

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CHARLES JOHN TUCHOLSKI,

Plaintiff

v.

CIVIL ACTION NO.: CV07-900829

LG ELECTRONICS ALABAMA, INC.

Defendant.

PRE-TRIAL BRIEF

This is a workers' compensation case. The primary issue in this case is the extent of Plaintiff's vocational disability as a result of his work-related accident and severe injuries. Plaintiff contends he is permanently and totally disabled.

I. BACKGROUND

The Plaintiff Charles Tucholski is presently 63 years old. He graduated high school in 1963. After high school, he worked a short period of time for a company unloading lumber and then a second company handling truck parts.

In 1965, the U.S. Army drafted Charles Tucholski. He served the Army assigned to duties in food service. After two years, he completed his service and received an honorable discharge.

Upon discharge, Mr. Tucholski continued his career in food services. Over the course of many years, up to approximately the year 2000, he was assigned positions at numerous cafeterias and institutions.

Around the year 2000, Mr. Tucholski left the food service industry to accept a position at Marvin's Lumber in Decatur. He worked in stocking and receiving at Marvin's. This position required strenuous physical labor.

In September, 2001, the Alabama National Guard activated Charles Tucholski. He returned to active duty, stationed in Montgomery. He remained on active duty until 2005.

Upon this second discharge, he returned briefly to his employment with Marvin's. After only a few months, he began working with the present Defendant, LG Electronics.

II. CHARLES TUCHOLSKI'S PRE-INJURY EMPLOYMENT WITH LG ELECTRONICS

In 2006, Charles Tucholski began working with the Defendant LG Electronics ("LG"). At first, he worked at LG through a separate temporary service. Mr. Tucholski worked at LG for this temporary service for several months.

In October, 2006, LG retained Charles Tucholski as a permanent employee. It is undisputed that Mr. Tucholski could fully perform his required employment when hired. (Dep. Mark Hester, p.11). According to his employer, Charles Tucholski "was a great employee." (Dep. Mark Hester, pp.11-12).

Charles Tucholski worked for LG in the receiving department. (Dep. Mark Hester. P.10). His duties required him to unload containers, scan parts, and place them on racks. (Dep. Mark Hester, p.11). The position required physical labor, including lifting materials and operating mechanical equipment. (Dep. Mark Hester, p.11).¹ One of these duties required the employee to actually climb on top of incoming trucks to remove boxes stacked on them.²

III. CHARLES TUCHOLSKI'S TRAUMATIC WORK-RELATED ACCIDENT

On November 16, 2006, Charles Tucholski suffered a traumatic work-related accident with devastating injuries. He was performing his normal job duties as required by his employer.

¹ Plaintiff's average weekly wage was \$524.15 (\$522.11 in wages plus \$2.04 in fringe benefits)(See, Dep. Hester, Plaintiff's Exhibits 2 & 4).

² It was this required duty that led to Mr. Tucholski's injuries. Since his accident, management has altered the required procedures to prevent future accidents.

Early that morning, Charles and a co-employee were unloading a container full of boxes. Boxes were stacked to the top of the container on pallets. As a result, Charles Tucholski had to climb on top of them to remove the boxes. While performing this task, Charles fell. (See, Supervisor's Report).

Charles Tucholski has no memory of his fall. When his co-employee got to him, Charles was unconscious and bleeding around his right eye. (See, Supervisor's Report).

The Defendant's manager Mark Hester testified in deposition that he was elsewhere in the building when the fall occurred. An employee came to him and reported that Mr. Tucholski had been injured. (Dep. Mark Hester, p.13). As he began walking toward the injury scene, another employee approached and told him that Mr. Tucholski had been "injured really bad." (Dep. Mark Hester, pp.13-14). From there, Mark Hester ran to the accident scene. (Id.). He estimates that it took him between 5 and 10 minutes to arrive at the scene of Charles Tucholski's accident. (Dep. Mark Hester, p.15).

By the time Mark Hester arrived at the scene 5 or 10 minutes after the accident occurred, he observed the following:

When I got to the container he was on, he was laying on the floor of the container, which was a trailer. He was laying on the floor of the container at that point semiconscious. You would ask him a few questions and he could mumble out a few things. When I looked at him, obviously, he was laying on his side and you could tell his wrist was broken. And it was obvious from that point. He was bleeding on his face at that point.

(Dep. Mark Hester, p.14). At this point, emergency medical responders were called. (Dep. Mark Hester, p.15). Emergency responders carried Charles Tucholski to Huntsville Hospital.

IV. CHARLES TUCHOLSKI'S SEVERE WORK-RELATED INJURIES

Charles Tucholski arrived at Huntsville Hospital suffering multiple injuries from his fall, including injuries to his face, head, hip, and wrist/arm. Promptly upon arrival in the emergency room, he was taken to surgery.

At that time, local orthopedic surgeon, Dr. Griffin, performed two surgeries. Dr. Griffin first attempted to repair Mr. Tucholski's right femoral neck (leg/hip) fracture. This surgery involved placing pins and a plate in his broken leg. (See, Huntsville Hospital records).

Next, while Mr. Tucholski remained under anesthesia, Dr. Griffin turned his attention to the severely fractured right wrist and arm. Upon opening and viewing this area, Dr. Griffin actually observed a very comminuted radius fracture. Mr. Tucholski suffered radius and scaphoid fractures in his right wrist and arm. The surgeon again had to install hardware, a plate with screws. (See, Huntsville Hospital records).

In addition to the fractures surrounding his arm/wrist and leg/hip, Mr. Tucholski also suffered severe head injury in the fall. At the scene he was bleeding around the eye and unconscious. At the hospital, it was confirmed that he had suffered a skull fracture, a fracture to his right orbital area.

Charles Tucholski remained in Huntsville Hospital until November 20, approximately 4 days. At that time, he was transferred to Healthsouth Hospital for rehabilitation. He remained a patient at Healthsouth Hospital for approximately 9 more days. While at Healthsouth, Dr. Keith Anderson began treating him.

Upon his release from the hospital, Dr. Keith Anderson continued to provide follow-up care to Mr. Tucholski. Additionally, Dr. Griffin and his partners at The Orthopedic Center continued to provide follow-up care.

On April 13, 2007, Charles Tucholski required a 3rd surgery, a carpal tunnel release with median nerve neurolysis at the forearm. (See, TOC records). Dr. Griffin's partner, Dr. Joseph Clark, performed this surgery. According to the physicians, the scar tissue from the fractures and initial surgery had caused a neuropathy in Mr. Tucholski's forearm. (See, TOC records). Although improved, Mr. Tucholski still suffers significant problems with his injured right arm and wrist.

Since that time, Mr. Tucholski has also returned to the orthopedic surgeons for continued problems with his fractured leg/hip. He has required injections into his injured hip. (See, TOC records).

Although Mr. Tucholski suffers severe pain, problems, and limitations, from his multiple orthopedic injuries, they are not the worst of his injuries. Following his injury, Mr. Tucholski complained to Dr. Anderson that he was suffering severe headaches up to 5 times a week as well as "ringing in his ears" "throughout the day." (See, Dr. Anderson's 6/6/07 note). Moreover, Mr. Tucholski's wife complained that he was having short term memory problems and could not function as quickly. (Id.). At this point, Dr. Anderson began seeking to refer Charles Tucholski to Dr. William McFeely. (Id.). Moreover, on August 15, 2007, Dr. Anderson noted that Charles had evidence of a traumatic brain injury. (See, Dr. Anderson's 8/15/07 note). Finally, Dr. Anderson opined that Mr. Tucholski should be limited to only light activities, avoid dangerous equipment, and perform no climbing and no balancing. Id.

On July 30, 2007, Dr. McFeely began treating Charles Tucholski. Dr. McFeely is a specialist with North Alabama ENT Associates.

On this initial visit, Dr. McFeely noted that Charles Tucholski had suffered a loss of consciousness with a maxillary sinus fracture in his work-related accident. (Dep. Dr. McFeely, p.7). Mr. Tucholski was suffering problems with ringing in his ears, headaches, dizziness, and balance problems. (Id.). He suffered light-headaches and some nausea. (Id.). He suffered feelings of pressure in his ears, concentration problems, and difficulties with memory. (Dep. Dr. McFeely, p.8). Finally, his family had noticed that his hearing was worse after his fall. (Id.). In

his initial visit, Dr. McFeely also performed testing on Mr. Tucholski which confirmed that he had difficulty with balance as well as sensory neural hearing loss in both ears (nerve hearing loss). (Dep. Dr. McFeely, pp.9-10).

Since July, 2007, to the present, Dr. McFeely has continued to treat Charles Tucholski. Mr. Tucholski has continued to suffer severe problems with ringing in his ears, balance, vertigo, nausea, and hearing.

During the course of his care, Dr. McFeely has also conducted additional testing relevant to Charles Tucholski's condition. On August 6, 2007, an ENG test revealed Mr. Tucholski had difficulty following light and problems tracking objects with his eyes, which indicated damage to a central process in the brain. (Dep. Dr. McFeely, p.12). Another test, an electrocochleography, resulted in a diagnosis of Ménière's Disease. (Dep. Dr. McFeely, p.13). According to Dr. McFeely, Charles Tucholski suffers "right-sided Ménière's Disease, post-traumatic in nature." (Dep. Dr. McFeely, p.14).

What conditions has Dr. McFeely diagnosed during the course of his treatment? In his most recent note from February 2, 2009, Dr. McFeely noted his diagnoses as:

- 1] Atypical right-sided Ménière's, posttraumatic.
- 2] Central disequilibrium with history of traumatic brain injury.
- 3] Tinnitus.
- 4] Headaches, problematic.
- 5] Labrinthine dysfunction.
- 6] Sensorineural hearing loss.
- 7] History of facial fractures.
- 8] Right neck sebaceous cyst.³

(2/9/09 Note of Dr. McFeely). Were these conditions related to Mr. Tucholski's fall and traumatic brain injury? Quite certainly they were. According to Dr. McFeely:

Q. Based upon a reasonable degree of medical probability, was the history of November 2006 trauma as reported to you a cause of the conditions that you discussed today and treated?

³ The neck sebaceous cyst is not-related and has no significance to Mr. Tucholski's condition. It presents no impairment.

A. Yes, I believe the trauma caused his Ménière's Disease based on history. He also had findings on the ENG inner ear test that were consistent with a central injury to the brain. Both of those problems can occur in patients that take a substantial hit to the head. He didn't relate any history of any of this to me before the accident, so it didn't appear to preexist all of this. So I would say with a reasonable degree of medical certainty that that trauma was related to his current symptoms and current diagnosis.

(Dep. Dr. McFeely, pp.22-23).

V. CHARLES TUCHOLSKI'S DEBILITATING LIMITATIONS

In the case at bar, Charles Tucholski suffered severe physical, orthopedic injuries. These injuries included fractures in both his right arm/wrist and right leg/hip. Both required the implantation of hardware. In his arm, the resulting scar tissue caused further nerve damage. In his leg and hip, his ability to function continues to decline. These injuries are significant.

As noted earlier, the carrier authorized Dr. Anderson to rehabilitate Mr. Tucholski's physical injuries. In his records, Dr. Anderson expressly noted that Mr. Tucholski should limit his activities to only light exertion. Moreover, Dr. Anderson prohibited climbing, balancing, and being around dangerous machinery. (See, Dr. Anderson's 8/15/07 note).

On April 2, 2008, Charles Tucholski had an IME with Dr. Eric Beck. Dr. Beck restricted Charles Tucholski as follows:

Recommendations for work restrictions

- Occasional lift 40 pounds and frequent lift 20 pounds.
- Occasional bending, stooping and lifting.
- Occasional squatting and crouching.
- Sitting— one at a time. The examinee should have the opportunity to change positions five to minutes.
- Standing/Walking— 30 minutes at a time. The examinee should have the opportunity to change positions five to minutes per 30 minutes standing or walking.
- Climbing— no climbing.
- Balancing— no balancing.

- Not to work around moving machinery.
- Occasional fingering, pinching and gripping of the right hand.
- Given that Mr. Tucholski does demonstrate mild deficits in cognition both on mini mental status examination as well as detailed neuropsychological testing, I would recommend that he not be placed in a stressful work environment at which he has to make rapid decisions, rely on extended memory and perform sustained task of attention and concentration. He should have the opportunity to work at his own pace and be able to utilize memory aids as needed.

(See, Dr. Beck's Report). While the physical restrictions discussed by both Dr. Anderson and Dr. Beck are significant, they are not the most limiting issues faced by Charles Tucholski.

Approximately 2 years ago, Dr. McFeely assumed the treatment of Mr. Tucholski for the impacts of his head injury. It is this condition that, beyond any doubt, prevents Mr. Tucholski from any gainful employment.

By October 27, 2008, Mr. Tucholski's condition had worsened to the point where Dr. McFeely instructed him "to avoid any dangerous activities at all, and hold on driving at that time." (Dep. Dr. McFeely, p.20) (underline added).

By February 2, 2009, the most recent visit,

It was becoming more difficult for him to do just basic activities of daily living. He was having trouble in places like the shower. He said that his memory was worse around that time. He described more dizziness associated with the headaches as well, as he had quite a bit of nausea. The Phenergan did help his nausea to some degree. He said that he didn't have any warning as to when a dizzy spell would hit. He was still taking the Ativan and the water pill.

(Dep. Dr. McFeely, p.21). Moreover,

He was using a cane at that time for ambulation and I felt that he should continue to do that and be very cautious with his activities.

(Dep. Dr. McFeely, p.22).

What does the future hold? According to Dr. McFeely:

Q. It appears to me that – I know your treatment has been between a year and half and two years now, that it looks like he has had waxing and waning periods of Ménière's and his condition. Do you have a prognosis or opinion on the future for him?

A. With Ménière's it's always difficult to tell. It's a problem that doesn't consistently get better by itself. It can with some patients. It can frequently get worse. But typically most people have fluctuation of symptoms where they have relatively good stretches and then other times where things are substantially worse. And he has been much worse lately, and it seems to have persisted now for a few months that he is much less functional that he was. It's hard to say for the future if it will completely resolve, but I would not expect that. Most people are left with worsening balance problems over time. Even if the dizziness portion improves most people are left with balance problems, and typically their hearing worsens over time as well. The tinnitus or ringing is quite variable and it's hard to say on that. But the majority of my patients, this is a life-long condition and requires treatments to try to get it to calm down and stabilize when we can.

(Dep. Dr. McFeely, pp.23-25).

Q. Mr. Tucholski described to me that when he is riding in a car and he is going down the interstate and the guardrails are going by on the left or the right, that affects his balance or affects him in some way. Is that – I don't know how I am trying to ask this, but is that consistent with something that can affect your balance or your dizziness?

A. He definitely is motion sensitive. Things that are moving around him will bother him. He has a malfunction of the inner ear and also a malfunction of certain sensors within the brain that process all of that. So certain types of motion he will really have a hard time with, and can set off his problems at least briefly. So there will be some things like that that may always be difficult for him. It may be impossible for him to do certain things in the future.

(Dep. Dr. McFeely, pp.26-27).

Q. When you have an attack, are there times when you just can't function, you have to lay there or sit there?

A. Most of my patients get spells severe enough that they simply are not functional. They have to take medicines to try to calm the nausea part down, suppress the inner ear. Most of my patients simply have to go to bed, and they can't function at all. The duration of the spell typically is at least hours, but most people with this they just don't feel well for a day or two after a spell hits and are much less functional during that time.

Q. I know someone who had to call me to come pick them up on the interstate when they had an attack one time. I take it you probably couldn't operate machinery or your car if this is coming on?

A. Correct. And in some patients we let them function and do certain things carefully if they have some warning, but the people who have unpredictable dizziness, it's very hard to release them back to any kind of work environment that might be dangerous, and it's hard to recommend that they drive if they have no warning. He had related to me that he did have unpredictable spells, that he could not tell when they were going to hit. So that's much more concerning. The patients that have some warning, I let them do more. There is no doubt I feel more comfortable with releasing them to do certain things on good days.

Q. Do patients sometimes get nauseous or have those type problems with this as well?

A. Very frequently people feel a lot of nauseam, they are very sick to their stomach, having vomiting during spells. Again, that's not everyone, but a lot of my patients with this have it at some point, maybe not every single spell.

(Dep. Dr. McFeely, pp.27-29)(underline added).

In the case at bar, Charles Tucholski suffers several unpredictable spells a week from his condition. When under stress or in situations involving movement, including just riding in a car, the spells increase in frequency. They are completely debilitating and often strike with little or no warning. Even when not experiencing a debilitating spell, his hearing and balance are impaired to the point it is both difficult and dangerous to place him in a work environment or a vehicle.

While Mr. Tucholski's orthopedic problems are severe, his brain injury and dysfunction is unquestionably disabling. This condition prevents Mr. Tucholski from now even attending to any employment.

VI. CHARLES TUCHOLSKI'S EFFORTS TO CONTINUE WORKING

It is undisputed by LG that, after his injury, Charles Tucholski was not able to return to his prior employment. (Dep. Mark Hester, p.18). However, according to his employer:

- A. I kind of created a clerical job for him to do, some clerical work, some data entry stuff, that kind of stuff.

(Dep. Mark Hester, p.18). Although all real jobs at LG have a written job description, there is not one for this created position. (Dep. Mark Hester, pp. 12, 20). LG simply sat Charles in the office with Mr. Hester's administrative assistant. (Dep. Mark Hester, p.20). LG imposed no production requirements and allowed Charles to take breaks whenever needed. (Dep. Mark Hester, pp.20-21). According to his supervisor, Charles "would have to take breaks often to clear his mind." (Dep. Mark Hester, p.21). On other occasions,, he would simply have to leave work early. (Dep. Mark Hester, p.24).⁴ Yet, he was simply paid for 40 hours of attendance a week. In deposition, LG's representative admitted that this created position could be fully performed by a healthy worker in only a couple of hours each day. (Dep. Mark Hester, pp. 22-23).

Finally, Charles reached the point where he could no longer even attend work. His attacks had become debilitating and increasingly frequent. He is now unable even to drive. Charles last worked at LG in October, 2008. LG did not replace him when he left. (Dep. Mark Hester, p.27).

⁴ One important safety issue is that Charles would have attacks of his Ménière's Disease at work. When this happened he would be sent home. This meant he would have to drive home despite experiencing severe dizziness and balance problems.

In the case at bar, Charles Tucholski lost his employment due to his injuries, within 300 weeks of his accident. As a result, under Ala. Code §25-5-57(a)(3)i, this case clearly involves a determination of Charles Tucholski's true vocational disability.

VII. CHARLES TUCHOLSKI'S PERMANENT AND TOTAL DISABILITY

As noted previously, Charles Tucholski suffered debilitating injuries. These injuries included severely limiting orthopedic injuries. That, alone, would make it difficult for Mr. Tucholski to maintain any employment.

In addition to his orthopedic injuries, Charles Tucholski suffered traumatic brain injury. This injury resulted in balance problems and ringing in his ears. It resulted in severe hearing loss. It resulted in problems with focus and memory. Moreover, it resulted in traumatic Ménière's Disease. Due to this condition, Charles Tucholski cannot drive. He suffers attacks several times a week which prevent him from functioning at all.

John McKinney, a vocational expert, has evaluated Charles Tucholski.⁵ John McKinney has thoroughly interviewed Charles Tucholski and reviewed the medical evidence. After conducting his evaluation, McKinney concluded that Charles Tucholski is one hundred percent (100%) vocationally disabled.

It is clear from the evidence that Plaintiff is permanently and totally disabled. According to well-established law, the test for total disability is the inability to perform one's trade, and if so unable, then the inability to obtain other reasonable gainful employment. The Plaintiff is not required to be completely helpless or to suffer total physical disability. *Asplundh Tree Expert Company, Inc. v. Latham*, 656 So.2d 839 (Ala. Civ. App. 1995). In the case at bar, Mr. Tucholski cannot drive, cannot balance himself well, cannot hear well, cannot concentrate, and suffers totally debilitating attacks due to his injury. Quite clearly, Plaintiff suffers a permanent

⁵ Although Plaintiff has employed a vocational expert, the undersigned believes the evidence is so overwhelming an expert is not necessary. The Defendant has not retained an expert.

and total disability. Therefore, Plaintiff respectfully contends he is due to be awarded benefits under the Alabama Workers' Compensation Act for a permanent, total disability.

Respectfully submitted,

JEFFREY G. BLACKWELL (BLA070)

OF COUNSEL:

Hornsby, Watson, Hornsby, Blackwell & McKown
1110 Gleneagles Drive
Huntsville, Alabama 35801
Ph: (256) 650-5500
Fax: (256) 650-5504
E-mail: jblackwell@hornsbywatson.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record on the _____ day of May 2009, by hand delivery, electronic filing, and/or depositing the same in the United States Mail, postage prepaid and properly addressed to:

Billy Middleton
Attorney for Defendant
EYSTER, KEY, TUBB, ROTH
MIDDLETON & ADAMS
402 E. Moulton Street
Post Office Box 1607
Decatur, Alabama 35602

OF COUNSEL