Lopez v Sunrise One, LLC

2013 NY Slip Op 51481(U)

Decided on September 10, 2013

Supreme Court, Kings County

Battaglia, J.

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Leo Danny Lopez, IGNACIO VALDEZ GARCIA, PEDRO ARENAS and RICHARDO ALVAREZ-PUEBLA and EUDOCIO IGNACIO GARCIA, Plaintiffs,

against

Sunrise One, LLC and SUNRISE ONE OPERATING, LLC, Defendants.

7243/11

Plaintiff Ignacio Valdez Garcia was represented by Joshua D. Pollack, Esq. of counsel to the firm Gorayeb and Associates, P.C. Defendants were represented by Kelly A. Waters, Esq. of Coughlin Duffy, LLP.

Jack M. Battaglia, J.

After a damages-only trial, the jury awarded plaintiff Ignacio Valdez Garcia total damages of $3,106,714, consisting of $500,000 for past pain and suffering, $900,000 for future pain and suffering, and $1,706,714 for future medical expenses, with the awards for the future intended to compensate Plaintiff over 28 years. Defendants Sunrise One, LLC and Sunrise One Operating, LLC have moved for an order setting aside the verdict in its entirely, and for a new trial.

Defendants' motion has essentially three prongs: (1) they seek a new trial on the ground that the verdict is "contrary to the weight of the evidence" (*see* CPLR 4404[a]), or, in the alternative, a reduction in the amount of the verdict on the ground that it "deviates materially from what would be reasonable compensation" (*see Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 632 , 634 [2d Dept 2012] [quoting CPLR 5501(c)]); (2) they seek a new trial on the grounds of "multiple instances [*2]of error and/or misconduct during the trial which was [*sic*] prejudicial to the defense and affected the verdict as to the amount of damages," which the Court understands as "in the interest of justice" (*see* CPLR 4404[a]; *Allen v Uh*, 82 AD3d 1025 , 1025 [2d Dept 2011]); and (3) they seek a collateral source hearing pursuant to CPLR 4545(a) (*see Turuseta v Wyassup-Laurel Glen Corp*., 91 AD3d at 636-37.)

Since an order for a new trial because of error or misconduct during trial would obviate consideration of the other grounds for Defendants' motion, that ground will be addressed first.

A. "*Error and/or Misconduct During the Trial*"

Defendants' contend that the following instances of error or misconduct warrant a new trial: (1) "the improper admission of testimony regarding [Plaintiff's] alleged inability to work especially when there was no claim for past or future wages and the improper preclusion of testimony regarding his immigration status"; (2) "the improper admission of expert testimony of Dr. Conrad Berenson and Dr. Gary Thomas"; (3) "the improper admission of testimony regarding authorization of medical expenses by the Worker's [*sic*] Compensation Board; and information that the Plaintiff was receiving worker's [*sic*] compensation benefits"; and (4) "the improper admission of testimony regarding [Plaintiff's] claim for future medical expenses especially when there was no claim for past medical expenses and given that Plaintiff had not been treating as early as 2011."

"A motion pursuant to 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise." (*Allen v Uh*, 82 AD3d at 1025.) "The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision." (*Id*.)

1. *Inability to work*

Defendants contend that the Court erred in allowing testimony as to Plaintiff's inability to work because of the injuries he sustained from this workplace accident. Specifically, "One's ability to work does not constitute loss of enjoyment of life and should not have been considered as part of the proofs of a claim of pain and suffering especially here, where Plaintiff[ ] stipulated that [he was] withdrawing [his] claims for loss of past or future wages" (*see* Affidavit of Counsel in Support of Motion to Set Aside Verdict ["Defendants' Counsel's Affirmation"] ¶ 103.) Defendants do not articulate how the admission of testimony as to Plaintiff's inability to work unfairly affected the jury's verdict, but presumably the concern is that the jury's awards for past and future pain and suffering were inappropriately inflated.

"[T]he fact finder may, in assessing nonpecuniary damages, consider the effect of the injuries on the plaintiff's capacity to lead a normal life"; "the plaintiff's inability to enjoy life to its fullest has been considered one type of suffering to be factored into a general award for nonpecuniary damages, commonly known as pain and suffering." (*McDougald v Garber*, 73 NY2d 246, 255-56 [1989].) [*3]Defendants cite authorities for the jury's consideration of social and recreational activities as part of a plaintiff's enjoyment of life, contending that only "activities outside of work and household chores" can be part of a plaintiff's enjoyment of life (*see* Defendants' Counsel's Affirmation ¶ 104), but Defendants cite no authority that, as a matter of law, work cannot lead to enjoyment of life, and the Court has found no such authority.

At least one court has acknowledged the relationship for this purpose between work and identity and dignity, and recognized that, even where work is still possible, an injury can affect the desire to work and the satisfaction one receives from it. (*See Medina v Chile Communications, Inc.*, 15 Misc 3d 525 , 527 [Sup Ct, Bronx County 2006]; *see also Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 22 [2d Dept 2008] ["Evidence of future pain and suffering included . . . the inability to perform certain chores and work"].) This court agrees.

Loss of enjoyment of life, however, whatever its nature, is an element of a plaintiff's proof, and Defendants are correct that "the record is devoid that [Plaintiff] in any way experienced enjoyment' as part of his employment" (*see* Defendants' Counsel's Affirmation ¶ 106.) The absence of such evidence would be considered in assessing the amounts of the jury's awards for pain and suffering.

The Court also notes that the jury was specifically instructed that "Plaintiff makes no claim in this case for lost earnings, either past or future" (*see* Trial Transcript ["T"] at 704.)

2. *Immigration status*

Defendants contend that the Court erred in precluding, without some foundation, their cross-examination of Plaintiff as to his immigration status. Specifically, "without allowing inquiry into plaintiff's immigration status, the jury was left with the impression that the future medical services were to be provided in the United States, which in and of itself, is not supported by the record and ignores the reality that Plaintiff will be [*sic*] choice return to his country or be deported"; "to prevent a defendant from putting a plaintiff to his proof by precluding the defense from presenting facts material to the accurate assessment of damages is prejudicial to the defense." (Defendants' Counsel's Affirmation ¶¶ 101, 102.)

In precluding Defendants, the Court relied on the First Department's decision in *Angamarca v New York City Partnership Hous. Dev. Fund Inc.* (87 AD3d 206 [1st Dept 2011]):

"Nor can we say, in the instant case, that the trial court erred in refusing to permit cross-examination of plaintiff about his immigration status and prior desire to return to Ecuador. Any argument, by defendant, that plaintiff was subject to deportation to Ecuador or had expressed an interest, prior to the accident, in someday returning to Ecuador, in an effort to suggest that plaintiff would incur lower medical expenses in Ecuador than in the United States, would also have been inappropriate . . . [D]efendant proffered no evidence that deportation was anything other than a speculative or conjectural possibility. The speculation that plaintiff might at some point be deported [*4]or voluntarily return to Ecuador was so remote that it rendered the issue of citizenship of scant probative value to the calculation of damages . . .

Moreover, defendant does not dispute that it was not prepared to show relevant evidence at trial that, had plaintiff returned to his native country, his future medical expenses would have been lower than those awarded by the jury . . . Significantly, defendant was not prepared to present evidence from any source that would have guided the jury in determining whether plaintiff's future medical expenses would have

been lower in Ecuador, and to what extent, than those awarded by the jury . . . [T]he jury's determination of future medical expenses in Ecuador would have been mere speculation." (*Id*. at 209.)

With the substitution of "Mexico" for "Ecuador," the same could be said here. Indeed, here there is no evidence of Plaintiff's desire, prior to or after the accident, to return to Mexico.

3. *Workers' compensation "authorizations*"

In addition to extensive medical records, Plaintiff's medical evidence was provided by Jeffrey S. Kaplan, M.D., a board-certified orthopedist, who first saw Plaintiff in September 2006, and Gary P. Thomas, M.D., a board certified pain management specialist, who first saw Plaintiff in June 2009. Defendants contend that these witnesses "injected unsolicited testimony to suggest that the only reason Plaintiff was not receiving certain medical treatment [was] because of a lack of worker's [*sic*] compensation authorization"; "this information was . . . ultimately prejudicial to the defense." (Defendants' Counsel's Affirmation ¶ 60.)

"[W]here an employee sues a third party for personal injuries sustained in the course of her employment, the question of whether or not a workers' compensation claim was filed is immaterial and should not be mentioned to the jury." (*Gropper v St. Luke's Hosp. Ctr*., 234 AD2d 171, 172 [1st Dept 1996].) Reference to workers' compensation has been found appropriate, however, to show an inconsistency in the plaintiff's version, particularly where the plaintiff has "opened the door." (*See Nappi v Falcon Truck Renting Corp*., 286 AD 123, 126-27 [1st Dept 1955], *aff'd* 1 NY2d 750 [1956]; *Gropper v St. Luke's Hosp. Ctr*., 234 AD2d at 172.)

As Defendants' contention recognizes, the "unsolicited testimony" at issue was offered as explanation for Plaintiff's not having received certain testing or treatment, which was clearly relevant to Defendants' arguments at trial concerning the nature and extent of Plaintiff's injuries and resulting damages. (*See Jean Baptiste v Tobias*, 88 AD3d 962, 962-63 [2d Dept 2011]; *Browne v Covington*, 82 AD3d 406 , 407 [1st Dept 2011]; *Abdelaziz v Fazel*, 78 AD3d 1086 , 1086 [2d Dept 2010].) Defendants cite no authority that reference to the workers' compensation process is not admissible for that purpose, and the Court has found none. Indeed, as to the testimony Defendants specifically object to (*see* Defendants' Counsel's Affirmation ¶ 61), Defendants' counsel made no objection, and requested no curative or limiting instruction to the jury, so it is difficult for the Court to apprehend the alleged "error."[*5]

The Court also fails to see the prejudice to Defendants, other than to undermine any inference they would claim as arising from lack of testing or treatment. Defendants state, "What was extremely prejudicial to the defense is that Dr. Thomas' opinions' regarding future medical care was [*sic*] based on the assumption that authority is not an issue'." (*See id.* ¶ 64.) That is a different point, and will be discussed below, but it is difficult to see, in light of that testimony, how Defendants are prejudiced by having the jury told that authorization has often been denied in the past.

Although Defendants contend, "Plaintiff did not need the treatment being recommended by [Dr. Thomas] and the Workers' Compensation Board denied same" (*see id.* ¶ 66), there is no evidence in the record as to the basis or bases for the Board's denial of authorization. Defendants did not seek to enter the file into evidence, which obviated the Court's determination of whether the file would have been admissible in evidence in whole or in part (*see, for example, Gropper v St. Luke's Hosp. Ctr*., 234 AD2d at 171-72; *Verdi v Saporita*, 34 Misc 2d 10, 11 [Sup Ct, Kings County 1962]), and, if so, whether any determination of the Board should be given preclusive effect in this action. (*See Auqui v Seven Thirty One Ltd. Partnership*, 20 NY2d 1035, 1037 [2013].)

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Finally on this issue, at the end of the trial the Court instructed the jury in accordance with PJI 1:65.1, including, "The fact that the Plaintiff has received workers' compensation benefits has no bearing on any other issue in the case than the weight you will give to Plaintiff's testimony," and that "payments are made without determining fault with respect to the happening of the accident."

4. *Future medical expenses/expert testimony*

In addition to testimony as to his treatment of Plaintiff, Dr. Gary Thomas "put together a plan for [Plaintiff] as the ideal treatment that he should have, if authorization and finances were not an issue" (*see* T at 278), which was then used by economist Conrad Berenson, Ph.D., to project Plaintiff's future medical expenses. Defendants contend that Dr. Berenson's testimony was inadmissible because the expert "failed to show that the method he used to calculate plaintiff's future medical expenses is generally-accepted by economists," citing *Frye v United States* (293 F 1013 [DC Cir 1923]) as it has been adopted and interpreted in New York. (*See* Defendants' Counsel's Affirmation ¶¶ 107, 111-12.)

First, to the extent that Defendants also contend that Dr. Berenson was not qualified to testify as to future medical costs because he is neither a doctor or life care planner (*see id.* ¶¶ 108-10), the contention has no merit. It is clear that Dr. Berenson accepted as his starting point the current costs for various elements of medical expense, as determined and testified to by Dr. Thomas, and projected those amounts into the future. (*See Felicia v Boro Crescent Corp.*, 105 AD3d 697 , 698 [2d Dept 2013]; *Wagman v Bradshaw*, 292 AD2d 84, 86-87 [2d Dept 2002].)

Assuming that *Frye* analysis is applicable to expert economic opinions (*see Ratner v McNeil-PPC, Inc.*, 91 AD3d 63 , 72 [2d Dept 2011]), Defendants make no showing that the methodology [*6]employed by Dr. Berenson was in any way "novel," as was their initial burden (*see Lipschitz v Stein*, 65 AD3d 573 , 575-76 [2d Dept 2009]; *Leffler v Fried*, 51 AD3d 410, 410 [1st Dept 2008].) Defendants make no showing that the methodology used by Dr. Berenson for life expectancy and inflation (*see* Defendants' Counsel's Affirmation ¶¶ 58, 110) are inappropriate as a matter of law, and Dr. Berenson's methodology could have been challenged by Defendants' own economic expert, had they chosen to retain one. (*See Adams v New York State Thruway Auth.*, 228 AD2d 627, 627 [2d Dept 1996] ["The methods used by the claimant's expert were not unreasonable and were fully supported"].)

To the extent that Defendants' objection is one of calculation (*see id.* ¶ 57), it is considered below on the amount of the award for future medical expenses.

5. *Future medical expenses/foundation*

Defendants contend that Plaintiff's evidence as to future medical expenses, based upon the medical opinions of Dr. Thomas, lack proper foundation (*see Ratner v McNeil-PPC, Inc.*, 91 AD3d at 72, 73.) Specifically, "It is uncontroverted that Plaintiff was not receiving any medical treatment at the time of trial and at least since the end of 2011"; "claims for future medical care and treatment which includes treatment which Plaintiff is not undergoing at the time of trial, [*sic*] are generally considered speculative and inadmissible." (Defendants' Counsel's Affirmation ¶¶ 114, 115.) An award for future medical expenses cannot be speculative, but rather must be supported by the record to reasonable certainty. (*See Guallpa v Key Fat Corp.*, 98 AD3d 650 , 651 [2d Dept 2012]; *Janda v Michael Rienzi Trust*, 78 AD3d 899 , 901 [2d Dept 2010]; *Doyle v City of Buffalo*, 56 AD3d 1134 , 1135 [4th Dept 2008]; *Hernandez v New York City Tr. Auth.*, 52 AD3d 367 , 370 [1st Dept 2008]; *Petrilli v Federated Dept. Stores, Inc.*, 40 AD3d 1339 , 1344 [3d Dept 2007]; *O'Donnell v Blanaru*, 33 AD3d 776 , 777 [2d Dept 2006].)

Defendants rely on a series of decisions that reject awards for future psychological or counseling

expenses, at least in part because there was no evidence that the plaintiff was receiving such services at the time of trial. (*See Alvardo v Culotta*, 65 AD3d 504, 506 [2d Dept 2009]; *Hernandez v New York City Tr. Auth*., 52 AD3d at 369-70; *Guerrero v Djuko Realty, Inc*., 300 AD2d 542, 543 [2d Dept 2002]; *Korn v Levich*, 231 AD2d 606, 607 [2d Dept 1996].) To the extent those decisions can be read as stating a rule precluding an award for any future treatment where that treatment is not being provided at time of trial, it does not appear that the rule has been applied to medical treatment for physical injury. At least as applied to such treatment, the rule would be questionable in that it would ignore the possibility of an injury worsening or changing, requiring additional or different treatment, while assuming that necessary medical treatment is available to all for the asking, which it clearly is not.

In any event, when this line of authority is traced back to its origin in *Roman v Bronx-Lebanon Hosp. Ctr*. (51 AD2d 529 [1st Dept 1976]),the authority is seen as holding essentially that the evidence did not establish with reasonable certainty that treatment would be required. And so, in *Roman*, the court characterized as "wholly speculative" the testimony of a psychiatrist "to the [*7]possible emotional problems that the infant plaintiff would have 10 years after the psychiatrist saw him and seven years after the trial and that these problems would then require two visits a week to a psychiatrist for one to three years." (*See id.* at 570*; Hernandez v New York City Tr. Auth*., 52 AD3d at 370; *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 , 219-20 [1st Dept 2005] ["treating physician's testimony that he imagined' plaintiff would need to see a physical therapist regularly in the future is speculative"]; *Jackson v Chetram*, 300 AD2d 446, 447 [2d Dept 2002] ["multifaceted support program"].)

Here, the support for the jury's awards for future medical expenses, provided primarily by Dr. Thomas, will be examined below. It is enough to say now that there is no rule that precludes an award to Plaintiff for any particular treatment for the sole reason that he was not receiving that treatment at the time of trial.

B. *Weight of the Evidence/Material Deviation*

"A jury verdict on the issue of damages may be set aside as against the weight of the evidence only if the evidence on that issue so predominated in favor of the plaintiff that the jury could not have reached its determination on any fair interpretation of the evidence'." (*Curry v Hudson Val. Hosp. Ctr*., 104 AD3d 898 , 900 [2d Dept 2013] [quoting *Carter v New York City Health & Hosps. Corp*., 47 AD3d 661 , 663 (2d Dept 2008)]; *see also Doran v McNulty*, 107 AD3d 843 , 844 [2d Dept 2013]; *Soto v Elmback Owners, LLC*, 106 AD3d 986 , 986 [2d Dept 2013].) "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors." (*Id*. [quoting *Nicastro v Park*, 113 AD2d 129, 133 (2d Dept 1985)].) "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view." (*Johnson v Yue Yu Chen*, 104 AD3d 915 , 916 [2d Dept 2013].)

"It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses." (*Doran v McNulty*, 107 AD3d at 844 [quoting *Exarhouleas v Green 317 Madison, LLC*, 46 AD3d 854 , 855 (2d Dept 2007)]; *see also Soto v Elmback Owners, LLC*, 106 AD3d at 986.) "Where . . . conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert." (*Easton v Falzarano*, 102 AD3d 826 , 826-27 [2d Dept 2013] [quoting *Morales v Interfaith Med. Ctr*., 71AD3d 848, 850 (2d Dept 2010) (internal quotation marks omitted)].) Specifically, a jury is "entitled to credit the testimony of [defendant's expert] over that of [plaintiff's] expert on the issue of causation" (*see Cohen v Kasofsky*, 55 AD3d 859 , 860 [2d Dept 2008]; *see also Doran v McNulty*, 107 AD3d at 844; *Crooks v E. Peters, LLC*, 103 AD3d 828 , 830 [2d Dept 2013]), including whether a condition is the result of traumatic injury or degeneration (*see Daniels v Simon*, 99 AD3d 658 , 659 [2d

Dept 2012].)

"With respect to the awards for past and future pain and suffering, the jury's determination will not be disturbed unless the award deviates materially from what would be reasonable compensation." (*Kayes v Liberati*, 104 AD3d 739 , 741 [2d Dept 2013] [internal quotation marks [*8]and citations omitted].) "Since the inherently subjective nature of noneconomic awards cannot produce mathematically precise results, the reasonableness' of compensation must be measured against the relevant precedent of comparable cases." (*Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 632 , 634-35 [2d Dept 2012].) "Comparable cases" are those "similar to the nature, extent, circumstances and duration of the injuries [the plaintiff] sustained." (*Id.* at 635.) Identifying "comparable cases" given the reality of memorandum opinions with limited facts is easier said than done.

Although, unlike "inherently subjective" noneconomic damages, damages for medical expenses and lost earnings can be properly or improperly computed (*see Petrilli v Federated Dept. Stores, Inc.*, 40 AD3d at 1341-43; *Jansen v C. Raimondo & Son Const. Corp.*, 239 AD2d 574, 575 [2d Dept 2002]; *Korn v Levich*, 231 AD2d at 607), the Second Department has been applying the "material deviation" standard to awards for medical expenses and lost earnings (*see Smith v Bywise Holding, LLC*, 106 AD3d 902, 903 [2d Dept 2013]; *Guallpa v Key Fat Corp.*, 98 AD3d at 651; *Zimnoch v Bridge View Palace, LLC*, 69 AD3d 928 , 930 [2d Dept 2010].) It has not been explained, however, how that application is to be made.

Plaintiff was 42 years old at the time of his fall, and 49 at the time of trial, with a statistical life expectancy of approximately 28 years, or, had the jury accepted Dr. Berenson's estimate, 33 years. Plaintiff's most serious alleged injuries were a disc herniation in his cervical spine at the C5-C6 level, and a disc herniation in his lumbar spine at the L5-S1 level. In March 2011, he underwent a discectomy and fusion at L5-S1, having previously received five epidural injections. An incomplete fracture to a rib and multiple contusions resolved soon after his fall.

Defendants argued to the jury that any condition in Plaintiff's cervical spine or lumbar spine was not caused by this accident, but rather was the consequence of Plaintiff's having performed heavy labor, in either construction or the sugar cane fields in Mexico, for approximately 27 years before his fall. The jury answered "yes" to the only question put to them on causation, *i.e.*, "Was the accident on September 6, 2006 a substantial factor in bringing about injury to plaintiff Ignacio Valdez-Garcia?" As to causation, the Court charged PJI 2:70.

It is worth noting that, at the charge conference, there was discussion as to whether the precipitation charge, PJI 2:283, or the aggravation charge, PJI 2:282, or both, should also be charged, and there was agreement that they should not. (*See* T at 612-21.) The Court was of the view, and is still, that the "substantial factor" charge and the verdict sheet question were sufficient to allow the parties fairly to argue, and the jury to determine, the effect of the nature and extent of Plaintiff's prior work history.

It is clear to the Court that, given the conflicting expert testimony on causation, a fair interpretation of the evidence supports the jury's determination that Plaintiff suffered injury as a result of the September 6, 2006 accident, which included injury to his cervical spine and lumbar spine. The relationship of Plaintiff's history, however, as it relates to the jury's damage awards is a separate issue.[*9]

In that connection, Defendants also argued to the jury that Plaintiff's injuries did not warrant high damage awards, pointing to the absence of recorded complaints of pain to his neck or lower back; relatively limited treatment of his injuries, particularly since the March 2011 surgery; and the absence of significant effect on his enjoyment of life. To some extent, Defendants' arguments were met by the testimony of the doctors on the lack of authorization from the workers' compensation system for additional treatment. Dr.

Kaplan testified to the absence of authorization for physical therapy or x-rays; Dr. Thomas testified to his inability to obtain authorization for physical therapy, trigger point injections, or radiofrequency ablation. The jury was free to accept Drs. Kaplan's and Thomas's testimony as to the reason for any limited treatment for Plaintiff's injuries.

Defendants point to the scant evidence on the effect of Plaintiff's injuries on his ability to enjoy life, either before trial or in the future. He testified to no impact on his enjoyment of life because of his inability to work. His entire testimony on the effect of the injuries on the activities he engaged in before the accident was as follows:

"Q:What could you do before the accident?

A:Before the accident I could lift heavy stuff, do sport, run because I didn't have any problems.

Q:After the accident, how were those things affected?

A:Now I can no longer lift heavy stuff. I cannot run. I can go – I can go up steps but I get tired. If I walk I get tired and I feel pain in the back. I no longer can do the things like before.

***

Q:What things do you no longer do now that you could do before the accident?

***

A:Right now I can no longer lift heavy objects. I can no longer walk for a long distance. I can go up the step and down but I get tired and to sit down, to sleep and to do my own things in the house." (T at 62, 64.)

Plaintiff testified to constant pain in his lower back and pain in his neck after certain activity, although he acknowledged that his lower back pain decreased after the spinal fusion surgery in March 2011, and that he receives temporary relief from medications, physical therapy, and injections. He exhibited limited range of motion, in his lower back at least, both before and after the surgery. When available, he takes a prescription pain reliever, an anti-inflammatory, and muscle relaxant; otherwise, he uses over-the-counter medication.[*10]

There is no question that, based on the evidence presented at trial, the jury was entitled to award Plaintiff damages for past and future pain and suffering. The question is whether the awards deviate materially from what would be reasonable compensation. The Court agrees with Defendants that the awards upheld in the Second Department are more "comparable" than those elsewhere, and agrees with Plaintiff that more recent decisions are more "comparable" than those rendered some time ago. Moreover, two of the rulings relied upon by Defendants, which were made in the early 90's (*see Brown v Stark*, 205 AD2d 725 [2d Dept 1994]; *Oris v West*, 189 AD2d 866 [2d Dept 1993]) do not indicate the elements of damages that were included in the total award.

Within these parameters, Defendants cite six Second Department decisions. In four of the cases, decided between 2004 and 2010, the Second Department approved verdicts for past pain and suffering that averaged $312,500, that averaged $275,000 for future pain and suffering, and that averaged $294,000 total pain and suffering (*see Conlon v Foley*, 73 AD3d 836 [2d Dept 2010] [$700K past; $100K future]; *Zimnoch v Bridge View Palace, LLC*, 69 AD3d 928 [$150K past; $300K future]; *Sanz v MTA-Long Island*

Bus, 46 AD3d 867 [2d Dept 2007] [$200K past; $200K future]; *Lifshits v Variety Poly Bags*, 5 AD3d 566 [2d Dept 2004] [$200K past; $500K future].) Compared to these awards, the awards here of $500,000 for past pain and suffering and $900,000 for future pain and suffering would be excessive.

As Defendants acknowledge, however, more recent Second Department decisions might point to the contrary conclusion. In *Kayes v Liberati* (104 AD3d 739 [2d Dept 2013]), the court approved verdicts of $500,000 for past pain and suffering and $1,400,000 for future pain and suffering. In *Guallpa v Key Fat Corp.* (98 AD3d 650), the court approved awards of $790,000 for past pain and suffering and $1,500,000 for future pain and suffering. The Court would disregard *Guallpa* because, in addition to a herniated disc, the plaintiff sustained an ankle fracture that required surgeries.

Defendants are correct that the recent decision in *Kayes* can be somewhat distinguished from this case. But Defendants fail to account for another recent Second Department decision that is more similar to this case. In *Turuseta v Wyassup-Laurel Glen Corp.* (91 AD3d 632), the court approved an award of $400,000 for past pain and suffering and $750,000 for future pain and suffering. Plaintiff suffered a fractured coccyx, a herniated disc at L4-L5, and depression as a result of a fall. She was never hospitalized, except for treatment at the emergency room, and underwent no surgery, which was not available for her fractured coccyx, although she "adduced evidence, presumably believed by the jury in light of its awards for economic loss, that she could not work as a consequence of her injuries" (*see id.* at 634.) Just as in this case, 6 Б years had passed from the date of her fall to trial, and the award for the future was intended to compensate the plaintiff for approximately 28 years.

When *Kayes* and *Turuseta* are included, the approved awards in the Second Department over the past decade average approximately $360,000 for past pain and suffering, approximately $540,000 for future pain and suffering, and $450,000 total. Averaging the awards ameliorates the effects of idiosyncracy in the individual cases as to the facts or the composition of the juries (or appellate [*11]panels), as well as the period of time between injury and verdict and the age of the plaintiff at the time of trial. As to past pain and suffering, for example, the awards over the period ranged from a low of $150,000 to a high of $700,000, and for future pain and suffering from a low of $100,000 to a high of $1,400,000.

By comparison to these averages the awards here deviate materially as to past pain and suffering, *i.e.*, $500,000 versus $360,000; as to future pain and suffering, $900,000 versus $540,000; and as to total pain and suffering, *i.e.*, $1,400,000 versus $450,000. The Court agrees with Plaintiff that the Court should attempt to determine the "highest amount the jury could have awarded plaintiff" (*see Huff v Rodriguez*, 45 AD3d 1430 , 1434 [4th Dept 2007].) That assessment requires however, not only a review of the approved verdicts in comparable cases, but a weighing of the evidence in the particular case, giving the jury its full due. This Court has previously addressed the relationship between the "weight of the evidence" and "material deviation" standards, concluding that they are symbiotic. (*See Carr v Third Colony Corp*., 2001 NY Slip Op 40400 [U] [Civ Ct, Kings County 2001].) "Where a verdict is much above or much below the average, it is fair to infer, unless the case presents extraordinary features, that passion, partiality, prejudice, or some other improper motive has led the jury astray." (*Senko v Fonda*, 53 AD2d 638, 639 [2d Dept 1976] [quoting *Jennings v Van Schaick*, 13 Daly 7, 8-9].)

Here, considering all the evidence that the jury was permitted to credit, together with the approved verdicts in comparable cases, with particular attention to *Turuseta v Wyassup Laurel Glen Corp.* (91 AD3d 632), the highest amount the jury could have awarded Plaintiff for past pain and suffering was $400,000, and the highest amount for future pain and suffering was $600,000.

The jury award for future medical expenses totals $1,706,714; consisting of $580,000 for medication; $96,000 for pain management; $49,000 for trigger point injections; $710,714 for lumbar epidural steroid

injections; $200,000 for radiofrequency ablation of lumbar facet; $46,000 for physical therapy; and $25,000 for MRIs; all intended to compensate for 28 years. The foundation for the medical necessity of each of these items of expense came from Dr. Gary Thomas, who testified that they would be required as the "standard of care" for post-fusion patients "for life-time duration." Dr. Thomas also testified to current costs for each of the items and the frequency with which they would be required, ranging from $500 each month for medications to $5000 for epidural steroid injections three times during every two-year period.

As noted above, Dr. Thomas's testimony as to the medical care Plaintiff would require assumed no question as to ability to pay or "authorization" by workers' compensation. In addition to the references to authorization, there was a reference or two to "Obamacare" and the shifting terrain of health care delivery. This court is not aware of any authority that a plaintiff's recovery for medical expenses should be limited by the amount that the plaintiff or an insurer could or would pay if a defendant was not required to pay, and both workers' compensation and private health insurance have been around for a long time. Perhaps there should be some room for such evidence. Here, however, the Court was spared a difficult decision because Defendants presented no medical, economic, or other suitable expert who might have offered such evidence. Dr. Thomas's testimony [*12]according to the "standard of care," with the costs falling where they may, cannot be rejected in its entirety for that reason, nor does the Court understand Defendants as so contending.

Defendants do not challenge the current costs as Dr. Thomas testified to them, nor their translation into current annual costs for purposes of Dr. Berenson's projections. Dr. Berenson testified to his methodology for projecting the future costs for each of the items of medical expenses, which consisted of annualizing the current cost of each item based upon Dr. Thomas's testimony, and then applying to that cost a "low percent" increase, *i.e.*, less than "historical" increases as he identified them, and a "high percent" increase, *i.e.*, more than "historical" increases. The lifetime totals for the current/no increase, low, and high projections were based upon a life expectancy for Plaintiff of 32.6 years.

The numbers presented to the jury were $686,792 total lifetime costs assuming no increase over current costs; $1,389,239 total lifetime costs assuming "low" annual increases at a rate 1% lower than "historical" increases; and $2,033,815 total lifetime costs assuming "high" annual increases at a rate 1% higher that "historical" increases. As stated above, Defendants offered no expert testimony to challenge Dr. Berenson's methodology or the numbers he presented to the jury. To the extent Defendants challenge Dr. Berenson's use of a longer life expectancy, the jury was instructed in accordance with PJI 2:281, and it is apparent from the jury's verdict that the 28.3 years offered by the Court was adopted. To the extent Dr. Berenson's numbers include an additional six months because they were computed in October 2012, it was effectively brought to the attention of the jury, and presumably was considered by them.

It is not clear how the jury arrived at its award of $1,706,714 as total future medical expenses, except that it assumes some percentage increase from current costs that is greater than Dr. Berenson's "low" total of $1,389,239 but less than his "high" total of $2,033,815. The parties offer no suggestion, nor provide the Court with a copy of the chart introduced into evidence that shows Dr. Berenson's computations. The jury was not required to accept Dr. Berenson's computations under any scenario in their entirety, but it could not arbitrarily or by compromise simply choose a number without some basis in the record for the choice. Although Dr. Berenson's testimony can be understood as expressing an expert opinion that costs in each of the categories of medical expenses at issue will necessarily increase in some degree, Dr. Berenson provided the jury with no assistance in choosing between his "low" or "high" totals. His testimony as a whole can best be summarized by his statement, "My best belief within a reasonable degree of economic certainty [is] that the cost will reside in the range of $1,389,000 and $2,033,000" (T at 338.)

To the extent, therefore, the jury's award for future medical costs exceeds Dr. Berenson's "low" total of

$1,389,239 it is not supported by the evidence to reasonable certainty, and must be reduced. The particular item or items to be reduced may be of significance for collateral source purposes, but cannot be determined on the papers before the Court on this motion.

As noted above, the Second Department has recently indicated that economic damages awards are subject to the "material deviation" standard, but as yet has provided no instruction as to [*13]how the review is to be done. It is not at all clear that a review of awards in "comparable" cases can or should be made as with noneconomic damages. Here, of the six decisions used for comparison on pain and suffering, three make no mention of future medical expenses; in one, an award directed by the court of $831,640 was set aside, since there was "a rational process by which the jury could have come to awards for future lost earnings and future medical expenses less than those directed by the trial court" (*see Kayes v Liberati*, 104 AD3d at 741); and in another, an award of $364,000 "did not deviate materially from what would be reasonable compensation" (*see Zimnoch v Bridge View Palace, LLC*, 69 AD3d at 930.) In *Turuseta v Wyassup-Laurel Glen Corp*. (91 AD3d 632), the recent case close to this one on the facts, an award of $23,000 for future medical expenses for a period of 10.8 years was apparently not challenged by either party. The most that can be said from this review is that the reduction in Plaintiff's award here is not thereby rendered suspect in the least.

Finally, Defendants also move for a collateral source hearing. "[F]or a defendant to be entitled to a collateral source hearing, the defendant must tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources." (*Firmes v Chase Manhattan Auto Fin. Corp.*, 50 AD3d 18 , 36 [2d Dept 2008].) Although there was testimony that Plaintiff has received workers' compensation benefits for medical treatment, Defendants make no showing that he will receive any benefits in the future for any of the medical expenses included in the jury's award. Defendants may renew their motion "any time before the judgment is entered" (*see id.* at 32.)

Defendants' motion is granted to the extent that the jury's award for future medical expenses is set aside as not supported by the evidence to the extent the award exceeds $1,389,239; and there shall be a new trial on damages unless, within thirty (30) days, Plaintiff files a stipulation agreeing to a reduction of the amount for past pain and suffering from $500,000 to $400,00, and a reduction of the amount for future pain and suffering from $900,000 to $600,000.

September 10, 2013_____

Jack M. Battaglia

Justice, Supreme Court