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

NICHOLAS NATOLI,

Plaintiffs,

against

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE NEW YORK IN SUPPORT CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

Index No.: **154612/2012**

Mot. Seq. **9**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
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LISA A. SOKOLOFF, J.

In this Labor Law case, Plaintiff Nicholas Natoli, a construction worker, was injured on July 6, 2011 when he and his coworker attempted to move a wooden pallet that was leaning upright against a wall "onto an A-frame dolly by tilting it at a 45-degree angle on one corner and toppling it onto the dolly. While Plaintiff hoisted his side of the [pallet] overhead with his arms, his coworker apparently lost his grip, and the [pallet] fell on Plaintiff, causing tears in his arm and shoulder" (*Natoli v City of New York*, 148 AD3d 489 [1st Dept 2017]).

After a trial before this court, Defendants The City of New York, The New York City Department of Education and The New York City School Construction Authority now move, pursuant to CPLR § 4404(a), for an Order: (1) setting aside the jury's verdict in

favor of plaintiff and directing judgment in favor of the defendants; or (2) setting aside the jury verdict in favor of plaintiff and directing a new trial on all issues; or (3) setting aside the jury's verdict in favor of plaintiff and directing a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction of the jury's awards. Plaintiff opposes and cross-moves for additur.

Whether Absence of a Hoist Was a Violation of Labor Law § 240(1)

Defendants contend that the evidence at the trial demonstrated that Labor Law § 240(1) was not implicated in that a hoist was not needed to transfer the pallet to the dolly. Defendants note that witnesses, including Plaintiff's liability expert, testified that a construction worker should be able to lift a 96-pound bag of cement. Because the jury determined that the pallet weighed between 150 and 196 pounds, Defendants argue, "the jury's own findings coupled with the plaintiff's expert testimony demonstrates that a hoist was not needed for plaintiff and his partner to lift the pallet and as such, the verdict is against the weight of the evidence." Defendants also argue that Plaintiff's injuries did not arise from a physically significant elevation differential, but from the usual and ordinary dangers of a construction site.

Defendants' argument ignores the fact that, on appeal in this action, the First Department ruled that the weight of the pallet and, therefore, whether a safety device was required under the statute, was an issue of fact for the jury (*Natoli v City of New York*, 148 AD3d 489 [1st Dept 2017]). During the same appeal, the First Department ruled "[t]hat plaintiff and the skid were on the same level does not bar application of Labor Law § 240(1)" (*Id.*; *Wilinski v 334 East 92nd Housing Development Fund*, 18 NY3d 1 [2011]). Further, in determining whether an elevation differential is physically significant or *de minimis*, it is necessary to consider not only the height differential, but also the weight of

the falling object and the amount of force it is capable of generating, even over the course of a relatively short descent (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009]).

At his deposition, Plaintiff testified that the pallet measured three or four feet by six feet and, at trial, that the pallet measured four feet by eight feet and weighed approximately 200-250 pounds. Although he did not inspect the pallet, Robert Murphy, an employee of the New York City School Construction Authority, testified that he saw the actual pallet involved in Plaintiff's accident and it measured four feet by six feet and weighed approximately 100 pounds. Syed Tanvir, a managing inspector for Defendant New York City School Construction Authority, who was a safety inspector at the time of Plaintiff's accident, agreed with Murphy's assessment of the pallet's size and weight. Clearly the jury did not credit the testimony of the defense witnesses as to the weight of the pallet. Based upon their expressions and body language, the Court also found their testimony to be lacking credibility.

Plaintiff's liability expert, Joseph Cannizzio, an engineer, opined that the pallet weighed approximately 192 pounds. He explained that size and configuration are key details that determine whether a hoist is necessary and while it might hypothetically have been safe for two workers to have lifted the pallet had it been configured and balanced differently, a hoist was required "due to the sheer bulk of the pallet."

As Plaintiff's counsel notes, First Department cases support a finding that the failure to provide a safety device for construction workers to move by hand items weighing less than 96 pounds per worker can provide a basis for liability pursuant to Labor Law § 240(1) (*Gutierrez v Harco Consultants Corp.*, 157 AD3d 537 [1st Dept 2018]). In *Gutierrez*, a co-worker was passing a piece of rebar to the plaintiff when the piece slipped,

fell and struck plaintiff. The First Department held that even "[a]ssuming that the piece of rebar that allegedly struck plaintiff weighed what defendants claimed it weighed, it still presented an elevation-related risk even if it may have traveled only a short distance before striking plaintiff." Notably, the Gutierrez defendants argued in their brief that the piece of rebar being passed to the plaintiff weighed approximately 95 pounds.

Similarly, in *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009], it was held that a plaintiff was engaged in an activity covered by §240(1) when he was instructed to pry from the wall an 80-pound, three-foot-high-by-five-foot-wide-by-one-foot-deep electrical panel that was positioned six or seven feet above the ground, and lower it to the floor. The court found that the "activity clearly posed a significant risk to plaintiff's safety due to the position of the heavy electrical panel above the ground, even if such elevation differential was slight, and was thus a task where a hoisting or securing device of the kind enumerated in the statute was indeed necessary and expected precisely because the object was too heavy to be hoisted or secured by hand." (*Id.* at 437.)

The plaintiff in *Mendoza v Bayridge Parkway Assoc.*, LLC, 38 AD3d 505 [1st Dept 2007] also established that he was engaged in the type of work that required the use of an adequate safety device where he was hoisting a large stone weighing between 60 to 80 pounds that could not be supported by him, his coworker, and a rope. The defendant's contention that there was no height differential, or that the injury was caused by an ordinary construction risk not contemplated by the statute, was unavailing.

Accordingly, there was ample evidence for the jurors to determine that, given the size and weight of the pallet, the Defendants violated Labor Law § 240(1) by not furnishing Plaintiff with a hoist or other protective device to secure and transport the pallet from the roof.

Juror Confusion Regarding Labor Law § 240(1) Charge

Defendants also contend that the jury's verdict on liability should be set aside because it is the product of confusion regarding the Labor Law § 240(1) charge. The argument is based on questions from the jury, which were addressed by the court, and affidavits procured from two of the six jurors after the jury was discharged. Defendants argue that the jury found a violation of § 240(1) only because it believed that it was compelled to do so by the charge.

During deliberations, the jury delivered a note asking to see the incident report, testimony concerning the size of the pallet and the law on Labor Law § 240(1). With the consent of counsel, the court re-read its § 240(1) charge to the jury. A second note from the jury asked whether there was evidence of a hoist on site and the court reminded the jury that there was no evidence of a hoist on site other than a crane that had been shut down before Plaintiff's accident. The jury's third note expressed a seeming inconsistency in the § 240(1) charge:

> "There seems to be an inconsistency in the charge. At the bottom, it appears we should find for the defendant if we believe a safety device was not needed for this particular incident. Earlier in the charge though it was indicated that liability is imposed regardless of fault if devices are not provided to protect harm directly flowing from the application of force of gravity. Which part of the charge should we focus on?

The court re-crafted its charge and explained to the jury: " I have tried to craft a better charge for you. And if you still have an issue with it, I will come back to it." The court then re-charged the jury concerning Labor Law § 240(1). The Court's re-charge included three sentences that sought to address the jury's question:

"The kind of accident triggering § [240(1)] coverage is one that will sustain the allegation that an adequate scaffold, hoist, stayed ladder or other protective device would

have shielded the injured worker from harm directly flowing from the application of force of gravity to an object or person."

"If you find that a protective device was required by 240 so as to give proper protection to plaintiff in the performance of his work, you will find for plaintiff. On the other hand, if you find that a protective device was not required by 240 so as to give proper protection to plaintiff, you will find for defendants."

The Court then asked the jury, "Does that help?" and immediately noted, "I see some nodding." The Court again invited the jury to come back with additional questions if there was any remaining confusion, saying "[i]f you need a further explanation of fault, just write a question and I'll address it."

Contrary to Defendants' contention that there was substantial jury confusion, there is no evidence that the jury remained confused concerning Labor Law § 240(1). Despite the court twice inviting the jury to ask for further clarification, the jury returned with its verdict without asking any further questions concerning Labor Law § 240(1) and the verdict sheet contained no indicia of confusion.

With respect to the juror affidavits, such affidavits should not be used to impeach a jury verdict absent extraordinary circumstances (*Selzer v New York City Transit Authority*, 100 AD3d 157, 164 [1st Dept 2012]). Here, there were no obvious errors in deliberation nor evident confusion on the verdict sheet as to the Labor Law § 240(1) charge (*Id.* at 164-165). Nor did those jurors complain when polled. Moreover, the First Department has found that affidavits of only three jurors is not evidence of jury confusion (*Chang by Chang v Frigeri*, 176 AD2d 643 [1st Dept 1991]), much less the two affidavits involved here. Accordingly, no new trial is warranted on the basis of jury confusion.

Whether Plaintiff's Injuries were Caused by the Workplace Accident

At trial, Plaintiff sought to recover damages for his bicep injury, as well as injury to his right shoulder, neck, back and spine. Defendants argue that the evidence demonstrated that the shoulder and neck injury were proximately caused by something other than the July 6, 2011 accident and thus the award for future medical expenses should be vacated. In support, Defendants note that records reveal that Plaintiff suffered from a degenerative condition as well as a prior neck injury sustained in a May 2010 car accident that was not addressed by Plaintiff's experts.

However, Plaintiff's treating orthopedic surgeon, Dr. Howard Baum, who had treated Plaintiff for shoulder and neck pain, and had the opportunity to review all of Plaintiff's medical records, testified unequivocally that the July 6, 2011 accident "absolutely was a substantial factor in causing the injury to his bicep." Additionally, Dr. Baum specifically addressed a notation on a CT scan of Plaintiff's cervical spine of mild degenerative joint disease changes "around some of the vertebral end plates," explaining that an end plate is not a facet joint, and not the disc itself. Dr. Baum noted that the atrophy, range-of-motion loss and pain in Plaintiff's shoulder and neck were due both to nerve damage in his neck and surgical insult from the prior surgery to repair his ruptured distal biceps tendon.

Similarly, Dr. Ranga Krishna, a neurologist who had treated Plaintiff for his neck and back injury for three years at the time of trial, opined that the July 6, 2011 accident was a substantial cause of Plaintiff's medical conditions, which included multilevel cervical disk herniation, bulging disks resulting in a cervical radiculopathy, and failed back syndrome resulting from an unsuccessful cervical spine surgery, with persistent chronic nerve pain. Dr. Krishna further described radiating neck pain, muscle weakness and

sensory deficits.

In contrast, neither of Defendant's experts, neurologist Richard Lechtenberg, nor orthopedic surgeon Joel Grad, testified as to a cause of Plaintiff's injuries other than the July 6, 2011 accident. Nor was evidence presented, as Defendants suggest, that Plaintiff's injuries were the result of spondylosis or other degenerative joint disease in Plaintiff's cervical spine.

Award for Lost Earnings

Defendants contend that the award for lost earnings should be vacated arguing that the methodology employed by Plaintiff's expert economist, Dr. Debra Dwyer, was flawed and not based on any reasonable certainty. Based on Plaintiff's work history, Defendants argue that the figures used to determine his lost earnings do not reflect the number of hours he typically worked in a given year before the accident. Defendants criticize Dr. Dwyer's choice of a particular three-year period, 2007, 2008 and 2009, on which to base Plaintiff's average hours worked, rather than the three years preceding that time period or the following two years, which would have resulted in a much lower yearly average.

Dr. Dwyer explained, however, that she excluded the earlier years because she was looking at a period of time closer to the accident. She testified that the basis for her starting point to determine what Plaintiff would have been able to earn in the labor market would be the last full year of work. Thus, she excluded 2011 because she "would never include" the year of the accident. She excluded 2010 because it was a recessionary year, a time of high unemployment in the construction field when Plaintiff was not working full time and therefore not representative of the hours Plaintiff could be expected to work going forward. Dr. Dwyer testified that she used Bureau of Labor Statistics for employment and earnings data to capture "a business cycle in trends and wages."

Defendants further claim that Dr. Dwyer's estimate was based on assumptions that lacked evidentiary support, citing *Vukovich v 1345 Fee LLC*, 72 AD3d 496 (1st Dept 2010). The expert economist in *Vukovich* projected future lost earnings on a collective bargaining agreement that paid higher wages than the collective bargaining unit of the union for which the plaintiff worked both before and after his accident. By contrast, Dr. Dwyer relied only on contracts of the union of which Plaintiff was a member which were in effect at the time of Plaintiff's accident. In *Janda v Michael Rienzi Trust*, 78 AD3d 899 (2nd Dept 2010), also cited by Defendants, the expert projected the plaintiff's lost earnings based on a higher hourly wage than the plaintiff was earning when he was hurt. Dr. Dwyer's projections were based upon Plaintiff's actual salary and his union contract, dated 2010 through 2012, which was in effect at the time of Plaintiff's accident.

A court may review a jury's award for pain and suffering to ascertain whether it deviates materially from what would be considered reasonable compensation under the circumstances (CPLR 5501 [c]), and for lost earnings to determine if it was established with the requisite reasonable certainty (*Vukovich v 1345 Fee LLC*, 72 AD3d 496 [1st Dept 2010]). Here, the court finds that the award for lost earnings was adequately supported by documentary evidence (*Sanchez v Morrisania II Associates*, 63 AD3d 605 [1st Dept 2009]) and was properly calculated by Plaintiff's expert economist. Accordingly, the award for lost earnings will not be vacated or reduced by the trial court.

Whether Defendants were Deprived of Fair Trial by Court's Rulings

Defendants' final point alleges that they were deprived of a fair trial as a result of several of the court's rulings and the manner and latitude afforded Plaintiff's witnesses as compared to the defense witnesses. First, Defendants allege that as a result of Plaintiff's withdrawal of his left shoulder injury claim, Defendants were prejudiced because they

were unable to question Plaintiff's experts about how that injury impacted his inability to return to work and whether the injury was considered in arriving at their expert opinion.

Defendants also object that the court precluded Dr. Grad from testifying with respect to the neurological testing because Dr. Grad stated that Plaintiff's neurological examination was an "integral part" of his entire assessment, and particularly, that Plaintiff's claims of a complete absence of sensation did not "jive with any injury that he had ..."

To the contrary, the court permitted the defense to cross-examine Dr. Krishna as to whether the left shoulder derangement or lumbosacral disk herniation formed the basis for his opinion as to the cost of Plaintiff's future medical care, and Dr. Krishna responded that they had not. While it is true that the court precluded Dr. Grad's testimony as to his neurological findings because it would have been cumulative of the testimony of Dr. Lechtenberg, Defendants' neurologic expert who testified first, Dr. Grad was permitted to testify as to his orthopedic exam of Plaintiff and as to material not already covered by Dr. Lechtenberg, including the bilateral measurements of Plaintiff's biceps, triceps and rotator cuff (*cf. Shafran v St. Vincent's Hosp. and Medical Center*, 264 AD2d 553 [1st Dept 1999] [blanket preclusion of testimony of plaintiff's pulmonologist, psychiatrist, and neurologist on basis that testimony would have been cumulative of that of psychologist who did testify, was reversible error]).

Finally, Defendants claim prejudice as a result of the court's ruling precluding them from questioning Plaintiff about physical therapy treatment he received for his neck following the May 2010 car accident despite evidence that he sustained a neck injury and suffered from degenerative disc disease in her cervical spine.

In fact, the court specifically permitted defense counsel to ask Plaintiff if he was treated at particular facilities following the May 2010 car accident and about any medical

complaints he made at those facilities. The only limitation placed on defense counsel was a direction not to hold up papers as if he was reading from a record and thereby mislead the jury with the impression that he possessed medical records with which to confront the witness when the records were in fact not in admissible form. The court invited defense counsel to recall Plaintiff if the medical records were subsequently obtained in admissible form.

Accordingly, the court finds that Defendants have failed to demonstrate that the court's rulings unfairly prejudiced them or warrant overturning the jury's determinations.

Plaintiff's Cross-Motion for Additur

The jury found that Defendants violated Labor Law § 240(1) and that the violation was a substantial factor in causing Plaintiff's injuries. The jury awarded $374,412.00 for Plaintiff's past lost earnings, $2,589,353.00 for 15 years of future lost earnings and $1,180,376.00 for 30 years of future medical expenses. The parties agreed that the past medical expenses to the date of verdict amounted to $124,088.

Notwithstanding the unimpeached and uncontradicted testimony of Plaintiff and his treating doctors regarding Plaintiff's injuries and the resulting pain and suffering, the jury did not award Plaintiff any damages for past or future pain and suffering.

Plaintiff now cross-moves for additur claiming that that jury's failure to award past and future pain and suffering deviates materially from what the First Department has found to constitute reasonable compensation for similar injuries (*Saft v Consol. Edison Co. of New York*, 124 AD3d 410 (1st Dept. 2015). As Plaintiff notes, the First Department has found that the failure to award damages for pain and suffering that was evident in the record deviated materially from what is reasonable compensation and additur was warranted (*Kane v Coundorous*, 11 AD3d 304 [1st Dept 2004]), and all four departments

of the Appellate Division are in agreement (*Conley v City of New York*, 40 AD3d 1024 [2nd Dept 2007]; *Simeon v Urrey*, 278 AD2d 624 [3rd Dept 2000]; *Faulise v Trout*, 254 AD2d 755 [4th Dept 1998] (cited by *Kane*, *supra*) and *Crawford v Marcello*, 247 AD2d 907 [4th Dept 1998]) (cited by *Kane*, *supra*).

Defendants counter that, although Plaintiff's cross-motion is framed as a one for addittur, Plaintiff is in fact arguing that the jury's failure to award damages for past and future pain and suffering is inconsistent with an award for future medical expense and future lost earnings, and because Plaintiff failed to object to the inconsistent verdict before the jury was discharged, Plaintiff has waived the argument.

In support, Defendants cite *Stanford v Rideway Corp.* (161 AD3d 505 [1st Dept 2018]), where the First Department affirmed the trial court's denial of the plaintiff's post-trial motion to set aside the jury's verdict upon finding that the plaintiff had waived the argument that the verdict was inconsistent by failing to raise it before the jury was discharged, thus preventing the trial court from taking corrective action (*Id.* at 506, citing *Barry v Manglass*, 55 NY2d 803 [1981]).

While Defendants are correct that a party is required to preserve a claim that a verdict is inconsistent, and here, the jury's failure to award pain and suffering damages is seemingly inconsistent with an award for future earnings and medical expenses, *Barry* makes clear that an "an inconsistency exists only when a verdict on one claim necessarily negates an element of another cause of action" (*Id.* at 805). No such contradiction was presented in this jury's verdict sheet.

Furthermore, in arguing that *Stanford* dictates a denial of the instant cross-motion, Defendants ignore a critical distinction. The court in *Stanford* found that the plaintiff's evidence as to her past pain and suffering was "not compelling" and that the jury could

reasonably have found that the plaintiff's claims were inconsistent with the objective medical findings. Significantly, the court further found that the award of no damages for past pain and suffering did not deviate from what would be reasonable compensation.

In striking contrast, the record here is replete with evidence of Plaintiff's traumatic injuries, including a ruptured right bicep tendon and a surgery to repair it, torn labrum in the right shoulder and surgery to repair it, neck/back/spine injuries including herniations, bulges and ruptured disc resulting in an unsuccessful back surgery, permanent limitations in range of motion of the right shoulder, and permanent and progressive limitations and pain in his back/neck/spine which will require future surgery. Defendants also ignore the plethora of First Department cases in which the Appellate Division has affirmed the grant of a new trial unless the defendant agreed to an additur where there was an original verdict of zero for past or future pain and suffering, or both (*see e.g. Sanchez v City of New York*, 97 AD3d 501 [1st Dept 2012]; *Bridges v City*, 18 AD3d 258 [1st Dept 2005]; *Bradshaw v 845 U.N. Ltd Partnership*, 2 AD3d 191 [1st Dept 2003]; *Myers v S. Schaffer Grocery Corp.*, 281 AD2d 156 [1st Dept 2001]; *La Fleur v Con Ed*, 245 AD2d 36 [1st Dept 1997].

Although the amount of damages awarded for personal injuries is primarily a question for the jury and the jury's determination is entitled to great deference based on its evaluation of the evidence (*Ortiz v 975 LLC*, 74 AD3d 485 [1st Dept 2010]), its determination should be set aside where the verdict is inadequate (*LaTorre v Knorr*, 35 AD3d 671 [2nd Dept 2006]). Where the court finds a jury verdict to be palpably insufficient, the court lacks the power to increase the damages directly, but may order a new trial unless the defendant stipulates to a higher amount, which the court determines to be the minimum warranted by the weight of the evidence (Siegel, NY Prac § 407 [6th ed]; *Kupitz v Elliott*, 42 AD2d 898 [1st Dept 1973]). Additionally, pursuant to CPLR § 5501(c),

the appellate courts may review a money judgment to determine whether it is excessive or inadequate and whether a new trial should be granted absent a stipulation otherwise. This provision is applicable to the trial courts as well (*Donatiello v City of New York*, 301 AD2d 436 [1st Dept 2003]). CPLR §4404(a) authorizes a court to set aside a jury's verdict on the ground that it is not supported by legally sufficient evidence, or on the basis that the verdict is contrary to the weight of the trial evidence.

Because personal injury awards, especially those for pain and suffering, are not subject to precise quantification, courts look to challenged awards in similar cases to determine whether an award deviates materially from what is considered reasonable compensation (*Donlon v City of New York*, 284 AD2d 13 [1st Dept 2001]; *Karney v Arnot–Ogden Mem. Hosp.*, 251 AD2d 780, 782, *lv. dismissed* 92 NY2d 942 [1998]).

With respect to reasonable compensation for Plaintiff's neck/back/spine injury, which includes herniations, bulges and ruptured disc and an unsuccessful surgery, Plaintiff cites *Lewis v Port Auth. of New York New Jersey*, 8 AD3d 205 (1st Dept 2004]) (jury's award for past pain and suffering reduced to $500,000 and for future pain and suffering reduced to $1,000,000 where the plaintiff underwent a single fusion surgery as compared to Mr. Natoli's three surgeries to date), *Gonzalez v Rosenberg*, 247 AD2d 337 (1st Dept 1998) (total pain and suffering awards of $1,500,000 [$750,000 past and $750,000 future] sustained where plaintiff suffered herniated disc and underwent two unsuccessful surgeries as compared to Mr. Natoli's ruptured disc, multiple disc herniations, bulges), *Donlon v City of New York*, 284 AD2d 13 (1st Dept 2001) (award of $500,000 for past pain and suffering and $400,000 for future pain and suffering where plaintiff fractured two vertebrae and returned to work as a firefighter with no restrictions after one year), *Amoneba v Perry Beverage Distributors, Inc.*, 294 AD2d 285 (1st Dept 2002) (awards increased to $200,000

for past pain and suffering and $750,000 for future pain and suffering, for plaintiff with four herniated discs), *Rountree v Manhattan 6 Bronx Surface Transit Operating Auth.*, 261 AD2d 324 (1st Dept 1999) (awards reduced to $450,000 for past pain and suffering and $300,000 for future pain and suffering where plaintiff sustained a herniated disc at C5-C6, with cervical pain and right shoulder radiculopathy, was disabled for several months and lost ability to perform his former job), *Waring v Sunrise Yonkers SL, LLC*, 134 AD3d 488 (1st Dept 2015) (awards of $100,000 for past pain and suffering and $500,000 for future pain affirmed where plaintiff sustained two bulging discs and three lumbar herniations, will require surgery, may perform sedentary work), *Martinez v Manhattan & Bronx Surface Transit Operating Auth.*, 23 AD3d 302 (1st Dept 2005) (award of $150,000 for past pain and suffering affirmed and reduced award for future pain and suffering to $450,000 where plaintiff underwent no surgery and was able to return to work "with over-the-counter Tylenol"), *Rutledge v New York City Transit Auth.*, 103 AD3d 423 (1st Dept 2013) (affirmed award of $400,000 for future pain and suffering for plaintiff who sustained "herniation to her lumbar spine and two bulging discs to her cervical spine, resulting in radiculopathy, for which surgery was recommended"), and *Ortiz v New York City Transit Auth.*, 107 AD3d 465 (1st Dept 2013) (First Department affirmed awards of $300,000 for past pain and suffering and $100,000 for future pain and suffering [for 10 years]).

To determine reasonable compensation for Plaintiff's shoulder injury, Plaintiff cites *Rubio v New York City Transit Auth.*, 99 AD3d 532 (1st Dept 2012) (First Department proposed awards of $500,000 for past pain and suffering and $500,000 for future pain and suffering where plaintiff was 62 years old at time of accident, had a preexisting biceps tear, suffered a rotator cuff tear for which he underwent unsuccessful surgical repair, resulting in a permanent reduction in strength and range of motion), *Guillory v Nautilus Real Estate,*

Inc., 208 AD2d 336 (1st Dept 1995) (affirmed awards of $450,000 for past pain and suffering and $750,000 for future pain and suffering for a 51-year-old plaintiff who sustained very extensive tear in the rotator cuff) and *Bernstein v Red Apple Supermarkets*, 227 AD2d 264 (1st Dept 1996) (awards of $600,000 for past pain and suffering and $500,000 for future pain and suffering for plaintiff who "suffered serious personal injuries, including a torn left rotator cuff").

Neither Plaintiff nor the court could find any First Department decisions proposing reasonable compensation for Plaintiff's torn bicep with surgery, however Plaintiff suggests that the cases cited for a shoulder tear should provide guidance.

Although Defendants reject the awards suggested by Plaintiff, they do not cite any comparable cases as a basis for determining reasonable compensation for past and future pain and suffering for Plaintiff's injuries.

Relying upon the above precedents as a reference, this court concludes that the jury award for past and future pain and suffering deviated materially from what would be reasonable compensation for Plaintiff's injuries.

Accordingly, it is

ORDERED, that the part of Defendants' motion seeking to set aside the jury's finding that the absence of a hoist was a violation of Labor Law § 240(1) as against the weight of the evidence, is denied;

ORDERED, that the part of Defendants' motion seeking a new trial due to juror confusion regarding that Labor Law § 240(1) charge is denied;

ORDERED, that the part of Defendants' motion seeking to vacate the award for future medical expenses as the evidence did not establish that all of Plaintiff's claimed injuries were caused by the accident, is denied;

ORDERED, that the part of Defendants' motion seeking to vacate the award for lost earnings because the number of hours Plaintiff's expert opined he would work was not based on any reasonable certainty, is denied;

ORDERED, that the part of Defendants' motion seeking a new trial because Defendants were deprived of a fair trial by the cumulative effect of rulings made by this court, is denied;

Plaintiff's motion for additur is granted to the extent that the jury's verdict and setting aside the award of damages for past and future pain and suffering, and granting a new trial solely on that category of damages, unless Defendants, within 30 days of service of a copy of this order with notice of entry, stipulate to increase the award of past pain and suffering to $500,000.00 and the award of future pain and suffering to $500,000.00.

Any other requested relief not expressly granted is denied.

Dated: April 11, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.S.C.

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