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**Commonwealth of Kentucky
Pike Circuit Court
First Division**

Jennifer Bentley and)	
William Bentley,)	
)	
Plaintiffs,)	
)	Civil Action No. 02-CI-1355
vs.)	
)	
Jeffrey Rose, Adams Trucking Corporation and)	
Adams Construction Corporation)	
)	
Defendants.)	

Affidavit of John P. Tierney

COMES NOW, John P. Tierney, being first duly sworn upon his oath states the following:

Defense has filed a motion to exclude my testimony and the testimony of my associate Edward P. Berla'. This motion centers around the following key areas:

1. Expert qualifications
2. Analysis regarding Ms. Bentley

Each of these points is refuted in the discussion that follows. As I was the primary expert on this case, the affidavit will be solely from me. Though Dr. Berla' is not expected to testify in this case, I will address his expert qualifications along with my own.

1. Expert Qualifications

Defense asserts that neither Dr. Berla' nor I am qualified to testify regarding Ms. Bentley's loss of lifetime earnings due to her injury of August 2002. Their objections center on our ability to provide economic testimony and on the fact that we are not medical doctors. These issues will be dealt with separately.

1.1. Field of Economics

Economics is defined in most Economics text books as "the study of the allocation of scarce resources." Thus, it is a field much broader than the impact of disability on a plaintiff's lifetime expected earnings. Indeed, there is no single discipline that focuses on this impact. Dr. Berla' and I do not hold ourselves out to be economists. Determination of the present value of an earnings stream could be argued to be part of many disciplines, including accounting, finance, economics, and vocational counseling. Our post-doctoral training has been targeted to build on earlier education and training to focus specifically on the assessment of lifetime earnings as stated in present value. In that minor application of the relevant fraction of economic theory, we do hold that we are qualified to testify.

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1.2. Economic training

In performing an analysis of loss of earning capacity in a personal injury case, five elements must be determined: pre-injury earning capacity, post-injury earning capacity, pre-injury worklife expectancy, post-injury worklife expectancy, and present value of the loss figure.

The first four elements are vocational issues, not economic ones. The elements require knowledge of jobs and the physical and mental attributes required to perform them; the labor market, including current pay rates; the concept of occupational disability and how it affects ability to work; and career cycles and worklife expectancies, and how they differ for workers of varying educational backgrounds and qualifications, with and without disability.

The last of the five elements, present value, is an economic issue. It requires an understanding of the relationship of wage growth and interest rates over time, and how that relationship can affect earnings. One might argue given the predisposition of many Kentucky courts toward use of a "pure offset" for computation of present value, that economic knowledge is not even required for this fifth step. Nonetheless, I believe the following paragraphs will prove our qualifications in this regard also.

As will be shown in the following sections, Dr. Berla' and I have both formal training and practical experience that provide us with expertise in the areas of career patterns, worklife expectancies, the effect of disability on ability to work and find jobs, earning capacity of individuals with and without disability, the labor market, and the world of work in general. Much of this involves the "practical economics" of work and disability.

Our training in economics has been specific to the issue of loss of earnings over a lifetime and the role of wage growth, interest rates, and inflation in the economy. The formal education in determination of present value figures, obtained through Purdue University, the University of Louisville, and the University of Nevada at Las Vegas, has been applied many times over the years in numerous cases of personal injury litigation. Thus, we have a minimum of 12 years of experience in applying those concepts to actual cases. Over this time we have kept up with the literature in the area of loss of earning capacity, including present value determination.

Thus, based on the combination of our knowledge, skill, experience, training, and education, we are qualified to testify as vocational economic experts to address issues related to the effect of injury on Ms. Bentley's ability to work and earn money.

1.2.1. John Tierney

My knowledge, skill, experience, training, and education all combine to qualify me as an expert. As noted in my Curriculum Vitae (Attachment A), I have a Master's degree in Guidance and Counseling and additional graduate level coursework specific to vocational counseling, vocational rehabilitation counseling, and economics as it pertains to the assessment of loss of

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lifetime earnings. My formal economic education was obtained through Purdue University, the University of Louisville, and the University of Nevada at Las Vegas.

In addition to my education, I have work experience specific to placing persons with disabilities in jobs. In particular, I was employed by the Metropolitan Sewer District from 1976 to 1987 and by the River Region Mental Health/Mental Retardation Board from 1974 to 1976. In both of these jobs, I managed Employee Assistance Programs that worked toward the rehabilitation and placement of persons with disability.

From 1986 to 1992, I was under contract as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. In this capacity, I provided opinion testimony regarding the employment potential of disabled persons seeking Social Security disability benefits. I provided such testimony at the government's request on numerous occasions.

My education and experience provide me with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition, data are available from the U.S. Census Bureau's Current Population Survey (CPS) that pertain specifically to the earnings and worklife expectancy of persons with and without a work disability. These data are analyzed in various government publications and scientific articles, demonstrating the impact of work disability on earnings and employment (worklife).

This combination of education, experience, and technical data enables me to assess the loss of lifetime earnings of Ms. Bentley in a way that is beyond the realm of common knowledge.

1.2.2. *Edward Berla'*

Defense notes that Dr. Berla' was previously disqualified to testify in *Kelly v. McFarland*. While this is true, it should be noted that no one associated with Vocational Economics, Inc. was notified about this challenge until after the opinion was rendered. The attorney hiring Dr. Berla offered no rebuttal of the defense motion. Thus, the judge was left with no choice other than the opinion he rendered. As will be shown below, this challenge could have been effectively addressed given the opportunity.

I note that in Defense's haste to find the one decision excluding Dr. Berla's testimony they overlooked a decision by the same court that allowed mine under the same qualification and average statistics challenge they issue in this case. The Federal Court decision in *Charles R. Wright, Jr. v. Werner Enterprises, Inc. and Renee A. Osborne* (Action No. 01-239) is attached as an exhibit.

Dr. Berla' has bachelor's, master's, and doctorate degrees in psychology and post-doctoral training in economics (see Attachment C). His training in economics, obtained from the University of Louisville and Purdue University, has been specific to the issue of earning

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capacity, loss of earnings over a lifetime, worklife expectancies, and the role of wage growth, interest rates, and inflation in the economy.

Dr. Berla' was employed as a vocational expert with the Social Security Administration from 1990 to 1999. In this capacity, he provided opinion testimony regarding the employment potential of disabled persons seeking Social Security disability benefits.

For approximately the last 15 years, he has been a consultant with Vocational Economics, Inc., where he has evaluated hundreds of persons in terms of their capacity to labor and earn and the loss of earning capacity over a lifetime. He has qualified as a vocational expert and as a vocational economic analyst on numerous occasions in both federal and state courts, including, but not limited to, courts in Indiana, Kentucky, Ohio, Tennessee, Missouri, Illinois, Michigan, and West Virginia.

Concurrently, he was employed as a university professor in the Department of Special Education from 1975 to December 2000. In that capacity, he taught courses on the impact disabilities have on persons' lives including vocational, psychological, social, and educational effects. He also taught courses on research analysis, research design, and statistics. Prior to 1975, he worked as a behavioral research scientist and statistical consultant at the American Printing House for the Blind where he conducted and supervised research on how to facilitate the functioning of blind persons, particularly blind children.

As a psychologist, he was trained in evaluative methods, including the administration of specialized instruments such as vocational and intelligence tests. He also had extensive course work in statistical analysis, research design, and techniques for treating persons with physical and/or emotional/mental disabilities.

Dr. Berla's combination of practical experience and formal training in both vocational and economic issues qualify him to render an opinion regarding Mr. Bentley's loss of lifetime earnings.

1.3. Not medical doctors

Defense criticizes our expertise, appearing to believe that, because we are not medical doctors, we should not be allowed to testify regarding her work disability. Dr. Berla' and I, like any other vocational or economic expert, are not medical doctors, and, therefore, cannot make a medical diagnosis. Testimony regarding work disability, however, is the province of a vocational expert, not a medical doctor.

Medical opinions cannot translate into vocational or economic opinions by themselves. They must be translated into vocationally-relevant data by experts knowledgeable about the world of work and the effects of impairments on ability to work. That is, based upon permanent physical restrictions (e.g., reduced lifting, bending, etc.) determined by a qualified medical expert, a vocational expert may opine on the impact of those restrictions in the workforce.

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Medical findings (e.g., the September 2, 2003 deposition of Dr. John Gilbert and the July 1, 2003 report of Dr. Robert Granacher, Jr.) identify permanent limitations for Ms. Bentley without detailing their specific vocational impact. Defense motion seems to require that this impact be analyzed only by a medical doctor – somebody that has no training in occupational or vocational analyses. As noted previously, Dr. Berla’ and I have years of experience working with people with disabilities and as vocational experts with the U.S. Department of Health and Human Services, Social Security Administration. It is with this experience that we examine the permanent limitations identified by medical experts (as well as all the other evidence) to analyze their impact on the plaintiff’s ability to function in the workforce.

2. Analysis Regarding Ms. Bentley

As with our qualifications, Defense seems to confuse medical opinion with vocational and economic opinion. They feel that the analysis of Ms. Bentley’s loss of lifetime earnings is based on unsupported assumptions regarding her physical condition and ability to work. Specifically, they object to our use of statistical averages and our “vague” opinion regarding her worklife expectancy. They also seem to confuse issues related to the time and money aspects of lifetime earning capacity.

In conducting an assessment of loss of lifetime earnings, an expert needs to consider a variety of factors, some of which are age, education, previous work experience, work-related limitations, and the lifetime effects of these impairments on ability to work and earn money. When conducting the assessment, it is essential that the expert take important vocational factors into consideration. In assessing Ms. Bentley’s post-injury earning capacity, consideration was given to the effects of her injuries and the impact that these limitations are likely to have on her capacity to work and earn money in the future.

2.1. Use of average statistics

Some of the Defense opposition centers on the fact that the data we used are derived from average earnings and employment rates from various disability category populations. The consternation seems to stem from a need for a very precise formula to apply these population statistics to an individual plaintiff. Averages from various populations have long been accepted as a means for prediction – life expectancy, earnings, and others. No statistic, no matter how fine-tuned, can provide an exact predictor of an individual’s future. This is as true of worklife expectancies as it is of various measures of annual earnings and growth and discount rates. The expert must use available statistics about populations and mold them to meet the specifics of the case. The expert must use available statistics about populations and mold them to meet the specifics of the case.¹ As Marcia Angell noted in *Science on Trial* (1997, p.115):

¹ See also the attached decision in *Wright v. Werner* (Attachment B).

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Courtroom trials are not about populations, they are about individuals. . . . We have no basis, at least in the current state of knowledge, for making a judgment about a particular woman. We therefore *must* appeal to epidemiological data – that is, studies of populations.

The United States Supreme Court addressed this very concern in *Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523 (1983), where they noted the impossibility of producing statistics that exactly match the plaintiff's future:

By its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured.

The Court went on to deride attempts at coming up with such statistics:

We do not suggest that the trial judge should embark on a search for "delusive exactness." It is perfectly obvious that the most detailed inquiry can at best produce an approximate result.

Economists, actuaries, insurance companies, and gambling establishments use population averages when making rational bets on human outcomes. The basic belief is that in the absence of more specific and precise information, the best predictors of outcomes are statistical averages or relative frequencies. The alternative would be to base an analysis on pure opinion alone, with no statistical support. Following this, disability data do not have to be segregated by type, severity, or duration of disability in order to be reliable or meaningful.

Even if segregated data existed, its use would be limited at best. Persons with the same diagnosis and the same length of time since injury can have significantly different experiences in terms of their experience in the workplace, especially when education level is factored in. Consider an example of two men with identical hand injuries resulting in reduced grip strength and limited range of motion. This injury would have an enormous impact on a carpenter, who would likely need to leave his employment. For an English professor, however, the effect may be minimal.

What the criticism does point to, however, is the fact that statistics of all sorts must be used responsibly and applied by persons familiar with the world of work and career development theory. When assessing persons with disability, the user should be familiar with the effects of impairment on ability to work and earn money as well as the experiences of persons with disability in the labor market. Dr. Berla' and I have the knowledge and experience necessary for performing such a calculation (see Attachment A).

2.2. Vague nature of continuum placement

As noted in the previous section, Defense objects to our use of average statistics in deriving our opinion regarding Ms. Bentley's ability to work and earn money, stating that they are too general

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to be meaningful. Immediately following this, Defense acknowledges our specific opinion regarding her worklife expectancy, while at the same time objecting to its “vague” nature. They object because the worklife expectancy placements “are given no definition or medical meaning.”

Defense confuses the issues. We were not retained to provide medical meaning, but as vocational economic analysts, were retained to provide vocational and economic opinion. The issue regarding the length of time that Ms. Bentley can be expected to work with and without the August 2002 injury is a vocational issue, not a medical one.

If Defense understood our analysis, they would understand that in saying, for instance, that Ms. Bentley’s post-injury worklife expectancy is “50% between severe and not severe,” that we are providing an estimate of the *amount of time* that Ms. Bentley may be expected to work because of her injury. No “medical meaning” is relevant for such an issue.

Ms. Bentley’s impairments clearly impact her ability to perform work as well as she would have been able had she not sustained the August 2002 injury.

2.3. Time versus money

Defense appears to confuse the two elements relevant to lifetime earnings, time and money. A person earns a given hourly wage or annual salary (the money element). How much that person earns over a lifetime, however, is also directly related to the number of hours or years that the person earns that money (the time element).

When conducting an analysis of loss of lifetime earnings, these two elements are assessed separately. Defense objects because we determined that, while her annual earning capacity has not dropped because of the August 2002 injury, the amount of time that she can be expected to work has dropped. Contrary to apparent Defense opinion, this is not contradictory. This is consistent with annual cross-tabulations produced by the US Census Bureau² that show that persons with a work disability not only suffer a decreased likelihood of employment, but also show significantly reduced earnings from those of their counterparts without disability, even when working year-round, full-time.

Given Ms. Bentley’s age, education, previous work experience, and work-related limitations, it was determined that, when she worked, she could earn the same hourly or annual wage. The nature of her limitations is such that we determined, with a reasonable degree of professional probability, that Ms. Bentley is likely to have more trouble finding and maintaining employment than she was prior to this injury. This directly results in the reduced worklife expectancy

² See particularly Tables 2 and 3 on the Census Bureau website:
<http://www.census.gov/hhes/www/disable/disabcps.html>

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objected to by Defense. The specific details regarding the calculations of her pre-injury and post-injury worklife expectancy can be found in the Worklife Probability received by Defense as part of our July 2003 report.

FURTHER, THE AFFIANT SAYETH NAUGHT.

John P. Tierney
Senior Vocational Economic Analyst

Subscribed and sworn to before me, a notary public, in this ____ of November, 2003.

Notary Public

My Commission Expires _____