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**In the Superior Court of California
County of Orange, Central Justice Center**

Kathy A. Mills Walker,)	
)	
Plaintiff,)	
)	Case No. L KA 99 0140
vs.)	
)	
Mel Saligumba, Chi Leung, and Carlos Salcedo,)	
)	
Defendants.)	

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

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

Defense has filed a motion to bar my testimony. This motion centers on the following key areas:

1. No medical basis for opinion
2. No support for worklife diminution
3. Expert admissibility
4. Current Population Survey disability data

Each of these is refuted in a separate section as follows.

1. Background

On September 24, 2002, I issued a Vocational Economic Assessment of lost lifetime earnings for Ms. Kathy Walker. My analysis of Ms. Walker revealed a 45-year-old female with a baccalaureate degree, well established in her employment with the city of Gardena. She had sustained head, back, neck, hand, wrist, and shoulder injuries in a boating accident. Ms. Walker reported various limitations with strength, constant pain, lifting light weights, repetitive use of her right hand and arm, fine manipulation, grip strength, fatigue, and other activities that indicated limitations in the kind and amount of work she can perform.

At the time of my analysis, limited medical reports were available, and an analysis was needed in a short time frame to meet disclosure deadlines. The retaining attorney provided me with the hypothetical that medical evidence would be presented at trial to corroborate the limitations reported by Ms. Walker.

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Based upon these limitations, I opined that Ms. Walker met the definition of “not severely disabled” as outlined by the US Census Bureau. I further opined that these limitations would result in a diminished worklife expectancy using the Census Bureau statistics. Given her stable employment, I also opined there would be no impact on her expected annual earnings as a result of the limitations. Thus the diminution of worklife expectancy was the sole source of lost lifetime earnings identified in my analysis.

2. No Medical Basis for Opinion

As noted in Section 1, my analysis was based upon self-reported limitations and the hypothetical that medical evidence would be presented at trial to substantiate them. I note that this is in keeping with Section 801 of the California Evidence Code as quoted in the defense motion (emphasis added):

Based on matter . . . perceived by or personally known to the witness *or made known to him at or before the hearing*, whether or not admissible, . . .

Defense objects to the fact that these medical opinions were not a part of my analysis, claiming that I am rendering a medical opinion without proper qualifications. I was in no way opining on the existence or permanence of Ms. Walker’s limitation. Instead, I relied upon plaintiff counsel’s statement that her self-reported limitations would be supported by medical evidence at a later date. I am now reviewing medical reports and a deposition recently received that appear to do just that.

I note that my findings relative to Ms. Walker’s not-severe disability are consistent with defense’s own motion, where they report that the deposition of Dr. Loddengaard indicates Ms. Walker is “not severely disabled.”¹ Thus, the motion in limine appears to provide evidence that my analysis was valid.

Defense motion also appears to confuse the boundaries between medical and vocational experts. Typically, a medical doctor diagnosis a plaintiff’s physical complaints and limitations and opines on their permanence and resulting restrictions. Based upon these restrictions, a vocational expert then translates the impact of any permanent restrictions in the world of work, interpreting their impact on various occupations and expected earning capacity.²

As noted in Section 4, I have extensive training and experience as a vocational and economic expert. With this background, I offer the trier of fact a review of the medically defined physical impairments in conjunction with Ms. Walker’s age, education, and training to assess the impact of the impairments on her ability to work and earn money.

¹ Page 8, lines 24-25 of motion

² This is consistent with Dr. Loddengaard’s deposition as reported in the defense motion on page 8, lines 26-27.

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3. Worklife Diminution

As noted in Section 1, the sole source of lost lifetime earnings identified in my analysis stemmed from my opinion that Ms. Walker will suffer a diminished worklife expectancy. That is, as a result of the work limitations emanating from the accident, she will experience a decrease in the number of years she is statistically expected work for the remainder of her life. This is in accordance with the average experience of US females with at least a baccalaureate degree and a not-severe work disability, as measured by the US Census Bureau.

As I have noted, I classified Ms. Walker's work disability as "not severely disabled," a classification created by the US Census Bureau. The defense motion erroneously states that I placed Ms. Walker in the "severely disabled" classification. Their error, however, is probably my fault. In the body of my analysis,³ I correctly stated that I used the not severe classification, reducing her worklife from 16.2 to 11.8 years. However, in the case comments section, the word "not" was omitted as a result of a typo.⁴ If I had indeed reduced her worklife commensurate with a person with a severe work disability, the diminution would have been much more profound – to 2.4 years.

The data used in my analysis specific to expected employment by disability status were extracted directly from the Current Population Survey (CPS), conducted by the US Census Bureau.⁵ It did not rely upon the Survey of Income and Program Participation (SIPP), as stated in the defense motion.⁶ Also, I did not draw the data from *The New Worklife Expectancy Tables*, as defense contends. Rather, *The New Worklife Expectancy Tables* and my analysis draw their statistics from common sources. My analysis merely draws a narrower subset of the data, specific to this one plaintiff.

The impact of work disability as measured by the CPS is consistent with published research identified in Attachment A. Yelin and Trupin authored two papers (1997 and 2000) showing that persons with a work disability were more likely to leave employment early and less likely to find reemployment when not employed. This research was performed for the Social Security Administration and the National Institute on Disability and Rehabilitation Research (NIDRR). In 1999, they performed a similar study specific to the California economy, using data from the California Work and Health Survey, and had similar results. Finally, this was also confirmed in research performed by Gibson (2001).

³ Page 2, "Post-Injury Worklife Expectancy"

⁴ Page 3, bottom of page.

⁵ See Section 5 for more detail.

⁶ Page 3, line 27

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This research shows that the problems faced by persons with work disabilities are consistent for all classifications. This includes those with college degrees (even doctorates). This is significant because this classification (matching the plaintiff's) is the least likely to be involved in physically demanding work. The research also shows that the impact is exacerbated by aging, with those persons 55 and older having the most profound drop in employment rates from their counterparts without disability.

Defense offers as evidence against my opinion of diminished worklife the observation that Ms. Walker has stable employment with a job she has held for more than 20 years. This is not inconsistent with my findings. As stated in Section 1, I opined that there was no decrease in expected annual earnings as a result of Ms. Walker's limitations. This was due to her consistent employment. My opinion on worklife reduction results from the surveys and studies mentioned above that note dramatically reduced probabilities of employment as females with at least a baccalaureate degree and a not severe work disability age – especially after the age of 55. This opinion does not predict she will suddenly lose her job. It merely recognizes the reality that physical maladies and limitations become increasingly problematic with the aging process, as measured and statistically supported by surveys from the US Census Bureau.

In short, my projection of worklife expectancy – both pre- and post-injury – relies upon statistical research, not gut instinct. 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.

4. Expert Admissibility

The defense motion details California Evidence Code and various court decisions identifying the guidelines for admission of expert testimony. My testimony meets all of the stated criteria.

4.1. Expert Qualifications

First they note that an expert is qualified if he or she:

1. **Offers specialized knowledge** – 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 US Department of Health and Human Services. 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 earning capacity.

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2. **Can assist the trier of fact** - With this background, I offer the trier of fact a review of the medically defined physical impairments in conjunction with Ms. Walker's age, education, and training to assess the impact of the impairments on her ability to work and earn money.

4.2. General Acceptance

Defense also notes that the data and methodology relied upon by the expert must be “of the type reasonably relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” This is consistent with the “general acceptance doctrine” promulgated through the *Frye v. United States* and *People v. Kelly* cases cited in the defense motion.

4.2.1. Worklife Methodology

Defense infers that the methodology or data that I used in estimating Ms. Walker's post-injury worklife expectancy do not have general acceptance in the relevant scientific community. Forecasting a plaintiff's future earnings stream is not an exact science. There is no single step in the loss computation process that enjoys universal acceptance in the relevant community. As such, it is predictable that experts will disagree on the method for computing lost earnings. This is true of defining earning capacity, computing worklife expectancy, projecting earnings growth, and determining discount rates.

The U.S. Supreme Court recognized the inexact nature of assessments for lost earnings in its 1983 decision in *Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523. The Court stated that

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 methodology used to develop my estimate of Ms. Walker's worklife expectancy was developed by Michael Brookshire and William Cobb (1983) and was further refined by Brookshire, Cobb, and Gamboa (1987). In a 1991 article in the *Journal of Legal Economics*, Gary Albrecht applied this methodology to assessments of earnings for partially disabled individuals. My opinions in this case are consistent with this methodology (see Attachment B).

4.2.2. Use of the Underlying Data by Disability Researchers

In addition to the validity of the model and methodology employed in my analysis, the underlying data also enjoy widespread support by disability researchers. Attachment A contains a partial list of this research, some of which is described in the paragraphs that follow.

Various independent researchers use CPS data in research on the employment experiences of persons with a work disability. In a presentation before the National

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Association of Forensic Economics (NAFE) in November 2000, John McNeil, a special assistant for disability statistics for the U.S. Census Bureau, now retired, reaffirmed the application of CPS data for the study of persons with a work disability. As part of the presentation, he produced a study entitled "Employment and Earnings of Individuals 18 to 64 by Disability Status: Data from the March 2000 Current Population Survey." The study explores the participation and employment rates for persons with work disability using the same data used in *The New Worklife Expectancy Tables*. In addition, he signed an affidavit (Attachment C) stating he sees no reason why the CPS data for work disability cannot be used in the manner applied by Vocational Econometrics. He also authored an article further supporting use of CPS data for studying worklife issues for people with a work disability (McNeil, 2002).

Herman Miller functioned as the chief of the Population Division of the Census Bureau. He has also signed an affidavit (Attachment D) noting that the CPS data are "the most appropriate source for studying the employment experiences of people with a work disability."

In addition, both government and non-government researchers rely on the CPS employment rates and earnings figures for non-forensic purposes. Burkhauser, Daly, and Houtenville (2000), for example, used data from the March supplement of the CPS to compare the employment experience of people with and without disability during the 1990s business cycle. This paper was published through the Rehabilitation Research and Training Center (RRTC) for Economic Research on Employment Policy for Persons with Disabilities at Cornell University. The Cornell RRTC has also published several other papers using CPS data on persons with a work disability. These include three papers by Houtenville (2000) that studied the prevalence, employment rates, and household income of people with disability, as well as a paper by Burkhauser, Houtenville, and Wittenburg (2001) that compared the employment trends of persons with work limitations using the CPS and two other government surveys.

Daly, Burkhauser, and Houtenville (2000) published a paper through the Federal Reserve Bank of San Francisco that used CPS data to study the work and income of men with disability. Acemoglu and Angrist (1998), both with the Department of Economics at MIT, published a paper through the National Bureau of Economic Research that used CPS data to study the impact of the ADA on the employment of people with disability.

Researchers at the University of California, San Francisco, also use CPS data to study persons with a disability. This work includes an article published in the U.S. Bureau of Labor Statistics' *Monthly Labor Review* (Yelin and Katz, 1994) that used both the CPS and the National Health Interview Survey to study the participation trends of people with and without disability during the period from 1970 to 1992. Yelin (1996) and Yelin and Trupin (1997) used the CPS to study the participation and employment of people with and without disability during the mid-1990s.

Government researchers have also used CPS data to study the experiences of people with and without work disability. The U.S. Census Bureau measured the participation and employment rates and average earnings of people with and without disability and

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published the results in two key documents (1983 and 1989). In 2001, the Census Bureau issued a press release that included basic information from the CPS on the prevalence, employment, earnings, and education of people with a work disability.

The research list above is not meant to be complete. It does, however, give an idea of the variety of researchers using CPS data. The use of the CPS by this sampling of government and non-government researchers corroborates the validity of the CPS for the purpose of studying the work experience of people with a work disability.

The extensive use of the CPS data for research on employment issues provides corroborative evidence of the validity of the data. Independent researchers from various institutions and with various purposes would not all use the CPS data unless the data were meaningful.

5. CPS Disability Data

Defense further claims that the data I relied upon (CPS) are unreliable and were not collected for studying the employment experiences of persons with disabilities. The Annual Demographic Survey is conducted in March of each year by the US Census Bureau as a supplement to its monthly Current Population Survey (CPS). The CPS survey is the primary source of employment data for persons in the United States, and the source of the government's monthly unemployment rates that are widely quoted by the media.

The definition of work disability used in the Annual Demographic Survey can be found on the Census Bureau web site.⁷ This definition was created and is controlled by the Census Bureau. As part of this definition, the government also created the sub-categories of severely and not severely disabled.⁸ The defense criticisms of these data are addressed in the following subsections.

5.1. Self-Reported Disability

Defense's first complaint deals with the fact the Current Population Survey is self-reported. They contend that the survey must be verified by independent medical exams to be valid. The CPS relies upon answers from respondents to questions administered by trained Census personnel (self-reporting). As such, the seven criteria used by the Census Bureau to classify a respondent's disability status depends upon

- 1 the respondent's ability to recognize the disability and
- 2 the truthfulness of the response.

⁷ <http://www.census.gov/hhes/www/disable/cps/cpsworkd.html>

⁸ This definition and classification into subcategories is based upon a 7-point test, not the single question claimed by the defense motion.

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Defense objection infers that one or both of these requirements is not met in a material quantity of responses. They further speculate that this impact is significant. The word “speculate” is used here, because no scientific support is offered.

As mentioned earlier, the Current Population Survey is the *primary* source of employment data for the United States. The entire survey is self-reported. Yet it is relied upon by researchers, economists, demographers, government agencies, and other scientists across the world for measurements of employment, earnings, education status, age, and other characteristics of the US economy:

- Researchers rely upon current employment status, but nobody verifies this with the respondents’ employers.
- Earnings information is relied upon, but CPAs do not verify the respondents’ tax returns. The surveyors do not even glance at them.
- Education status is taken as truthful, but nobody examines the respondents’ diplomas.
- Classifications by age are routinely made, but not a single birth certificate is reviewed.

Now, with respect to whether the respondent has a limitation in the kind or amount of work he or she can perform, defense contends the average US citizen is either ignorant or a liar.

5.2. Disability Does Not Match ADA

Defense next contends that the definition of disability under the CPS differs from the definition in the Americans with Disabilities Act (ADA). They are correct. They further contend that this difference invalidates the data for use in this case. They misunderstand the ADA, the CPS, or both.

Depending on the desired focus, different groups and surveys will define disability differently. The Veterans Administration (VA) and the Social Security Administration, for instance, each have their own definitions, which vary considerably. Other organizations have definitions that may not consider work effects, except within the context of the overall social effects of impairment.

The Americans with Disabilities Act (ADA) defines disability as existing in persons with a physical or mental impairment that substantially limits one or more of the major life activities. The ADA definition, however, is not the appropriate definition of disability to use in tort cases involving lost earnings. The ADA definition is too broad in that it includes people who do *not* have limitations in the kind or amount of work they can perform (e.g., a sexual dysfunction). For forensic purposes, when assessing loss of lifetime earnings, the most relevant data pertain to those persons who have a work disability, the definition used in the US Census Bureau’s Current Population Survey

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(CPS).⁹ This is the exact issue addressed by Mr. John McNeil, formerly with the Census Bureau, in an affidavit (Attachment C).

The Census Bureau website contains a page dedicated to disability data.¹⁰ In it, the Bureau notes three sources for disability statistics for the United States workforce: CPS, Survey of Income and Program Participation (SIPP), and the decennial census. Here, in terms of the disability questions asked, it notes that the sources range from limited (decennial census) to most expansive (SIPP). Most importantly, the site notes that the CPS focuses on work disability – the pivotal measure for disability-specific worklife expectancy computations necessary in forensic settings.

5.3. Data Not Collected for Disability Statistics

Defense next claims that the CPS was not intended as a vehicle to collect data on the employment experiences of persons with a disability. This is clearly incorrect. As early as 1983, the Census Bureau itself supported the validity of the CPS data for studying the effects of work disability, and published *Labor Force Status and Other Characteristics of Persons with a Work Disability: 1982* (see Attachment A). The beginning of the publication addresses the issue of measuring the experiences of persons with disability:

One of the issues that this country has tried to address through the Federal statistical system is the extent to which persons with a disability are able to participate in the labor force. Programs and policies have been established to discourage discrimination and encourage training and rehabilitation, but the success of these programs and policies cannot be measured without some type of statistical monitoring system. Statistics on persons with a disability are obtained from two sources: program statistics and household surveys. While the former source is critical for certain purposes, the basic unit in a statistical monitoring system must be household surveys. Only through household surveys is it possible to obtain estimates of the number of persons with a disability and learn how their situation changes over time.

Recent changes to the questionnaire used in the March Income Supplement to the Current Population Survey (CPS) make it possible for the March CPS to be used as a source of information on the labor force status and other characteristics of noninstitutional persons with a work disability.

In the 1989 publication *Labor Force Status and Other Characteristics of Persons With a Work Disability: 1981 to 1988* (see Attachment A), Census expanded on the reasoning behind these questions:

According to Saad Nagi, a major figure in the development of survey data on persons with disabilities, a person has a disability if he or she has a limitation in the ability to perform one or more of the life activities expected of an individual within a social environment. The primary way this basic concept is operationalized in the March CPS is

⁹ See footnote 7.

¹⁰ <http://www.census.gov/hhes/www/disable/intro.html>

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to ask whether any household member has a health problem or disability which prevents them from working or which limits the kind or amount of work they can do.

Finally, John McNeil (2002), the former Special Assistant for Disability Statistics with the US Census Bureau expands on the origins and intent of the CPS disability questions in the attached article (see Attachment A). This article provides further verification that the use to which I apply the CPS disability statistics is both appropriate and in keeping with the underlying criteria.

The defense claim that the CPS data are not appropriate for studying the effects of work disability is clearly incorrect.

5.4. Widely Criticized

Next, the defense motion claims that *The New Worklife Expectancy Tables* and the underlying CPS data have been “widely criticized by experts in the field.” As support for this “wide” criticism, they supply a single article – hardly a deluge. The article they cite was authored by Gary R. Skoog and David C. Toppino in a 1999 edition of *Journal of Forensic Economics*.

I congratulate defense counsel on their obvious studious readership of this journal. Unfortunately, their subscription seems to have lapsed shortly after this issue. They failed to read or cite a reply by David S. Gibson and John P. Tierney (Attachment E) only two issues later that flatly contradicted every criticism levied by Skoog and Toppino.

In addition, I also note the earlier mentioned works for former key Census personnel, Herman Miller (affidavit, Attachment D) and John McNeil (affidavit, Attachment C, and article, Attachment A). The article by Mr. McNeil is of special interest in that it replies to the Skoog and Toppino article, addressing multiple misquotes and erroneous assumptions they made. It is interesting to note that Skoog and Toppino thought so highly of Mr. McNeil at the time their article was written that Mr. Toppino noted:

. . . Dr. McNeil is a leading authority on this CPS subject data base, disability in general, and our original paper was careful to quote him thoroughly for that very reason.¹¹

5.5. No Tables in CPS

Finally, defense attacks use of the CPS data since the CPS itself does not include worklife tables. The government has no need to publish worklife expectancy tables. The Bureau of Labor Statistics formerly published tables from the CPS data which were not disability specific. However, they found that these were used almost exclusively for litigation purposes, which they found distasteful, and discontinued their publication in 1986. No other government agency has since taken up this burden.

¹¹ From a posting to NAFE ListServe, October 10, 2000.

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This does not invalidate use of the CPS data to project worklife expectancies. Forensic economists routinely use CPS data to project employment probabilities and earnings in cases across the country. Although the Census Bureau does not publish worklife tables, they do publish tables of the rates of employment by level of work disability using the same data employed in my analysis. These tables can be found on their web site.¹²

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 January, 2003.

Notary Public

My Commission Expires _____

¹² <http://www.census.gov/hhes/www/disable/disabcps.html>