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IN THE HARRISON CIRCUIT COURT

STATE OF INDIANA

JON WRIGHT

Plaintiff

v.

CAUSE NO. 31C01-9912-CT-407
SPECIAL JUDGE, HON. KENNETH L. LOPP

RONALD JENKINS and
ANTHONY JENKINS d/b/a
JENKINS BUILDERS,
HARRISON DEVELOPMENT, INC.,
ROGER HARBISON,
ROCHELLE HARBISON, and
PAYNE REAL ESTATE, INC.

Defendants

AFFIDAVIT OF EDWARD P. BERLA', PHD

COMES NOW, Edward P. Berla', PhD, being first duly sworn upon his oath states the following:

Regarding Dr. Berla's Qualifications (Exhibit A)

I have bachelor's, master's, and doctorate degrees in psychology and post-doctoral training in economics. My training in economics has been specific to the issue of earning capacity, loss of earnings over a lifetime, worklife expectancies, and the role of wage growth, interest rates, and inflation in the economy.

I have been employed as a vocational expert with the Social Security Administration since 1990. In that capacity, I review medical records and work histories of claimants and then participate in a hearing in front of an Administrative Law Judge (ALJ) who hears the testimony of the claimant. The ALJ then asks the vocational expert questions pertaining to the jobs in the local, state, and national economies that a person could perform given specific physical or mental limitations. The vocational expert responds by giving the percentages of jobs in the local, state, and national economies and examples of jobs that such persons can perform.

For approximately the last 15 years, I have been a consultant with Vocational Economics, Inc., where I have evaluated hundreds of persons in terms of their capacity to labor and earn and the loss of earning capacity over a lifetime. I have qualified as a vocational expert and as a vocational economic analyst on numerous occasions in both federal and state courts in Indiana, Kentucky, Ohio, Tennessee, and West Virginia.

Concurrently, I have been employed as a university professor in the Department of Special Education from 1975 to December 2000. In that capacity, I taught courses on the impact disabilities have on persons' lives including vocational, psychological, social, and educational effects. I also taught courses on research analysis, research design, and statistics. Prior to 1975, I worked as a behavioral research scientist and statistical consultant at the American Printing House for the Blind where I conducted and supervised research on how to facilitate the functioning of blind persons, particularly blind children.

As a psychologist, I have been trained in evaluative methods, including the administration of specialized instruments such as vocational and intelligence tests. I also had extensive course work in statistical analysis, research design, and techniques for treating persons with physical and/or emotional/mental disabilities.

Regarding the Data Source

In determining Mr. Wright's worklife expectancy and the earnings differential used to derive Mr. Wright's post-injury earning capacity, I use data from the Current Population Survey ("CPS"). Defense notes that the CPS has been criticized as a data source for studying the employment effects of work disability.

In fact, the CPS survey is the primary source of employment data for persons in the United States, the source of the government's monthly unemployment rates that are widely quoted by the media. The data are also used by private researchers to study employment patterns of the U.S. population.

In a recent presentation before the National Association of Forensic Economics (NAFE), John McNeil, a special assistant for disability statistics and former division chief for the U.S. Bureau of the Census, reaffirmed the application of CPS data for the study of persons with a work disability. Mr. McNeil has since retired from the Census, but he recently signed the attached affidavit stating he sees no reason why the CPS data for work disability cannot be used in the manner applied by Vocational Econometrics.

Regarding the Definition of Disability

During the NAFE session, Mr. McNeil presented the definition of work disability used in the CPS (See Exhibit B). This is the definition I used in conducting my assessment of Mr. Wright. This definition was created and is controlled by the Bureau. As part of this definition, the government also created the sub-categories of severely and not severely disabled.

In their motion, defense quotes a government definition of disability found in an article by Drs. Skoog and Toppino ("persons with a physical or mental impairment which substantially limits one or more of the major life activities"). This is not the appropriate definition of disability to use in this case. The definition quoted by defense is a much

broader one that is consistent with the Americans with Disabilities Act, and it includes persons who do *not* have limitations in the kind or amount of work they can perform. For forensic purposes, when assessing loss of lifetime earnings, the most important and direct focus is on persons who have a work disability, the definition used in the CPS. This is the exact issue Mr. McNeil addresses in his attached affidavit.

Regarding the VALE Software

The VALE software I used does not develop opinions on cases. It is used merely as a spreadsheet tool for calculating worklife expectancy and loss of lifetime earnings. My use of the VALE software is similar to use of a calculator, which is accepted without question. As with a calculator, I (or any user) review the output for reasonableness and accuracy.

To assure accuracy, quality control personnel within Vocational Econometrics checked the VALE software calculations thoroughly and repeatedly. In addition, my manual input for this case was checked by other personnel under my supervision to assure consistency with the facts of Mr. Wright's case.

Regarding the Methodology

Defense calls into question my basic assessment technique by noting that it is not performed outside litigation. However, damage calculations are never called for except within the context of litigation. Damages are not calculated unless damages are sought.

Defense also questioned the interview conducted on Mr. Wright. This interview was a typical vocational interview. I took all notes pertinent to conducting a Vocational Economic Assessment (Exhibit C). Despite the implication by defense, it is not usual to record an interview in any way other than written notes.

In determining Mr. Wright's pre-injury earning capacity, I used the plaintiff's actual earnings for multiple years at Wal-Mart. Before dollars from different years can be averaged fairly, they need to be put on equal terms with each other. The usual way of doing this is to update the dollars using the Consumer Price Index published by the U.S. Bureau of Labor Statistics. This is the government's index of inflation and the measure most quoted by the media and most often used by experts.

At the time of the assessment, Mr. Wright did not have long enough work experience post-injury to enable me to assess post-injury earnings based on actual experience. Therefore, I did what is typical in the field and used an estimate of post-injury earning capacity based on statistical data. In this case, I looked at the earnings differential between persons with and without disability who match Mr. Wright's gender and education level.

The dollars I used to assess the differential for post-injury earnings were obtained from data derived from the CPS. In addition to matching Mr. Wright's gender and education,

they represent the average earnings for workers who work year-round, full-time (defined by the government as 35 or more hours a week for 50 or more weeks a year). Therefore, they do not include persons who are “brain dead” (as stated by the defense) or who have disabilities severe enough to limit the amount of time they can work. The dollars represent average earnings for those with moderate work disabilities only. Mr. Wright clearly falls within this group of persons with moderate disability.

Regarding *Phillips v. Industrial Machine*, 597 N.W.2d 377 (Neb. 1999)

Defense notes that in *Phillips*, the plaintiff’s vocational expert relied on the same CPS data and that his testimony was declared inadmissible because it was too generic.

The facts in *Phillips* are much different than in this case. In *Phillips*, there was no medical opinion supporting the expert’s opinion that the plaintiff had a disability. The court stated that “without any evidence that Phillips was in fact disabled, Marchisio’s opinion, which relied on the conclusion that Phillips was disabled, lacked foundation and probative value.”

The worklife tables used by the expert in *Phillips* were an older version of the tables that did not break out disability into severe and not severe categories. The expert in *Phillips* blindly used an average disabled statistic without regard for how plaintiff may differ from that statistic. Therefore, based on an insufficient medical foundation and on his inappropriate use of the worklife tables, his opinion was not relevant to the case.

The data I used are newer and have specificity lacking in the *Phillips* case. In addition, I considered the specifics of Mr. Wright’s situation, his age, education, work history, and work-related limitations, before placing him on the disability continuum as an average not severely disabled individual.

Regarding the *Daubert/Kumho* Standards

The defense notes that my testimony should meet the criteria set out in the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2876 (1993). *Daubert*, as enhanced by the subsequent *Kumho* decision (*Kumho Tire Company, Ltd., v. Patrick Carmichael* 526 U.S. ___ 1999), requires that all expert testimony meet the general tests of “reliability” and “relevancy.”

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 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. The applicability of each of the four factors is discussed below.

1.) Testing - The scientific testing criteria is directed more toward the “hard” sciences (e.g. engineering) than toward vocational and economic testimony, since such testimony is 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. Bureau of the Census and the U.S. Bureau of Labor Statistics. 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.

2.) Peer Review and Publication – Worklife tables and the CPS data I used to measure employment rates of persons with a work disability are the subject of multiple articles. Exhibit D is a partial listing of these articles and shows that the worklife tables have been extensively reviewed in scientific literature (much more so than indicated by the defense) and that the CPS data have been used by researchers for both forensic and non-forensic purposes.

3.) Error Rates - This criterion is 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, Ronald Missun has computed the standard error of worklife expectancy (See Exhibit E) in an article that is currently in the peer review process with the *Journal of Legal Economics*. Statistically measured standard errors of the worklife expectancy statistics are insignificant.

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 universal acceptance in the relevant community. This is certainly true of determining discount rates, projecting earnings growth, defining earning capacity, and computing worklife expectancy.

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.”

Exhibit D documents the wide acceptance of use of the CPS data to define work disability. In addition, a 1999 publication by Hugh Richards and Jon R. Abele, *Life and Worklife Expectancies*, looks at several generally accepted ways of computing a statistical worklife, including the method I used. Finally, the worklife tables and the methodology underlying the tables have been the subject of many articles (See Exhibit D), lending credence to their overall acceptance.

Relevancy – The CPS data I used are averages for the applicable disability population. It is critical that users of the table apply these statistics to a specific case with “intellectual

rigor.” Experts must not blindly apply the data to a plaintiff without consideration of how it matches the plaintiff’s circumstances.

The expert must have experience dealing with persons with work disabilities to understand how a particular plaintiff is similar to or different from the statistic’s population. I have direct work experience in working with persons with disability. In addition, my qualifications (See Exhibit A) include designation as a Vocational Expert with the U.S. Department of Health and Human Services, Social Security Administration, enabling me to provide expert testimony regarding the employment experiences of persons with disability. My application of the disability statistics in this case was the subject of studied consideration by me.

FURTHER THE AFFIANT SAYETH NAUGHT.

Edward P. Berlá, PhD
Vocational Economic Analyst

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

Mary B. Watson, Notary Public

My Commission Expires _____