of his right shoulder, a possible contusion to the right elbow, and possible mild sprains of his wrists, with a possible transitory carpal tunnel syndrome, which have all resolved. Physical examination of his neck and lower back at this time is normal. There are no positive focal neurologic tests that would have any clinical correlation with any ongoing herniated disc in the neck or back, or a

cervical or lumbar radiculopathy, including absent or asymmetric reflex, decreased sensation in a dermatomal type pattern or other positive objective neurologic tests.

Based on a normal physical examination, there is no present disability, and there is no objective evidence of any permanency in his neck or lower back.

Physical examination of his right shoulder at this time is normal. Based on a normal physical examination, there is no present disability, and there is no objective evidence of any permanency in his right shoulder.

With regard to his right elbow, physical examination at this time is normal. Based on a normal physical examination, there is no present disability, and there is no objective evidence of any permanency in his right elbow.

Present physical examination of his wrists is normal, with no findings whatsoever of any ongoing carpal tunnel syndrome in either wrist. Based on a normal physical examination, there is no present disability, and there is no objective evidence of any permanency in either wrist.

From my medical standpoint, there is no objective evidence of any limitations. He is able to perform all his usual and customary activities of daily living.

Dr. Rene Elkin, an neurologist, concluded as follows:

Based on my review of the extensive medical records and diagnostic images provided, the claimant has a history of pneumonia, hypertension, chronic obstructive airways disease, anxiety, and cognitive impairment. Following the subject accident, his primary symptoms were pain referable to the neck, lower back, and right shoulder for which he sought treatment at Middletown Medical and Crystal Run Healthcare. He was seen in orthopedic consultation by Dr. Episalla. He was seen in neurological consultation by Dr. Jaeger. Follow-up records are noted with Dr. Ferguson, a pulmonologist and primary care physician. He received extensive physical therapy, chiropractic treatments, and acupuncture. An electrodiagnostic study by Dr. Cabatu notes right C6 radiculopathy and mild bilateral carpal tunnel syndrome. Dr. Degen, a neurosurgeon at Hudson Valley Neurosurgical Associates refers to an MRI of the cervical spine on 06/23/2016 with mild preexisting degenerative changes are noted and no changes when compared to a prior study in June 2010. An electrodiagnostic study of the lower extremities revealed no evidence for lumbar radiculopathy. The MRI of the lumbar spine from 04/25/2016 revealed preexisting degenerative changes as compared to the 2014 study. He was not considered a surgical candidate either by Dr. Jacobs, a neurosurgeon who he initially saw and predating the subject accident more by Dr. Degen, a neurosurgeon postdating the subject accident.

The symptoms of cognitive impairment predate the subject accident. I note that he was seen by Dr. Cosentino after the subject accident, as well as Dr. Copans, who notes the opinion of Dr. Belasco who considered the diagnosis of post-concussion syndrome and prescribed Elavil and amantadine. MRI examinations of the brain revealed no evidence for acute traumatic injury and no evidence for a primary intracranial pathology that might be attributed to this accident or that might explain his reported cognitive impairment.

Thus, it is my opinion that symptoms referable to the neck and lower back are degenerative in nature and while the accident may have resulted in at most cervical and lumbar muscle sprain, there is no evidence for an acute traumatic injury to the cervical or lumbar spines resulting from this accident. I defer an opinion regarding the right shoulder to the appropriate specialist. There is no record of any treatment for the electrodiagnostic finding of bilateral carpal tunnel syndrome based on the information provided for my review and in my medical opinion this was an incidental finding. I am unable to relate the diagnosis of post-concussion syndrome to this accident particularly given the evaluation and immediate post accident period by Ms. Collins and Gassert when he complained of right shoulder pain, right elbow pain and mid back pain with no documentation of any symptoms that might be supportive of a post-concussion syndrome.

The records reveal that he has returned to work as a security officer. The records revealed that he does feel better. He has reported incremental increasing cognitive deficit which would be inconsistent with an acute traumatic incident or acute traumatic injury resulting from the subject accident. There are no findings based on the records provided for my review for any permanent neurological injury that would result in ongoing symptomatology and inability to function at his pre-accident level without restrictions.

Dr. Bendetto, a neuropsychologist, concluded as follows:

Mr. Reardon is a man with numerous medical complications and a past medical history of cognitive problems related to his various underlying chronic medical conditions. According to the history, the reemergence of Mr. Reardon's complaints of cognitive problems revolving around forgetfulness and anxiety began three months after [th]is auto accident. They appear to have improved with the regular use of a CPAP device.

These facts support the conclusion that Mr. Reardon's reported problems with short-term memory and anxiety were related to a preexisting disorder, specifically, hypoxia secondary to chronic obstructive sleep apnea and CPOD and the failure to regularly follow the recommendation for the use of a CPAP device.

The cognitive consequences of TBI do not emerge three months following insult. They emerge immediately or evolve over a brief (days) period, typically plateauing and/or improving within a 12-18-month period. The fact that Mr. Reardon's cognitive difficulties, again, improved with regular therapy for sleep apnea and COPD rules-out

TBI as the underling cause of his reported cognitive problems.

Opinion:

In sum, Mr. Reardon's cognitive deficits are related to his preexisting medical conditions and are not the consequence of a purported TBI sustained in his auto accident that occurred on 02/09/2016. He did not sustain any aggravation, acceleration or exacerbation of his conditions.

In opposition to the Defendants' motion, the Plaintiff submits an affirmation from counsel, John Del Duco.

Del Duco argues that the following is the relevant factual and medical background concerning the Plaintiff's injuries.

Initially, he notes, the Plaintiff concedes that he cannot demonstrate a permanent loss of use of a body organ, member, function or system or a significant disfigurement.

However, he asserts, the Plaintiff "strongly contends" that the injuries to his head, cervical spine; lumbar spine; and right shoulder fall into the categories of a permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system.

Further, Del Duco notes, the Plaintiff also claims that he suffered a serious injury in the form of vestibular hypofunction; vestibular weakness, sensorineural hearing loss, adjustment disorder; visual impairment; blurred vision; light sensitivity; noise sensitivity; tinnitus; dizziness; and depression.

Del Duco argues that the Defendants' motion papers do not address any of those injuries, but rather only attempt to refute that the claimed head injuries caused cognitive issues, anxiety, and memory loss. Thus, he asserts, because the Defendants' motion failed to address the alleged

injuries affecting the Plaintiff's balance, vision, and hearing, as well as his psychological injury of depression, the motion must be denied, even if the Court found that the Defendants otherwise demonstrated a prima facie case as to the other categories of "serious injury."

Moreover, Del Duco notes, the Plaintiff need only demonstrate one "serious injury" from the accident to recover for all injuries incurred from the accident.

Regardless, he argues, the Defendants failed to meet their burden of proof on the motion.

For example, he notes, the Defendants' neurologist, Dr. Elkin, acknowledges observed, post-accident losses in vision and hearing, but does not state any pre-accident history of balance, hearing loss, or blurred vision. Further, Dr. Elkin does not discuss any causation for the visual and hearing impairment. Rather, she only discusses the lumbar spine injuries, cervical spine injuries, carpal tunnel syndrome, and post-concussion syndrome.

Similarly, he asserts, the Defendants' neuropsychological expert, Dr. DeBenedetto, causally relates the Plaintiff's short-term memory loss and anxiety to his sleep apnea. However, Dr. DeBenedetto does not address the Plaintiff's claimed balance, hearing, vision, and depression injuries.

The Defendants' orthopedist, Dr. Hendler, does not comment on the Plaintiff's neurological or psychological injuries.

Indeed, Del Duco argues, the Defendants do not directly address the Plaintiff's claims of vision loss, balance loss, hearing loss, or depression. Instead, they discuss solely "neurocognitive" limitations, which they attribute to the Defendants' sleep apnea, and which they claim are alleviated by use of the Plaintiff's CPAP machine. However, he asserts, the Plaintiff's balance, hearing, and vision symptoms did not predate the accident and were never

linked to his sleep apnea or his use of the CPAP machine.

Further, Del Duco notes, while the Defendants claim that there is no evidence that the Plaintiff had neurocognitive symptoms, the Plaintiff's medical records and Defendants' neurologist acknowledged the existence of a post-accident diagnosis for visual, hearing, and balance symptomology.

In sum, he argues, the Defendants' submission did not address causation of the Plaintiff's claims concerning visual, hearing, or balance limitations, or depression.

By contrast, he asserts, the Plaintiff's osteopath, Dr. Belasco, treated the Plaintiff for his head injuries. According to Dr. Belasco's appended report, the Plaintiff's head injuries were treated close enough to the accident to establish causation when considering factors such as the masking of the concussion symptoms by the Plaintiff's orthopedic injuries, and the common phenomenon of delayed expression of visual impairments and hearing loss as a result of a concussion.

Accordingly, Del Duco argues, the treatment of the Plaintiff's head injuries were "contemporaneous" with the accident, even if specialized treatment for those injuries began several months after the accident.

Dr. Belasco also describes substantial treatment for the Plaintiff's head injuries, including numerous objective tests which supported the Plaintiff's claims of head injury related to the accident, to wit: the Plaintiff first complained of daily headaches in the occipital region only a few weeks after the accident, on March 1, 2016; and the Plaintiff first sought out post-accident neurological treatment, with an EMG/NCV completed on March 10, 2016, which demonstrated radiculopathy. Further, he notes, the Plaintiff also began reporting further symptoms of head

injury about three months after the accident.

The Plaintiff also presented to a speech pathologist by July 18, 2016, and began seeing an ophthalmologist for his vision disturbances, right eye pain, balance issues and blurry vision in August of 2016.

By September of 2016, the Plaintiff presented to Dr. Belasco for treatment, who diagnosed the Plaintiff with a concussion, which explained the symptoms that the Plaintiff had already been reporting since June of 2016.

Del Duco notes that the Plaintiff has continued to treat his head injuries through September of 2020.

Dr. Belasco also explains how the effect of a TBI on attention, executive functioning, learning and memory may be delayed, and how the initial treatment for a concussion might lag behind treatment for orthopedic injuries. Dr. Belasco explains that, while the Plaintiff had begun to experience some symptoms of dizziness, sound/light sensitivity, and blurry vision shortly after the accident, the musculoskeletal pain issues he was experiencing constituted overriding symptoms upon which the Plaintiff focused his treatment. It was only after the Plaintiff's head injuries began to escalate, and they began to disrupt his activities, that he sought treatment.

Dr. Belasco also explains that, where a patient suffers both a head injury and orthopedic injuries, it is common for the patient to seek treatment for the orthopedic symptoms first, and to mis-attribute functional neurological symptoms as sequela of musculoskeletal injury.

Further, Dr. Belasco notes, patients with neck injuries, such as the Plaintiff, will often experience headache, dizziness, and nausea, which makes an initial assessment very challenging. Indeed, Dr. Belasco notes, here, the physical therapists, vestibular therapists, ENT,

ophthalmologists, and neurologists all treated objective physical signs attributable to concussive injury within the first months after injury.

Accordingly, Dr. Belasco asserts, the Plaintiff's head injuries were caused by the accident, and the treatment for those head injuries were an inclusive part of the Plaintiff's general treatment which began only two days after the accident on February 11, 2019.

Further, Del Ducco notes, Dr. Belasco directly refutes the assumptions of the Defendants' experts concerning the same, to wit: Dr. Belasco explains that, "while it is true that objectively identified worsening cognitive deficits would be somewhat inconsistent with an acute concussive injury without brain damage, a patient's subjective reports of their own cognitive function are quite variable and reactive to other personal and environmental stimuli." This is especially true where, as here, there are concurrent pain, sleep instability and psychological conditions.

Dr. Belasco explains that the gold standard is objective neurocognitive testing administered by neuropsychologists to determine true levels of functioning. Here, he notes, the Plaintiff underwent neuro-behavioral assessments by a neuropsychologist, and the tests identified neurocognitive impairments that were inconsistent with dementia or apnea related hypoxia, and consistent with a traumatic brain injury.

Indeed, Del Ducco notes, while the Defendants' experts rely heavily on the lack of anatomical changes in the MRI of the Plaintiff's brain to contest causation, Dr. Belasco explains that a lack of anatomical changes in the brain not only fails to refute the existence of a concussion, but also actually confirm that the Plaintiff's limitations are caused by a concussion. Dr. Belasco points out that the traditional definition of "concussion" (which can also be generally referred to as a mild traumatic brain injury) requires that an MRI of the brain initially be absent

of acute traumatic anatomical changes. Dr. Belasco points out that concussion refers to functional neurologic disturbances after trauma which may occur in isolation or in parallel to comorbid anatomical traumatic brain injury.

In fact, he asserts, Dr. Belasco affirms that the absence of significant demyelinating, or vascular or ischemic or age related atrophy to the brain, make the neurocognitive deficits recorded in the objective neuropsychological testing more likely attributable to the Plaintiff's head injury as opposed to another medical diagnosis.

Accordingly, Dr. Belasco, after reviewing his own treatment and other medical reports, determined that the Plaintiff suffered a complex neuromusculoskeletal injury and is suffering from neurological psychological, and neurocognitive injuries which are permanent in nature and causally related to the accident of February 9, 2016.

Concerning other claimed injuries, Del Duco asserts that the Defendants' orthopedic expert, Dr. Hendler, concedes that the Plaintiff was injured during the accident, and merely contests the nature, severity, and duration of those injuries. to wit: Dr. Hendler notes that the Plaintiff might have sustained a cervical and lumbosacral sprain during the accident, with a temporary exacerbation of pre-existing degenerative joint disease and degenerative disease in the neck and lower back areas, and a possible mild sprain or contusion of his right shoulder, and a possible contusion to the right elbow, and a possible mild sprains of his wrist with a possible transitory carpal tunnel syndrome. Dr. Hendler merely opines that such conditions have resolved.

However, Del Duco notes, the Plaintiff was evaluated by Dr. Dassa, an orthopedist, on October 29, 2019, and was found to have significant losses to the range of motion in his cervical

spine, lumbar spine and right shoulder, to wit: in the Plaintiff's cervical spine, the range of motion of the cervical flexion was 40 degrees out of 60 degrees; extension was 60 degrees out of 75 degrees; lateral bending was 25 degrees out of 40 degrees; and lateral rotation was 60 degrees out of 80 degrees.

As to the Plaintiff's cervical spine. Dr. Dassa also found a myospasm from C1-C7; a positive result on the Spurling test to the right; significant limitations in the lumbosacral spine; myospasm from L1 through S1; and a positive SLR bilaterally.

Further, he found a loss of motion in all planes of the Plaintiff's lumbosacral spine, to wit: flexion was 25 degrees out of 90 degrees; extension was 10 degrees out of 30 degrees; lateral bending was 20 degrees out of 40 degrees; and lateral rotation was 10 degrees out of 30 degrees.

Dr. Dassa also further found significant limitations in the Plaintiff's right shoulder, to wit: internal rotation was 45 degrees out of 60 degrees; flexion was 15 degrees out of 60 degrees; extension was 15 degrees out of 30 degrees; adduction was 15 degrees out of 40 degrees; and the Plaintiff was positive for impingement sign on the O'Brien test and speed test.

In sum, Del Duco argues, there are triable issue of fact exists concerning whether the Plaintiff suffered a serious injury to his cervical spine, lumbar spine, and left shoulder.

Further, Dr. Dassa found spasms in the Plaintiff's cervical and lumbosacral spine that were sufficient to constitute serious injuries.

Moreover, Del Duco asserts, the lack of resolution of the Plaintiff's injuries over the months of medical treatment is evidence that the injuries are permanent.

Indeed, he notes, Dr. Dassa found that the Plaintiff continued to suffer over three years

after the accident.

Finally, he argues, even if Dr. Dassa's opinion referable to the permanence of the Plaintiff's injuries is not considered, the category, "significant limitation of use of a major body function or system" need not be permanent in order to be significant and avert summary judgment.

In further opposition to the Defendants' motion, the Plaintiff also submits his own affidavit.

The Plaintiff avers that his vehicle was struck from the rear on February 9, 2016, which resulted in serious injuries to his head, including a concussion with post-concussion syndrome which has resulted in cognitive issues, balance problems, focus issues, hearing loss, visual impairments, blurred visibility, light sensitivity, noise sensitivity, and dizziness, all of which still affect him today.

Further, he asserts, he suffered a labrum tear of his right shoulder, which his treating providers told him was caused by the accident, and injuries to his cervical spine which have resulted in severe pain due to radiculopathy and a significant loss of range of motion.

Prior to the accident, he avers, he did suffer from sleep apnea which affected his memory only. His treating providers prescribed him a CPAP machine, which greatly helped him with sleep and his memory. At the time of the accident, he asserts, he no longer suffered significant memory or sleep problems as a result of sleep apnea.

Also, he notes, prior to the accident, he had pains in his shoulders, neck and back, and mentioned the same to his providers. However, he asserts, such pains "had largely resolved and were not substantially affecting [his] life at the time of the February 9, 2016 accident."

Moreover, he asserts, after the accident, he suffered “overwhelming pain from the new injuries in [his] neck and shoulder which quickly became unbearable.” Indeed, he avers, he was very anxious about the severity of his orthopedic injuries, and resolution of the same was his primary goal when he presented to Middletown Medical on February 11, 2016. Moreover, he notes, while he did not mention his headaches and other symptoms at that time, he did not affirmatively deny such symptoms to his treating providers. Rather, he avers, he gradually began to notice increasing cognitive symptoms after his initial treatment, and his memory began to become worse. He initially blamed his memory loss on the disruption to his sleep due to the severe pain in his spine and right shoulder, as well as an ineffective CPAP mask. However, he avers, he also began to suffer vision, hearing, and balance symptoms which he did not suffer prior to the accident. Initially, he asserts, he related the vision, hearing, and balance symptoms to the persistent injuries to his spine and right shoulder, and the correction of his neck and right shoulder injuries, which were causing him excruciating pain, remained his top priority. However, he avers, his cognitive, vision, hearing, and balance symptoms continued to progress, despite the treatment to his spine and right shoulder. Thus, he presented to Dr. Belasco on September 16, 2016.

Dr. Belasco told him that he had suffered a concussion in the accident which was causing his cognitive, vision, hearing and balance issues. He received consistent treatment for his concussion and post-concussion symptoms since receiving that diagnosis.

Further, he asserts, while he did suffer memory problems prior to the accident, the problems had been resolved before the accident with use of a CPAP machine. However, he avers, his memory got substantially worse after the accident. Indeed, he asserts, while there has

been some improvement in his memory, he still had not reached his pre-accident condition, even with use of the CPAP machine. Rather, he suffers cognitive issues where he forgets what he is doing; he walks away from conversations; or goes to wrong places at work. Further, he contends, he also now has significant difficulties following simple instructions.

In addition, he avers, his vision impairments have a significant impact on his life, and he has constant issues with vertigo and balance which make him feel like he is constantly on a cruise ship.

He also had to continuously pay attention to his footing to make sure that he did not fall, and had frequent bouts of nausea.

He also has difficulty hearing and understanding people during conversation.

Similarly, he asserts, his orthopedic injuries have continued to have a significant effect on his life, as he has difficulty sleeping through the pain from his cervical and right shoulder injuries. Further, he cannot lift items over my head, cannot lift heavy items, and has difficulty with household chores.

Finally, he avers, as a result of his cognitive and orthopedic injuries, he had been compelled to permanently abandon his career in insurance, and has difficulty performing his duties as a security guard. As a consequence, he asserts, he now contends with anxiety and depression on a daily basis.

Appended to the Plaintiff's opposition papers are the reports of the Plaintiff's experts.

Dr. Belsco states as follows:

From the history I took from [the Plaintiff], my own treatment of him and my knowledge and experience in treating individuals who have sustained traumatic brain injury, I have become fully familiar with the facts and circumstances of this matter and, as such, am

competent to render the opinions expressed within a reasonable degree of medical certainty. After my own encounters with the patient as well as a review of the ancillary medical reports, I find the patient to have suffered a complex neuro-musculoskeletal injury and is suffering from a degree of disability of a neurological, psychological and neurocognitive nature. Considering the plateau in his recovery and the amount of time that has already passed since the accident, in my medical opinion I find [the Plaintiff's] injury to be permanent, with a guarded prognosis, and causally related to the accident of 2/9/2016.

Dr. Gabriel Dassa, an orthopedic surgeon, stated as follows:

Impression:

1. Musculoligamentous injury to cervical and lumbosacral spine.
2. Bulging disk L3-L4 and L4-L5 without recess stenosis.
3. C6 radiculopathy confirmed on EMG and NCV March 10, 2016.
4. Right shoulder SLAP tea [sic] with partial tear of the supraspinatus tendon.

Discussion: The patient was injured on the above date and sustained injury to several areas of the body. The symptoms and clinical findings are consistent with the above diagnosis and were directly caused by the accident. The patient presents today for evaluation with complaints as described. Today's exam revealed restricted range of motion to the patient's neck, back, and right shoulder. Today's exam revealed findings of persistent cervical and lumbar nerve root compression as evidenced by positive straight leg raise test and positive Spurling test. Today's exam revealed findings of persistent adhesive capsulitis with findings of labrum tear and rotator cuff tear. It is my professional opinion, with a reasonable degree of medical certainty, that today's evaluation and findings represent objective evidence of persistent orthopedic impairment to the patient's neck, back, and right shoulder. It is also my opinion, if the history provided in the medical record is true and accurate, that the accident of February 9, 2016 is the cause of the patient's injuries and orthopedic impairments. Today's exam revealed the need for additional treatment. The patient would benefit from cervical and lumbar epidural injections. He also would benefit from proper MRI of the cervical spine. There is only CT scan was performed and not the test of choice to correlate with his EMG findings. Additionally, the patient requires arthroscopic surgery to the right shoulder. All these recommendations have been communication have been communicated to the patient. The patient relates understanding and again has fear due to the current medical complications. The patient was examined today and the ranges of motions were recorded using a handheld goniometer. The values of all measurements were compared to normal range of motion values. The assessments made were those of passive range of motion,

which was recorded independent of the participation of the patient, which is truly an objective assessment. The patient did not interfere with the proper performance of range of motion assessment.

Prognosis: Guarded.

Disability Status: Permanent.

Recommended Treatment:

1. Physical therapy.
2. Pain management for epidural injection.
3. MRI of the cervical spine.
4. Right shoulder arthroscopic surgery for labrum repair and rotator cuff repair.

In reply, the Defendants submit an affirmation from counsel, Samantha Cruzado.

As a preliminary matter, she argues, the physical therapy records that the Plaintiff submitted are of no probative value, as physical therapists cannot render a diagnosis, form a prognosis, or determine the permanency or duration of physical limitations.

In addition, she asserts, the Plaintiff specifically abandons his claim of “permanent loss of use”, and “significant disfigurement”, and implicitly abandons his “90/180” claim.

Accordingly, she argues, those branches of the Defendants’ motion concern the “permanent loss of use”, “significant disfigurement”, and “90/180” claims should be granted as unopposed.

Further, she asserts, although the Plaintiff attempts to distinguish his claimed hearing, balance, and vision symptoms from his other neurological symptoms, this is a “distinction without a difference.” Indeed, she notes, the Plaintiff’s own provider, Dr. Belasco, after summarizing the breadth of Plaintiff’s purported injuries, ultimately opines only that the Plaintiff

may have sustained “a complex neuro-musculoskeletal injury and is suffering from a degree of disability of a neurological, psychological, and neurocognitive nature.”

In any event, she argues, Dr. Belasco’s affirmation is “riddled with various notes referring to the Plaintiff’s complaints as neurological in etiology.”

Cruzado asserts that Dr. Belasco’s failure to parse out the hearing, visual, and balance claims as separate from the Plaintiff’s neurological diagnoses is telling, as the failure establishes that the hearing, visual, and balance claims, and the neurological claims, are all one and the same.

Notably, she asserts, the Plaintiff fails to submit the affirmation of an ophthalmologist, an ENT, and/or a vestibular therapist. This failure is significant, she argues, in that, if the complaints were truly separate and distinct from Plaintiff’s other, general neurological complaints, a separate specialist would be necessary to provide insight as to the same.

Indeed, she asserts, Dr. Belasco’s affirmation confirms the Defendants’ position; namely, that all of the Plaintiff’s purported neurological symptoms – including the claimed hearing, visual, and balance issues – are pre-existing in nature.

In sum, she argues, the Plaintiff did not sustain a neurological injury – including any that may have manifested themselves as a hearing, balance, or vision issue – of any kind as a result of the accident at issue.

Accordingly, she asserts, the Plaintiff’s contention that the Defendants failed to meet their burden because they failed to establish that he did not sustain, more broadly, a neurological injury is clearly without merit.

In any event, she argues, the Defendants met their burden, and presented ample evidence

to demonstrate the absence of any hearing, visual, or balance impairment causally related to the accident. That is, two days after the accident, the Plaintiff was noted to have good balance. Again, several days later, the Plaintiff's hearing was normal, as was his gait and balance. Seven months later, on September 13, 2016, the Plaintiff presented to Dr. Jaeger, at which time the Plaintiff was noted to have normal balance, gait, and coordination, and a negative Romberg test.

Further, an examination of the Plaintiff's eyes at that time was normal

Moreover, while Dr. Jaeger confirmed that the Plaintiff was experiencing vertigo, he nevertheless concluded that the etiology was unclear. In other words, she argues, Dr. Jaeger did not conclude it was related to the accident.

Finally, she notes, Dr. Ferguson concluded that the Plaintiff's vestibular issues were additive from his underlying obstructive sleep apnea syndrome.

Also, at that time, the Plaintiff denied any hearing issues, or changes in vision, blurred vision, diminished visual acuity, discharge, or double vision.

Concerning the alleged orthopedic injuries, Cruzado argues that the Plaintiff misconstrues the Defendants' motion papers when he argues that Dr. Hendler conceded that he sustained orthopedic injuries causally related to the accident. Rather, she asserts, even a cursory review of the motion papers reveals that Dr. Hendler made no affirmative statements as to causation, but rather only opined that, to the extent that the Plaintiff did sustain an injury in the accident, the injuries were limited to temporary exacerbation of his degenerative disease, and possibly a mild sprain or contusion.

Moreover, she argues, the Plaintiff misapplies the meaning of "conclusory" as it relates to Dr. Hendler's report, as his opinions are all supported by evidence in the record.

In sum, she asserts, the Defendants clearly met their burden on the motion.

In opposition to the motion, she notes, the Plaintiff relies principally on Dr. Belasco's affirmation to raise a triable issue of fact, and to establish he sustained a number of neurocognitive injuries causally related to the accident. However, she argues, a cursory review of the affirmation shows that it refutes more than supports the Plaintiff's claims.

Initially, she notes, Dr. Belasco's affirmation reveals a number of lengthy gaps in treatment for which the Plaintiff fails to provide a reasonable explanation: (1) the year-long gap between his October 30, 2019, visit with Dr. Belasco, and his recent, September 1, 2020, appointment; and (2) the 20 month gap between his February 9, 2018, and his October 30, 2019, appointments with Dr. Belasco.

Indeed, she argues, while a plaintiff need not seek needless treatment in order to survive summary judgment, a gap in treatment or cessation of treatment must be explained. Here, she asserts, the Plaintiff offers no explanation whatsoever.

Moreover, she argues, Dr. Belasco's affirmation fails to raise a triable issue of fact for a multitude of reasons.

First, with respect to the visual symptoms, Dr. Belasco states that the Plaintiff "was seen by ophthalmology and, even though he had never really regularly used his eyeglasses prior to injury, he needed an update to them."

However, Cruzado argues, the Plaintiff is nearly 70 years old, a vision loss is "unsurprising for his age." Indeed, she notes, in the records the Plaintiff submits, the claimed vision loss and other disturbances were "discovered to be related to his macular degeneration."

Moreover, she notes, Dr. Belasco's affirmation is devoid of any meaningful quantitative,

or qualitative assessment of any claimed vision loss.

In addition, she notes, the Plaintiff's submissions indicate that he did not begin to complain of visual issues until nearly 4 years after the accident, and neither the Plaintiff nor Dr. Belasco provide any explanation for this gap.

Further, Dr. Belasco, although concluding that the Plaintiff's neurocognitive complaints are related to the accident, fails to reconcile his affirmative conclusions as to causation with the various conflicting opinions noted in his own report. Cruzado argues that this renders his conclusions as to causation speculative at best, and insufficient to raise a triable issue of fact.

First, she notes, Dr. Copans, on January 11, 2017, after examining the Plaintiff, opined that, while it was possible that the Plaintiff's neurocognitive difficulties might have been caused by the accident, that his cognitive difficulties could also "have another etiology." Dr. Copans further opined that she "suspected" that the Plaintiff sustained an exacerbation of his baseline cognitive impairment, and could not affirmatively state whether the Plaintiff's neurocognitive issues were related to the accident.

In addition, Cruzaod notes, on September 30, 2016, it could not be determined whether the findings on the Plaintiff's brain MRI were traumatic or ischemic (*i.e.*, degenerative), in nature. It was recommended that he undergo a DTI MRI for follow up. Dr. Belasco notes that the DTI MRI was eventually performed, and that it demonstrated only ischemic changes and no evidence of traumatic injury.

On October 28, 2016, she notes, it was recommended that the Plaintiff "communicate with [a speech pathologist] regarding premorbid cognitive function versus post [accident cognitive function]..." and that this was necessary because the Plaintiff's providers wanted "to

establish the percentage of cognitive problems he is having from [the accident]. She notes that a review of Dr. Belasco's affirmation reveals that this analysis was never completed. Thus, she argues, there is no objective basis – quantitative, qualitative, or otherwise – to demonstrate an exacerbation, or any injury at all causally related to the accident.

On November 7, 2017, she notes, the Plaintiff's treating provider concluded that none of the Plaintiff's limitations "will recover without sleep stability" and recommended that the Plaintiff follow up on his CPAP "mask issues". In essence, she argues, the Plaintiff's providers concluded his neurocognitive issues would resolve when his sleep issues resolved.

On February 9, 2018, she notes, the Plaintiff's provider unequivocally stated, "at this time I feel that the etiology of his complaints are indistinguishable from one another... Cognitive complaints persist, again unable to distinguish between sleep-related issues, chronic pain issues, and any primary cognitive issues secondary to his head injury".

Finally, she notes, Dr. Turner, on June 25, 2020, could not say with certainty whether the Plaintiff suffered cognitive changes "because of or exacerbated by" the accident; instead, opining that it was merely "likely." Thus, Dr. Turner could make no affirmative statement as to causation.

In sum, Cruzado argues, "notwithstanding the overwhelming conflicting evidence contained in his own affirmation, Dr. Belasco nevertheless unbelievably concludes that the Plaintiff's neurocognitive issues are causally related to the Subject Accident." Cruzado asserts that, in light of these inconsistencies, and Dr. Belasco's failure to explain them, Dr. Belasco's affirmation fails to raise a triable issue of fact as to causation.

Moreover, she asserts, Dr. Belasco's statement that the Plaintiff's cognitive rehabilitation

therapy prior to the accident was successful is also plainly refuted by the Plaintiff's medical records. Indeed, two years prior to the accident, the Plaintiff reported difficulty maintaining his CPAP regimen, and reported problems with his CPAP unit.

In addition, she asserts, both Dr. Belasco and the Plaintiff fail to address the records of Dr. Jaeger and Dr. Ferguson which attribute his neurocognitive issues to his sleep apnea, rather than to the accident.

Finally, she argues, Dr. Belasco's conclusions are belied by his own logic and analysis, to wit: He states that "the absence of significant... ischemic... changes to the brain on MRI helps us understand that the current neurocognitive changes identified on patient's neuropsychological testing are more likely attributable to his head trauma."

Here, she asserts, the Plaintiff's brain imaging revealed the very ischemic changes Dr. Belasco claims an absence of. Thus, she argues, Dr. Belasco's opinions as to causation are undermined by his peers' conclusions, the objective evidence, and the very analysis he would apply.

Moreover, Cruzado asserts, even assuming, *arguendo*, that there exists a triable issue of fact as to causation, Dr. Belasco's affirmation, and the medical records summarized within it, nevertheless demonstrate that the Plaintiff's purported neurocognitive injuries are insufficient to constitute "serious injuries" under the Insurance Law. Indeed, she notes, the Plaintiff's purported neurological injuries are consistently characterized as being "mild" throughout Dr. Belasco's affirmation.

In fact, she asserts, the Plaintiff's own providers, implicitly conceding that his complaints are preexisting, opine that, to the extent the accident exacerbated his preexisting conditions, any

purported exacerbation was “mild” in nature.

In addition, she asserts, his neurological symptoms are not thought to be permanent, as the Plaintiff’s providers have observed improvements, and believe that he “has good prognosis for further improvement,” and that he seemed “to be getting back to his pre[-accident] cognitive baseline”.

Similarly, she notes, the claimed “depression” was not noted to be “a significant depression”.

In fact, she asserts, in Dr. Belasco’s summary of Dr. Turner’s neuropsychological evaluation, it is noted that the “thought of having dementia triggered significant anxious and depressive reactions. However, these have mitigated.”

Indeed, she argues, the resolution of the Plaintiff’s claimed depression was affirmed by Dr. Belasco on October 30, 2019.

In sum, she asserts, Dr. Belasco’s affirmation is riddled with inconsistent conclusions as to causation, and consistently characterizes the Plaintiff’s complaints as mild.

Similarly, Cruzado argues, Dr. Dassa’s affirmation fails to raise a triable issue of fact.

Dr. Dassa ultimately concludes that the accident at issue was “the cause of the patient’s injuries and orthopedic impairments.”

However, she asserts, Dr. Dassa makes this conclusion ostensibly without any knowledge of the Plaintiff’s chronic and pre-existing degenerative neck, back, and shoulder complaints.

Indeed, she argues, “Dr. Dassa’s apparent ignorance renders his conclusions as to causation speculative, and insufficient to raise a triable issue of fact.”

Moreover, she asserts, assuming, *arguendo*, that Dr. Dassa was aware of Plaintiff’s

pre-existing conclusions, his narrative report nevertheless remains speculative and insufficient to raise a triable issue of fact, as he fails to explain why Plaintiff's complaints are attributable to the accident rather than his long-standing degenerative conditions.

In addition, she argues, Dr. Dassa fails to reconcile his findings of a restricted range of motion with Dr. Hendler's finding of a full range of motion in all of the body parts complained of, which is "fatal to Dr. Dassa's report."

In sum, she asserts, Dr. Dassa's failures to reconcile his findings with the prior absence of objective evidence of injury, and his merely conclusory statements as to causation, made ostensibly without any knowledge of the Plaintiff's significant preexisting complaints and conditions, is clearly insufficient to raise a triable issue of fact as to the Plaintiff's orthopedic injuries.

Discussion/Legal Analysis

Under New York's No-Fault regulatory scheme, a party may commence an action to recover non-economic loss only in the event of a "serious injury," which is defined as:

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.

Insurance Law § 5102(d). The legislative intent underlying the No-Fault Law is to weed out frivolous claims and limit recovery to significant injuries. As such, the courts have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold.

Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). Subjective complaints of pain and limitations will not suffice unless supported by competent, admissible medical evidence, based on a recent examination and objective findings, that such subjective complaints of pain and limitation have a medical basis. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Oliva v Gross*, 29 AD3d 551 [2nd Dept. 2006].

Here, the Court notes, the Plaintiff concedes that he cannot sustain his allegations that he suffered a significant disfigurement, or a permanent loss of use of a body organ, member, function or system.

Thus, the branches of the Defendants' motion which are to dismiss those allegations are granted.

Concerning the remaining allegations in the Plaintiff's bill of particulars.

The "permanent consequential limitation" category requires proof that the body organ or member does not operate at all, or operates only in some limited way. It is not necessary to find that there has been a total loss of the use, but the limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence. *Decker v. Rassaert*, 131 A.D.2d 626 [2nd Dept. 1987].

The "significant limitation" category requires proof that a body function or system does not operate at all or operates only in some limited way. It is not necessary there has been a total loss or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant. *Licari v. Elliott*, 57 N.Y.2d 230 (1982); *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730

[2nd Dept. 2013]. Thus, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013].

Whether a limitation of use or function is “significant” or “consequential” (*i.e.*, important) for purposes of the No-Fault Law relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Some injuries can be so minor, mild or slight as to be considered insignificant within the meaning of the No-Fault Law. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

For example, to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. *Perl v. Meher*, 18 N.Y.3d 208 (2011). This is shown by comparing a measured range of motion against the “normal” range of motion. *Delp v. Guerra*, 173 A.D.3d 681 [2nd Dept. 2019]. Typically, limitations of motion are demonstrated by expert testimony by an appropriate medical professional setting forth the tests conducted, and the ranges of motion found as compared to the norms. *Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009].

An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Perl v.*

Meher, 18 N.Y.3d 208 (2011). The tests used must have an objective basis. They cannot be simply a recording of the patients' subjective complaints. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

A plaintiff need not necessarily demonstrate evidence of a restricted range of motion contemporaneous to the accident at issue. However, such evidence may be important to proving causation. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011). Where causation is proved, the severity of the injuries may be measured at a later time. Indeed, injuries can become significantly more or less severe as time passes. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011). Finally, the burden as to causation is not met with evidence of a preexisting degenerative condition causing plaintiff's alleged injuries. *Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011).

The 90/180 day category requires proof of a medically determined injury or impairment of a non-permanent nature that prevented a plaintiff from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. A medically determined injury is one that is supported by testimony by an appropriate medical professional. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

A defendant moving for summary judgment must demonstrate, *prima facie*, that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345; *Paul v. Weatherwax*, 146 A.D.3d 792 [2nd Dept. 2017].

The movant need only address those categories of injuries alleged in the bill of particulars. *Silan v. Sylvester*, 122 A.D.3d 713 [2nd Dept. 2014].

Here, in support of their motion, the Defendants' demonstrated that the Plaintiff did not suffer a serious injury under the 90/180 day category. Indeed, this is the conclusion to be drawn from the record as a whole.

In opposition, the Plaintiff failed to raise a triable issue of fact concerning the same. Indeed, the Plaintiff did not directly address this category of injury.

Thus, the branch of the Defendants' motion which is for summary judgment dismissing the allegations concerning that category of injury is granted.

Traumatic brain injury may give rise to a serious injury. *Rumford v. Singh*, 130 A.D.3d 1002 [2nd Dept. 2015].

Here, the Defendants' failed to demonstrate, *prima facie*, either that the Plaintiff did not suffer a brain injury (concussion) in the accident, or that all of his alleged injuries resulted from a pre-existing condition that was neither exacerbated nor aggravated by the accident.

Contrary to the Defendant's contention, the record does not support a finding that all of the Plaintiff's alleged symptoms from the same are attributable to his sleep apnea, or failure to properly and consistently use a CPAP machine.

Thus, the branch of the Defendants' motion which is for summary judgment dismissing the allegations concerning that category of injury is denied without need to consider the opposing papers.

In any event, were the issue to be reached, the Court would find that the Plaintiff raised a triable issue of fact whether the Plaintiff suffered a serious injury from a brain injury with the affirmed report of Dr. Belasco.

Concerning the remaining categories of injuries, the Defendants rely, in the main, on the

affirmed report of Dr. Hendler.

However, as threshold issues, the Court finds that the report does not establish, *prima facie*, that the Plaintiff did not suffer an injury to his back, shoulder and wrists from the accident, or that all such alleged injuries pre-existed the accident and were not exacerbated or aggravated thereby.

Further, the Court notes, although Dr. Hendler sets forth various measurements of ranges of motion, he did not set forth the norms for the same. Rather, he merely states that all measurements were within “normal” ranges.

Thus, the Court does not find that Dr. Hendler’s affirmed report is sufficient to demonstrate a *prima facie* entitlement to relief concerning the same.

Thus, those branches of the Defendants’ motion which are for summary judgment dismissing the “limitations” categories of injuries are denied without need to consider the opposing papers.

In any event, were the issue to be reached, the Court would find that the Plaintiff raised a triable issue of fact concerning the same with the affirmed report of Dr. Dassa. The Court notes that Dr. Dassa, in finding significant limitations in the Plaintiff’s ranges of motion, sets forth both the measurements obtained and the norms.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted in part and denied in part, as set forth herein; and it is further,

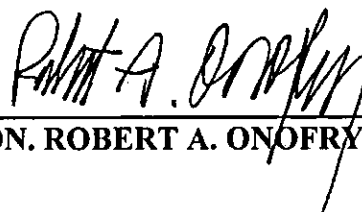
ORDERED that the parties are directed to appear for a status conference on Tuesday, May 18, 2021, at 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main

Street, Goshen, New York if the Courts are in session and open to the public. If the Courts are not open to the public at that time, the conference will be held virtually, by video conferencing, at a time to be designated by the Court.

The foregoing constitutes the decision and order of the court.

Dated: April 1, 2021
Goshen, New York

ENTER



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