

AMERICAN ARBITRATION ASSOCIATION  
NEW YORK SUM ARBITRATION TRIBUNAL

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In the Matter of the Arbitration between  
Demetrio Vasquez,  
(Claimant)

AAA# 43 200 S 00168 15

Arbitrator Assigned: Emily Diamond

Date of Arbitration: November 19, 2015

-against-

Hanover Insurance Group,  
(Respondent)

Issues in Dispute: SUM Case, cause of injuries, permanence of injuries, value & award for past pain and suffering, value and award for future pain and suffering, lost earnings award.

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### **CLAIMANT'S ARBITRATION MEMO**

#### **Parties**

The claimant in this matter is Demetrio Vasquez represented by Guerrero & Rosengarten by Edward Lemmo Esq. trial counsel .The respondent is Hanover Insurance Group represented by Vincent Crisci Esq. of Crisci Weiser & McCarthy.

#### **Witnesses**

The witness who will testify and appear at the arbitration is Demetrio Vasquez.

#### **Claimants Exhibits**

Exhibit 1- Police accident report

Exhibit 2- Photographs depicting black and blue of claimant and damage to car post -accident .

Exhibit 3- Verdict/settlement summaries.

Exhibit 4- Reports/records – Dr. Said Mian orthopedic surgeon 6/17/14 to present.

Exhibit 5- Shaid Mian M.D. Doctors Report of MMI/ Permanent Impairment C-4.3 dated 10/22/15

Exhibit 6- Record -Clara Maas Medical Center ED triage.

Exhibit 7- Interventional Physical Medicine & Rehabilitation P.C. records including initial evaluation.

Exhibit 8- Doshi Diagnostic Reports of MRI studies of the cervical spine, right shoulder and lumbosacral

Exhibit 9- Operative report 07/03/14 Oradell Ambulatory Surgery Center by S. Mian – arthroscopic surgery repair of rotator cuff subscapularis tendon, debridement of labral tear, debridement of rotator cuff tear, debridement of biceps tendon tear.

Exhibit 10- records from NY Ortho Sports Medicine and Trauma -Matthew Grimm M.D. Pain Management with MRI lumbar spine DOS 08-18-2015, EMG nerve conduction reports and operative records of lumbar epidural injections performed on 9/3/15.

Exhibit11. Reports / records Richard Pearl M.D. - with 3101(d) Expert Exchange

Exhibit12. Report/ Marc Hamet M.D radiology expert & attachments photos MRI right shoulder.

Exhibit 13- Report Economic loss – The Center For Forensic Economic Studies – Chad L Staller

Exhibit 14 - Reports/records – Dove J. Berowitz M.D.

Exhibit 15- W-2 forms from 2013, 2014

Exhibit 16 - Hanover Group's prior accident search print out index data base for Vasquez.

Exhibit 17- PJI, future life and working life expectancy tables.

Exhibit 18- Portions of transcript of EUO hearing of claimant Demetrio Vasquez.

Exhibit 19 -Hanover Group's prior accident search print out index data base for D. Vasquez.

Exhibit 20 - **Portions of Trial Transcripts of A. Robert Tantleff M.D.( respondent's radiologist);**

Exhibit 21- **Radiology reports of other claimants /patients films by A. Robert Tantleff .**

Exhibit 22- IME Watchdog report physical exam by Respondent's orthopedist.

Exhibit 23- *"The Sensitivity of the Seated Straight – Leg Raise Test in Patients presenting with Magnetic Resonance Imaging Evidence of Lumbar Nerve Root Compression,* Arch Phys Med Rehabil Vol 88, July 2007 ; Illustration of positive compression or Spurlings Maneuver used to Diagnose Cervical disc Herniations and illustration from *Orthopaedic Neurology* by Stanley Hoppenfeld, M.D. copyright 1997.

Exhibit 24 - Illustrations of muscles and tendons of shoulder.

Exhibit 25- Application for SUM Arbitration.

Exhibit 26- NYSIF New York State Insurance Fund workers compensation letter and lien total .

Exhibit 27- Hanover business summary and Key Executives

### **Summary of Issues in Dispute**

The applicable SUM coverage is \$1,000,000 One Million dollars. There is a set off of \$25,000 due to underling settlement with State Farm Insurance the carrier for the defendant driver. Liability is conceded. Respondent contests the cause of claimant's accident related injuries. Claimant

contends that as a result of the accident he was unable to resume his duties as a maintenance supervisor following surgery of his right shoulder on July 3, 2014 is permanently disabled cannot resume any type of gainful employment , has past and future pain and suffering and loss of earnings.

#### **Statement of Facts & Claimants Contentions**

On September 20, 2013, Demetrio Vasquez, date of birth 12/22/54, was a seat belted driver involved in automobile accident with an underinsured vehicle with a \$25,000 liability policy insured by State Farm Insurance Company. Demetrio Vasquez was operating a 2009 GMC (Veh #1) owned by United Building Maintenance his employer while travelling northbound on Broadway, when the vehicle he was operating was struck by (Veh #2) a 2009 Nissan which turned left onto West 135<sup>th</sup> Street and failed to yield the right of way to was heading eastbound on West 135<sup>th</sup> Street through the intersection of Broadway. A copy of the police accident report is annexed as **Exhibit 1**. The impact caused claimant's right shoulder and right arm to strike the console in the interior of the vehicle. See portions of EUO transcript of Demetrio Vasquez annexed as **Exhibit 18**. Mr. Vasquez testified that the impact caused his body to be pushed forward and backwards striking his neck and back up against the seat, which caused pain immediately to his neck, back, right and left shoulder. Portions of Claimant's EUO testimony annexed as **Exhibit 18** reveals that the impact caused his body to be pushed forward and backwards against the seat and to the right against the console, which caused pain immediately in his back, neck right and left shoulder. The issue of liability is not in dispute. Mr. Vasquez had the green light. The other vehicle made a left turn tried to cut across Broadway and struck Mr. Vasquez on the driver's side door. The police report clearly places blame on the driver of the Nissan.

Following the accident and receipt of medical documentation, State Farm's adjuster promptly tendered the limited policy for their insured and plaintiff settled the case with the permission of the underinsured carrier Hanover Group. At the time of the accident Mr. Vasquez was driving to one of the Bronx locations of Citibank in the course of his employment as a supervisor of maintenance. Mr. Vasquez told the vocational rehabilitation expert hired by Respondent that he had worked continuously up to the date of the accident doing the same type of work for approximately 10 years. Photographs of claimant's car depict significant physical damage to his vehicle, especially on the driver's door. **Exhibit 2**. Also annexed to Respondent's papers as **Exhibit**

A are copies of color photographs of the claimant's body taken shortly after the accident showing extensive bruising to his right arm. This is consistent with trauma to his right shoulder and arm from the impact. Mr. Vasquez has a high school education in the Dominican Republic and immigrated to the United States where he obtained his GED. He told respondent's rehabilitation expert that he is not skilled in any computer work, and testified at his EUO that he cannot walk more than a few blocks without rest, cannot stand for long periods of time, cannot lift anything over twenty 20 lbs., and cannot use his right arm in any overhead movements. He hasn't worked as a machinist since he was 18 years old in the Dominican Republic at a time when he was healthy. At the time of the accident, his job duties as manager of maintenance with Citibank included his having to demonstrate to cleaners how to operate heavy machinery such as buffing machines and other machinery requiring lifting, driving , bending ,reaching and using one's right arm shoulder and back. He further testified at his EUO that his supervisor laid him off in May of 2014 following surgery to his right shoulder in July of 2014, since Mr. Vasquez could not perform his physical duties. He received extensive physical therapy at Interventional Physical Medicine and Rehabilitation which provided only symptomatic temporary relief. All of the treating physicians Dr. Mian, Dr. Abramov, D.O, and Dr. Grimm document loss of range of motion and significant restriction of motion to the claimant's right arm/ shoulder, cervical and lumbar spine. The radiology review by Marc Hamet M.D. of the MRI films of the right shoulder and lumbar and cervical spine taken at Doshi Diagnostics confirms that Mr. Vasquez sustained traumatic tears to his rotator cuff, bicep tendon and glenoid labrum and herniated discs to his lumbar spine with minimal degenerative change. The MRI report of the lumbar spine of claimant without contrast DOE 08-18-15 by Park West Radiology, part of **Exhibit 11**, states under impression broad based posterior disc herniation at L5-S1 levels confirmed by MRI and straight leg raise test<sup>1</sup>. MRI reports further confirm disc herniations at the L1-2 and T12-L-1 level. Mr. Vasquez underwent arthroscopic surgery of his right shoulder performed by Shiad Mian M.D his treating orthopedic surgeon on July3,2014. Mr. Vasquez further sustained aggravation of any preexisting conditions to his lower back and cervical spine, and right and left shoulder. He is unable to perform his usual and customary activities and cannot work in any capacity. He was earning approximately \$50,000 per

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<sup>1</sup> The straight leg raise, also called Lasègue's sign, Lasègue test or Lazarević's sign, is a test done during the physical examination to determine whether a patient with low back pain has an underlying herniated disk, often located at L5 (fifth lumbar spinal nerve) .According to annexed article in **Exhibit 23** entitled" *The Sensitivity of the Seated Straight- leg test*" , it is up to 95% specific in diagnosing a lumbar herniated disc.

year. Copies of the claimants W-2 forms for 2013 and 2014 are annexed as **Exhibit 15**. He sustained a total economic loss of \$499,292, broken down as lost earnings totalling \$ 363,560 and lost household services of \$135, 732. See **Exhibit 13**. Dr. Mian's recent exam of October 22, 2015 annexed as **Exhibit 7**, indicates that Mr. Vasquez injuries have left him with a permanent impairment and he is unable to work. Mr. Vasquez low back pain is 7/10 which radiates to bother lower extremities. He has difficulty sitting or standing more than 2 hours, and cannot bend or walk more than a few blocks. He has right shoulder pain exacerbated upon lifting his arm or carrying things. His right shoulder is limited in forward flexion, extension and abduction. His activities of daily living are totally affected and he has lost his enjoyment of life.

#### Medical Treatment

Following the accident he was seen the next morning at Clara Maas Hospital ER. He was triaged with primarily neck tenderness and pain, discharged and instructed to follow up with Newark Community Health Centers in three days. No MRI studies or x- rays were taken at that time. **Exhibit 6**. Mr. Vasquez was next evaluated by Rehabilitation Associates beginning in October 2013 three weeks after the accident. Dr. Abramov opined in his initial narrative report and subsequent reports that causality was established between the accident and patients findings. Dr. Mian and Dr. Pearl and Dr. Grimm have opined that the accident was the cause of the torn tendons in the rotator cuff, ie torn labrum, torn shoulder tendons and herniated lumbar and cervical discs ultimately resulted in claimant's inability to work and engage in most activities of daily living.

Dr. Richard Pearl's whose report is annexed as **Exhibit 11**, opined "with a reasonable degree of medical certainty that the accident was the competent producing cause of the injuries sustained including the torn rotator cuff tendons, torn labrum and disc herniation at C6-7 He further opined based on the history and records that Mr. Vasquez was asymptomatic before the accident of 9/19/2013. In his review of the MRI report of the right shoulder DOS 01/10/14 he noted that there was some degeneration of only the right AC joint but that tears of the labrum, biceps tendon , and subcapularis tendon were post traumatic in nature. Dr. Pearl further opines that the injuries including the torn tendons in the right shoulder, torn labrum and herniated disc C-6-C-7 were post traumatic, permanent in nature and causally related to the accident. Dr. Mian's reports opine with a reasonable degree of medical certainty that because of the increased pain and limitation of motion of his neck, back and both shoulders and minimal benefits from physical

therapy and surgery , the patient is unable to perform any type of gainful employment. He will also be severely limited in performing any household duties. He includes a rating for workers compensation of what activates Mr. Vasquez cannot perform. The patient has no prior medical history of trauma or injury or problems of back pain, neck pain or shoulder pain which predate his motor vehicle accident. The patient states at his EUO that he is limited in his daily functions. Dr. Grimm has administered cervical and lumbar epidural injections to alleviate Mr. Vasquez pain without permanent relief .See Exhibit 10.

**The Radiographic Evidence Supports Claimant's Experts Findings That the Injuries to the Shoulder and Spine Were Caused by a Traumatic Event**

In the MRI reports of the lumbar spine taken of the claimant at Doshi diagnostics, **Exhibit 8** there was no finding or impression of spinal stenosis of the spinal canal from a degenerative process compressing a nerve root .The MRI report of the cervical spine DOS 1/10/14 reports under Impression : Degenerative disc disease, multiple foci of disc bulges; rule out right lateral disc herniation at the level C-6-C-7 . In the cervical MRI report there is no mention that spinal stenosis caused compression on the cervical nerve roots. The report goes on to state "that a right lateral disc herniation cannot be ruled out. Please correlate clinically".

Dr. Mian diagnosed claimant Mr. Vasquez with an impingement syndrome of his right shoulder. An impingement syndrome is the term used to describe symptoms and signs that result from compression of the rotator cuff tendons. See: Up To Date article incorporated in **Exhibit 23**. Respondent's radiology expert Dr. Tantleff 's conclusion that Mr. Vasquez has rotator cuff tendonopathy from long standing use should be rejected since he did not rule out trauma from the accident as the cause of the impingement to claimant's right shoulder. Dr. Tantleff and Respondent's analysis is fatally flawed by ignoring the clinical history and failing to fail to rule out trauma from the accident as a cause of the biceps tendon tear, infraspinatus tendon tear and glenoid labrum tears. Respondent has failed to establish any medical evidence that Mr. Vasquez had low back pain or shoulder pain or restrictions in performing his usual and customary activities including work before the accident.

**Claimant Satisfied the Serious Injury Threshold**

The submissions by claimants treating and examining doctors established that Demetrio Vasquez sustained a "serious injury". *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The documentary evidence demonstrates the existence of a specific, quantifiable and objectively verifiable injury of disability

to claimant's right shoulder and lumbar and cervical spine. (See *American Home Assur. Co. v Montilus*, 234 AD2d 543 [1996]). Petitioners claim injury to his right shoulder, neck and back produced objective or qualitative medical evidence regarding alleged range-of-motion limitations causally related to the accident .(see *Jones v Cesar*, 2007 NY Slip Op 50543U). The medical records and reports of Dr. Mian, Interventional Physical Medicine and Rehabilitation by Rafael Abramov, D.O., include range of motion studies conducted contemporaneously with the subject accident (see *Earle v Chapple*, 37 AD3d 520 [2007]; *Knijnikov v Mushtaq*, 35 AD3d 545 [2006]; *Cohen v A One Products, Inc.*, 34 AD3d 517 [2006]; *Ramirez v Parache*, 31 AD3d 415 [2006]) and supported by objective testing of MRI of the right shoulder, lumbar and cervical spine and EMG nerve conduction studies. (see *Jackson v Colvert*, 24 AD3d 420 [2005]; *Mohammed v Gonzalez*, 1 AD3d 328 [2003]. Claimant has established evidence of the extent of his physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004) and has met the serious injury threshold.

**Objective Evidence of Serious Injury is Demonstrated**

a) Range of Motion testing

The annexed records of Shaid Mian M.D., and Rafael Abramov D.O of Physical Medicine and Rehabilitation quantify limitation of motion of claimants right shoulder, lumbar spine, and cervical spine contemporaneously with the accident. The reports of Physical Medicine and Rehabilitation demonstrate during claimants initial visit on October 23, 2013 ( within 3 weeks of the accident ), that he presented with neck pain radiating to the right shoulder, lower back pain , right shoulder pain and left shoulder pain .See **Exhibit 7**. Dr. Abramov performed range of motion testing at that time of claimant's cervical spine, lumbar spine, right and left shoulder. The abnormal loss of range of motion measurements were documented contemporaneous with the accident in Dr. Abramov's initial evaluation report dated October 23, 2013 [ **Exhibit 7** ]:

Cervical spine: Reveals tenderness. Range of motion is painful and reveals flexion of 40 degrees (normal 50 degrees), extension of 40 degrees (normal 60 degrees), right rotation of 60 degrees (normal 80 degrees), left rotation of 60 degrees (normal 80 degrees), right side bending of 25 degrees (normal 50 degrees), and left side bending of 30 degrees (normal 50 degrees).

Lumbar spine: Tender. Flexion of 70 degrees (normal 90 degrees),

extension of 20 degrees (normal 30 degrees), right side bending 25 degrees (normal 25 degrees), left side bending 25 degrees (normal 25 degrees), right rotation of 40 degrees (normal 45 degrees), and left rotation of 40 degrees (normal 45 degrees).

Right shoulder: Tender. Range of motion is painful. Forward flexion of 150 degrees (normal 180 degrees) and abduction of 150 degrees (normal 180 degrees).

Left shoulder: Tender. No subluxation or dislocation. Range of motion is painful. Forward flexion of 150 degrees (normal 180 degrees) and abduction of 150 degrees (normal 180 degrees).

Motor strength: Manual muscle strength is 4/5 in the right deltoid.

The normal range of motion values are obtained from various studies including but not limited to the American Association of Orthopedic Surgery, the American Medical Association, as well as the New York State Worker's Compensation guidelines. The range of motion values are assessed objectively using a hand-held goniometer.

Follow-up testing and abnormal range of motion values of the cervical spine, lumbar spine, right and left shoulder, were repeated and confirmed on December 10, 2013, February 26, 2014, and April 2, 2014 by Dr. Abramov. The findings were made and the measurements taken were assessed objectively using a hand-held goniometer. The loss and restriction of claimant's range of motion to his shoulders, cervical and lumbar spine contemporaneous with the accident was also performed by Shaid Mian M.D. his treating orthopaedic surgeon. Dr. Mian first saw Mr. Vasquez on June 17, 2014. His initial report dated 6-17-14 annexed as part of **Exhibit 4** confirms range of motion testing and abnormal restriction of motion as follows :

#### **Cervical Spine :**

Tenderness : Present

Muscle Spasm: Present

Sensations : Present

#### **Range of Motion testing with goniometer:**

	<b>Actual</b>	<b>Normal</b>
Flexion	30 degrees	45
Extension	100 degrees	45
Lateral flexion	20 degrees R 20 left	45 right, 45 left
Rotation	60 degrees R, 60 L	80 degrees R, 80 left

### Lumbar spine :

range of motion tested with goniometer:

	<b>Actual</b>	<b>Normal</b>
Flexion	60 degrees	90 degrees
Extension	100 degrees	30
Lateral flexion	15 right , 15 left	30 right , 30 left
Rotation	20 degrees right , 20 left	30 degrees right , 30 left

### Shoulders

Tenderness : Present over the anterior aspect

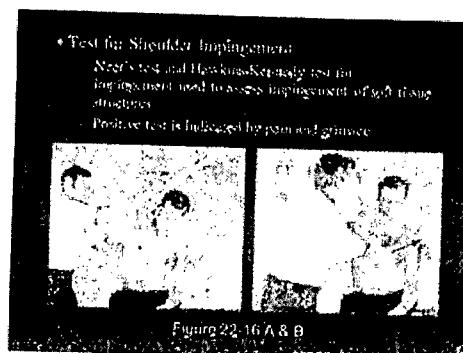
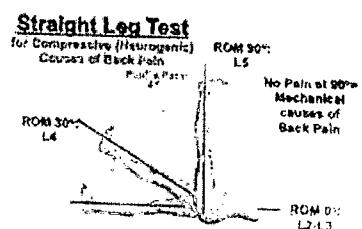
Impingement signs Present

Apprehensive test<sup>2</sup> : Positive

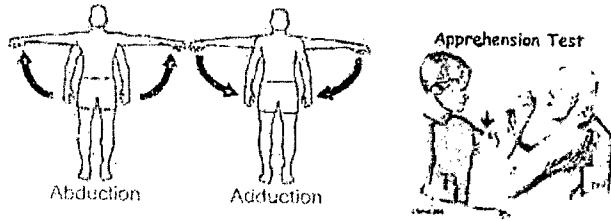
Range of motion of shoulders tested by Dr. Mian with goniometer on 06/17/14 revealed the following:

	<b>Right</b>	<b>Left</b>	<b>Normal</b>
Forward Flexion	100 degrees	140	180 degrees
Abduction	95 degrees	130	180 degrees
Adduction	25 degrees	30 degrees	45 degrees
Extension	30 degrees	35 degrees	45 degrees

### Illustrations / Clinical Objective Testing:



<sup>2</sup> An apprehension test checks for a possible torn labrum or anterior instability problem. It is up to 90 percent specific in diagnosing a torn labrum or anterior instability of the shoulder. Reference: Magee DJ. *Orthopedic Physical Assessment*, 5<sup>th</sup> ed. St. Louis, MO: Saunders Elsevier; 2008. Cook CE, Hegedus EJ. *Orthopaedic Physical Examination Tests: An Evidence-Based Approach*. Upper Saddle River, NJ: Prentice Hall; 2008.



A review of the follow-up exams and range of motion testing by Shiad Main M.D. to the present demonstrates that Mr. Vasquez continued to have documented objective loss of range of motion in his right shoulder, lumbar spine and cervical spine up to the present.

Dr. Mian diagnosed the patient with a partial tear of the infraspinatus tendon of the right shoulder as confirmed by MRI Right shoulder 01/10/14 report which had minimal hypertrophic degenerative changes at the AC joint. After prescribing a back brace, motrin and physical therapy he performed arthroscopic surgery and debridement of the tears in the claimant's biceps tendon, infraspinatus tendon and labrum in July of 2014. Claimant has been unable to perform his usual and customary duties since that time was laid off from work and cannot perform his job as a maintenance supervisor or other jobs requiring lifting ,bending , sitting or driving. See impairment rating by Dr. Mian is annexed as **Exhibit 5**. The annexed medical reports and submissions include clinical medical objective testing of Mr. Vasquez which demonstrated positive straight leg raising [ a sign of a lumbar herniation], positive compression testing [ a sign of a cervical herniation ], positive impingement test[ a sign of a rotator cuff tear] , confirmed loss of range of motion testing of his right shoulder, cervical and lumbar spine measured by goniometer, and loss of abduction , adduction, and inversion of the right and left shoulder. Also annexed are objective MRI studies confirming that claimant sustained torn rotator cuff tendons and herniated lumbar and cervical and lumbar disc herniations discs with nerve impingement.

#### Permanency of Claimant's Injuries is Established

The evidence supports the finding that Mr. Vasquez sustained significant limitation to the normal function, purpose and use of a body organ, member, function or system. The proof further demonstrates that claimant sustained a permanent consequential limitation or significant limitation of use of a body function or system as defined by Section 5102(d) of the Insurance Law [the serious injury statute]. Dr. Mian's recent report dated 10/22/2015 annexed as **Exhibit 5**, noted straight leg raising test positive at 50 degrees right and 60 degrees left. Further forward flexion on

the right was only 160 degrees out of 180 degrees, abduction on the right 150 out of 180 degrees, addition and extension only 30 degrees out of 45 degrees and internal rotation only 30 degrees on the right. Dr. Mian further noted decreased sensation at L4 nerve root and a positive Spurling test indicative of cervical compression. He noted that the claimant has a permanent impairment to his lumbar and cervical spine and right shoulder. Dr. Mian further opined that claimant's functional capabilities are severely limited , that Mr. Vasquez can never lift or carry, pull or push , climb, knee, bend/ stoop or squat, fine manipulation, drive a vehicle or operate machinery .

**b) MRI Film Review by Marc Hamet M.D. & Park West Radiology**

The affirmed report prepared by the claimant's expert neuroradiology's, Dr. Marc Hamet , indicates that the MRI taken of claimant's right shoulder revealed evidence of acute traumatic tears to the biceps tendon, glenoid labrum and infraspinatus tendon thus rising to the level of a serious injury and aggravation of any pre-existing changes to his lumbar spine . The MRI report of the lumbar spine without contrast DOE 08-18-15 by Park West Radiology is made part of **Exhibit 11**, the records of NY Ortho Sports Medicine , Dr. Grimm, states under impression broad based posterior disc herniation at L5-S1 levels ; central posterior annular tear and disc herniations at the L1-2 Level; disc protrusion at theT12-L-1 level. In the body of the report it is noted that there was "only mild disc dessication" in the lumbar spine. No spinal stenosis or narrowing of the spine is noted.

**c) EMG testing by Dr. Grimm revealed evidence of nerve injury / radiculopathy**

Further objective evidence of nerve injury are the EMG reports by r. Grimm test date 9/1/2015 revealing evidence of bilateral S-1 radiculopathy. In order to temporarily provide symptomatic relief to Mr. Vasquez, Dr. Grimm administered epidural steroid injections on 9/3/2015 to L5-S-1and L3-L-4 under fluoroscopic guidance.

**The Opinions of Causation and Damages by Respondent Radiology Expert A. Robert Tantleff M.D. and Mr. Pessalono are Suspect & Should not be Given any Weight**

**a) i) Prior Testimony and Reports of Dr. Tantleff damages his Credibility on Causation**

In his review of the MRI films of the lumbar, cervical spine and R shoulder, A. Robert Tantleff M.D renders cart blanche opinions of degenererative disc disease not supported by the evidence which lack medical reliability by prior testimony and reports, thus lacking credibility. Annexed as part of

**Exhibit 21** is Dr. Tantleff's 3101(d) exchange and report dated June 4, 2007 concerning a patient named Max Moreno. In said report concerning a review of MRI of cervical spine Dr Tantleff similarly opines that it reveals degeneration and dessication of the intervertebral discs. He also opines that the degenerative changes are "consistent with longstanding degenerative discogenic disease." He similarly cites hearsay articles and opines that acute traumatic injuries such as motor vehicle accidents do not cause bulging. He makes that same unsupported hearsay argument that by age 60 nearly 100% of symptomatic patients display disc bulges. Finally in the last sentence of his report he repeats his standard mantra that the examination depicts normal wear and tear degenerative changes consistent with the aging process. He admits in numerous transcripts that he reviews films for the defense over 90% of the time. He also utilizes the same arguments in reports on seemingly **every** claimant that herniated discs are in some people a natural progression of age even to the extent of testifying that it occurs in a 13 thirteen year old girl. He refers to articles over 20 years old that are not authenticated , such as the Boore study representing that they reflect the opinions him and radiologists. See **Exhibit 21**. Also made part of **Exhibit 21** is a **list of cases where Dr. Tantleff has testified.** There are 132 trial history cases in which he has testified for the defense and two for the plaintiff. See annexed. He has admitted under oath on cross examination in the case of *Juan Carlos Becerra v Leoncio Almonte- &Upta et al Supreme Kings*, index # 27259/04 on June 1,2006 that he reviews about 1,000 films a year. He further testified in that case that a week before the Juan Carlos Becerra case he testified a week prior in another case before Justice Schneir after being hired by the same defendants that "the injuries were not causally related".

ii) Dr. Tantleff 's opinions are further suspect since he never reviewed claimants medical records to rule out a clinical herniated disc or work records or EUO

Dr. Tantleff assumes without any medical or factual basis that just because Mr. Vasquez worked as a maintenance supervisor at the time of the accident his shoulder pain must have come from prior work related tasks.[ See Tantleff report, page 2 Exhibit E] . Dr. Tantleff cites to hearsay studies in his August 14, 2015 report of review of MRI of cervical spine and lumbar spine as well to a 1995 study by Boden et al "Abnormal magnetic resonance scans of the lumbar spine in asymptomatic subjects" without annexing the study or establishing that is currently an authoritative text recognized currently by all in the medical and radiology community. The list of

Definitions & Explanations written in his lumbar spine report of claimant is by no means authoritative and is inconsistent with recognized text books such as Principles of Neurology. Since this proceeding is arbitration, Claimant's attorneys cannot cross examine the hearsay chart and reference to articles cited by Dr. Tantleff. Such hearsay opinion should be disregarded by the arbitrator. Further, Dr. Tantleff's credibility must be called into question for repeatedly stating the same opinions of degenerative disc disease as the cause of pain to every claimant or plaintiff whose MRI films he reviews for insurance company representatives. His analysis fails to rule in or rule out herniated disc from trauma since he looks at every film in a vacuum without considering the clinical picture of the patient. He fails to circle or point out on the films where the degenerative disease is located and what effect if any it has on the spinal nerve roots or shoulder tendons . He does not state in any of his reports that Mr. Vasquez had pre-existing spinal stenosis. His credentials are also lacking as a review of his CV indicates that he has not been affiliated with any hospital for the past 30 years. He has not provided a radiological basis to refute the reading and opinions of Dr. Hamet who actually circles the traumatic tears in and annexes still pictures of the MRI Right shoulder he reviewed.

b) Timothy Henderson M.D. – Respondent's orthopedic Expert

Annexed hereto as **Exhibit 22** is a copy of the IME Watchdog report, an independent agency whose representative accompanied the claimant to Dr. Henderson's appointment on September 19, 2013. This independent report establishes that the exam only lasted 30 minutes .The IME watchdog representative notes the following observations. That the insurance company's physician did not use a goniometer to measure range of motion. Dr. Henderson did not ask the patient if there were any activities that he could no longer perform that he did before the accident. He did not use a pinwheel to test the patient's sensitivity. Mr. Vasquez was unable to bend his neck without pain. The examining doctor used active range of motion, meaning that the doctor physically assisted and pushed the claimant's neck to the right and left which elicited pain. The patient could not put his hands over his head and his right arm was restricted. Pain was elicited while Dr. Henderson performed a straight leg raise test.

A review of Dr. Henderson's report concedes several important positive findings. There were no prior injuries to claimant. Mr. Vasquez was not classified as a malingerer. Dr. Henderson documented that claimant had three pain injections to his right shoulder. Range of motion of the

cervical spine was severely limited extension 4 degrees (normal 30) .Range of motion was severely limited in his shoulders (abduction to 100 (normal 150-180).The claimant had external rotation to 30 degrees (normal 45).With respect to the lumbar spine range of motion was reported limited on extension (20 degrees) (normal 30-45) and lateral bend was only 20 degrees (normal 30-45). On physical exam, Dr. Henderson found a positive Hawkins sign bilaterally (+ impingement test). Claimant was tender to palpation from L2-L5 greater on the right. No degenerative changes to the lumbar spine were reported by Dr. Henderson. Dr. Henderson forms an opinion not supported by the medical proof when he states "he will achieve a full recovery one year following the shoulder surgery, which would be 07/03/2015.

c) Vocational Rehabilitation Expert Joseph Pessalano Opinions are not supported by the credible medical evidence

The opinions contained in the report of Mr. Pessalano respondent's vocational expert are unreliable and not based on all of the facts medical evidence of disability . Mr. Pessalano never made a statement that claimant was a malingeringer or was prolonging his symptoms for secondary gain. Mr. Pessalano's report does not list that he reviewed the all the medical reports and records by Shaid Mian M.D. He ignores the findings or reviews of the MRI's by Dr. Hamet and the fact that there is no mention of claimant injuring his low back or right shoulder in the prior claims list **Exhibit 16**. He failed to review the records of Matthew Grimm M.D. and misstates the facts testified to by claimant in his EUO. His report and findings are not credible. He solely adopts as true the findings of respondents expert Timothy Henderson as the basis that claimant can return to work and perform physical jobs listed on page 8 of his report. Query? One must ask the question who is going to hire a 62 year old Hispanic male with limited English who is physically disabled for more than minimum wage? The vocational counselor is totally disingenuous just looking to earn a fee. His opinion that claimant can seek employment as a machine operator, and other skills is contradicted by Dr. Shiad Mian's recent orthopedic evaluation of the patient dated 10/22/2015 and report of Permanent Impairment, **Exhibit 5**, who opined that Mr. Vasquez has a permanent impairment from causally related injuries to his cervical, lumbar spine and rotator cuff tears of his right and left shoulder. Mr. Pessalano's report and opinions on potential jobs for claimant contradict Dr. Mian's findings that at Mr. Vasquez cannot lift /carry, pull/ push, climb, kneel, bend/squat, fine manipulation, operate machinery or drive a vehicle, and can only sit or stand only occasionally. It also is contradicted by Dr. Richard Pearl's evaluation who opined that Mr. Vasquez has a 35% functional impairment to his

right shoulder and lumbar spine which is permanent and affects his ability to reach for, bend and lift objects. The information contained on page 4 of his report that Mr. Vasquez was injured in prior motor vehicle accidents is not supported by the record. Also the statement that claimant has made a fully recovery in regards to his neck and back is also contradicted by the treating physicians and claimant's experts. Mr. Pessalano acknowledges that Mr. Vasquez cannot drive a vehicle. His statement on page 6 "that Mr. Vasquez was unclear whether he resigned or was dismissed by his employer" is another fabrication stated in his report. It is submitted that the Arbitrator should accept as true the findings of permanent impairment and claimant's limitations contained in Dr. Mian's recent impairment exam of October 22, 2015 annexed as **Exhibit 5**. Accordingly, Mr. Pessalano's findings and opinions are flawed and should not be considered by the Arbitrator or given little weight. During the vocational interview, Mr. Pessalano did not test claimants reading or writing ability. Nor did he question claimant on any specific jobs he felt Mr. Vasquez could engage in or whether they required some level of reading or writing or physical exertion to his back and shoulders. He did not perform any aptitude testing nor analysis of the labor market survey to determine the job market to hire a physically limited individual such as Mr. Vasquez. The adage "garbage in, garbage out" is appropriate to employability opinions espoused by Mr. Passalano. The medical proof supports a finding that claimant's injuries coupled with his age renders him unemployable in today's society and justifies a significant monetary award for both past and future pain and suffering and lost earnings. Hanover Group's accident index data base print out for Demetrio Vasquez, annexed as **Exhibit 21** reveals that Mr. Vasquez did not sustain any pre-existing injuries or make any prior personal injury claims for injury to his lower back, right or left shoulder or cervical spine before or after the accident of September 20, 2013. Further there is no record or any pre-existing on the job accident sustained by Mr. Vasquez. Respondent does not challenge the lost earning calculations submitted by claimant.

Mr. Vasquez will testify at the hearing as to his current physical limitations and loss of income since the accident. The accident, resulting objectively defined injuries and permanent disabilities have left Mr. Vasquez only a shell of the man he was prior to the accident. Respondent Hanover Group's attempt to deny him justice is a travesty .Claimant's employer Citibank purchased an underinsured motorist policy from Hanover Group with sufficient coverage to protect Mr. Vasquez from unforeseeable accidents which leave the victim disabled with insufficient insurance from the primary tortfeasor to cover their injuries. Notwithstanding his receipt of workers compensation

benefits Mr. Vasquez needs to be made whole.

### Damages

During the course of negotiations, the claims adjuster assigned to this case by Hanover Group, Barbara Ferrar stated to me that "Mr. Vasquez can get a job in a restaurant." Hanover's adjuster's statement has a clear connotation, that despite collecting premiums from their insured's, it is their belief that Mr. Vasquez as a Hispanic Dominican man should be working in a restaurant, notwithstanding his injuries and limitations. One must ask the question who is going to hire a 62 year old Hispanic male with limited English who is physically disabled for more than minimum wage? Hanover Group's CEO reportedly makes over (4) four million dollars a year but their claims department chose to spend thousands of dollars on experts to render speculative opinions not supported by the medical records rather than tender a fair offer. The Arbitrator must evaluate this claim based on the accident, history, and credible medical proof, not bias, prejudice or unsupported allegations by respondent's experts. There is documented proof of lost earnings of totalling \$ 363,560 and lost household services of \$135,732. See **Exhibit 13**. As indicated in **Exhibit 3**, the sustainable value for pain and suffering for a non-surgical herniated disc in New York are as follows:

Lauro v. City of New York (1st Dept. 2009) – \$810,000 affirmed for 49 year old with herniated discs at L4-5 and L5-S1;

Spetter v. Alliance Towing Corp. (1st Dept. 2009) – \$230,000 affirmed for herniated disc at C6-7;

Sanabia v. 718 West 178th Street, LLC (1st Dept. 2008) – \$500,000 (reduced from \$600,000) for 57 year old with herniated discs at C3-4 through C6-7;

Browne v. City of New York (2d Dept. 2009) – \$625,000 (reduced from \$750,000) for 33 year old with bulging discs at C3-4 and C4-5;

Brown v. City of New York (2d Dept. 2008) – \$600,000 affirmed for 60 year old with mechanical back pain due to pulp protruding into his spinal canal;

Deshommes v. Hussain (2d Dept. 2008) – \$700,000 (reduced from \$1,200,000) for 42 year old with herniated disc at L5-S1 with nerve root compression and several bulges.

Our annexed verdict search further indicates that the sustainable value of torn rotator cuff with one (1) arthroscopic surgery is approximately \$250,000.

### Conclusion

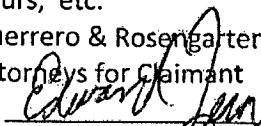
There is no evidence by Respondents that Mr. Vasquez is a malingeringer or filed arbitration for secondary gain. The evidence is clear that there was objective evidence of traumatic permanent

injury to Mr. Vasquez right shoulder, lumbar spine and cervical spine. Mr. Vasquez still possesses functional limitations from his injuries and which condition has been described as permanent and prevents him from performing his usual activities including work . The credible evidence supports an award of at least \$350, 000 for past pain and suffering and \$450,000 for future pain and suffering. He has a future life expectancy of 20 years that is until age 81. The economic proof which is not challenged states past and future lost earnings of \$363,560 less a set off of \$25,000 for the underling settlement with the tortfeasors carrier State Farm for the policy limits. It is respectfully submitted that the value of the Vasquez case is worth the policy limits of \$1,000,000 or at the very least an award in the high six figures.

**Filing Fee**

In addition, Claimant(s) having been awarded the maximum available recovery is also entitled to the return of the AAA filing fee.

Dated: New York, NY  
November 6, 2015

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