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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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VERONICA HARRIS,

Plaintiff,

Index No: 12410/00
Inquest Hearing Date: 11/01/01
Final SubmissionDate:2/15/02
Decision After Inquest

-against-

ROCKAWAY COMMUTER LINE,
and RODNEY PURCELL,

Defendants.

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This is a personal injury commenced by Veronica Harris (“plaintiff”) against Rockaway Commuter Line, the owner of a vehicle operated by Rodney Purcell (“defendants”) arising from a motor vehicle accident that occurred on January 6, 1997, at the intersection of Archer Avenue and Guy R. Brewer Boulevard. Plaintiff was a passenger in a vehicle that came into contact with defendants’ vehicle. Upon defendants’ default in answering, plaintiff moved for, and was granted, a default judgment by Order of this Court dated July 5, 2001, and the matter was set down for an Inquest, which was held on November 11, 2001. The record of that Inquest was held open for submission of certified medical records from plaintiff’s treatment providers; as of February 15, 2002, the only records received were uncertified medical records from the Queens Long Island Medical Group, P. C., and the uncertified Medical Reports of Eric Lubin, M. D.

The preliminary question that must be addressed by this Court is whether, as a condition

precedent to an award of damages, plaintiff, who was granted a default judgment on liability, suffered a “serious injury,” as defined by section 5102(d) of the Insurance Law. The general rule is that a person who is injured as the result of the negligent operation of a motor vehicle may not recover for noneconomic loss except in the case of a "serious injury," which is defined by section 5102(d) as:

a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

This Court held in Zafir v. Turbo Trans Corp. and Kiritchenko (Index No:21930/00) that, prior to recovering damages, a plaintiff, even at Inquest, must first establish that a “serious injury” was sustained, citing, Star v. Badillo, 225 A.D.2d 610, and cases cited therein; Perez v. State, 215 A.D.2d 740; and section 202.42 of the Uniform Civil Rules for the Supreme Court and the County Court. This Court’s grant of a default judgment on the issue of liability in the instant case in no way obviated plaintiff’s obligation to show on the Inquest for damages that she sustained a “serious injury.” This she failed to do.

Plaintiff testified at the hearing, as did Dr. Jean Claude Demetrius, a specialist in Physical Medicine Rehabilitation. Documentary evidence submitted in support of her claim included MRI Reports of Eric Lubin, M.D. a Board Certified Radiologist, related to plaintiff's lumbosacral and cervical spine, dated July 12, and July 26, 1997, respectively; and medical records from Queens-Long Island Medical Group.¹ Plaintiff, who is employed as an Investigator with the New York City Department of Human Resources, testified that, as a result of the accident, she sustained injury to her neck and back; went to the emergency room of Jamaica Hospital; and sought treatment from Dr. Jean Claude Demetrius and continues to suffer pain in her neck and back. Dr. Demetrius testified that plaintiff was in physical therapy for injuries to her neck and back from June 1997 through December 1997, and that he referred plaintiff for MRIs of both areas in July 1997. Dr. Eric Lubin, a Board Certified Radiologist, of MRI Metropolitan Radiological Imaging, P.C., by letters dated July 12, and July 26, 1997, reported his findings to Dr. Demetrius, setting forth that the MRIs revealed bulging discs at C3-C4 and C4-C5; posterior bulging discs at L2-L3 and L3-L4; and posterior central herniated discs at L4-L5 and L5-S1. Dr. Demetrius further testified that plaintiff suffered a limitation in range of motion, and that upon his last examination of plaintiff on September 24, 2001, he found significant limitation in her range of motion in the lumbar sacral area. He concluded that plaintiff's injuries were causally related to her automobile accident of June 6, 1997.

What gives this Court pause is the evidence not submitted at Inquest. The medical records

¹Counsel for plaintiff allegedly requested on several occasions medical records from HIP Midland Parkway. Those records, however, were not provided. Nor were any records from plaintiff's alleged visit immediately after the accident to the Emergency Room of Jamaica Hospital submitted to the court.

of the Queens-Long Island Medical Group were produced pursuant to a Judicial Subpoena Duces Tecum. Entries in a document entitled “Adult History and Physical Examination,” dated February 3, 1998, completed by P. Huang, M.D., indicate that plaintiff responded “NO” to Chief Complaint and Present History; gave a past history of “BP up & down. on no Med.,” and that “neg” was entered opposite examinations of various parts of the body, including “Skeletal, back and extremities.” A Progress Note of Dr. Huang, M.D., dated February 10, 1998, sets forth that plaintiff stated that she was involved in a car accident on February 5, 1998, in which her car was “hit in the back by another car,” that she was taken to Flushing Hospital, that she was experiencing “neck & back pain;” and also set forth a finding of “markedly restriction & painful.” A Progress Note of Dr. Huang dated December 2, 1998, again refers to car accident of February 1998, with the notation “refer to chiropractor as per pt’s request” and “refer to vascular surgeon as per pt’s request.” Neither plaintiff nor her treating physician offered any testimony concerning this subsequent accident. Accordingly, this Court finds Dr. Demetrius’ testimony with respect to his September 24, 2001 examination to be of no probative value.

The question remains whether the remaining medical information provided is competent evidence to meet the threshold requirement of establishing a “serious injury.” Dr. Demetrius’ findings are based, in part, upon the unsworn medical reports of Dr. Lubin, and a physical examination that post dated plaintiff’s second automobile accident in which she allegedly sustained injuries to the back and neck. Any medical reports submitted as evidentiary proof, however, must be sworn. See, Grasso v. Angerami, 79 N.Y. 2d 813; Williams v. Hughes, 256 A.D.2d 461; Fernanadez v. Shields, 223 A.D.2d 666. Rum v. Pam Transp., 250 A.D.2d 751; Lincoln v. Johnson,

225 A.D.2d 593; Barrett v. Howland, 202 A.D.2d 383; LeBrun v. Joyner, 195 A.D.2d 502. See, Grasso v. Angerami, 79 N.Y.2d 813, 814; Mobley v. Riportella, 241 A.D.2d 443, 444. , 660 N.Y.S.2d 57). Dr. Demetrius testified that he too reviewed the films, which were marked for identification, and had the same impression found by Dr. Lubin: that plaintiff sustained a herniated disc and bulging discs in the areas indicated. The testimony with respect to the films was as follows:

Q. Did you ever review them yourself?

A. Yes, I looked at them.

Q. And what was your impression? Was your impression the same?

A. Yes, the same as the report, yeah.

Q. And that it was a herniated disc, a bulging disc?

Colloquy.

Q. Is that correct?

A. Yes, at L4-L5, and L5-S1 two locations, L4-L5, L5-S1.

Dr. Demetrius did not refer to the film during this testimony. He offered the opinion that the accident of June 6, 1997, was the competent producing cause of plaintiff's injuries.

It is beyond cavil that a disc herniation or a bulging disc may constitute a serious injury within the meaning of the Insurance Law. West v. Rivera, 286 A.D.2d 327; Boland v. Dig America, Inc., 277 A.D.2d 337, 338; Caulfield v. Metten, 275 A.D.2d 758; Chaplin v. Taylor 273 A.D.2d 188; Flanagan v. Hoeg, 212 A.D.2d 756, 757; Boehm v. Estate of Mack, 255 A.D.2d 749. The existence of a herniated disc, however, does not per se constitute serious injury. Dimenshteyn v. Caruso, 262 A.D.2d 348 ; Guzman v. Paul Michael Management, 266 A.D.2d 508, 509 [stating that a herniated disc and bulging discs, such injuries do not, in and of themselves, constitute serious injury]. As was stated in Pierre v. Nanton, 279 A.D.2d 621:

Although the report of the magnetic resonance imaging (hereinafter MRI) of the plaintiff's lumbosacral spine indicated a disc herniation, the existence of a herniated disc does not, in and of itself, constitute a serious injury (see, Guzman v. Michael Mgt., 266 A.D.2d 508, 698 707 N.Y.S.2d 719). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required "to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration" (Noble v. Ackerman, 252 A.D.2d 392, 394, 675 N.Y.S.2d 86; see also, Guzman v. Michael Mgt., supra). Neither of the plaintiff's

treating doctors stated that the alleged restrictions in his range of motion were related to the herniated disc. Similarly, there was no claim that the straightening of the plaintiff's cervical spine, indicated in a second MRI report, was related to the alleged range of motion restrictions.

In short, the limitations in range of motion must be objectively verifiable, and cannot be based solely on plaintiff's subjective expressions of pain. Noble v. Ackerman, 252 A.D.2d 392, 395 [court stated: "Even accepting that plaintiff's disc and cervical spine injuries were medically verified, it was still incumbent upon plaintiff to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration (citations omitted)" 252 A.D.2d at 394].

In Rose v. Furgerson, 281 A.D.2d 857, a case somewhat analogous to the instant case, the Court rejected the testimony of the expert, and the proof submitted to establish the "significant limitation" and "permanent consequential limitation" categories of Insurance Law § 5102(d), stating:

Notably, herniated or bulging discs do not per se meet the statutory threshold of serious physical injury, absent " ' * * * objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration' " (Guzman v. Michael

Mgt., 266 A.D.2d 508, 509, 698 N.Y.S.2d 719, quoting Noble v. Ackerman, 252 A.D.2d 392, 394, 675 N.Y.S.2d 86). There must also be competent proof connecting the condition to the accident (see, Anderson v. Persell, 272 A.D.2d 733, 735, 708 N.Y.S.2d 499; see also, Heath v. Allerton, 279 A.D.2d 872, 718 N.Y.S.2d 901). While Cicoria did opine following a July 30, 1999 examination that plaintiff's herniated discs were caused by the accident and the condition was not preexisting, he failed to specify any resulting loss or limitation of motion (see, Guzman v Michael Mgt., *supra*; Hemmes v. Twedt, 180 A.D.2d 925, 580 N.Y.S.2d 510; cf., Heath v. Allerton, *supra*; Anderson v. Persell, *supra*; see also, Pierre v. Nanton, 279 A.D.2d 621, 719 N.Y.S.2d 706). Instead, he stated in a conclusory fashion that he felt plaintiff sustained "a permanent loss [that] is consequential to the motor vehicle accident." Id. at 859.

The same result obtains here.

Dr. Demetrius testified that he first examined plaintiff in June 1997, almost six months after her January 6, 1997 accident. Although Dr. Demetrius specified the objective tests performed during his September 24, 2001 examination, as well as the degree of limitations of range of motion, he failed to identify the objective tests that were performed to measure the alleged range of motion restrictions in plaintiff's cervical and lumbar spine during his initial

examination. There thus is no basis for his conclusion that the limitation of range of motion in the lumbar area was a result of the June 6, 1997 accident. His testimony thus is insufficient to establish that plaintiff sustained a serious injury. See, Grossman v. Wright, 268 A.D.2d 79, 84-85; compare, Conde v. Eric Service Corp., __ A.D.2d __, 552 N.Y.S.2d 121 [holding sufficient to establish "significant limitation of use of a body function or system" medical opinions based upon subjective complaints of pain and objectively measured and quantified injuries.] The absence of objective medical findings with respect to the June 1997 examination to support Dr. Demetrius' conclusions is fatal to plaintiff's claim that she sustained a "serious injury" within the meaning of the Insurance Law. Moreover, plaintiff testified that she last received treatment in January 1998, well over four years ago, which belies a claim for "serious injury" under any of the criteria applicable to either a permanent or significant limitation of use.

Nor was there sufficient evidence to establish that plaintiff met the criterion of "a medically determined injury or impairment of a non-permanent nature" which prevented her "from performing substantially all of the material acts" which constituted her "customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." She testified that immediately after the accident she went to Jamaica Hospital, that X-rays were taken and that she was given a painkiller; no records from Jamaica Hospital, however, were offered into evidence. Plaintiff further testified that she missed a "little over three months" from work, although no proof to that effect was offered into evidence. Nor was there any evidence establishing that her absence was based upon "a medically determined injury or impairment." She also testified that she can no longer dance, jog in the

mornings, lift heavy objects, “bend down” or do housework chores. Plaintiff testified that she is “now suffering from excruciating pains in [her] back and neck, and [is] suffering with a lumbar herniated disc.” As set forth above, plaintiff’s subjective complaints of pain are without probative value and insufficient to establish “serious injury.” Guzman v. Paul Michael Management, 266 A.D.2d 508; see, Dyagi v. Newburgh Auto Auction, 251 A.D.2d 619; see, also Scheer v. Koubek, 70 N.Y.2d 678, 679; Cacaccio v. Martin, 235 A.D.2d 384. Moreover, plaintiff failed to explain the almost six-month gap between the accident and Dr. Demetrius’ initial course of treatment, which took place well after the expiration of the 90 to 180 day period required to establish “serious injury” based upon “a medically determined injury or impairment of a non-permanent nature.”

Plaintiff clearly failed to meet her burden by submitting competent evidence that she sustained a “serious injury” within the meaning of Insurance Law § 5102 (d). Ventura v. Moritz, 255 A.D.2d 506; Washington v. Mercy Home For Children, 232 A.D.2d 549; Torres v. Micheletti, 208 A.D.2d 519; Cesar v. Felix, 181 A.D.2d 852; Bates v Peeples, 171 A.D.2d 635); see, also, Gaddy v Eyler, *supra*, 79 N.Y.2d at pp.956-957); Risbrook v. Coronamos Cab Corp., 244 A.D.2d 397. This Court is mindful of a seemingly harsh disposition in a case in which the defendant did not deign to appear. It might be argued that as a consequence of defendant’s default, plaintiff is entitled to receive compensation for injuries allegedly caused by the negligence of defendant based solely upon her request. However, the law provides to the contrary; “[e]ven in the case of a default upon inquest and assessment, plaintiff is required to prove the actual damages sustained.” Paulson v. Kotsilimbas, 124 A.D.2d 513, 514. Claims

subject to the section 5102(d) of the Insurance Law require a stringent evaluation by the court to determine if the threshold of establishing a serious injury is met before consideration can be given to an assessment of damages. Here, plaintiff failed to meet the threshold of establishing, by credible, admissible and sufficient evidence, that she sustained a serious injury. Accordingly, after Inquest, the complaint must be, and hereby is, dismissed.

This constitutes the decision and order of the Court.

Dated: February 22, 2001

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J.S.C.