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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MATTHEW R. BERNHARD,)	
)	
Plaintiff)	
)	
v.)	06 CV 1799
)	Judge Virginia Kendall
)	
RICHARD D. BORK,)	
TRANSCONTINENTAL SYSTEMS, INC.,)	
COUSINS TRUCKING,)	
)	
Defendants.)	

AFFIDAVIT OF DAVID S. GIBSON, MBA, CPA, CRC

Comes now, David S. Gibson, MBA, CPA, CRC, being first duly sworn upon his oath states the following:

Defense has filed a motion in limine to exclude my testimony and that of Ronald E. Missun, PhD. I will respond to all of the issues raised by defense because they all relate to my opinions in the case. The motion centers around the following key areas:

1. Post-Traumatic Stress Disorder (hereinafter referred to as PTSD) and its congruence with the definition of cognitive disability;
2. Not a medical doctor,
3. Use of a proxy vs. actual wage history;
4. Application of cohort group data;
5. Use of statistical averages.

1. PTSD and cognitive disability

Mr. Bernhard reports psychological and social problems as a result of his accident and has been diagnosed as having Post Traumatic Stress Disorder (PTSD). PTSD is an anxiety disorder, as classified by the Diagnostic and Statistical Manual of the American Psychiatric Association. Using this diagnosis and Mr. Bernhard's reported and diagnosed limitations, I analyzed the impact of his disability on lifetime earnings using data from the American Community Survey (ACS) concerning "cognitive" disability. In the ACS, cognitive disability is identified by those persons with limitations "learning, remembering, or concentrating because of a physical, mental, or emotional condition lasting 6 months or more."

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The defense motion contends my use of this data is inappropriate. Defense is perhaps confused on the differences between a *diagnosis* and the resulting *limitations* as witnessed by their complaint that no doctor has diagnosed Mr. Bernhard as having a “Cognitive Disability.” As used in the ACS, cognitive disability is not the name of a diagnosed condition, but a description of limitations (learning, remembering, and concentrating) that may impair employment outcomes. As pointed out in my deposition, there are any number of diagnosed conditions that can cause these limitations.

PTSD is associated with increased rates of other psychological disorders including depression.¹ Difficulty concentrating, remembering, and making decisions are symptoms of depression² and anxiety, and are therefore consistent with the definition of “cognitive” disability.

The plaintiff, Matthew Bernhard, reported psychological and social problems including depression, low frustration tolerance, irritability, mood swings, negatively impacted family relationships, and loss of interest in previous activities and social interaction during my interview with him on December 12, 2006. He also reported anxiety when driving. Mr. Bernhard has treated with Farid Karimi, MD, a psychiatrist, since May of 2006. As of the date of our interview, Mr. Bernhard continued to treat with Dr. Karimi on a monthly basis and takes the antianxiety/antidepressant medications Seroquel and Lexapro.

In his deposition dated February 14, 2007, Dr. Karimi reported he first saw Mr. Bernhard on April 19, 2006. He stated Mr. Bernhard began experiencing the symptoms of PTSD, specifically nightmares, immediately after the June 2005 automobile accident (pg. 32). Dr. Karimi was treating Mr. Bernhard for depression that he believed to be chronic. He stated in the future Mr. Bernhard will need antianxiety/antidepressant and sleeping medications along with periods of intensive therapy when he becomes dysfunctional (pg. 72). He described Mr. Bernhard as vulnerable to needing patient care and treatment in the future (pg. 78). Dr. Karimi described an instance where Mr. Bernhard was having a dispute with his girlfriend. Dr. Karimi said Mr. Bernhard “fell apart” and he “thought that he (Mr. Bernhard) would end up in the hospital.” He thought Mr. Bernhard’s reaction to the situation was out of the ordinary (pgs. 78-79).

The Life Time Expense Analysis prepared by Rebecca S. Busch, RN, MBA, CCM, CFE, FHFMA, of Medical Business Associates calls for psychiatric evaluation and follow-up for the next 20 years and ongoing management which includes antianxiety/antidepressant medications.

¹ Anxiety Disorders, National Institute of Mental Health publication, pg. 8. Found at <http://www.nimh.nih.gov/health/publications/anxiety-disorders/nimhanxiety.pdf>

² Depression, National Institute of Mental Health publication, pg. 4. Found at <http://www.nimh.nih.gov/health/publications/depression/nimhdepression.pdf>

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The information gained during my interview with Mr. Bernhard as well as the accompanying medical information illustrate the impact of PTSD on Mr. Bernhard's ability to reason and think rationally and manage his emotions as compared to the ordinary person.

2. Not a medical doctor

Defense repeatedly objects to the fact that I am not a medical doctor, claiming that precludes my ability to project the impact of Mr. Bernhard's limitations on his lifetime earnings. Defense confuses the training and expertise of the two disciplines. A medical degree is necessary to make a medical diagnosis and opine to the permanency of physical or cognitive limitations. However, it is the province of a vocational expert to translate these medically determined limitations into the expected impact for the plaintiff in his or her employment (current or future). Medical impairments 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.

In fact, medical doctors have no training in vocational counseling, the world of work, statistical analysis of annual earnings or employment, or the impact of disability on any of these factors. My training is multi-disciplinary, allowing me to review permanent physical or cognitive limitations *that have been medically determined*, and to analyze their statistically expected impact on earnings and employment.

I have a master's degree in rehabilitation counseling (MRC) and was certified as a rehabilitation counselor (CRC) after passing a national examination and meeting other requirements set forth by the Commission on Rehabilitation Counselor Certification. I have published many articles and made many presentations on the statistical impact of disabilities on annual earnings and worklife expectancy.

The MRC program trains graduate students to understand medical, social, and psychological information to assess the impact of disability in terms of attitudinal barriers, vocational and employment functioning, independent living, and adjustment within the family and community. I completed coursework that specifically focused on the medical and psychosocial aspects of disability and on psychopharmacology and mental health diagnosis. I have had the opportunity to work on hundreds of cases and review medical records involving a wide range of both mental and physical disabilities and their impact on an individual's employability during my 14-year tenure at Vocational Economics, Inc. In addition, the medical and psychosocial impact of disability is a component of the CRC national examination.

3. Use of a proxy vs. actual wage history

Defense takes issue with the use of a proxy as opposed to Mr. Bernhard's actual wage history for the five years preceding the accident in question. The role of the vocational analyst is to determine what most reasonably defines an individual's annual earning capacity.

Vocational and economic experts recognize that an individual's actual earnings sometimes best represent earning capacity, at other times a proxy is the best measure. A proxy is especially appropriate for younger workers and for those with little to no work history.

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The Proxy Bibliography attached as Appendix A on this web site offers a few articles that discuss the use of statistical averages for representing an individual's earning capacity. As discussed by the vocational and economic experts authoring these articles, earnings may be reasonably estimated by average earnings by educational level or occupation, or through the use of specific worker characteristics defined by the U.S. Department of Labor.

Determination of earning capacity needs to be addressed on a case-by-case basis by an expert who considers all relevant factors, such as age, gender, education, work history, and work-related limitations. Automatic use of an actual earnings figure could result in an analysis that is not a reasonable portrayal of the plaintiff's earning capacity, and, therefore, is not responsive to the needs of the court.

Mr. Bernhard's earnings for the years preceding the accident in question were as follows:

2002	\$29,712
2003	\$16,507
2004	\$10,503
2005	\$ 7,434

Based on Mr. Bernhard's hourly earnings history, which in recent years has ranged between \$14 and \$17 per hour, only 2002 can be considered a reasonable representation of annual earnings when fully employed. The base earnings figure used in my *pre-injury* earning capacity analysis beginning June 13, 2005, was \$29,634, slightly less than Mr. Bernhard's actual earnings in 2002. The use of a proxy in this case is comparable to Mr. Bernhard's demonstrated annual earning capacity when fully employed. These earnings are then statistically reduced for probable periods of unemployment in my analysis.

The use of proxies illustrates the *difference* in earning capacity between an individual without a disability and one with a cognitive disability allowing the calculation of a lifetime loss of earning capacity as a result of injury. In illustrating that difference, most of the *post-injury* base and adjusted earnings figures exceed Mr. Bernhard's actual earnings for the years 2002 through 2005. Attached is a list of journal articles addressing use of a proxy when calculating lost earning capacity.

4. Application of cohort group data

Throughout the challenge, defense refers to the demographic characteristics of the data used in my analyses as "broad" categories. I want to respond by clarifying the specific demographic profiles of the data used in my analyses.

The *pre-injury earning capacities* are based on the age-earnings cycles of a male high school graduate without a disability and a male with an associate's degree without a disability. The *post-injury earning capacities* are based on the age-earnings cycles of a male high school graduate with a cognitive disability and a male with an associate's degree with a cognitive disability. The *pre-injury worklife expectancies* are based on those of a male high school graduate without a disability and a male with an associate's degree without a disability. The *post-injury worklife expectancies* are based on those of a male high school graduate with a

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cognitive disability and a male with an associate's degree with a cognitive disability. The data used in my analyses match the age, gender, educational level or anticipated educational level, geographic locale, and disability status of Mr. Bernhard.

5. Use of statistical averages

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. As noted by Marcia Angell in *Science on Trial* (1997, p. 115):

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 recognized this uncertainty several years ago, in their decision in *Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523 (1983):

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.

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.

FURTHER THE AFFIANT SAYETH NAUGHT.

David S. Gibson, MBA, CPA, CRC
President, Senior Analyst

Subscribed and sworn to before me, a notary public, in this _____ of September 2007.

Notary Public

My Commission Expires _____

Proxy Use

Bibliography

Below is a list of articles and publications supporting use of a proxy in estimating earning capacity.

Albrecht, Gary. “Forecasting the Earnings of a Partially Disabled Individual.” *Journal of Legal Economics*, July 1991, 50-57.

While discussing a method for calculating lost earnings, the author includes the possibility of using Census Bureau data on the average earnings for persons with a work disability by educational level.

Dillman, Everett G. “The Age-Earnings Cycle – Earnings by Education.” *Journal of Forensic Economics*, December 1988, 105-116.

The author discusses the age-earnings cycle and notes that for people with little or no demonstrated earning capacity, earnings can be estimated by using a relevant statistical cohort group, such as average earnings by education.

Dillman, Everett G. “Interfacing the Economic and Vocational in Personal Injury Cases.” *Journal of Forensic Economics*, May 1988, 55-76.

The author discusses the interaction between the vocational and economic elements in assessing lost earnings. As part of this, he notes as possibilities for the estimation of earning capacity, the use of average earnings by educational level or through the use of vocational factors as outlined in the U.S. Department of Labor's *Dictionary of Occupational Titles*.

Martin, Gerald D. *Determining Economic Damages*. Costa Mesa, California: James Publishing, 1997.

This book includes a discussion of many elements of determining economic damages. When dealing with earnings estimates, the book discusses use of average earnings for various cohort groups, such as educational level or occupation, to estimate a plaintiff's earnings.

Toppino, David and Dawn Boyd. “Wage Loss Analysis: Vocational Expert Foundation and Methodology.” *Journal of Legal Economics*, July 1993, 69-79.

The authors note that while use of actual, historical earnings might be most appropriate for estimating the earning capacity of certain plaintiffs, use of statistical cohort groups is more appropriate for others, such as those with a limited or nonexistent work history.