



This document was downloaded from Vocational Economics Inc.  
([www.vocecon.com](http://www.vocecon.com)). For more information

on this document, visit:

<http://www.vocecon.com/resources/challenges/cases/chcsvei.aspx>

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
AT LEXINGTON**

Charles R. Wright, Jr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Action No. 01-239
	)	
Werner Enterprises, Inc. and Renee A. Osborne,	)	
	)	
Defendants.	)	

Defense has filed a motion to exclude Mr. Tierney’s testimony. This motion centers on the following key areas:

1. FRE 702, Testimony by Experts
2. Reliability of the Methodology
3. “Fit” of the Opinion to the Facts of the Case
4. Phillips v. Industrial Machine
5. Use of Mr. Tierney’s Deposition Transcript

Each of these points is discussed in the pages that follow.

**1. Introduction – FRE 702, Testimony by Experts**

**1.1. FRE 702**

As noted by defense, FRE 702 states that

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness who qualifies as a witness by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Defense discusses FRE 702 and various court decisions to show that Mr. Tierney’s opinion needs to be based on sufficient facts or data, on reliable principles and methods, and that it must “fit” the facts of the case. We agree. The requirement of FRE 702 is in keeping with Mr. Tierney’s vocational economic assessment regarding Mr. Wright. This is true both in the context of understanding the evidence of work disability and in determining the economic impact of that disability.

As shown in the remainder of this document, defense's arguments show that they do not have a thorough understanding of the proper nature of a lost earnings analysis or the data used in such an analysis. At times, they even appear to want to use data or methods that are notably inappropriate.

What the defense seems to want from Mr. Tierney is absolute knowledge of Mr. Wright's future. This, of course, is not possible for anyone. In the absence of a crystal ball, it is necessary to estimate based on appropriate population statistics that are applied to the facts of Mr. Wright's case. As Marcia Angell noted 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.

The United States Supreme Court addressed this very concern in *Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523 (1983), where they noted the impossibility of producing statistics that exactly match the plaintiff's future:

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 Court went on to deride attempts at coming up with such statistics:

We do not suggest that the trial judge should embark on a search for "delusive exactness." It is perfectly obvious that the most detailed inquiry can at best produce an approximate result.

## **1.2. Mr. Tierney's Qualifications**

Mr. Tierney's knowledge, skill, experience, training, and education all combine to qualify him as an expert. As noted in his Curriculum Vitae (Attachment A), he has a Master's degree in Guidance and Counseling and additional graduate level coursework specific to vocational counseling, vocational rehabilitation counseling, and economics as it pertains to the assessment of loss of lifetime earnings.

In addition to his education, Mr. Tierney has work experience specific to placing persons with disabilities in jobs. In particular, he was employed by the Metropolitan Sewer District from 1976 to 1987 and by the River Region Mental Health/Mental Retardation Board from 1974 to 1976. In both of these jobs, he managed Employee Assistance Programs that worked toward the rehabilitation and placement of persons with disability.

From 1986 to 1992, he was under contract as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. In this capacity, he provided opinion testimony regarding the employment potential of disabled persons seeking Social Security disability benefits. He provided such testimony at the government's request on numerous occasions.

Mr. Tierney's education and experience provide him with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition, data are available from the U.S. Census Bureau that pertain specifically to the earnings and worklife expectancy of persons with and without a work disability. This combination of education, experience, and technical data enables him to assess the loss of lifetime earnings of Mr. Wright in a way that is beyond the realm of common knowledge.

## **2. Reliability of the Methodology**

Defense contends that Mr. Tierney's opinion is not valid because it is based on unreliable methodology and on flawed government data. They state that his methodology is too general to rise above the level of speculation and that his opinion contains generalizations and averaging that make the opinion so unreliable that it will not assist the trier of fact. They attempt to discredit Mr. Tierney's testimony because he admits that he cannot tell the future. These contentions make it obvious that the defendants do not understand the nature of a lost earnings analysis or the data upon which such analyses are based. In fact, the methodology employed by Mr. Tierney was explicitly addressed in a recent peer-reviewed article specifically addressing assessment of earning capacity (see Attachment B). The article discusses the assessment of annual earning capacity, worklife expectancy, and lifetime loss.

When Mr. Tierney is retained as an expert witness for cases such as Mr. Wright's, he is asked to estimate the loss of earning capacity that plaintiffs will sustain over their lifetimes as a result of work disability. As noted by the U.S. Supreme Court (see Introduction), this is not an exact calculation; at best, the estimate is a "rough approximation." What is necessary in this case is that Mr. Tierney consider specifics relating to Mr. Wright (e.g., age, education, work history, work-related limitations) in combination with relevant population statistics to derive the most reasonable estimate possible. This is what he has done in estimating Mr. Wright's lost earnings.

### **2.1. The Methodology**

Defense contends that Mr. Tierney's methodology is unreliable because it relies on four, flawed variables—sex, location, earnings proxy, and disability status—and because it does not use government worklife expectancy tables.

These issues will be addressed separately.

#### *2.1.1. Gender*

Defense objects to Mr. Tierney's limiting the statistics used for Mr. Wright's case to male statistics in that this limits his calculations to only one-half of the working population. Since Mr. Wright is a male, use of male statistics are certainly most appropriate. It is common knowledge that men and women have different patterns of work and earnings.

This objection is also quite odd in that it directly contradicts the defense's desire for Mr. Tierney's opinions to "fit" the facts of the case. On one hand, they are asking him to be very

specific, and on the other hand, to be very generic and to consider all working people, regardless of how well the data fit Mr. Wright.

### *2.1.2. Location*

Defense contends that Mr. Tierney's data are inappropriate since they are not based on recent Kentucky data. The starting point for Mr. Tierney's assessment of Mr. Wright's earning capacity is Kentucky-specific data from the 1990 decennial census. The data used pertain to the relationship between Kentucky and national earnings. This relationship is applied to current national data to derive current Kentucky dollars. Mr. Tierney's assessment assumes that the relationship between Kentucky and national earnings has remained relatively constant since 1990. There is no evidence that Kentucky trends have deviated from national trends since 1990.

As an expert witness in this case, he has been asked to assess Mr. Wright's loss of earning capacity resulting from injury sustained in May of 2000. In conducting this assessment, therefore, the most relevant issue is Mr. Wright's loss of lifetime earnings considering this work disability. The most relevant data, then, must be those that specifically address this issue, that measure the differences in earnings and employment between people with and without work disabilities. This is what Mr. Tierney has done in his assessment of Mr. Wright. Doing this ensures that his analysis addresses the needs of the court.

It is possible that data exist on the earnings of chemical engineers in Kentucky. The data, however, would not be specific to people with and without a work disability, and, therefore, would not be relevant to Mr. Wright's case. This is another instance in which defendants are contradicting themselves by asking Mr. Tierney at the same time to ignore more relevant disability-related data in favor of non-disability data that do not adequately "fit" the facts of Mr. Wright's case.

### *2.1.3. Earnings*

Defense objects to Mr. Tierney's use of a proxy (what they refer to as a "fictional substitute") to determine Mr. Wright's earning capacity. There are two choices when assessing earning capacity—actual earnings or a proxy. Use of a proxy to determine earning capacity is very common and is supported by both vocational and economic experts (see Attachment C).

In deciding the most appropriate measure of earning capacity, it is necessary to consider many factors, such as age, education, and work history. Use of actual earnings is preferred when appropriate, such as with an older worker or with a worker well established in an occupation. For younger workers, homemakers, and people not well established in an occupation, however, actual earnings are rarely a reasonable representation of earning capacity.

In Mr. Wright's case, a proxy using statistics for people like him is the most reasonable choice given his fairly young age and his active pursuit of a college degree. Using Mr. Wright's actual, historical earnings, as defense seems to prefer, would be irrelevant and misleading and would not provide a fair assessment of Mr. Wright's earning capacity. As before, defendant's desire in this matter would not be responsive to the needs of the court.

Defense also objects to Mr. Tierney's use of an *average* figure based on education or occupation to estimate Mr. Wright's earning capacity. When estimating an individual's lifetime capacity to earn money, average figures are generally most appropriate. This is especially true when an individual is not yet established in the given field, as is the case with Mr. Wright. Mr. Wright's age and education status make use of statistical averages especially appropriate for him. Use of statistical averages is discussed further in Section 3.1.

#### *2.1.4. Disability Status*

Defense objects to Mr. Tierney's use of the U.S. Census Bureau's work disability categories. Their objection stems from the fact that there are only two categories and that the categories are not impairment specific.

In the field of statistics and actuarial sciences, probabilities are derived by determining the average of a statistical cohort, that is, the average performance of those persons most like the person being predicted. In conducting his analysis, Mr. Tierney determined that Mr. Wright was most like an individual with a nonsevere disability, as defined by the Census Bureau. In doing this, he excluded from consideration all of those people whose disabilities are severe or prevent them from working altogether. In this way, he applied to Mr. Wright only those statistics that are for people similar to him—those who have a work disability but are still able to work. This enables a more proper analysis of the lifetime effects of Mr. Wright's work disability.

Defense's desire for impairment-specific data on earnings and worklife expectancy makes no sense when looked at from a vocational rehabilitation perspective. Many different types of conditions can result in identical work-related impairments (e.g., both a knee injury and a lung ailment can result in a restriction to sedentary work). Also, the same condition may have varying work-related impacts on different people. (An attorney and a construction worker with less than a high school degree would have widely different impacts from the loss of use of a non-dominant arm.) Impairments from non-injury related causes can result in work disability of varying degrees, with minimum to maximum impact. What is relevant is the effect of the impairment, whatever the cause, on a person's capacity to work and earn money. In conducting his analysis on Mr. Wright, Mr. Tierney considered the effect of impairment on Mr. Wright's future ability to work and earn money.

#### *2.1.5. Worklife Expectancy Tables*

Defense appears to object because Mr. Tierney has not used government worklife expectancy tables. What they appear to be asking is that Mr. Tierney use government worklife tables that were published in 1986 using data from 1979-1980. (Note that this is in stark contrast to their objection to Mr. Tierney's use of the 1990 decennial census to determine average earnings.) Not only are these data more than twenty years old and, therefore, do not take changing employment patterns into account, but the government tables do not consider disability. Again, defense is asking Mr. Tierney to use data that are irrelevant to Mr. Wright's case, as they are not specific to the issue Mr. Tierney is to address for the court, his loss of earnings due to his work disability.

In addition, defense states that on page 47 of his deposition, Mr. Tierney says that he uses *The New Worklife Expectancy Tables* (The Tables) published by his company, Vocational Econometrics, Inc. Page 47 says nothing of the sort; Mr. Tierney is simply responding to a question posed by defense on the nature of those tables. In fact, pages 52-53 directly contradict defense's assertion. At this point, when asked by defense if he uses The Tables, Mr. Tierney clearly says that he does not, though he does use the same government data upon which The Tables are based (see Section 5 for a more complete discussion of this issue).

## **2.2. Validity of the Current Population Survey**

Defense objects to Mr. Tierney's use of the U.S. Census Bureau's Current Population Survey (CPS) for deriving earnings and employment information for people with and without a work disability. Many of their arguments are inter-related, but will be split out as possible below.

### *2.2.1. Nature and Purpose of the Current Population Survey*

Defense criticizes Mr. Tierney's use of data from the CPS, but obviously have a total misunderstanding of what the survey really is. They allege for instance, that the CPS surveys only full-time working persons (Motion, p. 3), when in fact the CPS surveys any person in the household regardless of working status. It would, after all, be impossible for the government to derive statistics on the percentage of people working in the United States if they only interviewed people who were working and ignored the large percentage of people who were not.

Defense also objects because the CPS data are based on surveys of 'only' 50,000 to 60,000 households (Motion, p. 12). As anyone familiar with surveys would understand, this is a very large number to survey, and actually represents over 100,000 people surveyed each month. In addition to being the largest regular survey in the world, the Census Bureau uses "stratified sampling" techniques where the sample size is scientifically computed and selected to best represent the overall US economy. Defense grossly underestimates the percentage of the population measured by the CPS when they state that it measures approximately 0.00001% of the population (Motion, p. 12). The actual figure is approximately 0.04%, about 4,000 times greater than defense states.

The CPS is conducted monthly by the Census Bureau and is used for a wide variety of purposes within the Federal government. 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. According to a joint web site maintained by the Bureau of Labor Statistics and the Census Bureau:

The CPS is the *primary* source of information on the labor force characteristics of the U.S. population. The sample is *scientifically* selected to represent the civilian noninstitutional population. ([www.bls.census.gov/cps/overmain.htm](http://www.bls.census.gov/cps/overmain.htm) - emphasis added)

In March of each year beginning in 1981, the CPS has been expanded to collect more information on income and employment. This supplement forms the basis for the rates of participation and employment used in The Tables through expanded questions that specifically address work disability.

The contention that the CPS was not intended to identify work disability is clearly wrong. The Census Bureau began publishing data from the March Supplement in 1983 in a publication entitled *Labor Force Status and Other Characteristics of Persons with a Work Disability: 1982*. The beginning of the publication addresses the issue of measuring the experiences of persons with disability (see Attachment D):

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*, Census expands on the reasoning behind these questions (see Attachment D):

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 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.

The CPS is the largest statistically selected survey conducted by the government and is second only to the decennial census in size. It is widely recognized by vocational rehabilitation experts and economists throughout the world for its value and reliability. Attachment D provides some government and non-forensic researchers who use the CPS to study the earnings and employment experiences of people with a work disability. This research list gives 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.

### *2.2.2. Use of the CPS Data*

Defense also misunderstands the use of the seven questions used in the CPS to identify people with a work disability and the full extent of the data used by Mr. Tierney. While defense appears to have a fairly accurate understanding of the seven questions that make up the CPS definition of work disability, they fall short when they state that Mr. Tierney bases his opinions only on these seven work disability questions (Motion, p. 4).

The CPS is a very comprehensive survey that questions people about many things in addition to work disability, such as age, education, gender, occupation, employment, and earnings and other income. Mr. Tierney used many of these other elements when he derived his opinion regarding Mr. Wright's earning capacity (e.g., occupation and education) and worklife expectancy (e.g., age, education, disability status). In applying these data, Mr. Tierney used only the most appropriate statistics for cohort groups most similar to Mr. Wright, using, for instance, only data for males with like occupation and education. In this way, Mr. Tierney has taken this very comprehensive data source and "fit" it to the facts of Mr. Wright's case.

### 2.2.3. *Skoog and Toppino Article*

In 1999, the *Journal of Forensic Economics* published an article by Skoog and Toppino, criticizing *The New Worklife Expectancy Tables*, published by Mr. Tierney's firm. These tables use the same methodology to compute worklife expectancy that he employed in his analysis of Mr. Wright. It is interesting to note that despite defense counsels' obvious studious readership of the *Journal of Forensic Economics*, they seemed to have missed other articles published in the same journal that support use of the disability data contained in the CPS.

A list of articles pertaining to the worklife expectancy and its underlying methodology is attached (Attachment E). Two of these articles (Gibson and Tierney, 2000 and Gibson, 2001, attached in full) specifically contradict all of the criticisms contained in the Skoog and Toppino article. In the interest of saving the Court's time, these arguments will not be repeated here, except as noted in the previous sections.

John McNeil, former Special Assistant on Disability Statistics with the Census Bureau, authored the attached article (see Attachment F), which specifically refutes some of the key points in the Skoog and Toppino article. His article points out errors made by Skoog and Toppino when referring to research he performed while at Census.

Herman Miller, economic consultant and former chief of the Population Division of the Census Bureau, has also supported use of the CPS in measuring the employment impact of disability. In an affidavit signed in August 2001 (see Attachment G), he states that the CPS data are "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."

### 2.2.4. *McNeil Article*

Defense has further attempted to disqualify the CPS data with an article by John McNeil (2000) entitled "Employment, Earnings, and Disability." As confirmed by McNeil, this article in no way invalidates use of the CPS for worklife expectancy purposes for the following reasons:

- McNeil's article studies results from the Survey of Income and Program Participation (SIPP), a survey conducted by the U.S. Census Bureau. One of McNeil's purposes in his study was to determine whether or not an appropriate measure exists for measuring the employment experience of people with a disability. In doing this, his focus was a definition of disability consistent with the Americans with Disabilities Act.

- McNeil used the SIPP because its definition of disability is more consistent with the ADA definition than the CPS definition, which focuses on work disability only. The SIPP definition is a much broader one that 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. For this reason, the worklife tables use data from the CPS.

McNeil's affidavit, filed in *Rogde v. Northeast Illinois Railroad* (2001; see Attachment H), supported use of the CPS for studying the worklife expectancy of people with a work disability. In addition, during a November 2000 presentation before the National Association of Forensic Economics (NAFE), McNeil reaffirmed the application of CPS data for the study of persons with a work disability.

### 2.2.5. *Hale Article*

Defense also attempts to discredit Mr. Tierney's testimony with an article written by Thomas Hale, an economist employed by the Bureau of Labor Statistics (BLS). The article criticizes the CPS as a data source for studying the employment experience of persons with a disability as measured by the ADA.

Hale's goal as an employee of BLS is to find/develop a survey to enable measurement of the employment experiences of persons with a disability as it is defined by the ADA. As discussed in the previous section, the CPS does not use this definition, nor is this definition the best one to use when assessing lost earnings. Other key criticisms in the article deal with the validity of the first work disability question and the presence of persons with a temporary disability.

Hale's criticisms of the CPS are not new. They are either irrelevant to the worklife expectancy calculations conducted by Mr. Tierney, or are not substantial enough to warrant discontinuing use of the CPS for estimating the worklife expectancy of persons with and without work disability. In addition, Hale's reservations are contradicted by the use of the CPS by many leading researchers to study the impact of disability (see Attachment D; also see Gibson and Tierney, 2000, and Gibson, 2001, found in Attachment E).

There is no official government position against use of the CPS to define work disability. In fact the Census Bureau regularly generates cross-tabulations of these data and publishes them on its web site. In fact, two noted former Census officials (Miller and McNeil, Attachments G and H) have authored affidavits regarding the validity of CPS for measuring work disability.

## 3. **"Fit" of the Opinion to the Facts of the Case**

Defense notes that it is not enough for an expert's methodology to pass a *Daubert* test, but that the expert's application of the methodology and data must fit the facts of the case. We agree. In furthering this argument, however, defense notes several items and court cases that make no sense. These are discussed separately below.

### **3.1. Use of Average Statistics**

Defense argues that Mr. Tierney's analysis is inappropriate because it did not consider any information specific to Wright, but instead restricted his analysis to four variables that encompass huge groups of persons, using the average income and life expectancy of these large populations.

The consternation seems to stem from a need for a very precise formula to apply these population statistics to an individual plaintiff. Averages from various populations have long been accepted as a means for prediction – life expectancy, earnings, and others. No statistic, no matter how fine-tuned, can provide an exact predictor of an individual's future. This is as true of worklife expectancies as it is of various measures of annual earnings and growth and discount rates. The expert must use available statistics about populations and mold them to meet the specifics of the case. As discussed in Section 1, the U.S. Supreme Court recognized this uncertainty several years ago, in their decision in *Jones and Laughlin Steel v. Pfeifer* (1983).

Economists, actuaries, insurance companies, and gambling establishments use population averages when making rational bets on human outcomes. The basic belief is that in the absence of more specific and precise information, the best predictors of outcomes are statistical averages or relative frequencies. Following this, disability data do not have to be segregated by type, severity, or duration of disability in order to be reliable or meaningful.

Even if segregated data existed, its use would be limited at best. Persons with the same diagnosis and the same length of time since injury can have significantly different experiences in terms of their experience in the workplace, especially when education level is factored in. Consider an example of two men with identical hand injuries resulting in reduced grip strength and limited range of motion. This injury would have an enormous impact on a carpenter, who would likely need to leave his employment. For an English professor, however, the effect may be minimal.

What the criticism does point to, however, is the fact that statistics of all sorts must be used responsibly and applied by persons familiar with the world of work and career development theory. When assessing persons with disability, the user should be familiar with the effects of impairment on ability to work and earn money as well as the experiences of persons with disability in the labor market. Mr. Tierney has the knowledge and experience necessary for performing such a calculation (see Attachment A).

### **3.2. Medical Impairment Rating**

Defense objects to the fact that Mr. Tierney did not use the impairment rating given to Mr. Wright (Motion, p. 6). In stating this, defense shows its obvious failure to understand the meaning of a Permanent Partial Impairment Rating. Such a medical rating deals only with the physical impact of injury to Mr. Wright's body and functional limitations resulting therefrom. This is not the same as the vocational effect of the Mr. Wright's injury. Rehabilitation counselors and vocational experts understand that medical impairment ratings cannot be

translated directly into “vocational impairment ratings” or into loss of lifetime income as defendant wants to do. The issues are different.

The *Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Press, 2001), the book referenced by Dr. Rayes in giving her 15% impairment rating, defines impairment as “a loss, loss of use, or derangement of any body part, organ system, or organ function.” (page 2) It also distinguishes impairment from disability, which is defined in the publication as “An alteration of an individual’s capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment.” (page 8)

Allowing the *Guides* to further speak for itself: “Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual’s overall ability to perform activities of daily living, *excluding work*.” (page 4; emphasis in original)

“The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the *Guides* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides*’ criteria or ratings to make direct estimates of work disability.” (page 9)

Obviously, then, when assessing the vocational loss due to injury, many factors other than the purely physical ones must be considered, such as the person’s age, education, gender, and work history. Mr. Tierney considered all these factors in developing his opinion regarding Mr. Wright’s loss of earnings. This is simply another instance in which defendants fail to understand a basic element of vocational economic assessments.

### **3.3. Use of Case Specific Information**

Defense objects to Mr. Tierney’s analysis because they feel he did not make enough use of the medical reports, tax/employment records, and college transcripts regarding Mr. Wright. Again, they fail to understand how documents such as these are used in a typical vocational economic assessment.

In assessing loss of lifetime earnings, experts use medical reports and depositions to confirm the existence of a permanent injury and to get confirmation on the work-related limitations that exist for the plaintiff. Mr. Tierney did just this. If defense had given even a cursory glance at Mr. Tierney’s file during his deposition, they would have noted the numerous places where Mr. Tierney annotated the various medical reports in his file. The medical reports and testimony clearly had an impact on his assessment. They clearly help to define Mr. Wright as work disabled, a person to whom work disability statistics would apply.

Mr. Tierney, like any other vocational or economic expert, is not a medical doctor (which defense also complains about), and, therefore, cannot make a medical diagnosis. Medical opinions cannot translate into vocational or economic opinions by themselves. They must be translated into vocationally-relevant data by experts knowledgeable about the world of work and the effects of impairments on ability to work. That is, based upon permanent physical restrictions (e.g., reduced lifting, bending, etc.) determined by a qualified *medical expert*, a

*vocational* expert may opine on the impact of those restrictions in the workforce. Mr. Tierney has this necessary knowledge and training to develop such an opinion (see Attachment A).

Many of the medical findings identify permanent limitations for Mr. Wright without detailing their impact in his occupation. Defense motion seems to require that this impact be analyzed only by a medical doctor – somebody that has no training in occupational or vocational analyses. As documented in Attachment A, Mr. Tierney has years of experience placing people with disabilities in jobs and as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. It is with this experience that Mr. Tierney examined 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.

Defense objects to the fact that Mr. Tierney did not use information contained in Mr. Wright's tax or employment records when assessing his lifetime loss of earnings. As noted previously, Mr. Tierney's task was to assess Mr. Wright's loss of earning capacity. In doing this, he determined that his earning capacity was most reasonably represented by the average earnings of Chemical Engineers and of people with similar education. Due to the fact that Mr. Wright was completing his chemical engineering program, his actual historical earnings are not relevant to his future earning capacity. Section 2.1.3 contains a fuller discussion of Mr. Tierney's assessment of Mr. Wright's earning capacity.

Similarly, defense objects because Mr. Tierney did not use information in Mr. Wright's college transcript when assessing his earning capacity. The use of the college transcript fits in with Mr. Tierney's assessment of Mr. Wright's earning capacity (see paragraph above and Section 2.1.3). Based partly on Mr. Wright's age and the fact that he was actively pursuing a college degree, the college transcript is relevant only for verifying Mr. Wright's stated intentions. In this case, Mr. Wright's stated intentions of getting a degree in Chemical Engineering were verified by the college transcript.

#### **3.4. Joy v. Bell Helicopter Textron, Inc.**

Defense uses this case in an attempt to discredit Mr. Tierney's testimony. The case, however, is not comparable to the current case. In *Joy*, the plaintiff was occupationally established in his occupation. Instead of focusing on plaintiff's historical earnings, the economist pulled in other possible earnings scenarios to increase the dollar loss to the plaintiff. Mr. Wright is not yet established in his field, and, therefore, historical earnings would not be relevant.

#### **3.5. Henry v. Hessler Virgin Islands Corp.**

Defense uses this case also in an attempt to discredit Mr. Tierney's testimony. The case, like *Joy*, is not comparable to the current case. In *Henry*, the expert assumed that post-injury earnings would be limited to minimum wage instead of determining the plaintiff's ability to work and earn money in the open labor market. In Mr. Wright's case, Mr. Tierney considered this capacity, thereby narrowing earning capacity to cohort groups with occupation or educational attainment similar to Mr. Wright.

### **3.6. Boucher v. Suzuki Motor Corp.**

This case, like the previous two, is not comparable to the current case. In *Boucher*, the expert took a man with very poor work history, but appeared to ignore this and instead calculated the plaintiff's earnings had the accident not occurred on full-time, year-round work. The expert's analysis did not match the facts of the case in that it was a complete break with the plaintiff's employment record. In the current case, Mr. Tierney used a worklife expectancy for people similar to Mr. Wright, thereby allowing for the probability that Mr. Wright would experience some periods of unemployment. Mr. Tierney did not assume any unusual earnings or work patterns for Mr. Wright. Since Mr. Wright was just completing his engineering degree, he had no opportunity to prove or disprove such a pattern.

## **4. Phillips v. Industrial Machine**

Defense attempts to use *Phillips v. Industrial Machine* (1999) to discredit Mr. Tierney's estimate of Mr. Wright's worklife expectancy. In *Phillips*, the court disallowed use of *The New Worklife Expectancy Tables*. 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, [the expert's] opinion, which relied on the conclusion that Phillips was disabled, lacked foundation and probative value."

The expert in *Phillips* relied on an older version of the tables, and his testimony was also declared inadmissible because it was too generic. The worklife tables used by the expert did not break out disability into severe and not severe categories. The expert in *Phillips* used an average disabled statistic without regard for how the plaintiff may differ from that statistic. This was compounded by the fact that the plaintiff had a comparatively minor disability. Therefore, based on an insufficient medical foundation and on his indiscriminate use of the average statistic, his opinion was not relevant to the case.

In the current case, Mr. Tierney used information specific to Mr. Wright to determine that the effect of his work disability over his lifetime would cause him to be most like people who are defined as not severely disabled. In addition, as discussed earlier, Mr. Tierney relied upon physical restrictions determined by extensive medical records.

## **5. Deposition Transcript**

Defense includes multiple quotes and citations from Mr. Tierney's deposition transcript in support of its motion. However, in most instances, they are taken out of context in a manner that misrepresents Mr. Tierney's testimony and misleads the reader regarding the proper method for conducting a vocational economic assessment. One example was already discussed, where defense states that Mr. Tierney used *The New Worklife Expectancy Tables* in conducting his assessment, when he clearly states in the deposition that he does not. In the motion (page 5), defense states:

Tierney does not rely on government work life expectancy tables. Instead, Tierney uses the New York [sic] Life Expectancy Tables, constructed and published by his company, Vocational Econometrics, Inc. (Tierney Dep., p. 47)

Page 47 says nothing of the sort. In fact, defense is simply asking about The Tables themselves, not whether or not Mr. Tierney used them in his analysis:

Q. Okay. We talked about Vocational Econometrics publishing what's called new worklife expectancy tables, and could you explain to me what the new worklife expectancy tables are?

In fact, defense's assertion is clearly proven wrong on pages 52 and 53 of the deposition:

Q. When you are making your analysis of Mr. Wright, the analysis figures that you come up with then are based on new worklife expectancy tables, based on the LPE model and the current population survey?

A. The—what I'm doing is based on the government data. The new worklife expectancy tables are also based on the government data, but they're formatted in a different way. . . . What I've done is taken the government data, which is what the worklife tables have done, and actually reported out the participation and employment rates from the government.

In many other instances, defense's technique blatantly misleads the reader unfamiliar with the context in which it was spoken. One example, previously discussed, is the defense's attempt to lead the reader into a misunderstanding of the proper use of medical impairment ratings. Mr. Tierney's deposition (p. 26-27) discusses his use of the rating and possible problems with using it without considering occupational factors.

In order to save the court's time, we will not detail all abuses of this defense technique. Suffice it to say that we suggest reviewing these citations only within the full transcript of Mr. Tierney's deposition and proper vocational economic assessment techniques.