

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PEDRO MOROCHO,

Plaintiff,

-against-

DORAN CONSTRUCTION CORP., and HM  
BUILDERS CORPORATION,

Defendants.  
-----X

DORAN CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

BIPEX CONSTRUCTION,

Third-Party Defendant.  
-----X

RUDERMAN, J.

The following papers were considered in connection with plaintiff's post-trial motion pursuant to CPLR 4404(a) for an order setting aside the jury verdict as to past and future pain and suffering as inadequate and for an increase in the award of past medical expenses as against the weight of the evidence:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits 1 - 13 and Memorandum of Law	1
Affirmation in Opposition	2
Reply Memorandum of Law	3

This matter came before this Court for trial on the issue of damages, after summary judgment was granted in favor of plaintiff on the issue of defendants' liability, based on plaintiff's worksite fall of approximately 30 feet from an unsecured extension ladder while he was performing carpentry work.

At trial, plaintiff presented the testimony of Dr. Louis Amorosa, a trauma orthopedic spine surgeon who treated plaintiff. Amorosa testified that as a result of his fall plaintiff suffered a fractured dislocation of T12-L1 and a transected spinal cord. While he performed surgery to stabilize the spinal column, the injury has resulted in complete paralysis below the level of the spinal injury. Because of this paraplegia, plaintiff has no control of or sensation in his legs, and has no bladder or bowel control; he must insert a catheter approximately five times per day to expel urine. Amorosa characterized plaintiff's condition as a "chronic, horrible pain syndrome," and stated that plaintiff's condition is permanent, and precludes plaintiff from employment. In addition, Amorosa suggested that plaintiff will probably need further surgery, because two screws that were inserted during surgery have not fused and are loose, meaning that they will probably fail at some point.

Dr. Bradley Cash testified with regard to the treatment of plaintiff's pain. He explained that the crushed nerves in plaintiff's back generate pain signals, and that notwithstanding the prescribed pain medication, plaintiff's neuropathic pain is real, severe, and disabling. Cash also maintained that plaintiff is permanently and totally disabled.

Plaintiff testified that prior to his injury, he was very active, working six days per week and playing soccer. He explained at length the nature and extent of the pain, discomfort and distress caused by his paraplegia. He discussed being taught during rehabilitation how to maneuver himself into and out of his bed and wheelchair, which process he described as very

hard. He also described the procedure of having to catheterize his bladder himself five time each day, and being unable to control his bowel movements. He further testified that he was required to inject himself in the stomach to administer a medication to prevent blood clots.

In the course of the jury's deliberations, it made a number of requests. In one note, it requested "an itemized statement of his [plaintiff's] past unpaid bills and bills that Pedro [plaintiff] paid." Counsel for both parties agreed that because there was no such itemized statement in the record, that the jury must be informed that no itemized statement existed, and that they must rely on the documents in evidence. However, plaintiff's counsel also proposed that because the question differentiated between paid and unpaid bills, the court should provide an additional instruction the jury that "whether the bills were paid by Mr. Morocho or not has nothing to do with whether he's entitled to past medical [expenses]." The Court declined that suggestion, because it required the court to infer merely from the question's naming two categories of bills, that the jury believed plaintiff's entitlement to an award for medical expenses depended on whether the expenses had been paid or not. After the jury's note was answered, counsel for plaintiff suggested that the Court's instruction had implied that the medical bills were not in evidence, and asked the Court to further instruct the jury that the bills were in evidence. That proposal was rejected.

Having heard all the evidence, the jury awarded plaintiff \$375,000 for past pain and suffering, \$4,625,000 for future pain and suffering for a period of 40 years, zero for past medical expenses, and \$11,200,000 for future medical expenses for a period of 37 years.

Plaintiff now contends that both awards for pain and suffering are inadequate; he also attributes the jury's determination regarding past medical expenses to this Court's failure to properly instruct the jury regarding the evidence in that regard.

### Discussion

#### Pain and Suffering

A trial court may set aside a jury verdict under CPLR 4404(a) based on inadequacy, if it “deviates materially from what would be reasonable compensation” (*see Gorman v Mathew*, 151 AD3d 816, 817 [2d Dept 2017]). This analysis is conducted by comparing the plaintiff’s injuries with the injuries and awards in comparable cases (*see Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]). Plaintiff contends that this Court should set aside the award of damages for both past and future pain and suffering as inadequate. The Court declines to do so.

Here, the awards for past and future pain and suffering, \$375,000 and \$4,625,000 respectively, totaling \$5 million, do not deviate materially from compensation granted in comparable cases. In *Herrera v St. Martin* (34 AD3d 529 [2nd Dept 2006]), where the plaintiff’s injuries “resulted in a total paralysis in her lower extremities, and bowel and bladder incontinence,” the Court reduced the plaintiff’s damages award for past pain and suffering from \$1,500,000 to \$1,000,000, and the damages award for future pain and suffering from \$2,500,000 to \$2,000,000 for a period of 10 years.

In *Schifelbine v. Foster Wheeler Corp.* (4 AD3d 736 [4th Dept 2004]), plaintiff was rendered quadriplegic, sustained a skull fracture and underwent above knee amputation. The Fourth Department affirmed the jury’s awards for past and future pain and suffering, which the trial court’s decision reflects were \$1 million for past pain and suffering and \$5.5 million in future pain and suffering (*see Schifelbine v Foster Wheeler Corp.*, 3 Misc 3d 151, 153 [Sup Ct Allegany County 2002]).

In *Miraglia v H & L Holding Corp.*, 36 AD3d 456, 456 [1st Dept 2007]), where the plaintiff suffered “paraplegia and associated complications” and was awarded \$5 million for past

pain and suffering and \$10 million for future pain and suffering over 35 years, the award for future pain and suffering was reduced to \$5,000,000.

The jury's total award of pain and suffering in this case is comparable to similar cases. While plaintiff suggests that the past pain and suffering awards in other cases were consistently greater than the \$375,000, the difference between this and other cases does not warrant additur, particularly when it is considered that the jury appears to have broken down a total award of \$5,000,000 into two proportioned segments. "In no two cases are the quality and quantity of such damages identical" (*Caprara v Chrysler Corp.*, 52 NY2d 114, 127 [1981]), and comparisons cannot be made with mathematical precision (*see Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]).

#### Past Medical Expenses

With regard to the jury's decision to award nothing for plaintiff's past medical expenses, review of the record, including the note asking for "an itemized statement of his [plaintiff's] past unpaid bills and bills that Pedro [plaintiff] paid," makes it unlikely that the jury's lack of an award for past medical expenses is attributable to the Court's response to that request. Initially, the court correctly responded that the requested items, including such an itemized statement, were not in evidence, and that the jury was required to make its decision based only on the exhibits and the testimony. The Court's statement that "these items are not in evidence" referred, of course, to the requested items, not to the medical bills.

The jury's failure to arrive at an award for past medical expenses is more likely due to the manner in which the evidence of plaintiff's past medical expenses was presented to the jury. Specifically, plaintiff relied on documents that were included among quantities of other documents in a large box of evidence, without providing testimony that explained that evidence

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