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**Jefferson Circuit Court
Division Nine (9)**

| | | |
|--------------------------------|---|----------------------|
| GARY ENGLE, |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. 99-CI-00771 |
| vs. |) | |
| |) | |
| URETHANE OF KENTUCKIANA, INC., |) | |
| And MELVIN P. STUMLER |) | |
| |) | |
| Defendants. |) | |

Affidavit of John P. Tierney

COMES NOW, John P. Tierney, being first duly sworn upon his oath states the following:

Defense has filed a motion to exclude my testimony regarding Gary Engle. This motion centers around the foundation for my opinion regarding the effect of injury on Mr. Engle's post-injury worklife expectancy, specifically dealing with the following areas:

1. expert opinion must be relevant, reliable, and fit the facts at issue
2. nature of impairment ratings
3. issue of causation

Each of these points is refuted in the discussion that follows.

1. Expert opinion must be relevant, reliable, and fit the facts at issue

Defendant uses KRS 702 and the US Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Company v. Carmichael* and states that expert testimony must be both relevant and reliable and must assist the trier of fact to understand or determine a fact in issue. Defendant further states that expert opinion must be supported by more than subjective belief or unsupported speculation. We agree.

Defendant demonstrates its lack of understanding of extensive scientific research on the issues faced by persons with disability, however, in stating that my testimony fails on this level. The analysis of Mr. Engle is supported by medical opinion (Section 1.2) and by published research regarding the employment experience of real people with a work disability (Section 1.3). These will be discussed in more detail below.

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Perhaps defense is frustrated by lack of a scientific formula to precisely predict the future employment of the plaintiff and calculate the resulting earnings impact. My opinion deals with the future of a human being, something that can never be known with absolute certainty. The U.S. Supreme Court acknowledges this uncertainty in a 1983 decision (*Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523):

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.

Vocational and economic testimony deal with the “soft” sciences as addressed in *Kumho*, which explicitly recognizes the need for such testimony and its acceptance under *Daubert*.

1.1. My specialized knowledge

The requirement that an expert’s specialized knowledge “assist the trier of fact to understand the evidence or to determine a fact” is in keeping with my vocational economic assessment. This is true both in the context of understanding the evidence of work disability and in determining the economic impact of that disability.

My knowledge, skill, experience, training, and education all combine to qualify me as an expert. As noted in my Curriculum Vitae (Attachment A), I have 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 my education, I have work experience specific to placing persons with disabilities in jobs. In particular, I 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, I managed Employee Assistance Programs that worked toward the rehabilitation and placement of persons with disability.

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

My education and experience provide me 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’s Current Population Survey (CPS) that pertain specifically to the earnings and worklife expectancy of persons with and without a work disability. These data are analyzed in various government publications and scientific articles, demonstrating the impact of work disability on earnings and employment (worklife). This combination of education, experience, and technical data enables me to assess

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the loss of lifetime earnings of Mr. Engle in a way that is beyond the realm of common knowledge.

1.2. Support from medical opinion

Defendant argues that my assessment of Mr. Engle's post-injury capacity was based purely on my own speculation, not on any medical records. This is not true.

The Independent Medical Evaluation Report from Frank S. Wood, MD (April 26, 2001) notes:

“The examinee has achieved maximum medical improvement. MMI is defined as the date after which further recovery and restoration of function can no longer be anticipated, based upon a reasonable degree of medical probability.” (page 10)

And later that:

“This examinee has at least a medium work capacity as defined in the Dictionary of Occupational Titles, U.S. Department of Labor. Because of the history of the medial meniscus resection, he will have difficulty squatting and kneeling for prolonged periods of time.” (page 11)

This clearly notes not only that Mr. Engle has sustained an impairment, but that the impairment is permanent.

Dr. Wood also notes on page 10, “The subjective complaints are consistent with the objective findings.” Earlier in the report (page 5), the doctor noted that Mr. Engle's chief complaint is pain and that the pain “is worsened by standing, walking any distance, kneeling, temperature changes, dampness and squatting down, and improved by staying off the knee and not performing any of the above activities. The pain is reported as frequent.” In a later section discussing Mr. Engle's functional status, the doctor reports that Mr. Engle has “greatest difficulties with handling and setting up ladders and with coring roofs, which requires a kneeling position.”

These impairments clearly impact Mr. Engle's ability to perform his work as well as he would have been able to perform the work had he not been injured. They also demonstrate that he meets the US Census Bureau's definition of work disability which is (in simplified form), anyone who has “a health problem or disability which prevents them from working *or which limits the kind or amount of work they can do.*” (The complete definition of work disability can be found on the Census Bureau web site at <http://www.census.gov/hhes/www/disable/cps/cpsworkd.html>.)

1.3. The effect of work disability

My assessment of the impact of injury on Mr. Engle's loss of future earnings is based also on facts known regarding the employment experience of real people meeting the definition of work disability.

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The presence of a disability is widely known to affect both earnings and worklife expectancy. This finding is documented in results from various surveys, including the decennial Census, the Current Population Survey (CPS) and the Survey of Income and Program Participation (SIPP) from the Census Bureau,¹ the National Health Interview Survey (NHIS) from the National Center for Health Statistics,² and the N.O.D./Harris Survey of Americans With Disabilities.³ The disability effect is the cause of such events as the passage of the well-known Americans with Disabilities Act (ADA),⁴ the existence of the Department of Labor's Office of Disability Employment Policy,⁵ and the practice of rehabilitation counseling, just to name a few.

For the purpose of assessing loss of earnings for Mr. Engle, I have used data from the CPS. The CPS 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.

In addition, government and private (nonforensic) researchers use CPS data to study employment patterns of the U.S. population with work disabilities (See Attachment B) as support for governmental policy decisions. This includes work funded by the Department of Education, National Institute on Disability and Rehabilitation Research and conducted by researchers at Cornell University. They have published multiple papers using the CPS to study the effects of work disability on earnings and employment. Other studies (See Attachment C) have demonstrated that age further impacts the effect of disability on work.

In assessing loss of earnings, what is important is the lifetime effect of the impairment. Even if we were to assume that Mr. Engle's work disability has not had an impact in terms of past work, it is shortsighted of the defendant to think that this will never impact work in the future. Such an opinion goes against the numerous studies finding that disability does affect ability to work. As documented in the above-mentioned studies, the impact of work disability is exacerbated with age. Also, people with a work disability are more likely to lose a job, and when out of work, suffer a significantly reduced likelihood of finding reemployment.

2. Nature of impairment ratings

On page 2 of defendant's Memorandum in Support of Motion to Exclude Testimony of John P. Tierney, defendant states that "the two independent medical evaluations state that Plaintiff is

¹ Data from the decennial Census, CPS, and SIPP can be found on the Census Bureau website at <http://www.census.gov/hhes/www/disability.html>

² One example is a study by Stapleton, et al. (1997) that accesses data from the NHIS. <http://aspe.hhs.gov/daltcp/reports/eshclit.htm>

³ <http://www.nod.org/index.html>

⁴ <http://www.usdoj.gov/crt/ada/adahom1.htm>

⁵ <http://www50.pcep.gov/pcep/>

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merely 1% and 3% disabled, respectively” and repeats this later on page 4 when they state that “Plaintiff is merely between 1% and 3% disabled.”

In stating this, defendant 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. Engle’s body and functional limitations resulting therefrom. This is not the same as the vocational effect of the Mr. Engle’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. Wood in giving his 1% 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. I considered all these factors in developing my opinion regarding Mr. Engle’s loss of earnings. In fact, I agree that the plaintiff’s disability is relatively minor in comparison with other persons with a work disability. The CPS data used in my analysis of worklife expectancy divide the population with work disabilities into “severe” and “not severe” groups. I further subdivided the not severe group to assess the plaintiff in the upper 50% when estimating loss of worklife expectancy.

3. Issue of causation

Defendant also seems to be somewhat confused about the nature of my testimony. On page 4 of their memorandum, they note, “What is required for admissibility is not precisely proper wording of the testimony but rather opinion that extends ‘beyond speculation and amount[s] to substantial evidence of causation.’” My testimony never deals with causation, but with the future effects of a past event, in this case, the loss of earnings sustained by Mr. Engle resulting from injury in August of 1998. This is a very important distinction. Who *caused* the injury

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does not impact the results of a lost earnings analysis. This is an issue I assume will be addressed separately by the parties when reviewing liability issues.

FURTHER, THE AFFIANT SAYETH NAUGHT.

John P. Tierney, MA
Senior Vocational Economic Analyst

Subscribed and sworn to before me, a notary public, in this ____ of March, 2002.

Notary Public

My Commission Expires _____