[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 109720/2005
ONCE, SEGUNDO
vs.
SERVICE CENTER OF NEW YORK
SEQUENCE NUMBER : 007
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to be decided per at Parte

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/6/11

E J G
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

SEGUNDO ONCE and MARIA ORELLANA

Plaintiff,

-against-

Index No. 109720/05

SERVICE CENTER OF NEW YORK et al,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C:

Plaintiff moves to set aside the verdict and for a new trial, on the basis that the jury erred in finding that Plaintiff was 70 percent at fault for the happening of his accident, because there was no evidence that Plaintiff misused the saw that was provided by his employer, and because the damages for past pain and suffering of $50,000 and future pain and suffering of $10,000 deviates materially from reasonable compensation. The injury included a partial amputation of Plaintiff's left ring finger, and Plaintiff's claim of pain and development of neuroma, which was disputed by Defendants' expert.

Defendants oppose the motion and point to instances where Plaintiff gave conflicting testimony regarding conversations with the owner, and Plaintiff's knowledge that there was a problem with the saw that he used. Accordingly, Defendants argue that

Plaintiff "was at fault for unreasonably continuing to use the saw, despite any compulsion he felt." Although Defendants also argue that there was no testimony, other than Plaintiff's, regarding the defective nature of the guard on the saw, and that Plaintiff's expert witness did not actually examine the saw, the jury concluded that the saw was defective as they found that Defendants violated Industrial Code 23-1.12 (c) (1), and therefore, were negligent.

Discussion

In assessing Plaintiff's arguments, the Court must bear in mind that reconsideration of a jury verdict must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict" (Brown v Taylor, 221 AD2d 208, 209 [1st Dept 1995]). To set aside a jury's verdict, there must exist "no valid line of reasoning and permissible inferences" which could lead rational persons to the conclusion reached by the jury on the basis of the evidence (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). Furthermore, the movant must demonstrate that the evidence so preponderates in favor of the movant's position that the verdict could not have been reached by any fair interpretation of the evidence (see Niewieroski v Natl. Cleaning Contr., 126 AD2d 424 [1st Dept 1987]).

The jury's finding that Plaintiff was 70 percent at fault for the happening of his accident is unsupported and against the weight of the evidence. In a strikingly similar case, the First Department found that a worker who misused a saw, which did not have

proper protection, in violation of Labor Law §241 (6), was 15 percent at fault for his injuries (see Leon v J&M Pepe Realty Corp., 190 AD2d 400 [1st Dept 1993] [plaintiff was 15 percent at fault because even his own expert acknowledged that plaintiff used a hazardous method to cut plywood]). Here, Plaintiff's "fault" was less than the fault of the worker in Leon, as the sole evidence of such "fault" is Plaintiff's knowing use of a defective saw, which was provided to him by his employer. Regardless of whether the jury believed Plaintiff's testimony that, due to economic necessity, he was compelled to use the saw which he had previously complained about, his fault cannot be more than the fault attributable to the worker by the Appellate Division in Leon.

The Court also finds that the jury's award of $50,000 for past pain and suffering and $10,000 for future pain and suffering over the period of 27 years, deviates materially from reasonable compensation. Defendants cite Bradshaw v 845 UN Ltd. Partnership (2 AD3d 191 [1st Dept 2003]), where the Court upheld the jury's award of $50,000 for past pain and suffering, but increased the jury's award of zero for future pain and suffering to $35,000, where the distal portion of plaintiff's right ring finger was amputated. This case illustrates that at a minimum the jury's award for future pain and suffering must be increased to $35,000. However, given Plaintiff's age, and comparisons with other cases in more recent years, such as the case cited by Plaintiff (O'Shea v State of New York, 836 NYS2d 494 [Ct Claims 2007] [$150,000 for past pain and suffering and $300,000 for future pain and suffering for loss of two fingers]), the amount awarded by the jury for

pain and suffering deviates materially from reasonable compensation.

It is hereby

ORDERED that this motion is granted and a new trial is directed unless the parties stipulate to accept an assessment of 15 percent comparative negligence and an increased award for past pain and suffering to $75,000 and an increased award for future pain and suffering to $150,000; and it is further

ORDERED that the parties notify the court by email to afield@courts.state.us by November 1, 2011 if they do not so stipulate, so that the matter may be restored for trial.

This constitutes the Decision and Order of the Court.

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 6, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN