SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GILBERT HERNANDEZ,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK INC., and DANELLA CONSTRUCTION OF NY, INC.,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,

Third-Party Plaintiffs,

-against-

EASTERN TESTING & INSPECTION, INC.,

Third-Party Defendants.

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Index No.: 301327/09

DECISION

Present:

Hon. Howard H. Sherman
J.S.C.

Defendant Daniella Construction of New York, Inc. moves, pursuant to CPLR 4404, to set aside the damages portion of the verdict or/and order a new trial or in the alternative, reduce the damages awarded to plaintiff and order a new trial unless plaintiff stipulates to accept the reduced damages.

Defendant seeks no relief from the liability portion of the verdict.

Plaintiff Gilbert Hernandez was an employee of third-party defendant Eastern Testing and Inspection Inc. On October 11, 2008 the plaintiff was working at a construction site in the Bronx. His job was to perform radiograph inspection of a gas line being installed by defendant Danella for defendant Consolidated Edison. Plaintiff was, on that day, working in a ditch which he claimed had no ladder to use to get in and out of. He testified that at some point he began

climbing out of the ditch the way he always did, by stepping on a cross-beam which gave way causing him to fall back onto a pipe on his spine and left leg.

He was not, at that time taken for any medical treatment nor did he seek any until one week later when he appeared at Westchester Square Medical Center emergency room complaining about left leg and ankle pain. He had in the intervening week returned to work for most of the week. Eventually plaintiff did seek treatment for back pain and ultimately received treatment including surgery and the insertion of a stimulator for his back.

While the parties spend a small portion of their time arguing over whether or not defendant has waived its right to appeal the liability portion of the verdict, the court will not address these arguments insofar as liability is not an issue on this motion and any appellate issues will be decided by the Appellate Division.

As to the application to reduce the damages and/or order a new trial the court has extensively reviewed the damages testimony, in particular the testimony of Dr. Lattuga, a treating physician of plaintiff and Dr. Root, a rehabilitation specialist, along with plaintiff's testimony. The court has also reviewed all of the cases submitted by both sides on past and future pain and suffering and on future medical damages.

At the outset it is noted the test to set aside a verdict has consistently been stated by the courts of this state as one in which the defendant must establish there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. The court must also judge the evidence in a light most favorable to plaintiff when plaintiff has prevailed at trial. Cohen v Hallmark Cards, 45 NY 2d 493 (1978).

To the extent that, again, defendants seek no relief on the issue of liability the court must

consider the set aside application solely on the context of damages, specifically the amount of damages which were awarded. In doing so the court must apply not only the test set forth in Cohen v Hallmark, *supra*, but must also consider whether or not the award deviates materially from what is reasonable compensation. Sow v Arias, 21 AD 3d 317 (1st Dept. 2005).

In reviewing the testimony of plaintiff, Dr. Lattuga and Dr. Root, the court, while cognizant of the high bar set before damages can be set aside or reduced, and more cognizant of avoiding substituting its own judgment for that of the jury is nonetheless troubled by the award of future medical damages and pain and suffering.

Any award of future medical charges cannot be based on speculation. Pouso v City of New York, 10 AD 3d 297 [2004]). Here, much of it is. In particular the need for replacement of the stimulator is speculative not only as to need, but as to effectiveness and cost. In addition the combined testimony of Dr. Lattuga and Dr. Root is further speculative as to the need for further surgery, both back and ankle. This is also true for the epidural injections.

As to the pain and suffering awards, a review of the cases cited by defendant along with those of plaintiff when reviewed in the context of this record and comparing with the injury and treatment received here along with plaintiff's testimony lead to the conclusion that they are excessive. The court will reduce the part pain and suffering to $200,000.00 and the future to $1,200,000.00. This is based on $40,000.00 per year.

The future medical expenses are reduced to $491,431.00. This is based on a reduction of $1,505,820.00 for future stimulator procedure, $102,331.00 for future ankle surgery, and its attending needs $171,694.00 for future spine surgery and $149,345.00 for future epidurals, along with $279,379.00 for future physiotherapist and podiatrist visits.

Accordingly the motion is granted to the extent of setting aside the verdict and ordering a

new trial unless plaintiff stipulates to the above total damages of $1,891,431.00

This constitutes the decision and order of this court.

Dated: September 22, 2015
Bronx, New York

Howard H. Sherman
J.S.C.