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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

OCT 18 2002

CLERK OF COURT  
U.S. DISTRICT COURT  
NEW ALBANY, INDIANA

STEPHEN C. JACKSON, et al.,

Plaintiffs,

vs.

ROADWAY EXPRESS, INC.,

Defendant.

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CAUSE NO. NA 99-106-C (S/H)

**ENTRY ON DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF  
LARRY E. GRABBE AND GEORGE V. LAUNEY**

This cause is before the court on the motion of defendant Roadway Express, Inc. ("Roadway") entitled Motion to Exclude Testimony of Larry E. Grabb and George V. Launey. The motion is fully briefed, and the court, being duly advised, GRANTS the motion as to Dr. Grabb and GRANTS IN PART the motion as to Dr. Launey for the reasons set forth below.<sup>1</sup>

This case arises out of a June 1997 accident in which plaintiff Stephen Jackson was injured. As one element of his damages in this case, Mr. Jackson alleges that his future earning capacity has been diminished by the continued effects of his injuries. Relative to this claim, the plaintiffs have submitted the expert report of Larry E. Grabb, "who purports to have "conduct[ed] a vocational assessment ... to determine and formulate an opinion regarding Mr. Jackson with respect to his ability to obtain and maintain employment." Grabb Report at 1. The plaintiffs also have submitted the expert report of George V. Launey, who, based in large part on the findings of Dr. Grabb, purports to have "estimate[d] total economic loss from the injury of Stephen C.

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<sup>1</sup> Inasmuch as neither party has requested a hearing on this motion, and the court determines that all of the information necessary to decide the issues raised in the motion is contained in the parties' briefs, the court determines that no hearing is required. See Target Market Publishing, Inc. v. ADVO, Inc., 136 F.3d 1139, 1143 n.3 (7th Cir. 1998).

Jackson in the following areas: (1) lost earnings from standard time employment, (2) lost earnings from overtime employment, (3) employer funded benefits, (4) household services to family, (5) past medical expense, (5) future medical expense." Launey Report at 12. Defendant Roadway Express, Inc. ("Roadway") argues in the instant motion that both Dr. Grabb's and Dr. Launey's testimony should be excluded because it fails to satisfy the requirements for admissible expert testimony set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and its progeny, and Federal Rule of Civil Procedure 702. As discussed below, based upon several problems with Dr. Grabb's methodology, the court agrees.

#### Dr. Grabb's Proposed Testimony

In his report, which is dated February 27, 2001, Dr. Grabb summarizes a Residual Functional Capacity Form that was completed by Mr. Jackson's physician on February 17, 2000. On that form, the physician noted certain physical limitations that Mr. Jackson had that may impact his ability to perform certain work and stated that it is "indeterminable" whether Mr. Jackson's condition will improve or deteriorate. Dr. Grabb notes that he interviewed Mr. Jackson on February 7, 2000. From that interview, Dr. Grabb determined that Mr. Jackson graduated from high school in 1962, received Electronics Technician training from the United States Navy from 1962-1964, and has worked for the same employer, Cummins Engine Company ("Cummins"), since 1971. In his deposition, Dr. Grabb testified that he had conducted a brief follow-up interview with Mr. Jackson by telephone in July 2002 and determined that Mr. Jackson's condition had not changed since the initial interview.

Mr. Jackson's current position at Cummins is Polishing Machine Operator. Dr. Grabb's report notes:

Mr. Jackson further reports that, prior to [the subject accident], he averaged 80 work hours per week (over the preceding four to five years). Since his return to work from the [accident], he was at first only able to average 56 hours per week (a reduction of 30%) - and pushed himself physically and emotionally to meet this number. Mr. Jackson continues to work the maximum number of hours he can force himself to complete because, as he stated, he "needs the money" for his family.

Based upon a reference entitled the *Dictionary of Occupational Titles*, Dr. Grabb states that the job of Polishing Machine Operator requires a medium level of exertion, and both the requirement of "frequent reaching" and the number of hours of standing required to do that type of job exceed Mr. Jackson's residual functional capacity for those actions.<sup>2</sup>

Dr. Grabb's report includes two scenarios regarding Mr. Jackson's impairment of earning capacity. In the first scenario, Dr. Grabb uses a reference entitled *The New Worklife Expectancy Tables* ("the *Tables*") to determine Mr. Jackson's remaining worklife-in other words, the remaining number of years that he is statistically likely to remain in the work force. As the plaintiffs explain in their brief:

The New Worklife Expectancy Tables were published by Vocational Econometrics, Inc. and were created by A.M. Gamboa, as [sic.] well known vocational expert and vocational economic analyst. The New Worklife Expectancy Tables utilize the factors of age, gender, occupational disability, and education to determine the worklife expectancy of an individual.

Dr. Grabb utilized Table 2 of the *Tables*, which applies to people with twelve years of education.<sup>3</sup>

The table provides the average statistical worklife expectancy of a person of a given age with a particular disability status. There are three disability status categories used in the table:

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<sup>2</sup> Dr. Grabb does not attempt to reconcile this with the fact that Mr. Jackson undisputedly has been performing the job of Polishing Machine Operator at Cummins in his current physical condition.

<sup>3</sup> Dr. Grabb does not explain why he did not consider Mr. Jackson's electronics training in the Navy as additional years of education.

"severely disabled," "not severely disabled," or "not disabled." Dr. Grabb determined that Mr. Jackson was "not severely disabled" based upon his residual functional capacity.<sup>4</sup> Based upon the table, a 53 year-old man<sup>5</sup> with 12 years of education who is not disabled has a worklife expectancy of 10.0 years, while the same man with a not-severe disability has a worklife expectancy of 6.3 years. Therefore, Dr. Grabb determined that Mr. Jackson's injuries and resultant not-severe disability from his accident decreased his worklife expectancy by 3.7 years (10-6.3=3.7). Dr. Grabb then multiplied 3.7 by Mr. Jackson's income in 1996, his last full year of employment before the accident, to arrive at a future income loss of \$307,100.

For his second scenario, Dr. Grabb assumed that Mr. Jackson "would have continued his employment with his present employer until the common retirement age of 65"-working an additional 8.5 years from the date of the accident-if he had remained uninjured. Dr. Grabb then opines: "However, should Mr. Jackson lose his present employment, it will be nearly impossible for him to find employment at the same rate of pay, with the same over-time possibilities (should he be able to work it), etc." Grabb Report at 5. Dr. Grabb then states that a "quick perusal of jobs available within a 50-mile radius of Mr. Jackson's ZIP code" reveals that, should Mr. Jackson have to seek other employment, he can at best expect a rate of pay of \$10.00 per hour. The report continues:

Multiplied \$10 times 2000 (the number of hours in an average work year) realizes a product of \$20,000. Comparing this "perhaps" income of \$20,000/year with his 2000 earnings of \$88,600 leaves a difference of \$66,600 (\$88,600 -

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<sup>4</sup> Dr. Grabb does not explain anywhere in his report how he reached this conclusion or what the *Tables* ' criteria for "not severely disabled" are. The court notes that Exhibit A of the *Tables* does set forth those criteria.

<sup>5</sup> Dr. Grabb chose 53 as the appropriate age because it was "Mr. Jackson's closest birthday at the time of the accident." Grabb Report at 5.

\$20,000 = \$66,600). Multiplying this annual difference (\$66,600) times 8.5 (representing the number of years before he reaches the common retirement age of 65) produces a figure of \$566,000, which would represent Mr. Jackson's loss under this scenario (should he no longer have his job at Cummins and have to seek employment on the "open market").

Grabb report at 6.

In order to be admissible at trial, a proposed expert's testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Federal Rule of Evidence 702.<sup>6</sup> Pursuant to Daubert, a federal trial court is required to "perform a gate-keeping function. . . before admitting expert scientific testimony under Rule 702." Chapman v. Maytag Corp., 297 F.3d 682, 686 (7<sup>th</sup> Cir. 2002). Thus, the court has examined Dr. Grabb's proposed testimony to determine whether it will assist the jury in determining Mr. Jackson's damages, and has determined that, due to several serious problems with Dr. Grabb's methodology, it will not.

Looking at Dr. Grabb's second scenario first, there are numerous problems with Dr. Grabb's methodology that render it useless as expert testimony. Perhaps the most glaring problem is Dr. Grabb's use of Mr. Jackson's age at the time of the accident to calculate his anticipated lost future income under this scenario. Dr. Grabb determined that, based upon available jobs near his home, if Mr. Jackson lost his job at Cummins and had to seek new employment he likely would make \$66,600 per year less than he does at Cummins.<sup>7</sup> He then multiplied that amount by 8.5 years-the number of years between June 1997, the date of the accident, and Mr. Jackson's 65<sup>th</sup> birthday-to obtain a total of \$566,000. In so doing, Dr. Grabb inexplicably fails to account for the fact that, as of the date of his report, Mr. Jackson was still

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<sup>6</sup> The court assumes, without deciding, that Dr. Grabb has the appropriate education and experience to qualify him as an expert in the areas addressed in his report.

<sup>7</sup> The court will not comment on the validity of this determination.

gainfully employed at Cummins, and had not, in fact, lost \$66,600 in 1998 (in which he made \$77,217), 1999 (in which he made \$94,284) or 2000 (in which he made \$88,646).<sup>8</sup> Therefore, Dr. Grabb's conclusion under his second scenario that "should [Mr. Jackson] no longer have his job at Cummins and have to seek employment on the `open market,'" his total loss of income would be \$566,000 has absolutely no basis in reality whatsoever. At best what Dr. Grabb calculated under Scenario 2 in his report was the amount of income Mr. Jackson would have lost had he lost his job at Cummins as of the date of the accident. Because Mr. Jackson did not lose his job as of that date, that calculation is entirely unhelpful to the jury in arriving at an appropriate damages award in this case.

Indeed, inasmuch as Dr. Grabb conceded in his deposition that he has no information to suggest that Mr. Jackson is in danger of losing his job at Cummins-either for reasons related to the accident and his resulting injuries or for entirely unrelated reasons-it is difficult for the court to understand why Dr. Grabb included Scenario 2 in his report at all. Finally, and no less importantly, the court notes that Dr. Grabb's report does not indicate that Mr. Jackson's job prospects should he lose his job at Cummins are any worse in light of his physical condition than they would have been had the accident never occurred. In other words, there is no information at all in Dr. Grabb's report regarding the jobs available to a person with Mr. Jackson's educational and work background who suffers from no physical impairments at all. Without this information, it is impossible to attribute any loss of future earnings under Scenario 2 to the accident.

Dr. Grabb's Scenario 1 suffers from its own problems, only one of which needs to be

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<sup>8</sup> The record before the court does not contain Mr. Jackson's earnings beyond 2000, but obviously those numbers are readily obtainable by Mr. Jackson.

addressed, because it is dispositive. Dr. Grabb performed no independent analysis of Mr. Jackson's worklife expectancy based upon his individual circumstances. Instead, he simply applied the *Tables* in a mechanical fashion. This is contrary to the instructions contained in the introduction to the *Tables*, which, in a section entitled "Use of the Tables," notes that

[i]f applied to a particular individual or circumstance, the tables are effective to the degree that the person using them understands how a particular subject may vary from the averages presented in the table.... [T]hose using the tables geared specifically to persons with a disability must not assume that every person meeting the government definition of disability has an age-specific worklife expectancy of the average person with a disability in the cohort group.

But this is precisely the assumption Dr. Grabb makes in his report when he applies the averages contained in the table without considering whether Mr. Jackson's personal circumstances warrant a different conclusion. As the introduction to the *Tables* notes:

In rendering an opinion as to probable worklife expectancy for a person with a disability, a number of factors must be considered. Most important is the present employment status of the person meeting the definition of occupational disability. Typically, a person with a disability who is employed will have a worklife expectancy greater than that of a person either unemployed or a non-participant, assuming all of the factors such as age, education, gender, and severity of impairment remain constant. Also important is the nature of the work performed by a person with a disability and its compatibility with the existing impairment.

Because Dr. Grabb failed to consider any of these factors, and thus failed to use the *Tables* in the manner in which they were intended to be used, his conclusions are not reliable.<sup>9</sup>

For the reasons set forth above, the court determines that Dr. Grabb's proposed testimony fails to satisfy the requirements of Federal Rule of Civil Procedure 702 and *Daubert*, and therefore he may not be permitted to testify at trial. Accordingly, Roadway's motion to exclude is

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<sup>9</sup> The court assumes, without deciding, that the *Tables* themselves are scientifically valid and an expert could use them in a manner that would satisfy *Daubert*.

**GRANTED** as to Dr. Grabb's proposed testimony.

Dr. Launey's Proposed Testimony

While Dr. Launey states in his report that he has "estimate[d] total economic loss from the injury of Stephen C. Jackson in the following areas: (1) lost earnings from standard time employment, (2) lost earnings from overtime employment, (3) employer funded benefits, (4) household services to family, (5) past medical expense, (5) future medical expense," Launey Report at 12, he acknowledged in his deposition that he did not make any calculations as to either future or past medical expenses. Launey Deposition at 19-20. In addition, his determination of Mr. Jackson's past lost earnings involved a simple mathematical calculation. Id. at 20-21. The bulk of Dr. Launey's report is devoted to his calculations relating to Mr. Jackson's anticipated future earnings loss. Inasmuch as this portion of Dr. Launey's report is derivative of Dr. Grabb's report, it is inadmissible for the same reasons as Dr. Grabb's report is. Specifically, Dr. Launey adopted both Dr. Grabb's unfounded conclusion under his Scenario 1 that Mr. Jackson's worklife expectancy has been decreased by 3.7 years (or 37%) because of his injuries sustained in the accident. Dr. Launey's Scenario 2 is also based upon the unfounded speculations that Mr. Jackson (1) may lose his job at Cummins as a result of his injuries or (2) may lose his job at Cummins for reasons unrelated to his injuries but will be unable to find new employment with comparable earnings because of his injuries.<sup>10</sup> Accordingly, Dr. Launey's proposed testimony regarding future lost earnings (included fringe benefits) is inadmissible, and Roadway's motion to exclude is **GRANTED** as to this testimony.

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<sup>10</sup> The court notes that, unlike Dr. Grabb, Dr. Launey did not include "anticipated" lost earnings for the years 1998-2000.

Finally, Dr. Launey's report also contains a section in which he calculates the economic value of the past and future household work that Mr. Jackson is and will continue to be unable to do because of his injuries. This portion of Dr. Launey's report is not dependent on any of Dr. Grabb's assumptions, and therefore is not directly addressed by Roadway's motion to exclude, which is based solely on the inadmissibility of Dr. Grabb's proposed testimony. The court notes that Dr. Launey relied on the plaintiffs' statement that, because of Mr. Jackson's injuries, his contributions to his household have been reduced by 75%.<sup>11</sup> Should the plaintiffs wish to present Dr. Launey's testimony regarding the loss of household services portion of his report at trial, they must first produce evidence to support the base assumption that Mr. Jackson's injuries have caused a 75% reduction in his household services contributions and that this reduction is reasonably likely to continue in the future.

For the reasons set forth above, Roadway's Motion to Exclude the Testimony of Larry E. Grabb and George V. Launey is GRANTED, except to the extent the plaintiffs wish to have Dr. Launey testify regarding the economic value of the household services Mr. Jackson is unable to

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<sup>11</sup> Dr. Launey's report does not explain this assumption, and the only explanation of it in his deposition is contained in the following exchange:

Q: According to this, there was a 75 percent loss attributed to Mr. Jackson of household services contribution to the family. Where did that number come from?

A: I think the questionnaire, together with a listing of the things he couldn't do or can't do by virtue of his injuries. I'm sorry. I think Grabb's report had a listing of the things he couldn't do. But the 75 percent figure comes from the questionnaire, I believe. I did not have a hand in computing that.

Q: This 75 percent loss, you just took at face value those things that were listed in Dr. Grabb's report of things he could or could not do, and apparently, some number that was in the questionnaire that you used, it was filed out by the plaintiff?

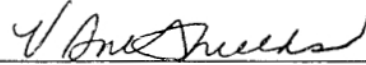
A: Which asked for that.

Q: Okay.

Launey Deposition at 50.

perform because of his injuries and are able to establish a proper factual foundation for that testimony.

ENTERED this 15 day of October 2002.



V. Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

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