

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3376-08T2

FELIX A. ESPINAL,

Plaintiff-Appellant,

v.

CURTIS L. RAGLAND,

Defendant-Respondent.

Argued January 4, 2010 – Decided January 27, 2010

Before Judges Rodríguez and Yannotti.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0071-07.

Pablo N. Blanco argued the cause for appellant (Timothy R. Smith & Associates, attorneys; Mr. Blanco, on the brief).

Christopher W. Ferraro argued the cause for respondent (Sellar Richardson, attorneys; John M. Kearney, of counsel; Mr. Ferraro, on the brief).

Heilbrunn, Pape & Goldstein, attorneys for amicus curiae The New Jersey Association for Justice (Robert E. Goldstein, on the brief).

PER CURIAM

Plaintiff Felix A. Espinal appeals from a January 9, 2009 order granting summary judgment in favor of defendant Curtis L. Ragland. The judge found that Espinal failed to present sufficient objective medical evidence to show that he sustained "a permanent injury within a reasonable degree of medical probability." N.J.S.A. 39:6A-8. We disagree and reverse.

Because Espinal is opposing the summary judgment motion, we must view the motion record in the light most favorable to him. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Espinal alleges that he was driving in Newark on August 31, 2005, when Ragland failed to stop at a red light and struck the side of his vehicle. Ten days after the accident, Espinal sought medical treatment from Dr. Allan Vargas, a chiropractor. Dr. Vargas submitted a certification of permanency to the trial court, indicating that "within a reasonable degree of medical probability [Espinal] has sustained permanent injury that will have permanent residual sequelae." His attached report revealed that a variety of tests resulted in Espinal reporting tenderness and radicular pain. Dr. Vargas found "deep and superficial" muscle spasm in the anterior cervical musculature, as well "tenderness and muscular spasm of the paravertabral musculature bilaterally."

An x-ray of the spine revealed "no evidence of dislocation or fracture." However, Dr. Vargas noted that "there was loss of normal cervical lordotic curve involving C1-C4 with subsequent jamming of the posterior articulating facets." A "Functional Evaluation and Impairment Rating" revealed Espinal had a "whole person impairment value" of sixty-seven percent, an eighteen percent impairment of the spine, a six percent cervical impairment, and a thirteen percent lumbar impairment.

Espinal underwent a course of "conservative [c]hiropractic care," which ended on May 31, 2006, nine months after the accident. According to Dr. Vargas, Espinal made "little improvement" and "is subject to episodes of exacerbations caused by various aggravation . . . [such as lifting and bending]." Further, Dr. Vargas indicated that "[t]he positive neurological and orthopedic findings along with the . . . patient's symptomatology and loss of range of motion point to a poor recovery." It was also Dr. Vargas's opinion that Espinal's injuries were caused by the August 31, 2005 accident.

Luba Karlin, M.D., submitted a certification and medical report. Dr. Karlin performed a physical examination of Espinal's cervical, thoracic, and lumbar spine. Espinal reported tenderness in various places. Dr. Karlin noted that Espinal has insulin-dependent diabetes mellitus. He confirmed

that the x-ray revealed "no evidence of dislocation or fracture either recent or old." His report also included verbatim language from the Vargas report, indicating that there was "loss of the normal cervical lordotic curve involving C1-C4 with subsequent jamming of the posterior articulating facets." Dr. Karlin administered an NCV/EMG test in February 2006, which revealed "L5-S2 nerve involvement with L5-S1 radiculopathy on the right."

Dr. Karlin's final diagnosis was that Espinal had chronic low back pain syndrome, resolved neck sprain, lumbar sprain, and displacement of the lumbar intervertebral disc. The report also indicated Espinal has "[r]ight L5-S1 radiculitis" and that "[l]umbar disc herniation should be ruled out." Dr. Karlin opined that "although further treatment in the future may alleviate some symptomatology, the permanent residuals of the injury cannot be completely resolved by way of further medical treatment intervention and there will always be some aspect of residual permanent injury experienced for the balance of [Espinal's] lifetime." Dr. Karlin characterized the injury as a "permanent injury to [Espinal's] low back that will have permanent residual sequelae."

Steven H. Dane, M.D., also concluded that Espinal's injuries are "permanent in character." Dr. Dane based his

opinion upon a review of Espinal's records from Dr. Vargas and Dr. Karlin and his own independent medical examination that took place on November 7, 2007. Espinal reported numerous areas of tenderness and pain as Dr. Dane performed the physical examination. Dr. Dane also noted "moderate, palpable spasm of the posterior and lateral cervical musculature." Additionally, there was tenderness "as documented by muscle spasm and painful withdrawal, extending through the lower back, into the sacroiliacs and flank areas" and "from the occiput through C7."

As to permanency, Dr. Dane opined:

[I] believe that this patient's residual findings are permanent in character. I do not anticipate any decrease in the symptomatology or any increase in function of the areas involved in the body of this report. Injuries of this type frequently accelerate the normal wear and tear process of the joints involved with the secondary arthritic changes occurring in the joints. I do not believe the patient is totally disabled from the injuries suffered, however, the patient will, in my medical opinion, have intermittent flare-ups of the conditions involving the areas injured, which will require further evaluation and treatment in the future. The frequency of the evaluations and the extent of the treatment cannot be determined at this time. However, based on my experience, it will occur.

Dr. Dane also opined that Espinal's injuries were a direct causal result of the accident "[b]ased on the proximity of the treatment to the date of the accident and the fact that

[Espinal] was not under treatment to the areas injured prior to this accident."

Howard L. Blank, M.D., reviewed Espinal's medical records and performed an orthopedic defense examination. Dr. Blank opined that Espinal suffered no significant physical injury from the car accident and that the "EMG nerve conduction findings are either related to his aging or his diabetes status." He found no evidence of a significant or permanent injury.

Dr. Allen S. Josephs, M.D., also reviewed medical files and examined Espinal in September 2007. Espinal reported no pain or tenderness during the examination. Dr. Josephs's report also indicated that "[Espinal] freely admits that he is fully recovered from this accident." The examination revealed no muscle spasm or tenderness. In Dr. Josephs's medical opinion, there is "no objective evidence of any residual neurological permanence that [is] directly attribute[able] to the accident." Instead, Dr. Josephs felt the findings were "suggestive of a very mild peripheral neuropathy, likely secondary to [Espinal's] diabetes mellitus." Finally, he would "discount the results of the EMG testing in the absence of any signs of radicular disease nor any symptoms of it."

The judge granted Ragland's motion for summary judgment, finding that Espinal presented no objective evidence of a

permanent injury because the NCV/EMG test used by Espinal's experts rely upon "subjective complaints."

On appeal, Espinal contends that he is "entitled to reversal because the judge below committed reversible error in failing to recognize that an NCV/EMG study is an objective diagnostic test and in ruling that a diagnosis of radiculopathy is not a permanent injury." We agree.

The judge's conclusion that an EMG (electromyography) is a subjective test that does not satisfy the threshold contradicts state regulatory law. A needle EMG test is amongst the list of approved objective diagnostic tests in N.J.A.C. 11:3-4.5(b)(5). See also Davidson v. Slater, 189 N.J. 166, 189-90 (2007) (referring to N.J.A.C. 11:3-4.5(b)(5) as determinative of which medical tests satisfy the AICRA standard). Further, case law supports the conclusion that an EMG provides evidence that will vault the verbal threshold. In Mack v. Passaic Valley Water Commission,¹ 294 N.J. Super. 592 (App. Div. 1996), we reversed summary judgment against plaintiff because "diagnostic test results of electromyographic studies taken together with other

¹ Though Mack is not an automobile accident case, New Jersey courts often analogize the AICRA verbal threshold to the threshold for suing public entities. See, e.g., Soto v. Scaringelli, 189 N.J. 558, 573-74 (2007).

data [are] sufficient to withstand defendant's summary judgment motion on a verbal threshold issue." Id. at 600.

Moreover, both Dr. Karlin and Dr. Vargas describe how radiculopathy and nerve root compression causes long-term scar tissue and permanent pain. Their medical opinions are based upon the objective findings of the EMG test.

Defendant also argues that Espinal has not established that his alleged injuries were causally connected to the motor vehicle accident. Although Dr. Karlin and Dr. Vargas did not delve deeply into the causation issue, Dr. Dane did provide more than a "bare conclusion without explanation" regarding causality. He based his opinion on "the proximity of the treatment to the date of the accident and the fact that [Espinal] was not under treatment to the areas injured prior to this accident." Dr. Dane further noted, "I have reviewed the patient's records and confirmed that the patient sought treatment to the areas injured shortly after the accident occurred. Therefore, it is my opinion that the accident was directly responsible for the physical findings and diagnosis noted in this report." This analysis is sufficient to survive summary judgment.

Espinal's doctors certify that his injuries were caused by the car accident. Defendant argues Espinal's nerve damage is a

result of his diabetes and provides two medical expert opinions supporting this proposition. Such a dispute is a question for the jury and is not appropriate for summary judgment. Davidson v. Slater, supra, 189 N.J. at 170. ("If [a] defendant raises a genuine factual issue about the causation of [a] plaintiff's claimed injuries by pointing to other injuries the plaintiff may have experienced, that disputed issue of causation is for the fact-finder to decide[.]")

Therefore, we conclude that Espinal submitted sufficient evidence of causation to overcome defendant's summary judgment motion.

Reversed and remanded for trial.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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