

Austin v Rent A Center E., Inc.

2011 NY Slip Op 30499(U)

March 4, 2011

Supreme Court, Wayne County

Docket Number: 65916

Judge: Daniel G. Barrett

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At a term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 19th day of January, 2011.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK COUNTY OF WAYNE

MARK AUSTIN,
Plaintiff

-vs-

DECISION
Index No. 65916

RENT A CENTER EAST, INC. And JOSH R. ARNOLD.
Defendants

2010

Appearances - Plaintiff - Carol A. McKenna, Esq.
Defendants - Lawrence F. Sovik, Esq.

Defendants moved for a judgment dismissing the Plaintiff's Complaint on the grounds that he failed to sustain a "serious injury", as defined in Section 5102 (d) of the Insurance Law. Plaintiff opposed this application.

This personal injury action arising out of a motor vehicle accident which occurred on January 26, 2007. On that date the Plaintiff presented himself to the Clifton Springs Emergency Room complaining of neck and upper back pain. X-rays were taken on that date and he began a course of treatment with his personal care physician, Dr. Hannan and Physician's

Assistant, Laura Moore. In addition, he was referred to two other doctors for the care and treatment of his injuries stemming from this accident, Dr. Holder and Dr. Lasser. In July, 2007 a MRI revealed broad disk protrusion at C5 -C6 and C6-C7. It also showed disk protrusion at T4-T5 indenting on the spinal cord and mild disk protrusions at T2-T3, T6-T7 and T9-T10.

At the time of the accident the Plaintiff was employed as a U.S. Postal Service rural mail carrier. He had been engaged in this employment for twenty years. The job required him to lift up to 70 pounds and involved prolonged sitting/driving and standing and sorting.

His personal care physician periodically examined him and kept him out of work until he subsequently received a disability retirement from the U.S. Postal Service in June, 2008. From the date of the accident until his disability retirement, he was never authorized to return to work.

The Defendants' had the Plaintiff examined by orthopedic surgeon, Daniel G. DiChristina, MD on August 28, 2009. In addition to examining the Plaintiff, Dr. DiChristina had reviewed the medical records, X-ray's and MRI films. As this case approached argument it became apparent that Dr. DiChristina was missing some records which were subsequently provided. Dr. DiChristina wrote a supplemental report based on the additional records which contained the same opinion as his initial report. He concluded that the accident on January 26, 2007 did not cause a "serious injury" within the definitions of the insurance law.

Between the Plaintiff's and Defendants' submissions it appears that

all of the treatment relative to the Plaintiff's spine from the date of the accident until this motion are included in the attachments of the parties. In addition, the Plaintiff's records from his personal care physician since 1988 are included. It is apparent that the Plaintiff never had a significant neck or back problem prior to the occurrence of this accident or since the accident occurred on January 26, 2007.

On his first visit with his primary care physician on January 30, 2007, he complained of spasm in his back which was observable. On March 6, 2007, Laura Moore noticed the spasm and his thoracic spine level. On April 30, 2007 Laura Moore notices one episode of a back spasm in his lower back and moderate pain at rest. The Plaintiff was referred to Dr. Holder. On May 1, 2007 Laura Moore notices one episode of back spasm when turning. On May 14, 2007 Laura Moore notices intermittent spasms.

On May 14, 2007 the Plaintiff has an appointment with Dr. Holder. Dr. Holder had an impression of cervical thoracic myofascial pain syndrome and recommended a series of six injections for the left upper back.

On June 11, 2007 Laura Moore noticed spasm in the back and there is a complaint at pain at rest and moderate pain with movement.

The notes of Dr. Holder revealed on August 27, 2007 the Plaintiff had undergone five trigger point injections of the upper spine. At this appointment the doctor reviewed the MRI of the cervical and thoracic region which were taken in July, 2007. The doctor indicated that the T4 protruded disk was the possible cause of the thoracic back pain. Two T4

epidural steroid blocks series were proposed.

On September 18, 2007 Laura Moore indicated he had mild pain at rest with moderate pain with movement. His range of motion shows flexion has decreased 40 degrees. Extension has decreased 10 degrees. Right rotation has decreased 40 degrees, left rotation decreased 40 degrees, bending right decreased twenty degrees, bending left decreased 40 degrees and there is tenderness over the T spine.

On November 6, 2007, the Plaintiff was referred by his primary care physician to Dr. Steven D. Lasser, an orthopedic surgeon for an evaluation of injuries sustained in the accident of January 26, 2007.

On his initial exam Dr. Lasser found a diminished range of motion of the cervical spine, which was limited to 65 degrees(80-90 degrees would be normal), 30 degrees of flexion (45-60 degrees would be normal), and 30 degrees of extension (60 degrees would be normal), with pain at the extremes of motion and tenderness to palpation extending down the cervical spine to the cervicotoracic junction. X-rays showed diffuse cervical spondylosis degeneration at C5-6 and C6-7 as well as age-appropriate degenerative changes in the thoracic spine. He also reviewed the MRI of the cervical and thoracic spine obtained in July, 2007. He diagnosed a cervical whiplash injury with cervical sprain (stretched or torn ligaments), underlying age-appropriate degenerative changes in the cervical spine at C5-6 and C6-7 and a thoracic sprain with underlying thoracic spondylosis. He opined the whiplash injury and the cervical and thoracic sprains were a direct result of the accident, while the degenerative

changes and the spondylosis were likely preexisting. However, he believes that the ongoing neck and mid-back symptoms reported since the date of the accident are directly related to the accident. He believes that the preexisting degenerative changes in his cervical and thoracic spine were aggravated and became symptomatic as a result of the cervical and thoracic injuries sustained in the accident. He agreed that based on his examination and review of his records that the Plaintiff would be unable to work as a mail carrier for the foreseeable future. He referred the Plaintiff for a formal functional capacity evaluation to determine his capabilities.

The Plaintiff underwent a functional capacity evaluation by occupational therapist Steven Egidi on December 6, 2007. The test results show a significant limitation in the Plaintiff's ability to lift (a maximum of 10 pounds frequently, 15 pounds occasional), climb, squat, crawl and kneel, among other things. He was unable to perform bending and squatting activities without support. His cervical and lumbar ranges of motion were also significantly limited, with cervical flexion measured at 45/60 degrees, extension 35/60 degrees, side bending to the right 40/45 degrees, side bending to the left 35/45 degrees, rotation to the right 60/90 degrees and rotation to the left 55/90 degrees, while lumbar range of motion was measured at 35 degrees flexion (normal is 60-80) and 15/20-30 degrees extension, 15/20-30. The evaluation established that the Plaintiff was capable of no more than light work as defined by the U.S. Department of Labor (exerting no more than 20 pounds of force occasionally, 10 pounds frequently and/or a negligible amount constantly to move objects).

The Plaintiff's performance was consistent in 19 of 19 consistency of

effort tests, an indication that he was exercising maximum effort during the evaluation and was not cheating.

On December 18, 2007 the Plaintiff saw Dr. Lasser's P.A., Marc Sidisky for a re-check of his neck and thoracic spine and review of the functional capacity evaluation. Based on the results of the functional capacity exam, P.A. Sidisky classified the Plaintiff as having a marked, partial disability of 75 percent caused by the motor vehicle accident of January 26, 2007.

On March 25, 2008 the Plaintiff returned to the office and reported ongoing neck pain radiating down into the mid-thoracic levels.

On May 6, 2008 the Plaintiff was seen by Dr. Lasser's P.A., Sadisky and the following ranges of motion were obtained in the neck: forward flexion 40/60 degrees, extension 30/60 degrees and rotation 40/90 degrees bi-laterally. His condition was stable, classified at 70 percent temporary marked partial disability.

He was next seen by Dr. Lasser on November 25, 2008. He had complaints of chronic pain in his neck towards the base and down between his shoulder blades. The epidural nerve blocks did not provide much help. On examination, he was tender, with palpable parvertebral spasms in the interscapular region (between the shoulder blades).

The Plaintiff was most recently seen by Dr. Lasser on December 17, 2010. The Plaintiff had complaints of neck and mid-back pain which

impacted his ability to perform his activities of daily living and rendered it virtually impossible for him to do sporting activities such as bowling or golf, which he had done before the accident. His pain was markedly aggravated by any type of lifting. X-rays revealed degenerative disk disease, worse at C6-7 and diffuse spondylosis in the thoracic spine with loss of thoracic kyphosis.

Plaintiff is relying on three categories of injury under the insurance law:

1. permanent consequential limitation of use of a body organ or member;
2. significant limitation of use or by body function;
3. inability to perform substantially all of his daily activities for a period of 90 days out of 180 days after the accident.

For the first two statutory categories, courts have held that whether the limitation of use or function is “significant or consequential” relates to medical significance and involves a comparative determination of this degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. (See Dufel v. Green, 84 N.Y. 2d 745, 622 N.Y.S. 2d 900, and Toure v. Avis Rent A Car Systems, Inc., 98 N.Y. 2d 345, 746 N.Y.S. 2d 865).


Given the presentation of medical records and test results this Court

cannot say that the alleged limitations of the Plaintiff's back and neck are so "minor, mild or slight" as to be considered insignificant within the meaning of Insurance Law Section 5102 (d). Considered in the light most favorable to the Plaintiff, this evidence is sufficient to defeat Defendants' motion for summary judgment (See Toure v. Avis Rent A Car Systems, Inc.)

Relative to the third category, "90/180", Plaintiff must submit evidence of a medically determined injury or impairment of a non-permanent nature as well as evidence that Plaintiff's activities were curtailed to a great extent, Zeigler v. Ramudhan, 5 A.D. 3d 1080, 774 N.Y.S. 2d 211. The medical issues in this case have been framed previously. Plaintiff was declared ineligible to return to work by his personal physician for a period exceeding 180 days. Therefore, questions of fact exist precluding the summary judgment on this ground.

This constitutes the Decision of the Court.

Dated: March 4, 2011
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

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