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**District Court
Clark County, Nevada**

Cheryl Knee, and	Plaintiffs,)	
James Knee,)	
)	
	vs.)	Case No. A364911
)	Dept. No. I
)	
G.B. Supply, Inc.,	Defendants.)	
Et al.)	

Affidavit of Anthony M. Gamboa, Jr., PhD, MBA

COMES NOW, Anthony M. Gamboa, Jr., PhD, MBA, being first duly sworn upon his oath states the following:

Defense has filed a motion to strike a vocational economic assessment of Cheryl Knee prepared by me and to preclude my ability to testify in the above case. This motion centers around four key areas:

1. a claim that I have stated a medical opinion, noting that I am not a medical doctor
2. an observation that Ms. Knee has received two promotions since her injury
3. a claim that the Current Population Survey prepared by the U.S. Department of Commerce, Bureau of the Census is an invalid source of statistical measures of the U.S. population with work disabilities, and
4. citation of various cases claimed to contradict my findings.

Each of these points is refuted in the discussion that follows.

1. Not a Medical Doctor

Defense claims that I reviewed no evidence of a disability verified by a medical doctor. Therefore, they assert that any findings I make resulting from disability lack proper foundation and should be disallowed. They state (page 7, line 6), “At no point does Dr. Gamboa indicate that a medical doctor has diagnosed Ms. Knee has <sic> having some form of work related disability.” This is expanded (page 11, line 17), “Any such testimony was never utilized by Dr. Gamboa in generating his report and opinions.” These statements are disingenuous and have no basis in fact.

The vocational economic assessment I prepared for Ms. Knee listed the documents I reviewed and relied upon. This list included multiple reports and opinions by medical doctors, neuropsychologists and neurologists all attesting to permanent impairments to Ms. Knee due to traumatic brain or orthopedic injuries. This listing was noted by the defense attorney in my

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deposition of October 13, 2000 (page 13, line 11) but quickly dropped and not asked about again. My use of these opinions was openly documented in my report and verified in my testimony. Yet, the defense motion isolates a technical discussion of the CPS disability criteria later in the same deposition as proof that I made no such review. Their assertions are clearly false.

Many of the medical findings identify permanent limitations for Ms. Knee without detailing their impact in her occupation. Defense motion seems to require that this impact can only be analyzed by a medical doctor – somebody that has no training in occupational or vocational analyses. As documented in Section 4.1.1, I have twenty-five years experience within the field of disability as a vocational counselor, researcher, university professor, and vocational expert with the U.S. Department of health and Human Services. It is with this experience that I examine the permanent limitations identified by the medical experts (as well as all the other evidence) to analyze their impact on the plaintiff's ability to function in the workforce.

Some of the medical, neuropsychological, and neurological reports and opinions listed in my report are included in the following subsections.

1.1. Dr. Michael Krieger, August 1995

Ms. Knee was found to demonstrate evidence of balance disturbance, difficulty with speech, and difficulty with memory. Findings of neurophysiologic testing included some intermittent localized irregularity in the left anterior to mid-temporal region possibly, correlating with Ms. Knee's intermittent speech difficulties. His impression was that Ms. Knee sustained a significant traumatic brain injury as a result of the accident. (This analysis was reaffirmed by Dr. Krieger in April, 2000.)

1.2. Dr. J. Sterling Ford, June 1996

Dr. Ford noted findings of left temporal and posterior brain dysfunction. Patterns seen on the testing were consistent with bilateral occipital lobe and left anterotemporal lesions, and were also consistent with coup-contra-coup type injury involving bilateral occipital regions and the left anterotemporal region.

1.3. Reynold L. Rimoldi, MD, January 1997

Dr. Rimoldi diagnosed rotator cuff tendonitis. He said Ms. Knee could either live with the pain, attempt another injection, or undergo arthroscopic evaluation of her shoulder.

2. Promotions since Accident

Defense goes to some lengths to emphasize that Ms. Knee has received two promotions from her employer since the date of the accident, assumingly inferring that my findings are incongruous. On the contrary, the vocational economic assessment shows no impact on Ms. Knee's expected annual earnings from the injury. The same salary is assumed both pre- and post-injury. This is in keeping with defense's observations.

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In addition, the assessment reflects the statistical evidence (Section 3 and Section 4.3.1.2) that persons with a work disability do not work as long as their nondisabled counterparts. The aging process exacerbates this phenomenon. Thus, as Ms. Knee ages she becomes increasingly less likely to remain in the workforce than had she not sustained the subject disabilities. Over time, this disparity results in a reduction of her statistical worklife expectancy from 8.7 years pre-injury to 5.9 years post-injury. This reduction of 2.8 years is the sole source of the losses reported in my vocational economic assessment.

3. Current Population Survey

The losses projected in Ms. Knee's vocational economic assessment all result from a loss of worklife expectancy due to work disability. The statistics used to compute Ms. Knee's worklife expectancies (both pre- and post-injury) are produced by the U.S. Department of Commerce, Bureau of the Census from its annual March supplement of the Current Population Survey (CPS). Using Census definitions of "Not Disabled," "Not Severely Disabled," and "Severely Disabled," the department creates cross-tabulations showing the probability of employment by gender, age group, and education level. Our analysis computed the worklife expectancies using the appropriate probabilities over the remainder of Ms. Knee's life expectancy.

Defense's motion often confuses the CPS statistics used in Ms. Knee's analysis with *The New Worklife Expectancy Tables*. This publication I authored provides a cross-tabulation of the worklife expectancies for all combinations of age, gender, education, and disability status. Both the tables and Ms. Knee's analysis use the same CPS data. However, Ms. Knee's analysis does not utilize the tables. In its motion, defense criticizes the CPS, making erroneous assertions, addressed in the following subsections.

First, however, I note a comment by Herman Miller, the former chief of the Population Division of the Census Bureau, in a recent affidavit after discussing the merits of the CPS:

These facts combined with a large sample size make CPS data the most appropriate source for studying the employment experiences of people with a work disability. In my opinion, *The New Worklife Expectancy Tables* published by Vocational Econometrics, Inc. make appropriate and accurate use of these data.

3.1. Not Relied Upon in Field of Economics

Defense contends that economists do not rely upon the CPS disabled statistics. In fact, these statistics are used by many economists, as discussed in Section 4.3.1.2. Many of these economists (Burkhauser, Houtenville, McNeil, Trupin, and the Bureau of Census itself) utilize the statistics outside of the forensic arena for assistance in making policy decisions for the disabled community. For example, researchers at Cornell University (Burkhauser and Houtenville) have published multiple papers using the data. This work is done under funding from the National Institute on Disability and Rehabilitation Research (NIDRR).

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3.2. Self-Reported, No MD Verification

Defense notes that the CPS data is gathered by interviewers without verification of the respondents' answers. They assert that without verification by a medical doctor of the respondent's disability status, the data is invalid. According to the Bureau of the Census, the "*March CPS supplement is the primary source of detailed information on income and work experience in the United States.*"

As noted by the defense, the CPS relies upon answers from respondents to questions administered by trained Census personnel (self-reporting). The government does not require CPAs to verify the income reported, employers to verify employment status, or birth certificates to verify age. Yet, economists routinely rely upon the resulting income, employment, and age statistics both in forensic and non-forensic settings. However, when it comes to the CPS question on whether the respondents have any physical or mental limitation in the kind or amount of work they can do, defense contends the respondents are ignorant and incapable of giving an accurate response. This contention defies logic and actual use of and reliance upon the data by economists – public and private, forensic and non-forensic.

4. Case Citations

Defense offers several findings to support its motion. I agree that all of the cited cases are important for admission of expert testimony. However, Defense has misinterpreted or misapplied each one.

4.1. Prabhu v. Levine

The requirement that an expert's specialized knowledge "assist the trier of fact to understand the evidence or determine a fact" is in keeping with my vocational economic assessment. This is true both in the context of understanding the evidence of work disability and in determining the economic impact of that disability.

4.1.1. Understand the Evidence

I have a PhD in Guidance and Counseling, specializing in vocational counseling and have since completed post-doctoral study in vocational rehabilitation and the economics of disability. I have twenty-five years experience within the field of disability as a vocational counselor, researcher, university professor, and vocational expert with the U.S. Department of Health and Human Services. With this background, I offer the trier of fact a review of the medically defined physical impairments in conjunction with Ms. Knee's age, education, and training to assess the impact of the impairments on her ability to work and earn money.

4.1.2. Determine a Fact

In addition to the qualifications stated above (Section 4.1.1), I have completed postdoctoral study in economics and finance at multiple universities and was awarded an MBA from the University of Chicago. I have provided expert economic testimony throughout the United States on the economic consequences of disability, particularly focusing on the impact on

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earning capacity. It is with these qualifications that I offer the trier of fact an assessment of the lifetime loss of earnings as a result of Ms. Knee's disability.

4.2. American Elevator Co. v. Briscoe

Defense contends that the methodology I use does not have general acceptance within the field of economics "because it allows a lay person to make a medical diagnosis." As stated in Section 1, my methodology in no way endorses assessment of lost earnings due to a work disability without support of the findings of a medical doctor.

4.3. Daubert/Kumho

Defense expands its review of case law to two key U.S. Supreme Court rulings, *Daubert* and *Kumho*. *Daubert*, as enhanced by the subsequent *Kumho* decision, requires that all expert testimony meet the general tests of "relevancy" and "reliability."

4.3.1. Reliability

With regard to reliability, The Court held that scientific evidence must be "grounded in the methods and procedures of science." *Daubert* provides four flexible factors to determine if the evidence so qualifies: testing, peer review and publication, error rates and standards controlling the technique's operation, and general acceptance in the relevant community. As updated by *Kumho*, the court stressed that not all factors may apply with every case, especially in the social sciences. The trial court is left as the gatekeeper using the factors as flexible guidelines to assure the expert employs the same level of intellectual rigor as he or she would outside the courtroom when working in the relevant discipline. With that as the backdrop, the applicability of each of the four factors to the CPS data and *The New Worklife Expectancy Tables* is discussed below.

4.3.1.1. Testing

The scientific testing criteria are principally directed at the "hard" sciences (e.g. engineering), and have less significance for vocational and economic testimony, since we are concerned with the future experience of people, which can never be tested or known with absolute certainty. However, data from the CPS are produced and extensively tested by the U.S. Department of Commerce, Bureau of the Census. The probabilities of life are drawn from the life tables from the U.S. Department of Health and Human Services, National Center for Health Statistics, which produces and extensively tests the tables.

4.3.1.2. Peer Review and Publication

Use of the underlying CPS data from the March supplement to measure employment rates of persons with a work disability is the subject of multiple refereed articles, including the following: Burkhauser (2000), Gamboa (1996), Houtenville (2000), McNeil (2000), Trupin (1999), U.S. Bureau of the Census (1983 and 1989), and Yelin (1996 and 1997). Articles explicitly concerning *The New Worklife Expectancy Tables* include Claretie (1998), Corcione (1995), Gamboa (1989), Gibson (2001 and 1998), Gluck (1996), and Misra (1992). These

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citations are by no means intended to be exhaustive, merely indicative that the tables and the supporting data have been extensively reviewed in scientific literature.

4.3.1.3. *Error Rates and Standards for Operation*

Again, these criteria are primarily intended to apply to the “hard” sciences in conjunction with the testing performed there (e.g., reliability of a bolt securing a heavy sheet of metal). However, one can compute the standard error of a worklife expectancy using the formula for the standard error of a probability. Due to the large sample size of the CPS, one could show that the standard error of a worklife expectancy would not exceed 3% of the estimate.

Thus, statistically measured standard errors of the worklife expectancy statistics are insignificant. The area of greatest potential error is the application of worklife expectancies to an individual case, as discussed in the Relevancy section below.

With regard to standards for controlling the technique’s operation, the LPE methodology used to develop the tables was developed by Brookshire and Cobb (1983). It was further refined by Brookshire, Cobb, and Gamboa (1987) to adjust for work disability, and is one of multiple widely accepted methods to compute worklife expectancies discussed in *Life and Worklife Expectancies* (Richards & Abele 1999).

4.3.1.4. *General Acceptance*

Forecasting a plaintiff’s future earnings stream is not an exact science. As such, there is no single step in the loss computation process that enjoys widespread acceptance in the relevant community. This is certainly true of determining discount rates, projecting earnings growth, defining earning capacity, and computing worklife expectancy.

General acceptance of use of the CPS data to define disability is documented in the “Peer Review and Publication” section above. The use of several generally accepted methods to compute a statistical worklife is quoted by Richards and Abele (1999), of which the LPE approach used in the tables is one.

4.3.2. *Relevancy*

It is critical that users of the CPS disability data apply these statistics to a specific case with “intellectual rigor.” That is, experts must not blindly apply a worklife expectancy to a plaintiff without consideration of how it matches the plaintiff’s circumstances.

The expert must therefore truly be an expert with experience dealing with persons with work disabilities to understand how a particular plaintiff is similar to or different from the statistic’s population (Section 4.1.1). If the plaintiff is unlike the statistical cohort, the worklife should be adjusted, or the analysis of lost earnings should be presented in a range, using two different worklife expectancies.

With the benefit of my training and experience (Section 4.1), I determined the applicability of these statistics to Ms. Knee. Pre-injury, I opined that Ms. Knee’s worklife was somewhat less

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than that of a typical non-disabled person due to pre-existing conditions. Post-injury, I opined that she was most like an average person with a Not Severe disability.

4.3.3. Defense Claims

Defense claims that the fact that my testimony and assessment point out that intellectual rigor is necessary to interpret the disability data proves that the assessment is not scientific under *Daubert* and *Kumho*. On the contrary, *Kumho* specifically address the “soft” sciences, recognizing that not all data can be measured with precision. It is due to the imprecise nature of the calculation that expert testimony is needed. The U.S. Supreme Court’s decision in *Jones and Laughlin Steel v. Pfeifer* (1983) noted:

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.

Defense also claims there is no peer review of the methodology outside of other VEI (Vocational Economics, Inc.) employees. Although *Daubert* and *Kumho* make no such third party requirement, Section 4.3.1.2 lists several authors with no connections to VEI (Burkhauser, Houtenville, McNeil, Trupin, Yelin, Misra, Brookshire, and Cobb) that have written on the tables or the use of the CPS disability data for economic research.

4.4. Phillips v. Industrial Machine

Defense also cites the decision in the above case by the Nebraska Supreme Court to exclude the testimony of a vocational expert and his use of *The New Worklife Expectancy Tables* in a claim of lost wages due to partial disability. In *Phillips*, the vocational expert opined on the loss of worklife expectancy due to disability using the “Average Disabled” statistic from the 1995 version of the *New Worklife Expectancy Tables*. (Use of this statistic without adjustment for the level of severity of the alleged impairments was contrary to warnings included in *The New Worklife Expectancy Tables*.) There was no medical opinion offered or relied upon by the vocational expert showing any permanent physical or mental impairment by the plaintiff. The court ruled that absent such opinion, the vocational expert lacked sufficient expertise to compute the lost worklife expectancy. In addition, the court found the “Average Disabled” statistic to be too broad to be used in this case.

Defense claims the circumstances of *Phillips* are identical to those in Ms. Knee’s case. However, there are two substantial differences:

1. In *Phillips*, there was no medical opinion on permanent impairment. In Ms. Knee’s case there is, as discussed in Section 1. My analysis explicitly relies upon these medical opinions.
2. In *Phillips*, the vocational expert misused the average disabled worklife from the 1995 version of the *New Worklife Expectancy Tables*. This statistic required adjustment for the level of severity of the disability, yet he applied none. In 1998, a new version of the tables was published using CPS data that distinguishes between “Not Severe” and

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“Severe” disability. For Cheryl Knee’s analysis, using this updated data, I opined that her worklife expectancy is best represented by the Not Severe statistic, or 5.9 years post-injury. Due to some pre-existing orthopedic constraints, I also lowered her pre-injury worklife expectancy somewhat below the Not Disabled category to 8.7 years.

Thus, despite claims to the contrary, *Phillips* has no resemblance to Ms. Knee’s case.

FURTHER, THE AFFIANT SAYETH NAUGHT.

Anthony M. Gamboa, Jr., PhD, MBA
Senior Vocational Economic Analyst

Subscribed and sworn to before me, a notary public, in this ____ of September, 2001.

Notary Public

My Commission Expires _____