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CASE NO. 99-CI-00771

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

GARY ENGLE

PLAINTIFF

vs.

URETHANE OF KENTUCKIANA, INC.
and MELVIN P. STUMLER

DEFENDANTS

MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE TESTIMONY OF JOHN P. TIERNEY

* * * * *

Defendants, Urethane of Kentuckiana, Inc. (the “Company”) and Melvin P. Stumler, (“Stumler”) (collectively referred to as “Defendants”), by counsel, submit this memorandum in support of their Motion to exclude the testimony of Plaintiff’s proffered expert, John P. Tierney. Mr. Tierney should not be allowed to testify regarding Plaintiff’s post-injury worklife expectancy, pursuant to KRE 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). His opinion lacks the reliability required by *Daubert*.

TIERNEY’S TESTIMONY

Mr. Tierney was deposed on January 28, 2002. A condensed copy of his deposition transcript (“Tierney Depo.”) is attached as Exhibit 1. Mr. Tierney used his “examination” in this case to assert the following opinions:

1. Plaintiff Engle’s post-injury earning capacity is \$61,636 per annum.
2. Plaintiff Engle’s post-injury worklife expectancy is 10.6 years.

It is the second opinion that Defendants challenge under Daubert and KRE 703.

Mr. Tierney opines that Plaintiff’s pre-injury worklife expectancy was 12.7 years, like that of an

average non-disabled male with 12 years of education. This average worklife expectancy is based on data published by the U.S. Department of Labor.

However, Mr. Tierney's opinion that Plaintiff's worklife expectancy reduced to 10.6 years after his injury is based on pure speculation and not supported by the facts of this case. Mr. Tierney bases his opinion on the theory that a disabled person has a shorter worklife expectancy, as compared to a non-disabled person. Mr. Tierney does recognize that "the disabled population varies significantly in terms of severity of disability." (Vocational Economic Rationale, pg. 5, Exhibit 1 to Tierney Depo.). Tierney accounts for this variance with three worklife expectancy averages: the average for all persons occupationally disabled, the average for persons with severe disabilities, and the average for persons whose disabilities are not severe. Id. Tierney defines an individual not severely disabled as an individual who meets the definition of occupational disability, who is employed or who has access to a significant portion of jobs in the labor market.

Mr. Tierney opines that Plaintiff's condition is 50% between not disabled at all and not severely disabled. Tierney admits that Plaintiff was "better off than a person who's not severely disabled." (Tierney Depo. Pg. 35). However, he claims that Plaintiff "has problems." Id. Mr. Tierney's assessment was based purely on his own speculation. It was not based on any medical records. In fact, the two independent medical evaluations state that Plaintiff is merely 1% and 3% disabled, respectively. Mr. Tierney did not rely on this information. He did not even know whether Plaintiff's "problems" were permanent or not. (Tierney Depo. Pg. 57).

ARGUMENT

Under KRE 702, expert testimony must meet two requirements for admissibility. The expert must be qualified by specialized knowledge, skill, experience, training or education, in order to testify on the subject matter of his testimony. Also, expert testimony must concern scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. *Id.* Mr. Tierney's testimony fails on the second level.

The second requirement for expert admissibility is divided into a two-prong test as described in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court held that FRE 702 and 703, the federal counterparts of KRE 702 and 703, impose upon a trial judge the duty of serving as a "gatekeeper" with respect to proposed expert opinion testimony. 509 U.S. 579 (1993). In other words, the Rules of Evidence require each trial judge to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. This "gatekeeping" obligation applies to not only "scientific" testimony, "but to **all** expert testimony." *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999); FRE 702.

Kentucky courts follow the standard for determining the admissibility of expert scientific testimony set forth in *Daubert* and *Kumho Tire Company*. See *Mitchell v. Commonwealth, Ky.*, 908 S.W.2d 100 (1995), *overruled on other grounds, Fugate v. Commonwealth, Ky.*, 993 S.W.2d 931 (1999); *Goodyear Tire and Rubber Co. v. Thompson, Ky.*, 11 S.W.3d 575, 576, 577 (2000). According to these principles, first, an expert's opinion must be based on "methods and procedures of science," rather than on a "subjective belief or unsupported speculation." *Daubert* at 590. Secondly, the expert testimony must "fit" the facts at issue, meaning there must be a valid scientific connection between the testimony and the issue to be proved. *Id.* at 591.

In order to be admissible, expert testimony must be “not only relevant, but reliable.” *Daubert*, 509 U.S. at 597 (1993). Although *Daubert*’s focus is primarily “on principles and methodology, not on the conclusions that they generate,” *Daubert*, 509 U.S. at 595, “conclusions and methodology are not entirely distinct from one another.” *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). *Joiner* states:

[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. At 519. Expert opinion based on speculation rather than reasonable analysis and judgment is of no assistance to triers of fact and is not admissible into evidence. Lawson, *The Kentucky Evidence Law Handbook*, §6.15 at 290 (3d ed. 1993). What is required for admissibility is not precisely proper working for the testimony but rather opinion that extends “beyond speculation and amount[s] to substantial evidence of causation.” *Baylis v. Lourdes Hosp., Inc.*, Ky., 805 S.W.2d 122, 124 (1991); *see also Walden v. Jones*, Ky., 439 S.W.2d 571 (1968). Unsupported opinions offer no assistance to the trier of fact, as required by KRE 702, and may be more prejudicial than probative, and thus, inadmissible under KRE 403.

By applying these standards, this Court should exclude Tierney’s opinion regarding Plaintiff’s worklife expectancy. Tierney’s opinion is based on his own speculation, and does not rest on a reliable foundation. There is no foundation for opining that Plaintiff’s “disability” is 50% between that of a non-disabled person and that of a not severely disabled person. In fact, the evidence in this case shows that Plaintiff is merely between 1% and 3% disabled. The actual facts in this case indicate that the difference between Plaintiff and a non-disabled person is negligible. In fact, there is no evidence that Plaintiff actually has been impaired in his work.

Tierney's testimony fails to meet the standards for admissibility of expert testimony under the Kentucky Rules of Evidence.

Because Mr. Tierney's testimony amounts to nothing more than "subjective belief or unsupported speculation," the trial court's "gate keeping" job is complete. The proffered evidence is excluded without further inquiry into its "helpfulness" to the trier of fact. *Daubert, supra*. Mr. Tierney's opinion is not based on reliable science, data, or study; nor is it based on the facts of this case. His views have not been validated as required by *Daubert* and its progeny.

CONCLUSION

For the foregoing reasons, Defendant respectfully implore the Court to exercise its gatekeeper role by excluding Mr. Tierney's "expert" testimony regarding Plaintiff's worklife expectancy.

Respectfully submitted,



Raymond C. Haley, III
Lisa C. Hester
Elizabeth N. Monohan
WOODWARD, HOBSON & FULTON, L.L.P.
2500 National City Tower
Louisville, KY 40202-3175
Telephone: (502) 581-8000
Facsimile: (502) 581-8111
Counsel for Defendants