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IN THE CLARK COUNTY CIRCUIT COURT

STATE OF INDIANA

FRANK BOWMAN, JR.,

Plaintiff,

v.

CAUSE NO.: 10C01-0303-CT-190

McCLENDON TRUCKING CO., INC.,

and

WILLIAM WALKER, SR.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' DAUBERT MOTION

Comes now Plaintiff, by counsel, and for his Response to Defendants' Daubert Motion states as follows:

A. Background

Defendants have not deposed Dr. Berla nor examined him about the methods used to create his report, data used or methodology. Instead, Defendants are trying to exclude Dr. Berla's report based solely upon an isolated report reflecting that the Current Population Survey ("CPS") data is not perfect. No data is perfect. Defendants' Motion does not establish any basis to exclude the testimony.

B. Daubert/Kumho Standard

In Daubert, 509 U.S. 579 (1993), and subsequently Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), the Supreme Court indicated that all expert testimony must bear the general tests of reliability and relevance. There are four (4) factors to consider if evidence qualifies under Daubert; testing, peer review and publication, error rates, and general acceptance in the relevant

community. In Kumho, the Court stressed that not all factors may apply with every case, especially in the social sciences. The trial court is left as a gatekeeper using the factors as flexible guidelines.

1. Testing.

Data from CPS are produced and extensively tested by the U.S. Bureau of Census and the U.S. Bureau of Labor Statistics. The probabilities for 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. The scientific criteria referred to in Daubert is directed more towards the hard sciences, i.e. - 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.

2. Peer review and publication.

The worklife tables using the CPS data used by Dr. Berla and his colleagues have been the subject of multiple articles, including numerous articles in the Journal of Forensic Economics. Attached to Dr. Berla's report, (attached hereto as Exhibit "A"), is a partial listing of those articles and shows that the worklife tables have been extensively reviewed in scientific literature and that the CPS data have been used by researchers for both forensic and non-forensic purposes. Defendants' own expert testified that the Journal of Forensic Economics was an authoritative source. (Mehaffey discovery depo., p. 12.)

3. Error rates.

Again, this criteria is primarily intended to apply to the hard sciences in conjunction with the testing performed there, i.e. - reliability of a bolt securing a heavy sheet of metal. A recent article, however, has computed a standard error of worklife expectancy and found that statistically

measured standard errors of the worklife expectancy statistics are insignificant. (See Exhibit “B” attached hereto.)

4. General acceptance.

The U.S. Supreme Court recognized the inexact nature of assessments for lost earnings in its 1983 decision, Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, wherein the Court stated:

“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.”

It is curious that Defendants question the use of the CPS data while their own expert, Dr. Mehaffey, in his report relies upon a textbook entitled Life and Worklife Expectancy Tables by Hugh Richards. The authors in that text note there are several generally accepted ways of computing a statistical worklife, including the one used by Dr. Berla. (See Exhibit “C” attached hereto.) Finally, the worklife tables and the methodology underlying the tables, have been the subject of many articles lending credence to their overall acceptance.

C. Reliability of U.S. Census Bureau Data

No survey data are absolutely perfect. Researchers accept this fact and it is one of the reasons for the very existence of the field of statistics. Defendants’ own expert noted that census data was valid. (Mehaffey depo., pp. 68-69.) The articles and other information Defendants’ expert relied upon was based, in part, upon the same type of data. (Mehaffey depo., p. 82.) The experts in the field acknowledge that the CPS is the best data available for studying the impact of work disability unemployment. Averages from various populations have long been accepted in the courts as a means for estimating the future, for example - life expectancy, average earnings, earnings

growth rates. No statistic, no matter how fine tuned, can provide an exact predictor of an individual's future. The expert must use the available statistics about populations and mold them to meet the specifics of the case as Dr. Berla did in Plaintiff's case. As noted by one author, "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." Marcia Angell in Science on Trial, 1997, p. 155.

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 in the media. It is also used by private researchers to study employment patterns of the U.S. population. During presentations before the National Association of Forensic & Economist, 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 previously signed an Affidavit indicating he sees no reason why the CPS data for work disability cannot be used in the manner applied by Dr. Berla and his group, a copy of this Affidavit is attached as Exhibit "D". Exhibit "E" is an Affidavit from Herman P. Miller, the former head of the Population Division of the Census Bureau. He states that the CPS data are statistically reliable and the most appropriate source for studying the employment experiences of people with a work disability. He concludes that the worklife expectancy tables make appropriate and accurate use of the data.

The CPS data used by Dr. Berla represent averages for the applicable disability population. Dr. Berla has specific experience dealing with persons with disabilities. In addition to a doctorate

in psychology and postdoctoral work in economics as indicated on his resume, attached as Exhibit “F”, he has previously worked as a vocational expert with the U.S. Department of Health and Human Services and the Social Security Administration. Defendants’ vocational expert is not an economist, but has also served as an expert with Social Security.

1. Caveat on the Census Bureau Website.

The Defendants contend that the presence on the Census Bureau website¹ of a document discussing possible limitations of CPS work disability data precludes use of the data.

As titled, the document does discuss “Uses and limitations of CPS data on work disability.” Defendants state too strongly the document’s negative intent. As noted in the text, the paper is intended to be a caveat regarding the CPS data, not a document precluding their use. As noted on page three, “data users have to look at the questions and the use to which they plan to put the data to determine the adequacy for the purpose at hand.” Therefore, the paper simply cautions the user to be aware of the impact of potential errors in the survey, a wise caution before using any survey data.

Similar caveats apply to any survey. In fact, the Bureau of Labor Statistics has an even stronger warning regarding the widely-used *Occupational Outlook Handbook* (OOH). This caveat states that the OOH should not be used to compute future lost earnings in adjudication proceedings. Despite this, many expert witnesses continue to see the earnings data as valuable and continue to use them, in combination with their experience and expertise, to calculate lost earnings. The user must understand the source and limitations of the data and adjust their use of it accordingly.

¹ <http://www.census.gov/hhes/www/disability/cps/cpstablexplanation.pdf>

It is important for users to understand the potential imperfections in order to be able to use data most effectively. Understanding the issues can enable an expert to use CPS (or OOH) data as one element in calculating losses in individual cases.

2. Heterogeneity.

Defendants contend that the population of those with a disability is so diverse that application to a particular individual is difficult to impossible.

Heterogeneity is a statistical term referring to the diversity of the population averaged to derive the disability statistics. Plaintiff agrees that the population of those with a specific impairment is quite diverse. However, it is incorrect to surmise that this precludes the use of a statistic drawn from this population.

Plaintiff further believes that any statistic applied should be applied appropriately. In cases concerning the assessment of lost worklife, the expert should rely on medical reports verifying the impairment and apply the appropriate “vocational scrutiny” to assess the impact of the impairment, if any, on the individual’s ability to work. The critical vocational issue is whether a medically determinable permanent physical or mental impairment exists that limits or is likely to limit the individual in terms of the amount or kind of work he or she is capable of performing. Work disability data from the CPS regarding employment should be used only if the individual has a work disability, regardless of the severity of the impairment.

The solution for some critics of disability statistics is to use worklife statistics that are not specific to disability at all. It is clear that this is not a reasonable solution as it uses statistics from a much broader and more diverse population than the disability specific worklife expectancies. Most

importantly, it ignores what is known about persons with a disability. They experience lower levels of employment and, hence, a reduction in worklife expectancy.

When predicting the height of a 5-year-old boy, should one use an average of all people or of 5-year-old boys? Similarly, when predicting the employment experience of, for instance, a female with a non-severe work disability, should one use an average of all people or of females with a non-severe work disability?

Most forensic economists routinely project earnings and employment based upon education. Categorization by education results in averages from diverse populations. Imagine, for example, averages for persons with a baccalaureate degree. These degrees may range from an Accountant/CPA or Mechanical Engineer to a Social Worker, or lead to occupations ranging from a CEO of a large corporation to a minister. Obviously, these occupations have a wide range of expected earnings. Yet, despite the diversity, this average is accepted and used by many economic and vocational experts, as it is the most appropriate predictor in many cases – such as a college freshman who had not yet determined an area of focus. Allowing use of a broad education average while not allowing a more narrowly defined disability-specific education average is a nonsensical double standard.

3. Sample Selection Bias.

The contention is that, since the CPS does not randomly and independently sample people with a work disability, the data derived from it are invalid.

It is true that people with a work disability are not randomly sampled. The CPS in general, however, is based on a large sample size that is statistically stratified (over 50,000 households and 100,000 people). The overall sample size is large enough that data from the subpopulation is

reliable. If this were a problem, we would expect to see greater variability in employment rates from year to year. The stability of these rates over time lends credence to the value of the work disability sample.

The criticism contradicts the frequent use that many vocational and economic experts make of the CPS data. The sampling and weighting procedures in the CPS are based primarily on geographic area, household type, unemployment ratios, age, gender, race, and Hispanic origin. Education is not a part of this procedure. Despite this, many forensic experts value the CPS data and use average earnings and employment by education level in order to estimate lifetime earning capacity. Based on the Skoog and Toppino (2002) criticism, however, this is wrong. This criticism, then, appears to be carrying the sampling need to extremes with the sole purpose of denigrating the CPS disability data.

Skoog and Toppino (2002) state that disability surveys are only useful if they are extremely specific in their sampling methods. They note (p. 85):

For their Tables to have any validity, their statistics must be based on sensible (read statistically *consistent* at a minimum, if not statistically *unbiased or efficient*) structural parameter estimates. They must answer the question *if one has this education, sex, age, and impairment/condition, what is the conditional probability such a person will be employed?* (Emphasis in original)

This is an impossible solution to the issue. First, the sample size would have to be enormous in order to accommodate this desire – probably a sample size much larger than even the 5% sample of the Decennial Census! Even if this could be accomplished to any degree, it would be impossible to anticipate every combination of age, gender, education level, and impairment that might arise in a forensic setting.

4. Lack of Exogeneity/Self-Reported Disability.

Defendants contend that, since work disability for those responding to the CPS is self-reported and not independently verified, one cannot say with certainty that the work disability data are accurate. Respondents could be influenced by other factors, such as current employment status.

What is suggested in this position is a study that would be so enormous as to be impossible. Acquiring independent verification from the thousands of people interviewed would be very difficult, at best, and probably impossible. In those cases of persons identified as having physical or mental impairment, it would require an independent medical evaluation of the selected sample in order to resolve the issue of “lack of exogeneity.” All survey research of a macro nature lacks exogeneity, but the large sample size reduces, if not eliminates, the supposed problem regarding exogeneity. Stern (1989) tests for this problem by measuring labor force participation using self-reported disability. He finds that any potential bias is small and that “the standard disability measures are powerful and reasonably exogenous predictors of labor force participation” (p. 392).

The CPS relies upon answers from respondents to questions administered by trained Census personnel (self-reporting). As such, the 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

Critics speculate that one or both of these requirements are not met in enough cases as to skew the results. The Current Population Survey is the *primary* source of employment data for the United States. The entire survey is self-reported, or lacking exogeneity. Despite this, it is relied upon by

researchers, economists, demographers, and other scientists across the world for measurements of employment, earnings, education status, age, and other characteristics of the U.S. economy.

The government does not require a CPA to verify the income reported, employers to verify employment status, or birth certificates to verify age. Yet, vocational and economic experts and social scientists in general routinely rely upon the resulting income, employment, and age statistics both in forensic and nonforensic 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, challengers contend that respondents are incapable of or unwilling to give an accurate response. As with the heterogeneity issue, this is a nonsensical double standard. Those who contend that lack of exogeneity is a problem themselves routinely use such data specific to earnings, level of education, and age.

D. Criticisms of Berla's Methodology

The primary source of Defendants' complaints are from one article from the Journal of Forensic Economics. Defendants fail to include the response to this article by Mr. Tierney, one of the authors of the report in the present case. A copy of this response is attached as Exhibit "G". In addition to this response, Vocational Economics prepared a 25 page monograph in response to these allegations providing a step-by-step response to the allegations essentially raised by the Defendant as well. A copy of that is attached hereto as Exhibit "H".

E. Prior Admission of Testimony

Courts in other states have allowed testimony based upon the same tables relied upon by Dr. Berla. In Wright v. Werner, Cause No. 01-239, United States District Court for the Eastern District of Kentucky at Lexington, the Court rejected a challenge to Dr. Berla's report, specifically as to Mr.

Tierney. A copy of the Court's detailed Opinion as to this issue is attached hereto as Exhibit "I". In Garibaldo, et al. v. Bandera Drilling Company, Cause No. 16006, District Court, Terry County, Texas, the Court rejected a challenge to Vocational Economics' report. In Lyons v. Follweiler, Cause No. 02-00355, Court of Common Pleas, Delaware County, Pennsylvania, the Court rejected exclusion. See, Nilavar v. Osborne, Case No. 99CA-53TC, Numbered 96-CV-0343, (2000, Ohio Court of Appeals). In Swiech v. Gottlieb Memorial Hospital, Case No. 98C5749, United States District Court for the Northern District of Illinois, Eastern Division, (2004), the Court rejected to challenge a report from Vocational Economics. In Middleton v. Sears Roebuck & Co., No. 5, 99CV157, District Court for the Eastern District of Texas, Texarkana Division, (2000), the Court rejected the exclusion of Vocational Economics' report. In Bentley v. Rose, Civil Action No. 02-CI-1355, Commonwealth of Kentucky, Pike Circuit Court, Division I, the Kentucky Court rejected a Motion to Exclude. In Parsons v. Gabbard, Civil Action File No. 98-CI-00779, Madison Circuit Court of Kentucky, the Court denied a Motion to Exclude Vocational Economics' report. In Williams, et al. v. City of New York, Cause No. 9454/96 Supreme Court, State of New York, the Court rejected a Motion to Exclude Vocational Economics' report.

F. Conclusion

Based upon the Daubert factors, Defendants' Motion should be denied. Dr. Berla's opinions are based upon reliable, although imperfect data. The opinions and methodology have been the subject of appropriate peer review and are generally accepted in the field.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February 2005, a copy of the foregoing pleading was served, either personally or by First-Class Mail, postage prepaid to:

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