SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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MICHAEL SAGINOR,

Plaintiff,

- v -

OSIB-BCRE 50TH STREET HOLDINGS, LLC, and FLINTLOCK CONSTRUCTION SERVICES, LLC,

Defendant.

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INDEX NO. 152479/2013

MOTION DATE 06/04/2019

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222

were read on this motion to/for SET ASIDE VERDICT.

A. INTRODUCTION

In this action to recover damages for personal injuries, the defendants move pursuant to CPLR 4404(a) to set aside, as inconsistent, unauthorized, and/or excessive, so much of a jury verdict as awarded the plaintiff $250,000 for 27.6 years of future lost wages, $232,547 for 16 years of future lost social security retirement benefits, and $25,000 for 27.6 years future lost union pension and annuity benefits, and for a new trial on the issue of damages with respect to those items. They also seek to set aside, as unauthorized, so much of the verdict as awarded the plaintiff $150,000 for the future cost of medications. The defendants further contend that the verdict should be set aside in the interest of justice because the court erred in charging the jury with respect to the existence of a tripping hazard. In addition, the defendants move to set aside, as contrary to the weight of the evidence, so much of the verdict as awarded the plaintiff compensation for future pain management visits to health-care providers. They further argue that the court should set aside, as contrary to the weight of the evidence, so much of the liability

verdict as found that their negligent provision of insufficient illumination at the plaintiff's job site was a substantial factor in causing his accident.

The plaintiff cross-moves pursuant to CPLR 4404(a) to set aside, as insufficient, so much of the same jury verdict as awarded him only $150,000 for future pain and suffering and only $250,000 for future lost wages.

The defendants' motion and the plaintiff's cross motion are granted to the extent that the court (1) sets aside so much of the verdict as awarded the plaintiff damages for future lost wages, future lost social security retirement benefits, and future lost union pension and annuity benefits, and directs a new trial on the issue of damages for those items, unless all parties stipulate to increase the award for future lost wages from $250,000 over 27.6 years to $791,663.50 over 9.5 years, to decrease the award for future lost social security retirement benefits from $232,547 over 16 years to $168,596.60 over 11.6 years, and to increase the award for future lost union pension and annuity benefits from $25,000 over 27.6 years to $359,530.40 over 11.6 years, respectively, and (2) sets aside so much of the verdict as awarded the plaintiff $150,000 for future pain and suffering and directs a new trial on the issue of damages for future pain and suffering unless the defendants stipulate to increase the award for future pain and suffering to $750,000. The motion and cross motion are otherwise denied.

B. BACKGROUND

The plaintiff was injured while working on a construction project, when he tripped over a portion of an unfinished metal wall frame that was protruding onto the work-site floor. He alleged that the placement and condition of the frame presented a tripping hazard and that the defendants' failure to provide sufficient illumination at the work site was a substantial factor in causing his accident. The plaintiff sustained several fractures to his right, dominant arm, which he claimed caused him to suffer from complex regional pain syndrome (CRPS), a condition formerly referred to as reflex sympathetic dystrophy (RSD). The plaintiff and his treating and

retained health-care providers adduced evidence at trial that the plaintiff had permanent burning pain in his right arm with discoloration, was receiving monthly injections of a nerve-blocking agent and would be required to continue that treatment into the future, and underwent a procedure to implant a nerve-blocking device, known as a spinal cord stimulator, near his spinal cord. There was conflicting medical testimony as to whether the accident caused the plaintiff to become permanently disabled, whether he suffered from CRPS, and whether he would require pain-management medications, injections, and consultations in the future.

After a 10-day jury trial, the jury found that the defendants were negligent in failing to provide sufficient illumination at the plaintiff's job site, were also liable under Labor Law § 241(6) for violating 12 NYCRR 23-1.30, referable to illumination standards at construction sites, and were negligent in permitting a tripping hazard to remain at the site. The jury found that these negligent omissions and statutory violations were substantial factors in causing the plaintiff's accident.

As relevant here, the jury initially awarded the plaintiff $375,000 for past pain and suffering, $432,474 for past lost wages, and $185,964 for past loss of union pension and annuity benefits over 6 years. The jury also awarded the plaintiff $300,000 over 27 years for the future cost of physical and occupational therapy, $75,000 over 8 years for future cost of pain management consultations with health-care professionals, $250,000 over 15 years for future cost of pain injections, and $209,753 over 27 years for the future cost of surgical procedures; nonetheless, the jury awarded the plaintiff $0 for future pain and suffering and $0 for the future cost of other medications. In addition, the jury awarded the plaintiff $250,000 over 3 years for future lost wages and $232,547 over 16 years for future lost social security retirement benefits, but awarded the plaintiff $0 for future lost union pension and annuity benefits.

Inasmuch as the combined awards for future medical expenses were inconsistent with the jury's failure to award damages for future pain and suffering, the court, with the mutual assent of the parties, directed the jury to reconsider those portions of the verdict so that the

awards were consistent. When the jury reported its revised verdict, it not only made an award for future pain and suffering of $150,000 over 27.6 years, but added an award for future cost of medications of $150,000 over 27.6 years as well. The jury also amended its awards as to all other future medical expenses, as well as future lost wages, to reflect that these awards were made to compensate the plaintiff over 27.6 years; it, nonetheless, declined to alter the number of years over which the award for future lost social security retirement benefits was meant to compensate the plaintiff, leaving the number at 16. In addition, the jury amended the verdict so as to award the plaintiff $25,000 for future lost union pension and annuity benefits over 27.6 years. The defendants took exception to the revision of the awards, other than that for future pain and suffering, and both parties submitted post-trial motions addressed to various aspects of the award.

C. JURY'S REVISION OF AWARDS FOR FUTURE COST OF MEDICATIONS, FURTURE LOST WAGES, FUTURE, SOCIAL SECURITY RETIREMENT BENEFITS, AND FUTURE UNION PENSION AND ANNUITY BENEFITS

There is no merit to the defendants' contention that, inasmuch as the court only expressly directed the jury to reconsider the award for future pain and suffering in light of its awards for certain future medical expenses, the jury was without power to alter or modify the awards for future cost of medications and future loss of union pension and annuity benefits, or to modify the periods of time over which other awards for future damages were made.

In the first instance, the court did not expressly limit the amendments or revisions that the jury could make, and did not prohibit the jury from amending its verdict in any particular regard.

In any event, CPLR 4112 provides that,

> "when the jury renders a verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the general verdict and any answers to written interrogatories, or the questions and answers or other written findings constituting the special verdict and the

> direction, if any, which [sic] the court gives with respect to subsequent proceedings."

As the Court of Appeals explained,

> "[i]t is a general rule, that no verdict is of any force but a public verdict given in open court; until that is received and recorded there is no verdict. When the jury come to the bar to deliver their verdict, all or any of them have a right to dissent from a verdict to which they had previously agreed . . . . A verdict is not recognized as valid and final until it is pronounced and recorded in open court: the jury may change their mind and disagree as to their verdict after they have pronounced it in open court before it is received and entered on the minutes. After a verdict is rendered or announced and before it is entered, the jury may be examined by the poll, if the court please, and either of them may disagree to the verdict"

(*Duffy v Vogel*, 12 NY3d 169, 174 [2009], quoting *Labar v Koplin*, 4 NY 547, 550-551 [1851] [citations omitted] [emphasis added]; *see Kitenberg v Gulmatico*, 143 AD3d 947, 949 [2d Dept 2016])).

Contrary to the defendants' contention, "[t]he law is well settled, that before a verdict is recorded, the jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand; and there are many cases in the books of a jury changing their verdict, immediately after they have pronounced it in open court, and before it was received and entered" (*National Equip. Corp. v Ruiz*, 19 AD3d 5, 12-13 [1st Dept 2005], quoting *Blackley v Sheldon*, 7 Johns 32, 33-34 [1810]; *see Brigham v Olmstead*, 10 AD2d 769 [3d Dept 1960]). Inasmuch as the jury had the right to vary its first offer of the verdict prior to the time when the verdict was received and entered, and did so here, the revised verdict that was actually received and entered is an appropriate and lawful verdict.

D. THE AWARDS FOR PAST AND FUTURE LOST WAGES AT UNION SCALE AND FUTURE LOST UNION PENSION AND ANNUITY BENEFITS

The court rejects the defendants' contentions that the plaintiff did not adduce legally sufficient evidence to support his claim for past and future lost wages at union scale and future lost union pension and annuity benefits, or that the jury's findings in this regard were contrary to

the weight of the evidence. Specifically, the defendants contend that the plaintiff's submission of proof with respect to only one year's worth of union wages was insufficient to establish that it was more probable than not that, were he able to continue electrical work from the date of the accident to the date of verdict, and from the date of the verdict into the future, he would have obtained union jobs at union wage rates.

Future lost wages and benefits must be established with reasonable certainty (*see Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d 467, 469 [1st Dept 2006]; *see Tassone v Mid-Valley Oil Co.*, 5 AD3d 931, 932 [3d Dept 2004]). Nonetheless, contrary to the defendants' argument, this requirement does not compel the plaintiff to adduce testimony from a union representative to prove future lost wages and benefits (*see Savillo v Greenpoint Landing Assoc., LLC*, 2011 NY Slip Op 31950[U] [Sup Ct, N.Y. County, Jun. 13, 2011]).

As this court previously explained in denying the defendants' motion pursuant to CPLR 4401 for judgment as a matter on the issue of future lost wages, "[r]ecovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident . . . and the assessment of damages may instead be based upon future probabilities" (*Kirschhoffer v Van Dyke*, 173 AD2d 7, 10 [3d Dept 1991]). The loss, however, must be more than speculative. Hence, a plaintiff who was never employed in the position upon which he or she bases lost earnings, or never obtained the training or credentials necessary to secure such employment, may not seek lost earnings because the proof will be deemed speculative (*see Naveja v Hillcrest General Hosp.*, 148 AD2d 429, 430 [2d Dept 1989]).

Where, however, the nature of a plaintiff's employment possibilities subsequent to an accident is reasonably certain, he or she satisfies the burden of establishing the right to recover lost earnings even where he or she has not actually commenced that employment. In *Keefe v E & D Specialty Stands, Inc.* (272 AD2d 949 [4th Dept 2000]), the plaintiff had not yet begun his apprenticeship with an ironworkers' union at the time of his accident. He had nonetheless "completed all written and physical tests and had been notified that he would be accepted into

the apprenticeship program" (*id.* at 949). In rejecting the defendant's contention that the Supreme Court erred in admitting evidence regarding the wage rates and fringe benefits of union ironworkers, the Appellate Division concluded that "the loss of earnings was established with reasonable certainty" (*id*).

Similarly, in *Savillo v Greenpoint Landing Assoc, LLC* (2011 NY Slip Op 31950[U] [Sup Ct, N.Y. County, Jun. 13, 2011]), the jury, in awarding the plaintiff lost union wages and benefits, was permitted to rely on videotaped deposition testimony of a prospective employer and one of its workers that the plaintiff "was to become a union member. No testimony from a union representative was necessary regarding the process and the time-frame for entering the union because" the owner "testified competently on both subjects" (*id.* at *8)

> "Although [the employer] was not a union member, he employed union members, and the jury was entitled to credit his testimony that the process for Plaintiff's union admission had already been started by the time [the plaintiff] was injured, and that in the absence of the injury, he would have become a member of the union in the typical time frame to accomplish membership. [The employee] gave similar testimony. The union benefits were not hypothetical because there was sufficient evidence to support, with a reasonable certainly (and no contrary evidence), that [the plaintiff] would have joined the union. . . . The jury was entitled to determine a reasonable date of union membership"

(*id.*) (citation omitted). Thus, even where a plaintiff is not yet a full union member, a jury could consider the loss of future union benefits where it was merely "likely" that the plaintiff would have become a union member.

Where, as here, a plaintiff has already been a union member for 32 years, the claim for lost union wages and benefits cannot be deemed speculative, and the fact that the plaintiff here only adduced evidence as to the rate of compensation for his two last years on a union job is sufficient to calculate and project his losses. The defendants have cited, and research has revealed, no precedent for their claim that a union member's one-time employment in a non-union job vitiates his right to recover lost union wages, union pension contributions, or union annuity contributions. Hence, there is no merit to the defendants' contention that the amounts of lost union wages and benefits were speculative. Nor is there merit to their contention that

entitlement to union-scale wages and union benefits was somehow vitiated because the plaintiff's injuries were sustained on a non-union job or because several of the jobs on which he worked since he attained union membership were non-union jobs.

The court rejects the defendants' argument that the decision in *Kirchhoffer v Van Dyke* (173 AD2d 7 [3d Dept 1991]) is somehow inapposite to the present situation because the plaintiff there identified a specific, higher-level position that was available to her at the time that she was injured. The decision in that case was not limited to its specific facts. Moreover, members of trade unions invariably cannot predict if or when they will be called by the union to work on a particular job for a specific employer; rather, the contingency of any particular employment depends on the state of the economy, the amount of work being done in the New York City metropolitan area, and the season. Many trade union members are on call, awaiting notification from their union as to when their services may be necessary. Thus, their situations are quite unlike the teacher in the *Kirchhoffer* case, who was able to establish that she was qualified for a higher-paying job in the same bureaucracy precisely because of the regularity of a school district's budgeting, hiring, and promotion practices. Hence, the fact that the plaintiff was a union member allowed the jury here to infer that it was reasonably certain that, both after the date of the accident to the date of verdict, and from the date of verdict into the future, he would work on union jobs and thus secure pensionable wages at union rates.

E. INCONSISTENCY OF AWARDS FOR NON-MEDICAL ECONOMIC LOSS

A contention that a verdict is inconsistent and irreconcilable must be viewed in the context of the court's charge (*see Velasquez v New York City Tr. Auth.*, 37 AD3d 707, 707 [2d Dept 2007]; *Lundgren v McColgin*, 96 AD2d 706, 706 [4th Dept 1983]). "[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" (*Koopersmith v General Motors Corp.*, 63 AD2d 1013, 1014 [2d Dept 1978]; *see Sikorjak v City of New York*, 168 AD3d 778 [2d Dept 2019];

KBL, LLP v Community Counseling & Mediation Servs., 123 AD3d 488 [1st Dept 2014]; *Rubin v Pecoraro*, 141 AD2d 525, 526 [2d Dept 1988]). Here, however, the jury's verdict with respect to the three elements of future economic loss arising from the plaintiff's employment cannot be reconciled. This is because the awards for each of the three elements----lost wages, lost social security retirement benefits, and lost union pension and annuity benefits---were dependent on the jury's finding of the number of years that the plaintiff likely would be unable to work in the future as a consequence of his injuries and the number of years he would live from the date of his retirement to his expected date of death. The jury ascribed a different number of years to future lost social security retirement benefits than it did to future lost union pension and annuity benefits. Those numbers, however, must bear some relationship both to each other and to the evidence concerning the length of the plaintiff's likely retirement. Moreover, the number of years ascribed to future lost wages and future lost union pension and annuity benefits was the same as the plaintiff's life expectancy, not his work-life or retirement expectancy, yielding a further inconsistency, as well as a verdict that was contrary to the evidence adduced at trial.

The only testimony that the jury heard with respect to the plaintiff's work-life expectancy was that persons engaged in his trade generally retire at age 65, that he was 50 years old at the time of trial, and that he was thus likely to have worked for an additional 16 years after the date of verdict had he not been injured. The jury was instructed to "consider that information in your deliberations, but you are not bound by it. You may consider it, together with your own experience and the evidence you have heard, in determining how long Mr. Saginor would have worked had he not been injured on February 26, 2013." The jury also was instructed, in accordance with the life expectancy tables in the New York Pattern Jury Instructions, that he was likely to live for an additional 27.6 years from the date of verdict. Inasmuch as the jury apparently accepted those numbers, it would necessarily have concluded that the plaintiff was likely to live for 11.6 years after his retirement at age 65.

The experts who testified as to the benefits that the plaintiff would lose by virtue of his inability to work explained that future lost social security retirement benefits constituted the amount by which his anticipated future benefits would be reduced over the course of his likely 11.5 years of retirement by virtue of the cessation of FICA payroll deductions over the 16 years that he would otherwise have been receiving FICA wages. Similarly, his future lost union pension and annuity benefits constituted the amount by which his anticipated future benefits would be reduced, over the course of his likely 11.5 years of retirement, by virtue of the cessation of pension and annuity contributions that would have been made by his employers over the 16 years he would otherwise have been receiving pensionable wages from them.

The number of years over which all of the awards for future lost work-related income were to be made must be harmonized. In other words, the award for future lost wages must reflect the number of years over which the plaintiff likely would have worked had he not been injured, and the award for future lost retirement, pension, and annuity benefits must reflect the number of years that the plaintiff was likely to live after his likely date of retirement.

The jury, in its initial verdict, awarded future lost wages over 3 years and future lost social security retirement benefits over 16 years, apparently reflecting the plaintiff's expected work-life, not the number of years over which he was likely to receive such benefits. It did not make an award for future lost union pension and annuity benefits, despite having made an award for past union pension and annuity benefits. Upon modification, the jury retained the amounts awarded for future lost wages and future lost social security retirement benefits, but increased to 27.6 the number of years over which it was awarding future lost wages----the same as its determination of the plaintiff's life expectancy----while retaining the number of years over which it was awarding future lost social security retirement benefits at 16. In its amended verdict, the jury also awarded future lost union pension and annuity benefits over 27.6 years. There is no way to reconcile either the jury's initial finding that the plaintiff would only lose 3 years of wages in the future, or its revised finding that he would lose 27.6 years of wages in the

future, with either the evidence adduced at trial or its finding that he would lose 16 years of future social security retirement benefits. Nor is there any way to reconcile so much of the jury's revised verdict awarding the plaintiff future lost union pension and annuity benefits for 27.6 years with its award as to future social security retirement benefits. There also is no way to reconcile the jury's conclusion that the plaintiff would have been working for the remainder of his life had he not been injured with the evidence of his work-life expectancy that was actually adduced at trial. Nor can that latter conclusion be reconciled with the jury's award for future losses of retirement and pension benefits, both of which presume that the plaintiff will retire from work at some point, rather than work until his death.

It is clear from the initial verdict that the jury intended to award $83,333.33 per year in future lost wages for 3 years, up from its award of $72,079 per year in past lost wages over 6 years. A rational jury could indeed have concluded that the future union pay scale was likely to increase. It is also clear that it intended to award $14,534.19 per year in future lost social security retirement benefits and $30,994 per year in past lost union pension and annuity benefits. The court cannot discern from the amended verdict the jury's conclusion as to the number of years of work that the plaintiff would lose over the course of his anticipated work life by virtue of the accident, as the numbers do not match. It simply cannot be concluded that the jury meant to apply the 16 years that it attributed to future lost social security retirement benefits to all future work-related losses; nor can it be concluded that the jury meant to award the plaintiff for loss of work-related income and benefits for the remainder of his life.

A reasonable approach for ascertaining what would constitute reasonable compensation for future lost wages would be to take the average of 3 and 16, or 9.5 years, and apply that length of time to the annual future lost wages that were apparently intended by the jury. A reasonable approach for ascertaining what would constitute reasonable compensation for future lost social security retirement benefits and future lost union pension and annuity benefits would be to take the difference between 27.6 (life expectancy) and 16 (work-life expectancy), or 11.6

years, and apply that length of time to the annual future lost social security retirement benefits that were in fact calculated by the jury, and the past lost union pension and annuity benefits that were in fact calculated by the jury. This would yield awards for future lost wages of $791,663.50, future lost social security retirement benefits of $168,596.60, and future lost union pension and annuity benefits of $359,530.40.

Where a verdict is inconsistent and the jury has been discharged, a new trial is the most appropriate remedy (*see Bellinson Law, LLC v Iannucci*, 116 AD3d 401 [1st Dept 2014]). Since all parties seek to set aside all or part of the awards for future lost work-related income, the court sets aside those awards, and directs a new trial on all of those items of damages, unless all parties stipulate to increase the award for future lost wages from $250,000 over 27.6 years to $791,663.50 over 9.5 years, to decrease the award for future lost social security retirement benefits from $232,547 over 16 years to $168,596.60 over 11.6 years, and to increase the award for future lost union pension and annuity benefits from $25,000 over 27.6 years to $359,530.40 over 11.6 years.

F. INSUFFICIENCY OF DAMAGES AWARD FOR FUTURE PAIN AND SUFFERING

A jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the award deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Harvey v Mazal Am. Partners*, 79 NY2d 218, 225 [1992]; *Garcia v CPS 1 Realty, L.P.*, 164 AD3d 656, 659 [2d Dept 2018]; *Quijano v American Tr. Ins. Co.*, 155 AD3d 981, 983 [2d Dept 2017]; *Harrision v New York City Tr. Auth.*, 113 AD3d 472, 476 [1st Dept 2014]). "The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]). "Although prior damage awards in cases involving similar injuries are not binding

upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *see Garcia v CPS 1 Realty, L.P.,* 164 AD3d at 659; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7).

The plaintiff draws the conclusion that the jury found that he suffered from CRPS or RSD. He argues that the award for future pain and suffering must be increased to render it fair and reasonable in light of such a finding. The court, of course, cannot read the minds of the jurors; inasmuch as there was no interrogatory asking the jury to determine whether the plaintiff indeed suffered from CRPS/RSD, the court cannot draw the same conclusion as the plaintiff, particularly because the defendants' expert, Dr. Lloyd Saberski, emphatically denied that the plaintiff presented symptoms of CRPS. Rather, Dr. Saberski opined that while the underlying symptoms described by the plaintiff were doubtlessly painful, they did not constitute a "regional" pain syndrome because the pain and burning sensations were localized in two specific sites on the plaintiff's arm and did not shoot all the way down to the plaintiff's hand. Although Dr. Saberski conceded that the symptoms were not inconsistent with the definition of the now-disused and superseded diagnostic condition known as RSD, he concluded that, in present medical parlance, the plaintiff did not suffer from any regional pain syndrome. Thus, despite the fact that the plaintiff adduced evidence from several physicians that he was suffering from CRPS, presented testimony that his nerve-block treatments were typically employed to treat CRPS, and noted that even the defendants' retained physician who conducted an Independent Medical Examination diagnosed CRPS, it is not for the court to guess whether the jury itself made that conclusion.

The court agrees with the plaintiff that the Appellate Divisions have, on several occasions, sustained verdicts between $2.5 million and $6.1 million in cases in which an injured plaintiff established that he or she suffered from CRPS or RSD (*see e.g. Kromah v 2265 Davidson Realty LLC*, 169 AD3d 539 [1st Dept 2019] [$6,100,000 for past and future pain and

suffering]; *Brown v Reinauer Transp. Cos*, 67 AD3d 106 [3d Dept 2009] [$3,700,000]; *Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242 [1st Dept 2009] [$2,500,000]; *Hernandez v Ten Ten Co.*,102 AD3d 431 [1st Dept. 2013] [$1,000,000 for past pain and suffering over 8 years and $2,166,666.67 for future pain and suffering over 25.8 years]).

There are, however, appellate decisions that either sustained or modified awards in RSD cases at somewhat lesser amounts. In *Garcia v CPS 1 Realty, L.P.* (164 AD3d at 659), the Second Department sustained a verdict in an RSD case that had been reduced by the trial court from $1,200,000 to $750,000 for past pain and suffering and from $3,000,000 to $1,250,000 for future pain and suffering over 23 years, for a total of $2,000,000. In *Jeffries v 3520 Broadway Mgt. Co.* (36 AD3d 421, 422 [1st Dept 2007]), the First Department sustained an award of $250,000 for past pain and suffering arising from RSD. In *Serrano v 432 Park S. Realty Co., LLC* (59 AD3d 242, 242-243 [1st Dept 2009]), the First Department sustained an award of $600,000 for past pain and suffering in an action in which the plaintiff claimed to suffer from RSD and post-traumatic stress disorder. In *Kutza v Bovis Lend Lease LMB, Inc.* (131 AD3d 838, 839 [1st Dept 2015]), the First Department reversed a judgment where the plaintiff established that her decedent sustained RSD in his wrist area, but the jury only awarded $100,000 for past pain and suffering; the Court directed a new trial on the issue of damages unless the defendant stipulated to increase the award to $400,000. In *Diarassouba v Lubin* (95 AD3d 930, 931-932 [2d Dept 2012]), the Second Department sustained a jury verdict in an RSD case where the plaintiff was awarded $800,000 for past pain and suffering and $650,000 for future pain and suffering. In *Colon v New York Eye Surgery Assoc., P.C.* (77 AD3d 597, 597-598 [1st Dept 2010]), the First Department affirmed a verdict that had been reduced by the trial court from $750,000 to $300,000 for past pain and suffering and from $1.5 million to $650,000 for future pain and suffering. In that case, the jury heard evidence that the plaintiff suffered from "some components" of RSD.

As noted, although the plaintiff presented ample evidence that he suffered from CRPS, a reasonable jury could have agreed with the defendants' expert, and concluded that he did not. Moreover, with respect to the award for future pain and suffering, a reasonable jury might have concluded that, inasmuch as it was compensating the plaintiff for all types of future medical treatments, those treatments would be successful, and that those treatments would mitigate the pain that the plaintiff would otherwise suffer in the future in the absence of those treatments.

The plaintiff places a talismanic power on a diagnosis of CRPS or RSD; he contends that the jury necessarily found that he suffered from those syndromes, and that the amount of his award must thus be increased accordingly. While the court cannot, as a matter of law, conclude that the plaintiff suffers from CRPS/RSD, it concludes that the $375,000 award for past pain and suffering over 6 years does not materially deviate from what would be reasonable compensation, regardless of whether plaintiff suffers from CRPS/RSD, but that the award of $150,000 for future pain and suffering over 27.6 years does indeed materially deviate from what would be reasonable compensation, whether or not the plaintiff suffers from CRPS/RSD. In light of the symptoms of pain, burning sensation, and discoloration that were described at trial, as well as the past and future medical treatment rendered and to be rendered to the plaintiff, the court concludes that $750,000 over 27.6 years would constitute reasonable compensation for future pain and suffering. Hence, that branch of the plaintiff's cross motion that was addressed to the award for future pain and suffering is granted, and a new trial is directed on the issue of future pain and suffering, unless the defendants stipulate to increase the award for future pain and suffering from $150,000 over 27.6 years to $750,000 over 27.6 years.

G. INSUFFICIENCY OF AWARD FOR FUTURE LOST EARNINGS

The plaintiff seeks to set aside the award of future lost wages as insufficient. The court has already determined to set aside so much of the verdict as made awards for future economic loss arising from employment, including future lost wages, on the ground of inconsistency, and

is directing a new trial on the issue of those items of damage unless the parties stipulate to, among other things, increasing the award for future lost wages to $791,663.50. Hence, that branch of the plaintiff's motion explicitly seeking an increase in that award on the ground of insufficiency has been rendered academic.

Were the court to consider the issue of the insufficiency of the award for lost future wages in isolation, separate and apart from the issue of the inconsistency between the awards for other future economic loss arising from employment, the court would be constrained to deny the plaintiff's request for relief. In this regard, the court concludes that the award of $250,000 for future lost earnings did not deviate materially from what would be reasonable compensation. The jury could reasonably have concluded that the plaintiff was not disabled from performing gainful, sedentary work, and that he was only unable to undertake physical work, such as in construction, carpentry, and the like (*see Tworek v Mutual Hous. Assn. of N.Y., Inc.*, 1 AD3d 588, 589 [2d Dept 2003] ["injured plaintiff was employable in a position that did not involve heavy physical labor, such as light or sedentary clerical work"]; *Aman v Federal Express Corp.*, 267 AD2d 1077, 1078 [4th Dept 1999]). Contrary to the plaintiff's contention, the defendants did in fact adduce evidence in this regard from Dr. Saberski (*cf. Edwards v Stamford Healthcare*, 267 AD2d 825 [3d Dept 1999] [defendants adduced no evidence to support their contention that a small award for future lost earnings was justifiable because the jury disbelieved the plaintiff's contention that he could not work at all]).

H. JURY CHARGE WITH RESPECT TO TRIPPING HAZARD

In its order dated May 8, 2019, the court determined that the defendants could be held liable for common-law negligence arising from a tripping hazard. In doing so, the court distinguished this issue from the Appellate Division's ruling that 12 NYCRR 23-1.7(e)(1) and (2), which regulate construction-site tripping hazards, did not support a Labor Law § 241(6) cause of action, "as the allegedly hazardous condition was integral to the work plaintiff was to perform at

the time he was injured" (*Saginor v Friars 50th St. Garage, Inc.*, 166 AD3d 529, 529 [1st Dept 2018]). Importantly, the Appellate Division's decision was limited to Labor Law § 241(6); it was silent as to the common law. In fact, in its decision, this court cited at least one appellate decision in which the statutory "integral-to-the-work" defense did not immunize a defendant from common-law liability for a tripping hazard (*see Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313 [4th Dept 2009]) and another in which a common-law negligence cause of action was dismissed solely because of lack of notice, even while the equivalent Labor Law § 241(6) cause of action was dismissed because the condition was integral to the work (*see Sanders v St. Vincent Hosp.*, 95 AD3d 1195 [2d Dept 2012]).

The court deems the defendants' request for relief in connection with the jury charge to be an untimely motion for leave to reargue, and denies it on that ground.

The court recognizes, however, that a motion pursuant to CPLR 4404(a) to set aside the verdict 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" (*Russo v Levat*, 143 AD3d 966, 968 [2d Dept 2016]). To the extent that the defendants' instant motion is premised on the ground that this court made errors in its evidentiary rulings and jury charges, the interest of justice does not warrant setting aside the verdict here, since, contrary to the defendants' contention, the court discerns no errors in the admission of evidence on the issue of a tripping hazard and no mistakes in the charge given to the jury.

In any event, regardless of whether the jury could hold the defendants liable under the common law for creating a tripping hazard, or permitting it to remain without remediation despite notice thereof, the jury also concluded that the defendants' failure to provide sufficient illumination at the work site constituted both common-law negligence and a violation of the Industrial Code. Hence, unless there is a basis for setting aside the verdict in connection with

the issue of insufficient illumination (see Section I, *infra*), the issue of whether the common law permits recovery based on a tripping hazard is academic.

I. LACK OF ILLUMINATION AS A SUBSTANTIAL FACTOR IN CAUSING THE ACCIDENT

The court rejects the defendants' contention that it was contrary to the weight of the evidence for the jury to find that the lack of sufficient illumination at the plaintiff's work site was a proximate cause of his accident.

The standard for making a determination as to whether a jury's verdict is contrary to the weight of the evidence is whether "'the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence'" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995], quoting *Moffatt v Moffatt*, 86 AD2d 864, 864 [2d Dept 1982, *affd* 62 NY2d 875 [1984]; *see Killon v Parrotta*, 28 NY3d 101, 107 [2016]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205 [1st Dept 2004]; *Goldstein v Snyder*, 3 AD3d 332, 333-334 [1st Dept 2004]; *Kennedy v New York City Health & Hosps. Corp.*, 300 AD2d 146, 147 [1st Dept 2002]).

"Whether a particular factual determination is against the weight of the evidence is itself a factual question. . . . Thus, the question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors" (*Cohen v Hallmark Card, Inc.*, 45 NY2d 493, 498-499 [1978]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 205). These factors include "'an application of that professional judgment gleaned from the Judge's background and experience as a student, practitioner and Judge'" (*Annunziata v City of New York*, 175 AD3d 438, 441 [2d Dept 2019], quoting *Nicastro v Park*, 113 AD2d 129, 135 [2d Dept 1985]) and "interest of justice" factors (*Jordan v Bates Adv. Holdings, Inc.*, 11 Misc 3d 764, 774-775 [Sup Ct, N.Y. County 2006] [Acosta, J.]). "A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be

exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Nicastro v Park*, 113 AD2d at 133).

Here, there was ample evidence that electric lights intended to illuminate the plaintiff's work site were missing or blown out. There was also ample evidence that the natural lighting at the site was woefully insufficient to permit the plaintiff to see where he was going as he carried electrical cable. In addition, the plaintiff steadfastly maintained that he was caused to fall not only because of the tripping hazard, but because he could not see where he was going (*see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]; *see also Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144 [1st Dept 2017]; *Robbins v Goldman Sachs Headquarters, LLC*, 102 AD3d 414 [1st Dept 2013]; *cf. Ortiz v Rose Nederlander Assoc., Inc.*, 103 AD3d 525 [1st Dept 2013] [the plaintiff conceded that she fell because of an uneven step, not because of poor lighting]; *Sarmiento v C & E Assoc.*, 40 AD3d 524 [1st Dept 2007] [although the plaintiff asserted that lighting conditions were poor, he admitted that his accident was caused solely by a slippery condition on a marble floor]). Based on the testimony adduced at trial, a fair interpretation of the evidence supports the jury's finding that the insufficient illumination was a substantial factor in bringing about the accident, i.e., that it was not only the protruding metal beam that caused the plaintiff to trip and fall (*see Murphy v Columbia Univ.*, 4 AD3d at 201]). Indeed, a fair interpretation of the evidence would have permitted the jury to infer that poor lighting conditions might have caused the plaintiff to trip on or collide with numerous objects extant on the premises, regardless of whether or not the object was "protruding" or a "tripping hazard."

Hence, there is no basis upon which to set aside the jury's verdict as to proximate cause.

J. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion and the plaintiff's cross motion are granted to the extent that:

(a) so much of the verdict as awarded the plaintiff damages for future lost wages, future lost social security retirement benefits, and future lost union pension and annuity benefits is set aside, and a new trial is directed on the issue of damages for those items, unless all parties stipulate to increase the award for future lost wages from $250,000 over 27.6 years to $791,663.50 over 9.5 years, to decrease the award for future lost social security retirement benefits from $232,547 over 16 years to $168,596.60 over 11.6 years, and to increase the award for future lost union pension and annuity benefits from $25,000 over 27.6 years to $359,530.40 over 11.6 years, respectively, and

(b) so much of the verdict as awarded the plaintiff $150,000 over 27.6 years for future pain and suffering is set aside, and a new trial is directed on the issue of damages for future pain and suffering, unless the defendants stipulate to increase the award for future pain and suffering to $750,000 over 27.6 years,

and the motion and cross motion are otherwise denied; and it is further,

ORDERED that any request for relief not expressly addressed herein is denied.

This constitutes the Decision and Order of the court.

11/18/2019
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE