

## **LOCOMOTIVE ENGINEER HAS NOT BEEN ACCOMMODATED BY HIS EMPLOYER, CN RAIL. JUDGE AWARDS \$650,000.00 FOR LOSS OF EARNING CAPACITY.**

**HAWES V. NYHUS**  
**2021 BCSC 1407**

The Reasons for Judgment of the Honourable Madam Justice Matthews were given on July 19, 2021 in Vancouver, British Columbia

On November 23, 2017, Rian Hawes, age 45 at the time of trial, was involved in a motor vehicle collision at the intersection of Lougheed Highway and Burnett Street in Maple Ridge, British Columbia. The accident occurred when the defendant, Christien Nyhus, travelling in the opposite direction to Mr. Hawes, executed a turn onto Burnett Street in front of Mr. Hawes' vehicle. The defendants have admitted liability for the accident. The parties agree that Mr. Hawes suffered soft tissue injuries to his wrist, neck, left shoulder, mid-back and lower back. Mr. Hawes asserts he had migraine headaches caused by the accident. The defendants argue that he had pre-existing migraine headaches and the accident did not aggravate them.

The most contentious issue is whether Mr. Hawes' accident injuries have interfered with his career as a conductor with CN Rail. Mr. Hawes claims that CN Rail has not permitted him to work since he asked for accommodation due to his injuries which impede his ability to undertake some physical aspects of the job. The defendants assert that Mr. Hawes' injuries do not cause these impediments and if they do, CN Rail has a duty to accommodate Mr. Hawes. They also assert that since the accident, Mr. Hawes has trained to become a locomotive engineer and can work in that position without issue and earn more money. For these reasons their position is that Mr. Hawes has not suffered a loss of earning capacity.

At the time of the collision, Mr. Hawes was driving his son and step-daughter to school. He reports that he has fuzzy memories of the impact. In the immediate aftermath of the accident, Mr. Hawes was most concerned about his step-daughter, who appeared traumatized by the accident. After the accident Mr. Hawes experienced left wrist pain, neck pain, left shoulder pain, migraine headaches, mid-back pain and low back pain.



Mr. Hawes testified that his wrist pain improved significantly with physiotherapy and by six months post collision it had improved to the point where he has minor wrist pain occasionally. He massages his wrist to relieve the pain. Mr. Hawes testified that his neck pain reduced in frequency and severity by six months after the accident and that it has pretty much resolved.

Dr. Harpreet Sangha, Physiatrist, testifying for the Plaintiff observed a consistent trigger point on the upper trapezius ridge and tenderness. He opined that this was consistent with Mr. Hawes' reports of a burning sensation when he wears a belt pack at work. He opined that Mr. Hawes experienced a strain to this area which caused impairment and impingement. Dr. Chris Steyn, Orthopaedic Surgeon, testifying for the defendants, had a similar opinion.

Mr. Hawes testified that he had migraine headaches for about six months after the accident, following which their frequency and intensity lessened. At the time of the trial, he had them only occasionally. Mr. Hawes denied having migraines prior to the accident. He testified that prior to the accident he never had headaches as severe or frequent as those in the six months following the accident. Dr. Sangha opined that Mr. Hawes' post-accident headaches were cervicogenic headaches, ie: caused by the soft

tissue injuries to his neck. He maintained this view on cross-examination, explaining that the pre-accident clinical note, pertaining to headache-migraine (on which the defendant relied) did not provide meaningful information without some explanation or indication that Mr. Hawes was undergoing medical investigation for ongoing headaches. Dr. Steyn opined that Mr. Hawes' headaches were caused by the accident. The Court found that Mr. Hawes had significant headache symptoms for about six months after the accident, that they have only rarely caused him problems since, and that they were caused by the accident. Mr. Hawes' mid-back and shoulder pain resolved in severity by six months after the accident and they no longer bother him regularly nor cause impairment to his functioning.

Currently Mr. Hawes' main area of dysfunction is his low back. He testified that since the accident he has had lower back pain that radiates from his low back into his buttocks. He testified that he has a constant level of pain and he has flare ups with certain activities. The pain seemed to slowly improve until 2019, when it became worse. He testified that at that time he was taking many Advil during a work shift. In late 2019 his family doctor advised him to reduce his Advil consumption because it was causing him stomach problems. This left him with fewer options to control his pain.

Mr. Hawes testified that wearing a belt pack at work, especially the manner in which pulls his torso and swings around his body, causes low back pain flare ups. He cannot lift knuckles (a component used to link rail cars together) which weigh 70 to 80 lbs. Some of the postures of engineer work, including prolonged sitting, and twisting his torso at the controls, cause him pain. Mr. Hawes' wife testified that



sometimes he would come home from a shift in so much pain that she would have to help him remove his footwear. He attended physiotherapy, chiropractic treatment and massage therapy. He found them helpful for his neck, shoulder and wrist, however they only provided short term relief for his back.

[38] Dr. Sangha opined that Mr. Hawes has a strain to the lumbosacral area of his back with mechanical low back pain caused by loading on the left facet joints at the end of his lower lumbar and sacral spine. He testified that he determined this by having Mr. Hawes flex and extend his back. Mr. Hawes exhibited pain in the range of motion where the facet joints are loaded on flexion or extension. Dr. Sangha also palpated Mr. Hawes' lower back deeply and elicited pain. He testified that he did not elicit this pain on superficial palpation, leading him to conclude that the pain was more likely coming from the joints that are deeper than soft tissues which are more superficial. He also noted discomfort in Mr. Hawes' left sacroiliac joint and opined that pain contributes to his low back discomfort to a lesser extent than his facet joint pain.

[39] Dr. Sangha opined that the type of facet joint pain that Mr. Hawes has typically involves flare ups of pain and dysfunction. He characterized Mr. Hawes' report of flare ups as severe bouts of lumbago and opined that they are typically very frustrating and difficult to manage. He recommended that physiotherapy, chiropractic treatment and massage are appropriate to aid in symptom recovery and functional improvement. He also recommended a core strengthening program and an interventional pain clinic to consider branch blocks or radial ablation therapy. Dr. Sangha does not expect any treatments to be curative. He opined that Mr. Hawes will continue to experience this pain with flare ups from time to time.

Dr. Steyn was of the opinion that Mr. Hawes has a lumbar strain injury to the muscles supporting his lower back, caused by the accident. He suggests that a physical rehabilitation program will provide symptom relief. He stated he does not believe that the source of Mr. Hawes pain is the facet joints. Madam Justice Matthews commented "...I note that Dr. Steyn did not, in his written report, describe anything he did in his examination or otherwise to rule out a facet joint issue, such as the deep palpations that Dr. Sangha did that provoked pain coming from the joint as opposed to superficial tissues." She goes on to say...

[42] I prefer Dr. Sangha's opinion because he stated why he reached his opinion and because he based it on a combination of subjective and objective information. He explained the assessment he did that provoked the pain. He remarked that if Mr. Hawes was manufacturing pain emanating from his facet joints, he would have had to have read a text on facet joint pain to have determined to react in the way that he did. Dr. Steyn simply said he did not see anything consistent with facet joint pain, without



testifying that he did any palpations or other examination techniques to determine the source of the pain and support his opinion that it is not coming from the facet joints.

[43] Both medical experts opined that Mr. Hawes is unlikely to improve much further given the time that has passed since the accident and the treatment modalities he has already tried. They both recommend strengthening exercises. Dr. Sangha recommends therapies to provide temporary symptom relief while Dr. Steyn does not.

[44] I conclude that Mr. Hawes has ongoing low back pain due to a strain to the low back with pain emanating from his facet joints and his sacroiliac joint. This pain is unlikely to improve and will be subject to flare ups.

Mr. Hawes also experienced periods of low mood and irritability. He has been referred for a psychiatric assessment but it has not occurred yet. Dr. Sangha opined that Mr. Hawes should have a psychological assessment while Dr. Steyn suggested his treatment should include emotional support by way of cognitive behavioural therapy.

### NON-PECUNIARY DAMAGES

Mr. Hawes had multiple sources of pain and headaches for approximately six months after the accident. Since then he has had almost constant lower back pain with flare ups, occasional neck pain and headaches. His ability to sleep, his work, his recreational activities and his relationship with his wife have been negatively affected by his low back pain. It is clear from the evidence that his ability to do the physically demanding tasks required at his job has been compromised. He also struggles with walking on uneven ground in the yard, being transported over rough terrain and wearing the equipment of a yard conductor. Dr. Steyn opined that Mr. Hawes has a partial permanent disability in relation to his employment with CN Rail due to his accident injuries.

Ms. Hawes has a degenerative health condition. It limits her mobility and endurance. As a result Mr. Hawes' was the primary income provider for the family and did a significant number of the household chores. Mr. Hawes' evidence, which is not disputed, is that since he was a teenager his primary focus was to provide for his children and then later, Ms. Hawes and their blended family. The financial stress he is experiencing as a result of the manner in which the accident has impacted his income is directly related to the responsibility he feels for his family, which is at the core of his self-esteem and self-definition. Mr. Hawes enjoyed hiking, fishing and dirt bike riding, all of which are now limited or completely abandoned.

The Court awarded non-pecuniary damages in the amount of \$105,000.00.



## LOSS OF EARNING CAPACITY

Mr. Hawes left high school after grade 10. He had a variety of jobs including general labourer, metal fabricator auditor and courier. He returned to high school and completed his secondary education. He started his own courier company in 2009. In 2013 he shut down his company and took a conductor training course at Red River Community College. He interviewed with CN Rail and was offered a position working out of the Vancouver terminal. He and his family relocated from Manitoba to the Lower Mainland. The work of a yard conductor is extremely physically demanding, involving separating and moving inbound cars and locomotives as well as moving and arranging outbound train cars and locomotives to be built into trains. It involves lifting weights in excess of 70 lbs., wearing a belt pack weighted with gear essential to the job, as well as carrying, pushing and pulling heavy drawbars and turning a two and a half foot wheel to apply or release handbrakes. Testimony confirmed that Mr. Hawes was a hard worker who took on difficult duties and did them well.

Mr. Hawes was off work until February 16, 2018. When he returned to work he struggled with some of his duties. He testified that he would sometimes take 15 to 20 Advil a day when working. On occasion he has laid down at work to relieve the pain in his back, a practice he considers dangerous and would result in a reprimand should he be observed doing so. In the spring of 2019 Mr. Hawes took training to become an engineer. He completed training and when he qualified (due to seniority) for locomotive engineer shifts, he took them. In 2019 and from January through May 2020 he only worked occasional shifts as a yard conductor, the rest were road conductor or locomotive engineer shifts. In 2020, due to the COVID-19 pandemic, CN Rail ran fewer trains and accordingly there were fewer locomotive engineer and road conductor shifts. Mr. Hawes did not have enough seniority to secure shifts other than yard conductor shifts. He sought his doctor's support to not be required to do duties wearing a belt pack because of the weight and the significant pain it caused him. He went to his superior, Mr. Ken Scott, with his doctor's letter in June 2020. Mr. Scott told him that he had to address the issue with CN Rail occupational health and safety and until he received clearance from that authority, he could not work. Despite all actions taken by Mr. Hawes to resolve this matter, by the time of trial in February 2021, CN Rail's occupational health and safety personnel had not addressed Mr. Hawes' situation and he has not worked since he asked Mr. Scott for accommodation.

Past loss of earning capacity was assessed at \$75,000.00

## REAL AND SUBSTANTIAL POSSIBILITY OF A LOSS

[144] In addition to the evidence of Dr. Sangha and Dr. Steyn, Mr. Hawes underwent a functional capacity evaluation by a kinesiologist, Raph Kowalik. Mr. Kowalik opined that Mr. Hawes does not meet the strength requirement to be a train conductor because his lifting ability is limited to 40-50



pounds (knuckles weigh 70-80 pounds), and has limits on certain postures, overhead reaching, sitting and standing for extended periods of time. Mr. Kowalik opined that Mr. Hawes is at a competitive disadvantage compared a candidate who is pain free and who can sit and stand without limitation. Mr. Kowalik opined that Mr. Hawes is suited to lighter jobs. He is not suited for sedentary jobs due to his limits on standing and sitting.

[145] This evidence, combined with the evidence of Dr. Sangha and Dr. Steyn that I have already described, and the fact that at the time of the trial Mr. Hawes was not permitted to work in any capacity, including locomotive engineer, because he asked for accommodation for his back pain, easily passes the threshold of a real and substantial possibility of a future loss.

...

[150] The evidence shows that Mr. Hawes is not capable of working in jobs that involve regular heavy lifting, awkward postures or sustained sitting or standing. Because of that, he is less capable overall than he was before the accident. He is clearly less valuable to himself because of his embarrassment that he has broken the CN safety rules in order or manage his back pain, and his anguish over having been sidelined when he asked for accommodation with the belt pack. CN Rail's reaction to his request and its failure to address his request for accommodation in a timely way demonstrates that he is less valuable to his employer.

Madam Justice Matthews commented that "Although the possibility that CN Rail will accommodate must be taken into account, the evidence that CN Rail had not done so in the six months after the requested accommodation is a pessimistic indicator. The opportunity for a man in his mid-forties with a high school education to retrain at work, excluding physical or sedentary work that generates an income of \$150,000.00 per year is remote."

Future loss of earning capacity was assessed at \$650,000.00.



## SUMMARY:

Non-pecuniary damages:	\$105,000.00
Past loss of earning capacity:	\$75,000.00
Future loss of earning capacity:	\$650,000.00
Cost of future care:	\$3,000.00
Special Damages:	\$1,857.49
<b>TOTAL</b>	<b>\$834,857.49</b>

The full Reasons for Judgment of The Honourable Madam Justice Matthews [CAN BE FOUND HERE.](#)

**WRITTEN BY STELLA GOWANS, PARALEGAL**

**IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. HARPREET SANGHA, PHYSIATRIST,  
PLEASE CONTACT US AT INTEGRA**