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IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEPHEN C. JACKSON and)
REBECCA C. JACKSON)
)
Plaintiffs)
)
v.)
)
ROADWAY EXPRESS INC.)
)
Defendant)

Case No.: 99-106-C S/H

**REPLY TO THE PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY
TESTIMONY OF LARRY E. GRABBE AND GEORGE V. LAUNEY**

Comes the Defendant, Roadway Express Inc., by counsel, and for its Reply to the Plaintiff's Response to Roadway's Motion to Exclude the Testimony of Larry E. Grabbe and George V. Launey, states as follows:

Despite the Plaintiff's testimonials about Grabbe's professional qualification, he does not have the expertise necessary to render a vocational opinion pertaining to Stephen C. Jackson. Neither of Grabbe's education or job experience required him to do vocational assessments of this type; determining whether a person is unable to work because of an injury, and how an injury will affect that person's future income. Grabbe's educational qualifications are confined to college and student administration, and his job experiences are primarily in the head hunting end of the employment services area.

Frankly, Grabbe's only training to perform vocational assessments using the New Worklife Expectancy Tables, was in a one-day seminar. While the Plaintiffs claim that this is enough "training," it is not.

In addition, the methodology employed by Grabbe to make his determinations do not involve any expertise on his part. First, Grabbe's testimony unequivocally shows that he does not have any personal knowledge of how the New Worklife Expectancy Tables, that he used to determine Jackson's future wage loss, were formulated, or even the underlying basis of the data used in those tables.

The tables themselves only have a limited criteria; age, educational level, disability status and sex. These criteria take in a huge population such that the application of these statistics to an individual case, like Stephen Jackson's, renders meaningless any opinion based on these statistics.

Because Grabbe did not understand how the New Worklife Expectancy Tables were generated, or how the data was collected and formulated, he could not state that any of the physical conditions that Jackson claimed he had or any of the injuries reported in Jackson's medical records are part of the statistical base of the New Worklife Expectancy Tables.

As Exhibit "9" to Grabbe's deposition shows, the seven questions used to generate the underlying data for the New Worklife Expectancy Tables do not even address an individual's symptoms, injuries, or physical complaints. Consequently, regardless of whether Jackson reported any physical complaints, or Grabbe was able to glean any physical injuries from Jackson's medical records, these things cannot be used to form an opinion based on the data in the New Worklife Expectancy Tables.

Although the Plaintiffs attempt to rehabilitate George Launey's opinions by differentiating him from Larry Grabbe, as demonstrated in the Defendant's Motion to Exclude, Launey's opinions are so intertwined with Grabbe's analysis that Launey's opinions are also speculative.

Those cases cited by the Plaintiffs in support of their objection are primarily pre-Daubert opinions. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, is a 1983 decision; Bazemore v. Friday, 478 U.S. 385, is a 1986 decision; O'Shea v. Riverway Towing Company, 677 F.2d 1194, is a 1982 decision. Adams v. Ameritech, Inc., 231 F.3d 414 (7th Cir. 2001), is post-Daubert. That decision dealt with a motion to exclude testimony regarding the statistical findings of an expert. However, the proffered expert was not an economist, but simply someone doing a statistical analysis to show age-related discrimination by a company. The court reiterated the importance of the principles in Daubert when it said:

Daubert made clear that expert testimony should not be considered in a case unless the expert has genuine expertise (there), and that expertise will assist the trier of fact to understand or determine a fact in issue. Id. at 424.

Another post-Daubert case cited by the Plaintiffs is Tuf Racing Products, Inc. v. American Suzuki Motor Corp., 223 F.3d 585, 590 (7th Cir. 2000). However, the expert discussed in Tuf Racing, supra, was an accountant, not a vocational economist. With respect to that expert, the court stated:

The principle of Daubert is merely that if an expert witness is to offer an opinion based on science, it must be real science, not junk science. Tuf's accountant did not purport to be doing science, he was doing accounting. Both financial information furnished by Tuf and assumptions given him by counsel for the effect of the termination on Tuf's sales, the accountant calculated the discounted present value of the lost future earnings that Tuf would have had it not been terminated. This was a calculation well within the competence of a CPA. Id. at 591.

Thus, in the case of Tuf Racing, supra, the expert was well qualified to render an opinion within the realm of accounting.

In this case, Grabbe's opinions, and by extension, Launey's opinions, are junk science, not real science.

Recent cases show that courts are taking a hard look at expert economic testimony, whether it be in the personal injury arena, or the commercial arena. In Berlyn, Inc., et al. v. Gazette Newspapers, Inc., et al., 2002 U.S. Dist. Lexis 15789 (D.C. Md. 2002), the court excluded testimony by an expert witness because of the expert's lack of qualifications in a specific area. In Berlyn, Inc., supra, although the expert, Shaffer, was allowed to testify about certain opinions in an anti-trust litigation, the court excluded his testimony regarding the predatory pricing of the defendants.

Even though this expert had some qualifications to render such opinions, the court noted:

The Fourth Circuit has explained further that 'when the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court.' ... Of course, expert testimony in general, and a witness's qualifications in particular, also must be judged in light of the potential for the finder of fact to accept blindly the testimony of a witness who the Court has qualified as an expert. Id. at 15-17.

A unique feature about Berlyn is that the plaintiff's expert, Shaffer, had attempted to educate himself about the issues to which he was going to testify shortly before his deposition. However, the court determined that his attempt to become a qualified expert was not enough.

To accept Shaffer as an expert on this issue would be to recognize that, with minimal training and experience in antitrust economics, a person can become qualified to offer an expert opinion on the complex topic of defining relevant markets by applying himself to the topic for five or fewer days. The Court makes no such finding, and, for the reasons stated above, concludes that Shaffer is entirely unqualified to offer an opinion as to market definition.

Even if Shaffer were properly qualified by knowledge, skill, experience, training, or education, the plaintiffs have offered no evidence to show that his opinion is based on proper facts and data and that his methods in forming his opinion are reliable. Id. at 21-22.

Thus, in this 2002 case, the court excluded the testimony of an expert's opinion because he was not properly qualified, or the facts upon which he based his opinion were erroneous.

In Scardina v. Maersk Line, Ltd., 2002 U.S. Dist. Lexis 13468 (D.C. E.D. La. 2002), the court excluded the testimony of an expert economist, who would have testified about an injured seaman's lost past and future earnings, based on an assumption that the plaintiff's earnings would have been many times higher than his actual earnings history indicated. For example, the plaintiff's expert projected an impairment of earning capacity based on annual incomes of \$38,481 and \$76,962, when in fact, the plaintiff's average earnings for the three to five years preceding the accident were approximately \$26,000;

It is true the plaintiff demonstrated that it was possible for him to actually earn in one year, \$38,900.00 because he did so in 1997. On the other hand, it is also possible for him to actually earn only \$15,895.43, as he did the following year, in 1998. Plaintiff asks the Court to assume that in the future a high paying employment contract requiring a PIC (special certificate) and providing 100% to 150% overtime would always be available, that he would always be hired for that contract, and that, unlike his practice in the past, he would have always worked to his full capacity, for his future work-life expectancy of 9 years. Even assuming Mr. Scardina testifies at trial to his personal knowledge that such jobs exist, such a scenario is pure speculation and, even acknowledging his recent receipt of the PIC certificate, is not supported by the evidence of his past work history.

Based on the court's conclusion that the plaintiff's economist's opinion were speculation, the court excluded his testimony.

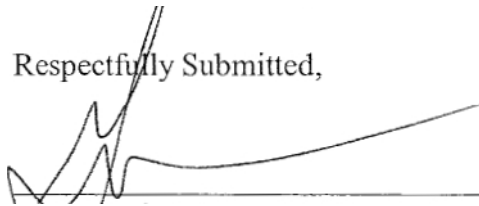
In this case, Grabbe's opinions, and therefore Launey's opinions, are pure speculation.

Using the over generalized New Worklife Expectancy Tables, Grabbe opines that Jackson's worklife expectancy will be significantly reduced, even though Jackson has been working full time, and in excess of 40 hours per week, since December of 1997. Even more speculative is Grabbe's second scenario in which he opines that Jackson will lose his job, and thereafter only be able to learn nominal wages, even though Grabbe has no direct evidence that Jackson will lose his employment with Cummins Engine for the reason related to the injuries he sustained in this accident.

CONCLUSION

This Court should exclude the testimony of Larry Grabbe and George Launey based upon all the Daubert criteria. Grabbe is not qualified to render vocational opinions, his opinion is unreliable because it is not grounded in sound methodology, and his opinions are unreliable because there is no fit between his assumptions and the actual facts of the case. To the extent Launey's opinions are based on Grabbe's conclusions, his opinions should also be excluded.

Respectfully Submitted,



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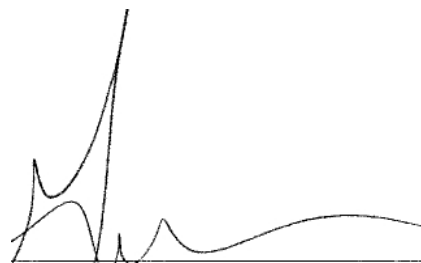
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this 1 day of October, 2002, properly addressed, postage pre-paid, and was deposited in the U.S. mail to:

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