Kang v. Sahota

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

M.B. Blok J.

Heard: July 14 to 16, 2020.

Judgment: April 7, 2021.

Docket: M204030

Registry: New Westminster

[2021] B.C.J. No. 700 | 2021 BCSC 624

Between Simratpal Kang, Plaintiff, and Malkit Singh Sahota, Defendant

(121 paras.)

Counsel

Counsel for the Plaintiff: B. Yu.

Counsel for the Defendant: J. Gill.

Reasons for Judgment

M.B. BLOK J.

I. Introduction

1 Simratpal Kang was injured in a car accident that occurred on July 15, 2017. Liability is admitted, so these reasons for judgment address damages only.

2 The parties are fairly far apart in their assessment of the seriousness of the plaintiff's injuries. The plaintiff says his injuries are permanent and they significantly affect his ability to work as a longshoreman. The defendant notes the plaintiff worked and earned more after the accident than he did before and submits the plaintiff's claims of lost capacity are largely unproven.

3 Some of the evidence summarized below is derived from an agreed statement of facts.

II. Plaintiff's Case

A. The Plaintiff

4 The plaintiff was 25 years old at the time of the accident and 28 at the time of trial. He took one year of post-secondary education before securing work as a longshoreman in June 2015.

The Accident

5 At the time of the accident, the plaintiff was driving a 2003 Nissan Sentra northbound on 124th Street in Surrey, British Columbia. His cousin was in the front passenger seat. They were heading to a restaurant. He was stopped at a red light on 80th Avenue when his vehicle was struck from behind by a 2005 Toyota Corolla.

6 The plaintiff testified that he did not know the speed of the other vehicle at impact, but said it was a "mediocre" impact that pushed his vehicle forward. His chest moved towards the steering wheel but did not come into contact with it. He was wearing a seatbelt. His vehicle was driveable after the collision but it suffered damage to the right side of its rear bumper that cost about $900 to repair.

7 The other driver did not stay at the scene, but Mr. Kang was able to identify the vehicle by noting its licence number before it departed.

Post-Accident

8 Mr. Kang said he first noticed symptoms in his lower back a couple of days after the accident. Neck symptoms began about a month afterward.

9 When asked what symptoms he attributes to the accident, Mr. Kang said "radiating pain from my lower back to my right buttock" and "neck strain". He said his neck feels stiff at times, particularly if he does a physically demanding job. This issue is intermittent. If he does a physically demanding shift he feels it after work, although it also arises randomly, including at nighttime. He said his neck symptoms have improved by about 50 percent since the accident.

10 As for his back, he said he gets low back pain right after work on his work days, and otherwise it occurs two or three times a week. Bending and heavy lifting aggravate his back. His back symptoms have improved by 50 percent since the accident. He said treatments have helped. He said his back was the most significant injury he suffered in the accident.

11 Treatments consisted of massage therapy, physiotherapy and active rehabilitation, with massage being the most helpful. He said that because of the way he has to bid for work shifts (explained below), he missed eight to ten treatments.

12 As noted in the agreed statement of facts, the plaintiff had 42 treatments (massage therapy, chiropractic and kinesiology) from one particular omnibus clinic between September 7, 2017 and May 9, 2019. He attended another clinic on two other occasions. He missed scheduled treatments on 10 occasions.

13 His pre-accident weight was 220 pounds, but he now weights 290 pounds. He attributes his weight gain to a lack of treatments and exercise. He feels more physiotherapy and active rehabilitation might help.

14 Mr. Kang said he had some pre-accident anxiety that became a little more prominent starting about a month after the accident. He did not have any sleep problems prior to the accident but had "a little bit" of trouble sleeping afterward.

15 He has not seen any physician since the Covid-19 lockdown. He does not take any prescription medications as he is concerned they might be habit-forming or addictive.

Employment

16 As noted earlier, Mr. Kang is a longshoreman. He works at the Deltaport container terminal.

17 He testified that he went to work "immediately" after the accident. I took this not to be a literal statement, but instead I understood him to say he reported to work as usual. He was given light duty work for two weeks to a month. He was working 20 to 25 hours per week just prior to the accident and his hours remained the same afterward. Later in his testimony, he modified the figures to 20 to 30 hours per week.

18 His work involves shift work, with three different shifts (morning, afternoon and graveyard). He said he takes graveyard shifts one to four times a month. He takes shifts that he knows will be less physically demanding. The pay rate for morning shifts is $48 per hour, for afternoon shifts it is $57 per hour and for graveyard shifts it is $68 per hour. Employee benefits are available to those who earn more than $78,000 a year, but he did not work enough hours to achieve that earnings level.

19 Mr. Kang's employment status is that of a "casual" employee. Work availability is offered through the union on a seniority basis. There are about 1,000 union members. Seniority for casual employees is divided between casual "boards", designated as A, B, C, etc., down to H Board. Mr. Kang said he was on E Board at the time of the accident, but he has now gained enough seniority

that he is now on C Board. Shifts are posted through an online portal, which employees access to check for available shifts. He said he checks this portal three times a day.

20 Some jobs are more desirable than others. He considered that shifts with the multi-track tractor-trailer were the least physically demanding. Sometimes there are no jobs available on a given day, and sometimes jobs involving more physically demanding work are the only ones available.

21 Mr. Kang said he turns down some available jobs because they are too physically demanding. He acknowledged that no physician has told him to refuse this work. He knows from the description of the job, or how much work is offered on that shift, what kind of job is being offered on the portal. He added that safety is a primary concern as well, saying he does not feel safe with some of the jobs given his physical limitations.

22 Mr. Kang said that, as at the date of trial, he was working, but he said he did not work a lot during the pandemic. His goal is to work 40 to 50 hours per week.

23 Mr. Kang referred to a number of photographs depicting work equipment and work tasks at Deltaport. These included:

a) A "bomb cart": this is a colloquial term for a small tractor-trailer unit that is used to move containers within the yard. The job involves sitting in a cab all day;

b) Lashing: this involves securing containers onto ships, using heavy (40 to 50 pounds) lashing bars. The job, done with two people, involves constant lifting of the bars and the turning of their turnbuckles. He said he cannot do this work because it is too physically demanding. He last did this type of work 18 to 24 months ago and, at that time, he had to rely on his co-worker to do 70 to 80 percent of the job;

c) Reach-Stacker: this is a machine that moves containers short distances and stacks them. This job involves sitting in a cab and constantly looking up in awkward positions. He said he is not capable of this sort of work because of the awkward positions;

d) Tying Steel: this job involves using heavy hooks and slings to attach to a crane in order to transport bulk steel. This is another job involving a work team or pairing. He said he is not able to do this work because of the constant bending and lifting, which involves weights of 15 to 50 pounds. He last did this sort of work 18-24 months ago, at which time his work partner did most of the work; and

e) Rubber Tire Gantry: this is a mobile overhead crane that requires the operator to sit in an awkward position, looking down, while stacking containers. You have to be certified to do this job. He is not certified, and he has not pursued certification for this work because it requires climbing ladders and stairs.

24 Mr. Kang said his income in 2017 was around $60,000; in 2018 it was $72,000; and in 2019 it

was in the area of $63,000 or $64,000. He attributes the decrease in income from 2018 to 2019 to his inability to do the more physically demanding jobs.

Housekeeping and Recreational Activities

25 Mr. Kang lives in a home with his wife and daughter, his parents, his grandmother and his sister. Formerly, he helped with housekeeping by vacuuming, washing dishes and cleaning cars. Post-accident, he hardly does any housework as it aggravates his back. The jobs he used to do are now done by his sister. Other work is done by his wife and mother.

26 In the two-year period prior to the accident he enjoyed playing basketball and flag football, but he is not able to do those now. Jumping aggravates his back, as does the twisting that occurs in flag football.

27 On two occasions he went on vacations with others and he did not do any activities on those trips, and he did not join in when the others played basketball.

Other Matters

28 Mr. Kang acknowledged that he attended at Delta Hospital on June 13, 2017, about a month prior to the accident, with complaints of heartburn, mostly in his rib area, which radiated to his upper back. He said this event lasted two or three days and then resolved. He was never given a diagnosis. He said he had not had any other back pain in the three years preceding the accident.

29 He said he had a fall at some point post-accident, where he missed the last step in a set of stairs. He said he bruised his left gluteal area.

30 Mr. Kang also acknowledged he had some anxiety issues prior to the accident. He said "I can't handle big crowds". He believed he had raised this issue with his doctor prior to the accident. She prescribed some medication, but he only took that medication a few times as he was concerned it might be habit-forming.

Cross-Examination

31 In cross-examination, Mr. Kang said:

a) right after the accident, he and his cousin continued on to a restaurant and, after that, he dropped off his cousin, went home and did a couple of house chores;

b) the damage to his vehicle was quite minor "to a certain extent" and cosmetically there was barely any damage;

c) he had a fall on January 3, 2018, causing bruising to his gluteal muscle. It was put to him that he had a second fall in July 2018, but he said he did not recall a second fall, though he corrected himself about the date of the fall he did remember, saying it occurred in July 2018;

d) he agreed he had some headaches at times following the accident, but said they were "very minimal";

e) he also agreed he had some anxiety after the accident, but said this had improved by 50 percent and his "mood issues" were minor and "mediocre" and did not cause him any functional disability;

f) he has never sought any counselling for any mood issues, he did not discuss them with his new family doctor and he did not discuss them with Dr. Moosa, his former family doctor. He agreed there was no particular reason he has not discussed anxiety with his physicians. He also agreed treatment might help him manage his mood;

g) the symptoms in his neck improved by 50 percent through treatment and therapy;

h) his neck is not causing any disability but instead it is his lower back;

i) he agreed with his discovery testimony that was to the effect that the pre-accident activities that were affected by the accident were "mostly basketball" and there were no other activities that were affected;

j) he tried playing basketball post-accident, five or six times, though most of these attempts took place in the year after the accident. He agreed that he does not have the same amount of free time anymore given that, since the accident, he got married and now has a three-month old daughter;

k) he acknowledged there are six adults in his household and everyone shares chores. He said his pre-accident activities consisted of "washing dishes here and there" and he did not dispute that in May 2018 he told a kinesiologist that he had no pre-accident household responsibilities. Ultimately, he agreed that his ability to do household chores has not been negatively affected;

l) he agreed he is still able to travel. He travelled to India in February 2019. The India trip lasted two or three days and involved a 16-hour flight, where he became engaged to his wife. He said he had no issue with the four-hour flight to Arizona (September 2019), when he and others stayed three nights and went to bars and nightclubs. A trip to Thailand in April 2018 lasted 12 days and involved a 14-hour flight. In Thailand he did lots of walking, and went out at night. He said he managed the flights "just fine" but had to get up to stretch. His trips were not affected by his injuries aside from not playing basketball while in Thailand;

m) he agreed he had weight problems prior to the accident. In May 2017 he told Dr. Moosa that his weight was 240 or 278 pounds. When asked if he had poor eating habits, he said "a bit, yes". He agreed these contributed to his weight issues;

n) he agreed that his doctor recommended massage therapy in July 2017, but he did not go for therapy until October 30, 2017, saying that this was because "they were fully booked up". He agreed his symptoms had improved with treatment and he should have gone sooner. He also agreed there were some significant periods of time when he did not attend any treatment. He said, "I was going through a tough time";

o) he acknowledged he missed sessions or left early, but he explained that it was because he had to attend work;

p) he agreed there was a four-month gap in treatment from December 2018 to April 2019, and another gap from July 2019 to October 2019, then another from October 2019 to late January 2020;

q) he acknowledged that at his November 2019 discovery he testified "I try to go [to treatment] once a week" and that he was attending massage treatments approximately once a week. He agreed that was not accurate, but said he was *trying* to go once a week;

r) there is no way to determine or verify that he turned down work or passed on work that was available. In fact, he worked more post-accident because he moved up to a higher board;

s) no one has suggested to him that he stick to light duty work;

t) he was on light duty in the month after the accident, but he agreed summer is when the regular union members take vacation and summertime is when there is "bomb cart" work available. He said he was on light duty that summer because he was getting the bomb cart rating;

u) he agreed that it was not possible that *all* of his work hours in that time would have been light duty work. He also agreed that he was able to work a fair number of hours in the time prior to commencing treatments;

v) he was moved up to D Board in July 2017. This enabled him to work increased hours. He moved to C Board in July 2018. His post-accident work hours were greater than his pre-accident hours, which he attributed to his moves up the casual boards as he "jumped past 200 people";

w) a chiropractor's note of December 6, 2017 recorded him saying he "works full time, did not miss work", but he testified that he was "pretty sure" he said "part-time" as he never worked full-time;

x) he missed work (or was unavailable for work) during his trips to Thailand in April 2018 (12 days), India in February 2019 (about seven days) and Arizona in September 2019;

y) there was construction taking place at Deltaport in December 2019 and January 2020, and work slowed for the casual employees during that time. In particular, there was no bomb cart work available to him;

z) from March 2020 onward - after the pandemic began - the only work available to him was physical work;

aa) when it was put to him that he never had to turn down shifts, he said he turned work down because he knew how hard the work would be. He agreed, however, that he could not identify the days when this happened;

bb) he has never sought any workplace accommodations from his employer. He knows that accommodations are available at his workplace;

cc) he did heavier duty work after the accident but only "once in a blue moon", and only with his work partner doing 80 percent of the work;

dd) he explained that once he indicates through the work portal he is available for work he has to accept the work assigned to him;

ee) he feels his career has been hindered a bit because he has missed out on work, although he agreed he is still on track to move to B Board when the opportunity is there. The higher he is up the boards, the higher his priority in terms of picking jobs and doing lighter work;

ff) when he was assessed by Dr. Mian (physiatrist) and Ms. Ditson (occupational therapist), he did not fully participate in the assessments because he was not capable of doing some of them. He agreed he did not even try those ones because he knew they would aggravate his back. He agreed he was self-limiting in these assessments;

gg) he attended a gym prior to the accident and would have continued with that but for the accident; and

hh) he has not taken any counselling and he agreed it was unlikely he would engage in it if available.

B. Gurjinderpal Sidhu

32 Mr. Sidhu is a co-worker of the plaintiff at Deltaport. He has known the plaintiff for five years. He started as a longshoreman at the same time as Mr. Kang. Sometimes they worked on the same shift, and on the same team.

33 Mr. Sidhu said Mr. Kang was a good worker prior to the accident. He was fine doing heavy work. After the accident, Mr. Kang had problems with his back when they worked with steel. He also had problems when they had to use ladders. Mr. Sidhu said he was aware of the problems because Mr. Kang was saying he had back problems.

34 Mr. Sidhu said sometimes other workers do not like working with Mr. Kang because if Mr. Kang has back problems the other worker has to do a lot more. He said Mr. Kang now avoids heavy work or he "won't show up". Mr. Sidhu said he last saw Mr. Kang do lashing or steel work about four months prior to trial.

35 Mr. Sidhu said he makes about $80,000 per year.

36 In cross-examination, Mr. Sidhu agreed that construction at Deltaport in late 2018 and early 2019 caused less work to be available. He disagreed that the pandemic essentially shut down the docks, but said although there was less work, fewer workers were showing up, and so there was still enough work available.

37 Mr. Sidhu agreed that the cruise ship work was lost during the pandemic, but he noted that only full union members do that sort of work. He agreed, however, that during the pandemic this meant that full union members were now doing work that is usually done by the A, B and C Boards.

38 Mr. Sidhu agreed that since the pandemic the manner in which work is dispatched has changed, and workers no longer have to report in person but can report by telephone. He said that, so far, this had not resulted in any change to the volume of work available to casual workers.

39 Mr. Sidhu agreed that once a worker indicates he or she is available, the choice of work is up to the terminal. Only full union members and casual workers on the A Board can turn down work once assigned.

40 Mr. Sidhu agreed he never actually saw any division of labour on Mr. Kang's work teams. He said his knowledge of Mr. Kang's difficulties with his back did not come from just what Mr. Kang told him, as he has seen Mr. Kang work slower. When Mr. Sidhu is with him, he (Mr. Sidhu) may be finished a task and Mr. Kang is still doing his task and needs help. When Mr. Sidhu has asked Mr. Kang about that, Mr. Kang says his back hurts and he cannot bend.

C. Jerica Ditson - Occupational Therapist

41 Ms. Ditson performed a functional capacity evaluation on January 22, 2020 and prepared a report dated February 28, 2020. Her report also contained a cost of care analysis.

42 In her report, Ms. Ditson noted that Mr. Kang underwent formal screening procedures in order to establish the level and consistency of his effort. Based on those test results, in combination with clinical observations, Ms. Ditson concluded that Mr. Kang put forth a consistent and high level of physical effort during testing. From this, she concluded the assessment findings were an accurate measure of Mr. Kang's current functional capacity.

43 Ms. Ditson noted some variability between Mr. Kang's subjective reports of his abilities and limitations and the objective test findings, but said "as a whole the majority of his reports were generally consistent with objective findings". Similarly, Mr. Kang's subjective reports were generally consistent with objective measures and observations during testing.

44 Ms. Ditson concluded Mr. Kang demonstrated the capacity to perform work within the following parameters, among others:

a) functional strength activities up to the Modified Medium range, but he should avoid performing tasks that require repetitive load lifting;

b) overhead reaching on an occasional basis;

c) mild bending and stooping on an occasional basis with the ability to shift and change positions; and

d) he should avoid performing more moderate degrees of bending and stooping, as well as sustained squatting, crouching and kneeling.

45 Ms. Ditson said Mr. Kang does not meet the full functional strength requirements of the heavier longshore positions such as lashing and readying loads of steel commodities, especially given the repetitive nature of the work involved. He likely meets the functional strength requirements of the lighter positions.

46 Ms. Ditson said her test findings revealed that Mr. Kang is not competitively employable as a longshoreman on either a part-time or full time basis. In her testimony, she explained that he has reduced competitiveness due to his limitations.

47 She concluded:

> Due to limitations in his functional strength capacity and his limitations with below waist level postures, standing and overhead reaching, he is not compatible with performing the heavier physical labour Longshoreman positions. He did not demonstrate the sustainable capacity to perform the job demands required of these positions, and due to the dynamic and often hazardous environment of heavier Longshoreman work (i.e. environmental and weather hazards, it is likely unsafe for him to perform the physical labour positions.
>
> Mr. Kang is better suited for working in the lighter Longshoreman Positions. Specifically he is better suited for driving the bombcart and unloading the car ships. ... He is not as well suited for performing the stackers position, as this position requires repetitive bending and stooping and constant standing. ... Although he is better suited for the driving and unloading car ships positions, he would still require accommodations to shift and change his positions to help manage his lower back symptoms.

48 Ms. Ditson also commented on Mr. Kang's functional capacity for daily living, recreational and other activities. She said that if he were to move away from his parents' home he would have some limitations in performing more prolonged durations of moderate to heavier cleaning tasks and outside yard work.

49 In cross-examination, Ms. Ditson said:

a) she agreed that her report, and her test results, rely in part on Mr. Kang's subjective reports;

b) Mr. Kang told her that, after the accident, his shifts ranged in frequency from three to five shifts each week;

c) there were times during testing that Mr. Kang said he did not feel safe, and so he was self-limiting;

d) when asked if she has to rely on the truth of those statements, she said she checks these reports against other tests to "cross-correlate". He was unable to sustain certain tests and was consistent in his inability or test refusals;

e) when asked if Mr. Kang could have attempted certain tests he declined to perform, she said she tells her test subjects to determine what they feel safe doing. She said his declining to do tests was consistent with other tests and with his declining performance on other tests; and

f) she has assessed many longshoremen in the past, and some of those have been done on site, so she is familiar with the work milieu.

50 In answer to questions from the bench, Ms. Ditson said there were three tests that Mr. Kang started but did not complete (the Valpar and Matheson Bench tests, and the Lashing Simulation) and one test that he declined to do at all (the Epic 4).

D. Dr. Najam Mian - Physiatrist

51 Dr. Mian is a specialist in physical medicine and rehabilitation (physiatry). He has a sub-specialty in pain medicine. Dr. Mian assessed Mr. Kang on August 8, 2019 and wrote a report dated December 5, 2019.

Current Symptoms (As of August 2019)

52 Dr. Mian summarized Mr. Kang's then-current symptoms as follows:

a) Lumbar pain: Focal right lumbar pain, described as "sharp", aggravated with bending and, in particular, lifting heavy weights, and by extended standing or walking;

b) Neck pain: Bilateral paracentral cervical pain, described as "stiff", aggravated by sitting and standing;

c) Sleep disturbance: Often "tossing and turning" at night, with difficulty maintaining sleep due to neck and back pain; and

d) Mood disturbance: Mr. Kang reported that he is "cranky and frustrated" that he cannot go to work, is depressed he is not making enough money and has ongoing anxiety about "what he could have been".

Diagnoses

53 Dr. Mian made the following diagnoses: (1) cervical sprain/strain, with persistent chronic mechanical cervical pain; and (2) lumbar sprain/strain, with persistent chronic mechanical lumbar pain. Dr. Mian concluded it was more likely than not that these were a direct result of the accident of July 15, 2017.

Prognosis

54 In his discussion of prognosis, Dr. Mian noted the treatments Mr. Kang had taken to date, and he also noted Mr. Kang's reluctance to take medication and the fact that he has not attempted psychological treatments or procedural treatments. Dr. Mian said:

> Based on the natural history of his conditions, I would not expect complete resolution of his mechanical cervical or lumbar pain at any point in his life.

Impact of Injuries

55 As for the impact of the injuries on Mr. Kang's work, Dr. Mian noted Mr. Kang's report that he could not do the heavier jobs associated with longshore work. Dr. Mian said:

> Based on his diagnoses of chronic mechanical cervical pain and chronic mechanical lumbar pain, I would expect limitations in his ability to perform sustained or repetitive loading of the cervical region and the lumbar region. These limitations would be amplified when lifting heavier objects. Based on his descriptions of the heavier tasks that are required as a longshoreman, in my opinion it is medically reasonable that he has attempted to refrain from these.
>
> In my opinion, a loss of productivity, more frequent breaks, sick days during flares of pain and shorter work hours during flares of pain are medically reasonable, indefinitely.

56 As for limitations in other areas of life, Dr. Mian noted Mr. Kang's report that he did not have any limitations in his ability to perform household activities. He said Mr. Kang's limited ability to play basketball is "medically reasonable" and that touch football could cause pain flare-ups.

Recommendations

57 Dr. Mian noted that some of Mr. Kang's symptoms have been dissipating. He noted the treatments to date, and said he recommended a "more multimodal approach" for management of

Mr. Kang's chronic pain, which would involve pain medicine (pharmacologic treatments), physical treatments, psychological treatments and procedural treatments. He elaborated on those treatments as follows:

a) Pharmacologic treatments: Dr. Mian recommended two medications, one for pain flare-ups and the other that could "potentially help with his chronic myofascial pain and sleep disturbance";

b) Physical treatments: He noted Mr. Kang seems to have ongoing deconditioning. He recommended a short course of re-engagement with active rehabilitation, to be followed by a home or gym-based exercise program. He said, "In my opinion, long-term engagement in conditioning/resistance exercise will help limit flares of pain";

c) Psychological treatments: Dr. Mian recommended an assessment by a chronic pain psychologist. He noted that psychological treatments can often be more beneficial than physical treatments. He also recommended self-management programs using online modules;

d) Procedural treatments: He recommended diagnostic medial branch (or facet) blocks. If these resulted in a significant reduction in pain, then this would indicate facet joints as the source, and would support the further procedure of radiofrequency ablation "which can often result in longer-term improvement of his pain" and "help him function at a significantly higher level". If the initial blocks did not result in a significant response, then Dr. Mian recommended further treatment through intramuscular trigger point injections.

Cross-Examination

58 In cross-examination, Dr. Mian acknowledged that in preparing his opinion he relied on the accuracy of the plaintiff's reports, and if these were not accurate then his opinion would be affected.

59 Dr. Mian said he did not have Ms. Ditson's functional capacity report at the time of his assessment, and that report would have been helpful to him. He agreed that, based on Mr. Kang's statement to Ms. Ditson that his symptoms had improved 50 to 60 percent through massage therapy, this treatment was working. He said, however, that massage therapy is not curative and he found it hard to see "what the course would have been". He said, instead, the plaintiff should be focusing on strengthening through active rehabilitation, which he thought would help. He said the plaintiff should be an active participant in his rehabilitation and not be reliant on passive treatment, which is more appropriately limited to flare-up management.

60 Dr. Mian said his own comments concerning the impact of the injuries on the plaintiff's work are premised on the plaintiff's report about what his work entails.

III. Defendant's Case

61 The defendant did not call any *viva voce* witnesses. The only defence witness, occupational therapist Jeff Ford, provided an expert's report as a rebuttal to Ms. Ditson's report, but he was not required by the plaintiff for cross-examination.

A. Jeff Ford - Occupational Therapist

62 Mr. Ford's rebuttal report is dated May 25, 2020. In that report, he said:

a) he disagreed that the results of Ms. Ditson's function capacity evaluation objectively support the plaintiff demonstrating a "consistent and high level of physical effort", and he provided a number of reasons why he came to that conclusion, including what he saw as Mr. Ditson's failure to discuss the validity of the effort used by the plaintiff in various tests;

b) he disagreed with the rating assigned by Ms. Ditson for sitting, standing, walking, climbing, reaching overhead, bending/stooping and crouching/squatting/kneeling, "as these have not been substantiated and justified by objective and verifiable date presented";

c) without adequate support indicating a valid physical effort put forward on testing, he would disagree with the results documented for functional tolerances as being representative of maximum possible effort put forward by Mr. Kang on assessment;

d) he concluded:

> I would not identify objective and verifiable data representative of a maximum possible effort that would indicate that Mr. Kang does not meet the physical requirements of his position as a longshoreman, nor does the data indicate a limitation in performance of housekeeping and home maintenance activities or leisure pursuits as tolerated.

IV. Positions of the Parties

A. Plaintiff

63 Counsel for the plaintiff submits the plaintiff is a credible witness, noting that he kept working as best he could and did not exaggerate his limitations. The alleged inconsistencies in his testimony, if valid at all, are inconsequential. Also, the fact that the accident was relatively minor in nature means little or nothing in terms of assessing the injuries claimed.

64 Counsel submits the evidence establishes that the injuries to the plaintiff's neck and back have caused mood or anxiety issues, sleep difficulties and headaches. The plaintiff's back injury is his most significant injury. It limits the work he can do at the docks and so he avoids the heavier jobs

and instead tries to arrange his work so that he only has lighter duty jobs. His injuries also prompted him not to pursue certification as a rubber tire gantry operator because it involves climbing ladders and prolonged periods of looking downward.

65 The plaintiff submits that his testimony is supported by both that of his co-worker, Mr. Sidhu, and the expert evidence. Ms. Ditson concluded the plaintiff is not competitively employable as a longshoreman either on a part-time or full-time basis. Dr. Mian's diagnosis was that the plaintiff had suffered neck and lumbar back strains or sprains, causing persistent chronic mechanical cervical pain and persistent chronic mechanical lumbar pain. Dr. Mian said he does not predict complete resolution of these symptoms at any point in the plaintiff's life.

66 Relying on *Wong v. Campbell*, 2020 BCSC 243, and several of the cases cited within it (*Blackman v. Dha*, 2015 BCSC 698; *Carson v. Ehman*, 2019 BCSC 2120; *Williams v. Nekrasoff*, 2008 BCSC 1520; and *Ruscheinski v. Biln*, 2011 BCSC 1263), the plaintiff submits that non-pecuniary damages ought to be assessed in the range of $85,000 to $90,000.

67 The plaintiff submits that his claims for past and future losses of capacity ought to be assessed together, as was done in *Bhatti v. Ethier*, 2018 BCSC 1779 [*Bhatti*]. The plaintiff acknowledges the challenges in this assessment, given that he did not keep a log of those shifts he declined and given that he worked more and earned more after the accident than he did before. However, in terms of past loss, he emphasizes the evidence showing he turned down shifts or otherwise limited the work he accepted, and he has had to rely on co-workers to accomplish heavier tasks, a situation that does not endear him to work partners.

68 As for loss of future capacity, many of the same factors apply and so the plaintiff's ability to earn income has been diminished. The plaintiff submits he meets all of the factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 [*Brown*].

69 The plaintiff submits an award for loss of capacity may be assessed by assuming Mr. Kang's capacity has diminished by 20 percent which, using his 2018 earnings of about $72,300 as an earnings benchmark and assuming retirement at age 65, translates to a gross loss of $535,400.

70 The plaintiff acknowledges a positive contingency given that lighter-duty jobs will be more available to him as he gains seniority. He notes that even a 20 percent loss of capacity over just 10 years brings about a gross loss of $144,700. The midpoint of those two gross figures is $200,000 to $250,000. After allowing for past losses, and taking into account the loss of opportunity to become certified on rubber-tire gantries, the plaintiff submits that $300,000 to $350,000 is a proper assessment of both past and future losses of capacity.

71 I summarize the plaintiff's submissions on other heads of damages as follows:

a) Loss of housekeeping capacity: the plaintiff submits that $15,000 would be an appropriate award that would reflect a balance between acknowledging that other family members do housework as well as his evidence that he avoids heavier household chores;

b) Cost of future care: the plaintiff seeks an award covering active rehabilitation ($500) and cognitive behavioural therapy for pain management ($2,400); and

c) Special damages, which are agreed at $1,494.95.

72 The plaintiff made submissions on failure to mitigate, anticipating (correctly) that the defendant would raise this issue. Essentially, the plaintiff says he acted reasonably in obtaining treatment, but even if he did not, the defendant has not met his burden of showing the extent to which damages would have been reduced had he followed a more diligent course.

73 The following is a summary of the plaintiff's claim:

Non-pecuniary damages: $85,000 to $90,000

Past and future loss of earning capacity: $300,000 to $350,000

Loss of housekeeping capacity: $15,000

Cost of future care: $2,900

Special damages (rounded): $1,455

Total $404,355 to $459,355

B. The Defendant

74 The defendant does not dispute that the plaintiff suffered injuries, but does dispute the nature and extent of the injuries alleged and the damages that are being sought. The plaintiff's neck and back injuries are his most significant injuries, but some of the claims (headaches and increased anxiety), have been shown to be very minor issues.

75 The defendant also says the plaintiff's evidence is unreliable, as there were inconsistencies between things he said at other times and those he testified to in court. These included how much he worked post-accident, whether he did heavier jobs post-accident and whether he stopped playing basketball as a result of his injuries. While the plaintiff said he only did light duty jobs after the accident, it is clear the plaintiff did heavier jobs as well.

76 The defendant emphasizes the plaintiff's symptoms had improved by 50 or 60 percent, and

notes that Dr. Mian said his further treatment recommendations, if followed, would bring further improvement (though not complete improvement).

77 The defendant submits that $40,000 would be an appropriate award for non-pecuniary damages, based on the following cases: *Montes v. Lee*, 2007 BCSC 1238; *Erwin v. Buhler*, 2017 BCSC 362; and *Cegielka v. Grace*, 2020 BCSC 115.

78 The defendant says the plaintiff's claim for loss of past earning capacity suffers from an absence of proof that he missed work shifts or turned down shifts because of his injuries.

79 The defendant submits the plaintiff's claim for loss of future earning capacity suffers from the same dearth of evidence as does the plaintiff's past earnings capacity claim. Specifically, the defendant says there is no real or substantial possibility of a future loss given that: (1) the plaintiff worked and earned more after the accident than he did before; (2) there were unchallenged criticisms of Ms. Ditson's report by Mr. Ford; (3) any negative fluctuations in the plaintiff's earnings were due to matters unrelated to the accident (vacations, interruptions due to construction, and the pandemic); (4) the evidence shows the plaintiff did in fact do heavy work after the accident; and (5) the plaintiff's increasing seniority will result in greater opportunity to work his preferred light-duty shifts.

80 In the event that the Court concludes there is a real and substantial possibility of a future loss of income, the defendant submits it should be assessed on the basis of a loss of capital asset, not on a lost stream of income basis. The defendant suggests an award of $20,000, based on one year's income but discounted to reflect his increasing access to light-duty work, the prospect that his symptoms will improve with treatment and the apparent availability of accommodations at his workplace.

81 The defendant suggests an award of $500 for active rehabilitation, being the only treatment the plaintiff is likely to pursue, and argues that there should be no award for loss of housekeeping capacity because the evidence shows the plaintiff's ability to perform household tasks has not been negatively impacted by the accident.

82 Finally, the defendant submits that the awards for non-pecuniary damages and loss of future earning capacity ought to be reduced by 20 percent as a result of the plaintiff's failure to mitigate.

83 Leaving aside a reduction for failure to mitigate, the following is a summary of the defendant's position on damages:

> Non-pecuniary damages: $40,000
>
> Past income loss: $0
>
> Loss of future earning capacity: $20,000

Cost of future care: $500

Loss of housekeeping capacity: $0

Special damages (rounded): $1,455

Total: $61,955

V. Discussion

A. Credibility and Reliability

84 I found the plaintiff to be credible, in the sense that he was honest and strove to be truthful, but there were curious aspects to his testimony that left me with doubts about its accuracy and reliability. He was an unusually pliable witness in that he readily agreed with propositions or discovery answers put to him in cross-examination that were quite different than those he had given in his direct examination. For example, in direct he testified about the household tasks he now avoids or cannot do, but in cross-examination he agreed his ability to perform household tasks was unaffected. In direct he testified that his weight gain was attributable to a lack of treatments and exercise - clearly implicating his injuries as the cause - but in cross-examination he readily admitted he had problems with his weight prior to the accident. In direct, he said, or at least implied, that he was unable to engage in any activities on his vacations in Arizona and Thailand, but in cross-examination he said his trips were not affected by his injuries aside from not playing basketball while in Thailand.

85 There were also discrepancies with what he has told other witnesses. For example, he testified in direct that he stopped playing basketball, but he told Ms. Ditson that he still plays basketball although for shorter durations and with less intensity.

86 Leaving those aside, I am satisfied that certain of the plaintiff's alleged inconsistencies were mere inadvertent misstatements, as where he said on discovery "I just do lashing and tractor-trailer [driving]", misstating "lashing" for "stackers" (as he explained at trial), and where he was recorded by a chiropractor as saying he works "full-time" when it was part-time. Of course, the latter could also be an erroneous entry by the chiropractor. It is quite clear from the evidence in general that the plaintiff was not a regular full-time worker at Deltaport.

87 Despite these testimonial inconsistencies, I conclude Mr. Kang was an essentially honest witness, but that he was very careless in his testimony. This raises concerns as to whether and to what extent his evidence can be relied upon.

B. Findings

88 As per Dr. Mian's diagnosis, I find that the plaintiff suffered cervical and lumbar sprains or strains and has suffered persistent chronic cervical pain and chronic lumbar pain as a result. These

matters were not in dispute. They key matter in dispute was the severity of the injuries and symptoms, and their effects on both the plaintiff's life in general and his work life in particular. This aspect was much more difficult to assess because the plaintiff's tendency to give very brief or terse answers on these subjects made it difficult to gain a full appreciation of his ongoing symptoms and limitations. Severity was also difficult to assess from the evidence of others, Dr. Mian and Ms. Ditson in particular, as their own assessments relied significantly on the possibly questionable accuracy of the plaintiff's reporting.

89 I conclude that the effects or limitations caused by the plaintiff's injuries are neither as minimal as the defendant submits, nor as severe as the plaintiff argues. To address the defence position, I am satisfied that after the accident the plaintiff did not regularly work the heavy-duty positions available at Deltaport. I will return to this point shortly. I am also satisfied that he likely, and reasonably, turned down some of the work available to him because it was heavy work that unduly aggravated his symptoms. As to the plaintiff's position, one would expect that if the plaintiff's injuries were as disabling as suggested, he would be much more motivated than he is (or was) to do something about them and not be utterly disinclined to pursue recommended and available measures such as exercise, medications, counselling, psychological assistance or workplace accommodations from his employer.

90 To return to an earlier point: the defendant made much of the fact that the plaintiff's co-worker (Mr. Sidhu) said "yes" in answer to the question "Do you see [the plaintiff] doing lashing or steel often?" Based on this exchange, the defendant submits the plaintiff did and does this sort of heavy work all the time. However, Mr. Sidhu also testified that while the plaintiff was fine doing heavy work before the accident, "now he avoids heavy work, he won't show up". Mr. Sidhu also said he last saw the plaintiff doing lashing or steel work about four months prior to the trial and that other workers do not like working with the plaintiff because they have to do more of the heavy work due to the plaintiff's back problems.

91 Mr. Sidhu's answer about seeing the plaintiff doing lashing or steel "often" was inconsistent with almost all of his other evidence about the plaintiff. At the time, I concluded it must be a misstatement or misunderstanding. Neither party sought to clarify with Mr. Sidhu what he meant by it. Perhaps something was lost in translation, as Mr. Sidhu testified with the assistance of an interpreter. Whatever the reason, given all the problems with that particular statement, I do not consider that it is safe to conclude from it that the plaintiff regularly or frequently worked or works heavy-duty shifts such as lashing or steel work.

C. Non-Pecuniary Damages

92 I base my assessment of non-pecuniary damages on the findings set out in the previous section, as well as the following additional findings: (1) the plaintiff suffered somewhat from headaches after the accident, though they were fairly minor in nature; (2) his mild pre-accident anxiety became more prominent for a time, although again this was a fairly minor issue; (3)

although his neck and back issues have improved by about 50 percent since the accident, and they may improve further, they are unlikely to resolve completely; and (4) he either avoids or is restricted from heavier lifting or other movements involving his back, or awkward movements with his neck, particularly if they are repetitive in nature.

93 As perhaps might be expected, I conclude the cases cited by the plaintiff involved more serious injuries and effects and those cited by the defendant involved much less serious injuries. The plaintiff's cases were closer to the mark.

94 Based my findings, and having considered the various factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, I assess non-pecuniary damages at $80,000.

D. Past Loss of Earning Capacity

95 The plaintiff suggests the Court should assess both past and future loss of earning capacity together, citing *Bhatti*. I conclude that *Bhatti* does not support that approach. The plaintiff in *Bhatti* was 16 years old at the time of the accident and even by the time of trial, she had not completed her post-secondary education. It appears she had no past pecuniary loss at all and, perhaps more to the point, she did not claim a separate award for loss of past earning capacity (at para. 78).

96 I conclude that loss of capacity in this case should be treated in the traditional manner by assessing past and future losses separately.

97 In terms of past events, my key finding, noted above, is that the plaintiff turned down available work involving heavier-duty jobs because of his injuries. I add that he was reasonable in doing so.

98 The defendant makes a variety of arguments why an award for past loss of earning capacity ought not to be made, but I do not find any of those arguments persuasive. The fact that the plaintiff worked and earned more after the accident, or that he worked *some* heavy-duty shifts (but not all offered), does not mean there is no loss. The fact that there are no documents evidencing the work offered and declined does not end the matter either, although it certainly makes quantification much more difficult. Mr. Sidhu's evidence was that the plaintiff avoids heavy work shifts, and that when the plaintiff did heavy work with a partner, the partner had to bear a disproportionate share of the work burden. This evidence is confirmatory of the plaintiff's testimony on these points. Taken together, I am satisfied there is a sufficient basis for my findings.

99 The quantification of this loss is difficult because there is so little objective evidence to rely upon and the award has to be essentially at large. My initial impression, based on the admittedly vague evidence, was that the loss was perhaps between $5,000 and $10,000 per year. Mr. Sidhu's

stated income of $80,000 provides some general guidance (and support for that initial impression) insofar as both the plaintiff and Mr. Sidhu started longshore work at the same time and would presumably have a similar level of seniority. The most Mr. Kang has earned in any post-accident year is the $72,300 he earned in 2018, which suggests his maximum annual earning capacity is about $7,700 less than Mr. Sidhu's.

100 Based on this rough analysis, I assess damages for past loss of earning capacity at $25,000.

E. Loss of Future Earning Capacity

101 The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:

> [17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.
>
> [18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:
>
> [56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award ... .
>
> [19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:
>
> (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> (2) The plaintiff is less marketable or attractive as an employee to potential employers;
>
> (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

102 As I have found, the plaintiff avoids some of the heavier jobs available to him. He also opted against obtaining certification as a rubber tire gantry operator because the job involves climbing ladders and prolonged periods of looking downward. These matters satisfy me that there is a real and substantial possibility that the plaintiff's earning capacity has been impaired. I am satisfied that the plaintiff meets all of the factors set out in *Brown*.

103 The loss is not easily quantified on an income basis because there is an insufficient evidentiary basis to do so. The plaintiff's suggestion of a 20 percent loss of capacity, together with a calculation that does not discount future losses by stating them in present value terms, is not at all persuasive. There are, in any event, too many variables and contingencies for this approach to be used. Instead, the assessment must be made on the basis of a lost capital asset.

104 I am satisfied that, at present, the plaintiff cannot perform some of the heavier jobs available to him on anything other than an occasional basis, and this situation will extend into the future for an indefinite period of time. I am also satisfied that the any losses associated with his limitations will decrease over time as his increasing seniority will give him more priority for lighter duty work. In just two years, his seniority increased considerably, and at some point his seniority will be such that he will be able to fill all his available hours with lighter duty jobs. In addition, I conclude there is a reasonable prospect of at least some improvement in the plaintiff's symptoms, particularly if he is diligent in following Dr. Mian's recommendations. Finally, the plaintiff may be able to mitigate at least some aspects of loss by seeking workplace accommodations from his employer.

105 The authorities establish that in cases involving a loss of capacity but also a difficulty in identifying or assessing a specific pecuniary loss, the assessment of damages for loss of future earning capacity is more at large than it is a calculation or similar measurement: *Sinnott v. Boggs*, 2007 BCCA 267, at para. 16. In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), Finch J.A. said (at para. 43) that in some cases the assessment of this type of loss may be made by awarding the plaintiff's annual income "for one or more years". In that case, the court awarded the equivalent of about one year's income.

106 I conclude that this general approach is the most appropriate approach in this case. However, because any pecuniary losses will fade to zero or near-zero at some point, I consider that an amount somewhat less than one year's earnings is appropriate here. I assess these damages at $50,000.

F. Alleged Failure to Mitigate

107 The defendant argues that the plaintiff failed to mitigate his damages because he did not pursue treatment assiduously, given that treatments had improved his symptoms, and by not seeking accommodations from his employer.

108 While it is true that Mr. Kang was perhaps not the most diligent of plaintiffs in arranging and attending treatment, he did not ignore it either, as confirmed by his 44 treatment attendances. Most importantly, however, the defendant has failed to prove the extent to which the plaintiff's damages would have been reduced had he acted with more diligence: *Chiu v. Chiu*, 2002 BCCA 618, at para. 57.

109 The treatments the plaintiff was getting consisted primarily of passive treatments such as massage and chiropractic, although he also had a course of active rehabilitation. Dr. Mian acknowledged that the plaintiff reported symptom improvement through massage therapy, but when asked if further therapy would have brought about further improvement, Dr. Mian said "it depends", adding that massage therapy is not curative and is directed more at pain management. He ended his answer by saying "it's difficult to say what the ongoing course would have been". This evidence does not establish that the plaintiff could have avoided all or some of his loss through further treatments.

110 The defendant also argued that the plaintiff failed to mitigate because he did not seek workplace accommodations. Again the evidence on this is wanting. The plaintiff testified that there are workplace accommodations available, but there was no other evidence about this topic and no evidence that the plaintiff qualifies or would have qualified for any workplace accommodations that are available, or what effect those accommodations would have had. I agree that the plaintiff *should* have inquired, but he did not, and the defendant, who bears the burden of proof, led no evidence on the subject.

111 The defendant has failed to prove that the plaintiff failed to mitigate his damages.

G. Loss of Housekeeping Capacity

112 Mr. Kang's evidence in cross-examination was that his ability to do household chores has not been negatively affected. I accept that this is the situation at present, but I also accept that if his immediate family moves to a separate residence he may find that he has difficulty doing heavier tasks inside or outside the house, as Ms. Ditson noted.

113 I summarized the general principles relating to a loss of housekeeping capacity in *Javan Parast v. Curry*, 2020 BCSC 877. For convenience, I reproduce that summary here:

> [251] The law relating to loss of housekeeping capacity was discussed by the Court of Appeal in both *O'Connell v. Yung*, 2012 BCCA 57 [*O'Connell*] and *Kim v. Lin*, 2018 BCCA 77 [*Kim*].
>
> [252] In *O'Connell*, the court said:
>
> > [67] ... As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it

> is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required ... .

[253] In *Kim*, the court said:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

114 I conclude Mr. Kang's loss of housekeeping capacity is more in the nature of a loss of amenities or a loss involving increased pain and suffering, and so I decline to make a separate award for loss of housekeeping capacity. Instead, I addressed and included this claim when I assessed the award for non-pecuniary damages.

H. Cost of Future Care

115 Despite the several treatment recommendations of Dr. Mian, the plaintiff sought awards for just two items, active rehabilitation ($500) and cognitive behavioural therapy ($2,400) to help the plaintiff manage his pain.

116 The defendant did not oppose an award for active rehabilitation, but said the plaintiff was unlikely to attend any psychological treatment. I agree, as Mr. Kang was clear in in stating his disinclination to engage in this sort of treatment.

117 I award $500 for the cost of future care.

I. Special Damages

118 These are agreed at $1,454.95, which I have rounded to $1,455.

VI. Conclusion

119 I award damages to the plaintiff as follows:

Non-pecuniary damages: $80,000

Loss of past earning capacity: $25,000

Loss of future earning capacity: $50,000

Cost of future care: $500

Special damages: $1,455

Total: $156,955

120 The parties have leave to address any adjustments that may be needed to finalize the award.

121 Unless there are matters the parties wish to bring to my attention, the plaintiff will have his costs of this action at Scale B.

M.B. BLOK J.

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