Traumatic Back Injury Results in $3,260,000 Jury Verdict (Including $1,600,000 for Pain and Suffering); Appeals Court Rejects Defense Claim for $400,000 Reduction for Future Social Securuty Disability Payments

Posted on January 21, 2010 by John Hochfelder

Gerard Malloy had been an elevator mechanic for many years at 14 Wall Street in Manhattan when, on July 21, 2004, he **tripped and fell** over an air handler cover that had been left on the floor. He was thrown several feet and struck his back against nearby stairs.

Diagnosed with **herniated discs at L3-4**, Malloy was forced to undergo **fusion surgery**.

Here is what the spine looks like after lumbar fusion surgery:

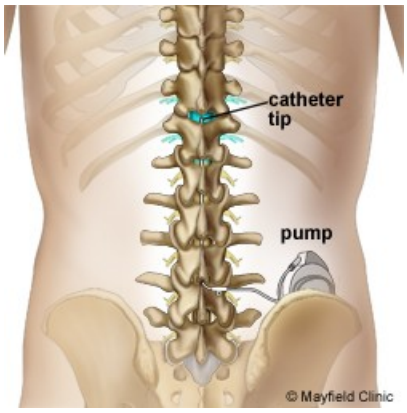
Malloy had been earning $90,000 a year with full union benefits but was **never able to return to work** due to his injuries. While the building owner and operator denied they were negligent in maintaining the area and creating a dangerous condition, a Manhattan jury disagreed and found them 100% at fault.

On February 4, 2008, the jury awarded Malloy $3,260,000 in damages which included **$1,600,000 for his pain and suffering ($400,000 past – 3 ½ years, $1,200,000 future – 25 years**) plus $1,064,000 for lost earnings ($344,000 past, $720,000 future – 12 years).

Defendants did not challenge the reasonableness of the pain and suffering awards; nor would any such challenge have been successful in view of prior appellate court decisions (discussed **here**) and the severity of Malloy's injuries such as:

- **chronic, severe low back pain** leaving him totally unable to return to work
- **bilateral branch blocks at L1-L4** in which an anesthetic was injected into the spaces surrounding the nerve roots
- insertion of a **spinal cord stimulator** device which had to be removed after 10 days because it worsened the pain
- implantation of an **intrathecal pump** which emits a flow of narcotics into the spinal canal

Here is what the intrathecal pump looks like:



The defendants appealed on the issue of whether the lost earnings award should be reduced by social security disability ("SSD") payments that plaintiff expects to receive in the future.

In one of the last decisions of 2009, the appellate court in **Malloy v. Stellar Management** ruled that the $100,000 of SSD payments already received by the time of trial should be deducted from the verdict; however, in a victory for the plaintiff the court also **ruled that the estimated $400,000 in future SSD benefits should not be deducted.**

The operative law is **New York's CPLR 4545** which requires trial judges to reduce a future loss of earnings verdict to the extent that it will with "**reasonable certainty"** be replaced or indemnified from a collateral source such as social security.

New York's so-called common law (the law as set forth in court decisions) used to be that a personal injury plaintiff's damages would not be reduced by the amount plaintiff received from collateral sources such as insurance. Beginning in 1975, the legislature started to chip away at that doctrine – the **"collateral source rule"** - and each evolving diminution of the doctrine was intended to prevent double recovery by plaintiffs and to curb rising liability insurance costs.

The question in Malloy v. Stellar Management was whether defendants had proven with reasonable certainty that plaintiff would continue to receive future SSD payments.

Since plaintiff was already awarded SSD and the award could be reduced or discontinued in the future only if the Social Security Administration made a new finding of employability (based on new medical

evidence) and since plaintiff had argued at trial (based on testimony from his doctors) that he was permanently disabled and unemployable, defendants argued that they met the reasonable certainty test and they should be credited with $400,000 of future SSD payments.

Plaintiff argued that because there was conflicting medical testimony at trial as to whether he was totally disabled from employment, the defense could not meet its heavy burden of proving that it was highly probable the plaintiff would continue to be eligible for SSD benefits. The appellate judges agreed stating that an offset for future SSD benefits was not warranted because the trial record showed that plaintiff's condition had improved and, although still primarily disabled, he was capable of performing some limited sedentary work.

Inside Information:

- This case drew wide attention shortly after the trial in 2008 when **David Golomb**, one of New York's top trial lawyers, skewered two doctors on cross-examination. The doctors had examined Malloy for the defense and issued reports that purposefully omitted information that would have been favorable to the plaintiff. Eric Turkewitz discussed those issues, **here**, praising Golomb and suggesting that there may have been deception and a breach of ethics by those acting for the defendants.
- Four years before Malloy fell at work, he had been injured in a car accident in which he sustained herniated discs at L4-5 and L5-S1 requiring a laminectomy and fusion. He returned to work three years before his new accident but as part of his new surgery in 2005, the old hardware had to be removed.
- Defendants had also appealed on issues concerning (a) the so-called discount rate to be applied to the portion of the judgment that's to be paid in installments over the years (under CPLR Article 50-B, certain portions of personal injury verdicts for future damages are to be paid out over time) and (b) whether plaintiff could insist that the annuity to fund the future payments be issued only by a top rated insurance company. Plaintiff's position was upheld in both instances.
- Sources tell me that while the appeal was pending the parties settled for a $3,000,000 lump sum payment plus between $150,000 and $750,000 more depending upon the outcome of the appeal.