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IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

RECEIVED
8/12/02

STEPHEN C. JACKSON and)
REBECCA C. JACKSON)
)
Plaintiffs)
)
v.) Case No.: NA 99-106-C S/H
)
ROADWAY EXPRESS INC.)
)
Defendant)

**MOTION TO EXCLUDE TESTIMONY OF
LARRY E. GRABB AND GEORGE V. LAUNEY**

Comes the Defendant, Roadway Express, Inc.. (hereinafter "Roadway"), by counsel, and moves this Court to exclude the testimony of the Plaintiffs' experts, Larry E. Grabb and George V. Launey, from trial on the grounds elucidated under the United States Supreme Court case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), and its progeny.

INTRODUCTION

This case arises out of an automobile accident that occurred on June 17, 1997. The Plaintiff, Stephen C. Jackson (hereinafter "Jackson"), was involved in an accident with a vehicle owned and operated by the Defendant, Roadway.

Jackson's experts with respect to his future wage loss are Larry E. Grabb (hereinafter "Grabb"), and George V. Launey (hereinafter "Launey"). Grabb has rendered an opinion that Jackson will lose future income from approximately \$300,000.00 to in excess of \$450,000.00 based on what he speculates would be Jackson's reduced work life in the future. (See Grabb Report

attached hereto as Exhibit "A.") Launey's testimony regarding this same subject is anchored by Grabb's opinions on Jackson's supposed decrease worklife expectancy.

Roadway contends that Grabb's opinions should be excluded from this case on the grounds that his testimony does not meet the requirements laid down in FRE 702, and as such, his testimony would also be violative of FRE 403. FRE 702, Testimony By Experts, 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 qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.

In Daubert, supra, the United States Supreme Court confirmed that a trial judge had a gatekeeper function to ensure that scientific testimony is not only relevant but reliable.

The next major decision concerning FRE 702, Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), expanded the application of Daubert to include all testimony covered by FRE 702, including testimony based on technical or other specialized knowledge, and held that the Daubert factors were not a definitive checklist or test of the findings that a Court could consider to determine the reliability of an expert's testimony. The Court has also held that the test for an expert's reliability is an exacting one. Weisgram v. Marley Co., 528 U.S. 440 (2000).

In Kumho, supra, the Supreme Court emphasized that the Trial Court's duty was to decide if a particular expert had sufficient specialized knowledge to assist the jury in deciding a particular issue in the case. Id. at 156. Although the Plaintiff's expert claimed that his methods were accurate, nothing in Daubert or the Federal Rules of Evidence required the District Court to admit opinion

evidence that is connected to existing data only by the "ipse dixit" of the expert. Kumho at 158, citing General Electric Company v. Joiner, 522 U.S. 136, 139 L.Ed.2d 508, 118 S.Ct. 512 (1997). Further, the Plaintiff is required to show, by a preponderance of the evidence, that the expert's opinion testimony is reliable. Padillas v. Stork-Gamco Inc., 186 F.3d 412 (3rd Cir. 1994); Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001).

In this case, Grabb's opinions should be excluded under the Daubert criteria because (1) he is not qualified to render this opinion, (2) the underlying basis for his methodology is flawed; and (3) there is no "fit" between the assumptions underlying his opinions and the actual facts as they exist in this case. Launey's opinions should be excluded because his opinions were based on Grabb's predictions.

The Plaintiffs' expert, Larry Edward Grabb, owns his own business, Midwest Personnel Testing and Career Center, and he also works for a company called Heat Recovery Systems. (Grabb Dep., p. 5). Heat Recovery Systems makes commercial and industrial fans, and cooling systems, and Grabb helps them determine the best way to market their products. (Grabb Dep., p. 9). With Midwest Personnel, Grabb serves as a vocational assessment expert, but he also does career counseling, career testing, pre-employment testing, training, and he is a hiring consultant. (Grabb Dep., pp. 10-11). During the summer, approximately 90% of Grabb's time is spent with Heat Recovery, and during an average year, approximately 50% to 70% of his time would be devoted to marketing industrial and commercial fans with Heat Recovery. (Grabb Dep., p. 10).

The majority of the things Grabb does with Midwest Personnel is related to the testing, training, and hiring of employees. Only 25% to 30% of the time he devotes to Midwest Personnel is actually related to vocational assessments for litigation. (Grabb Dep., p. 16). Of the other jobs

Grabb listed in his curriculum vitae, with International Collection Training Institute, United Student Aid Funds (a collection agency for college student loans) and as Director of the School of Public and Environmental Affairs for Indiana University, Grabb did not perform vocational assessments for litigation. In addition, the two certifications listed on Grabb's curriculum vitae as a certified training consultant, which is related to designing programs for sales persons, and the certification by the American College of Counselors, also do not have anything to do with vocational assessments in litigation. (Grabb Dep., pp. 25-27). Finally, Grabb's educational background was not related to vocational assessments. He received an Ed.D., which is a doctorate in education, a master's degree in education in college and student personnel, which covers everything from admissions and records to student activities, residence halls, etc., and a bachelor's degree in commerce and management with a minor in advertising and marketing. (Grabb Dep., pp. 28-29).

Although Grabb has published some articles, none of these articles have dealt with vocational assessments, or the application of the New Worklife Expectancy Tables, which he used to render his opinions in this case. (Grabb Dep., p. 22).

Grabb has only done between 15 and 25 vocational assessments using the 1998 New Worklife Expectancy Tables. (Grabb Dep., p. 19).

Grabb's familiarity with the underlying basis for the New Worklife Expectancy Tables that he used to render the opinions in Jackson's case is nil. For example, Grabb did not know who published the New Worklife Expectancy Tables. (Grabb Dep., p. 61). When he was advised that it was Vocational Econometrics, he stated that he did know anything about that company. (Grabb Dep., p. 62). He did not know anything about the ownership of Vocational Econometrics. (Grabb Dep., p. 62). The only training he received in using the New Worklife Expectancy Tables was a one-

day seminar. (Grabb Dep., p. 62). The only books, articles, etc. that he referred to in using the New Worklife Expectancy Tables is the 10 to 20 page preface and introduction to the Tables. (Grabb Dep., p. 63). Although Grabb was aware that the New Worklife Expectancy Tables were based upon government census data, he did not know the difference between statistics published by the government and the New Worklife Expectancy Tables. (Grabb Dep., p. 64). Frankly, Grabb did not even know how the information was compiled to form the New Worklife Expectancy Tables. (Grabb Dep., p. 64).

Other than a standard first aid course, Grabb does not have any medical training and he does not consider himself qualified to review medical records and determine a diagnosis of a person based on those records. (Grabb Dep., p. 37 and 81).

Grabb's first analysis, known as Scenario No. 1, is a statistical analysis based upon the New Worklife Expectancy Tables. (See Grabb Report, and Grabb Dep. at p. 64). Grabb used Table 2 of the New Worklife Expectancy Tables, the data from which is based upon persons with twelve (12) years of education. (See Table 2 attached hereto as Exhibit "B," and as Exh.10 to Grabb's Dep.) The only other criteria used to make a determination for decreased worklife expectancy using Table 2 are age, education, gender and occupational disability. Occupational disability can range from no disability, to disabled, to severely disabled. (Grabb Dep., p. 65, and see Table 2). The criteria used in Table 2 of the New Worklife Expectancy Tables that Grabb employed in making his analysis are self-explanatory. Although Table 2 is headed as Education 12 Years, the educational component does not distinguish between persons who were on the honor roll or got D's, or persons who actually obtained a high school diploma or dropped out in the twelfth year, etc. (Grabb Dep., p. 70). The other differentiating criteria; age and sex, are obvious.

However, the way Jackson's occupational disability status was determined is not as obvious. Again, there are only three criteria of occupational disability under the New Worklife Expectancy Tables; not disabled, not severely disabled, and severely disabled. (See Grabb Dep., p. 67 and Table 2 of the New Worklife Expectancy Tables.) At his deposition, Grabb did not know how disability was determined for purposes of the New Worklife Expectancy Tables, but he would have relied upon the information in the introduction to the New Worklife Expectancy Tables and applied the information from that source. (Grabb Dep., p. 68).

Grabb did two "analyses" pertaining to Jackson's alleged future wage loss. The first analysis represented the supposed difference between Jackson's worklife assuming that Jackson was a 53-year old male, with 12 years of education, who was not disabled, compared with a 53-year old male with 12 years of education, who is disabled, but not severely disabled. The second analysis was based on the assumption that Jackson would lose his job at Cummins Engine, and that Jackson would only be able to obtain employment making \$10.00 an hour. The amount of Jackson's loss under this scenario would be the difference in income between a working machinist of Jackson's present age compared to an unemployed machinist who expected to work to age 65. (See Grabb Report at p. 5, and as Exh. 3 to Grabb's Dep.).

According to the published Introduction to the New Worklife Expectancy Tables, the underlying basis for the Tables in the Current Population Survey conducted by the Federal Government, the Current Population Survey ("CPS") is a survey that is conducted by sampling approximately 50,000 households in the United States. (See Introduction to New Worklife Expectancy Tables attached hereto as Exhibit "C", and as Exh. 9 to Grabb Dep. at p. 8).

There are only seven questions in the CPS that are used to determine the disability status of a person. According to Exhibit "C", p. 9, of the Introduction to the New Worklife Expectancy

Tables, Exh. 9 to Grabb's Dep.), a person is considered to have a work disability if a person answers affirmatively to the following conditions.

1. Identified by the March Supplement question "Does anyone in this household have a health problem or disability which prevents them from working or which limits the kind or amount of work they can do?"
2. Identified by the March Supplement question "Is there anyone in this household who ever retired or left a job for health reason."
3. Identified by the core questionnaire as "currently not in the labor force because of a disability."
4. Identified by the March Supplement as a person who did not work at all in the previous year because of illness or disability.
5. Under 65 years old and covered by Medicare in previous year.
6. Under 65 years old and received Supplemental Security Income (SSI) in previous year.
7. Received VA disability income in previous year.

If the respondent gives an affirmative answer to any one of the four questions dealing with Medicare benefits, Social Security disability, not worked in the survey week, or not worked in the previous year, those persons are automatically classified as severely disabled. According to the New Worklife Expectancy Tables, there are not any separate statistics for persons who are "not severely disabled." These statistics are computed by merely subtracting the number of persons who responded affirmatively to the severely disabled questions from the total number of persons encompassed in the disability statistics. (See Introduction to New Worklife Expectancy Tables at p. 8). The current worklife expectancy statistics are apparently generated from national data since there is not a table related to Indiana, nor is there a separate category for geographic location. Therefore, Grabb assumes that Indiana's population follows the national trend.

The manner in which Grabb does his analysis does not rely on Jackson's individual circumstances. Of the materials that Grabb was provided by Jackson's counsel, he did not take into account much, if any, of the information. First, the information Grabb gathered was through a 90 minute interview with Jackson. (Grabb Dep., p. 46.)

Grabb did not use what would ordinarily be considered as vital information to determine future wage loss.

Grabb did not use the information of any of the medical records sent to him, including those from King's Daughters Hospital (except to confirm the ER visit), University of Louisville Hospital, Columbus Regional Hospital, x-ray reports, Southern Indiana Surgery, or any of Jackson's treating physicians. (Grabb Dep., pp. 39-41).

Grabb did not review any of the medical depositions in this case. (Grabb Dep., p. 53).

Grabb used Jackson's functional capacity report allegedly completed by his treating physician. But Grabb drafted this form and supplied it to Jackson's lawyers who in turn apparently sent it to one of Jackson's physicians. (Grabb Dep., pp. 54-55).

According to Grabb's interview with Jackson, Jackson described numerous symptoms that he related to the accident. (Grabb Report at p. 4). Further, the Functional Capacity report lists some restrictions to Jackson's activities. Neither Jackson's symptoms or the restrictions in the Functional Capacity form, have any direct relationship to the definition of occupational disability in the New Worklife Expectancy Tables. According to Grabb, one cannot take any of the information in the Functional Capacity form and directly translate it to the New Worklife Expectancy Tables. (Grabb Dep., p. 75). One could not use the New Worklife Expectancy Tables to find out any information pertaining to a person's specific restrictions like lifting, etc. (Grabb Dep., p. 75). In fact, one could

not use any of the responses to the questions in the Functional Capacity form to obtain a specific worklife disability reduction according to the New Worklife Expectancy Tables, except for those responses that would indicate a person was completely disabled. (Grabb Dep., pp. 75-76).

None of the physical difficulties that Grabb attributed to Jackson can be translated into whether or not a person is disabled or severely disabled according to the New Worklife Expectancy Tables. (Grabb Dep., p. 80). For example, one could not use driving limitations, whether or not one could go up and down stairs, or a person's ability to climb, or lift, to obtain any type of information pertaining to the decrease in person's worklife expectancy under the New Worklife Expectancy Tables. (Grabb Dep., pp. 80-81).

In fact, Grabb admitted that with respect to the New Worklife Expectancy Tables, he cannot look up any information about a person's specific injury or a person's specific symptoms. (Grabb Dep., p. 82). Thus, under the New Worklife Expectancy Tables, the definition of disability could include conditions ranging from a mild backache to paraplegia. (Grabb Dep., pp. 83-84).

The New Worklife Expectancy Tables are equally general with respect to an individual's occupation. Nothing in the New Worklife Expectancy Tables tells whether a particular person is disabled with respect to their particular occupation. (Grabb Dep., p. 72). There are no occupational subcategories of any kind in the New Worklife Expectancy Tables. (Grabb Dep., p. 72). Because there is no breakdown by occupation, all occupations are encompassed within the definition of "occupational disability" in the New Worklife Expectancy Tables. (Grabb Dep., p. 82).

With respect to Scenario No. 2, Dr. Grabb's assumptions are equally unavailing. First, Grabb assumed that Jackson would continue in his employment with Cummins Engine up until the age of 65, even though he acknowledged that there were any number of reasons, such as heart attacks,

stroke, or other problems that could prevent Jackson from doing this. Grabb did not have any information that Mr. Jackson is in danger of losing his employment at Cummins Engine; "I don't have a crystal ball." (Grabb Dep., p. 93). Grabb did not talk to any person at Cummins Engine or at Jackson's union, to determine severance pay, job security, seniority, or other factors that could affect Grabb's opinion. (Grabb Dep., pp. 93-94). The only jobs that Grabb referred to in his report of February 27, 2001, were those listed in a job search data base from the Indiana Department of Work Force Development. Grabb did not run any searches in any other sources of employment, like job banks, temporary agencies, or similar sources. (Grabb Dep., p. 94).

Further, Grabb acknowledged that there are employers in the state of Indiana who do not put their jobs in these data bases. (Grabb Dep., p. 97). Grabb did not investigate the possibility of whether Jackson could obtain re-training for a different job at Cummins Engine or any other employer. (Grabb Dep., p. 98). In fact, Grabb did not have any opinion as to whether Jackson could be re-trained for another job if in fact he did lose his employment at Cummins Engine for some reason.

George V. Launey, the counterpart to Larry Grabb for purposes of Plaintiff's economic damages, has better credentials than Grabb. However, Launey's report and his opinions rely on Grabb's analysis to such an extent that Launey's opinions should also be excluded from the evidence at trial. In fact, with respect to lost future earnings, Launey uses the exact models that Grabb uses; scenario 1, the statistical model, and scenario 2, the real world model. (See Report of George Launey at pp. 2 and 3, attached hereto as Exhibit "D"). On page 4 of his report, Launey makes the projections for lifetime standard time earnings projection, which means Jackson's basic 40-hour work week, and another projection for lifetime overtime earnings, which represents those hours

Jackson works in excess of 40 hours. In both these determinations, Launey adopted Grabb's worklife reduction of 3.7 years out of 10 expected worklife years, (37% in Launey's report) to estimate Jackson's worklife reduction.

As stated in his report at page 13, Launey's basis for his projections were as follows:

Larry Grabb, in his February 27th report, identifies two future scenarios for Stephen Jackson given Jackson's injuries:

Scenario No. 1: Statistical Model. Grabb estimates a 37% loss of Mr. Jackson's lifetime future earnings, assuming his losses are proportionate to an estimate of lost worklife for statistically average disabled males (as compared to non-disabled males).

Scenario No. 2: Real World Model. The second scenario reviews the various jobs (and pay rates) that Mr. Jackson would likely be able to perform and without the physical limitations that are in the region of his home. Grabb provides a 'generous estimate' of \$10.00 per hour as Mr. Jackson reaches a earning capacity given his skills and injury-induced work limitations. This study assumes a 25 and \$800 annual residual earning capacity to be within Mr. Jackson's physical job limitations. (Launey Report at p. 13).

On page 14 of this report, Launey also indicates that his projections are based on Grabb's report:

Larry Grabb acknowledges that Mr. Jackson has been able, out of economic necessity, to continue his employment at Cummins Engine Company. However, Grabb puts Jackson in a category of working hurt, given his physical limitations and current job demands as a machinist. Mr. Jackson continues in his current employment as a machine operator, Grabb opines that he [Jackson] will likely suffer a 37% loss in his future worklife (under Grabb Scenario No. 1). On the other hand, Mr. Jackson could seek other new employment in keeping with his job skills and physical limitations. If he could secure alternate employment, Grabb believes that Jackson's highest and best wage given his injuries would be no greater than \$10.00 per hour with little likelihood of significant overtime. (Under Grabb's Scenario No. 2). Source: Larry Grabb Report of February 27, 2001.

Launey testified about his reliance upon Grabb's projections to formulate his own loss for Jackson. Launey stated that he projected Jackson's remaining lifetime earnings had he not been injured, and then multiplied both numbers by 37%, which 37% was the number that Grabb generated in his report. (Launey Dep., p. 22). In addition, Launey patterned his Scenario No. 2 after Grabb's Scenario No. 2. (Launey Dep., p. 23). In Scenario No. 2, Launey took Grabb's opinion that if Mr. Jackson should lose or resign his job at Cummins Engine because he can't do the work any longer, he could go and obtain a job at best in the range of \$10.00 per hour. Then, Launey applied these numbers to formulate his loss estimates. (Launey Dep., p. 25). In other portions of his deposition, Launey confirmed that his estimates were based upon Grabb's projection of worklife loss. (See Launey Dep., pp. 36, 37, 39, 40, 41, 42, 43, 44, 59, 60, 65, 66, 71, etc.). Because Launey's estimate pertaining to Jackson's future wage loss for regular hours and overtime hours and fringe benefits, are based upon Grabb's projections of Jackson's losses under Scenario No. 1 and 2, Launey cannot be allowed to testify because the underlying bases for his opinions are based on Dr. Grabb's unreliable methods.

ARGUMENT

I. GRABB'S METHODOLOGY IS UNRELIABLE.

Courts have taken an increasingly hard look at the testimony provided by economists in both commercial and personal injury litigation. In Total Containment, Inc. v. Dayco Products, Inc., 2001 U.S. Dist. Lexis 15838, (Sept. 6, 2001), one of the most recent cases dealing with the testimony of an economist, the Court outlined its role under Daubert, supra.

As under the precursor to the current Rule, a court must conduct a threefold inquiry before permitting expert testimony. It must: come from a qualified expert witness, be based on reliable methods, and 'fit' the facts of the case. (Citation omitted.) ...

While the proponent of an expert need not prove that his or her opinions are correct, it must prove, by a preponderance of the evidence, that his or her testimony is reliable. (Citation omitted.) The Supreme Court has emphasized that the test for reliability is an 'exacting' one. (Citation omitted.) And the expert will be held to the intellectual rigor of his field....

Courts must also assess whether the expert relied on data reasonably used by economic experts and had good grounds to rely on such data in drawing conclusions. (Citation omitted.) Nothing requires a court to accept an opinion tied to existing data only through an expert's 'ipse dixit.' (Citation omitted.) To that end, the Third Circuit has found that an expert may not testify where an economic expert's testimony rests on faulty assumptions. See, e.g. Elcock, 233 F.3d. at 754-55. 'Although mathematical exactness is not required, expert testimony of post-injury earning capacity must be based upon the proper factual foundation.' Elcock, 233 F.3d at 754 (quoting Benjamin v. Peter's Farm Condo, Owners Ass'n., 820 F.2d 640, 643 (3d Cir. 1987)). Thus, in Elcock, the Third Circuit ordered the exclusion of economic expert evidence which set the plaintiff's potential earnings at \$12,000 a year where the record showed that the plaintiff made only \$5,574 in the year preceding her injury.

The Court in Total Containment, *supra*, went on to note that other Courts had excluded economic expert testimony that was not supported by sufficient evidence.

Other courts have not hesitated to exclude an economic expert where their testimony is not supported by sufficient evidence or engaged in mere speculation. See e.g. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056 (8th Cir. 2000) (exclusion warranted where esteemed economic expert Robert Hall had not considered all relevant facts in relevant market when performing market share analysis); Target Marketing Publishing v. ADVO, Inc., 136 F.3d 1139, 1143 (7th Cir. 1998) (where economic expert's projections of lost profits unsupported and based on mere speculation, district court may exclude proposed testimony); Boucher v. United States Suzuki Motor Corp., 73 F.3d 18, 21-22 (approving exclusion of testimony based on conjecture and faulty assumptions); JMJ Enters. v. Via Veneto Italian Ice, 1998 U.S. Dist. Lexis 5098, at 18-19, 97-0652 (E.D. Pa. Apr. 15, 1998).

In Total Containment, *supra*, the Court excluded the testimony of the Plaintiff's economic expert, because the expert had used unreliable economic data, the expert had based his opinion on assumptions without any explanation as to why these assumptions were reasonable, and that the model employed by the expert was unreliable.

In Concord Boat Corp., et al. v. Brunswick Corp., et al., 207 F.3d 1039 (8th Cir. 2000), the Appellate Court held that the District Court should have excluded the Plaintiff's economic expert, explaining that:

Counsel's assurances [that plaintiffs economic expert's model would reflect market reality] did not eliminate the need for a thorough analysis of the expert's economic model and his proffered opinion. Under Daubert, the District Court is to make a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue.' Daubert, 509 U.S. at 592-93. Among the factors to consider is whether the 'expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' Id. at 591. (Quoting United States v. Downing, 753 F.2d 1224, 1242 (3rd Cir. 1985)). The court referred to this requirement as 'fit' meaning that the expert testimony must not only be based on reliable science but must also 'fit' the particular facts of the case. See Id.

In recent years, the Supreme Court has put renewed emphasis on the importance of the 'fit' of an expert's opinion to the data or facts in the case:

Conclusions and methodology are not entirely distinct from one another.. nothing 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 analytic gap between the data and the opinion proffered.

General Elec. Co. v. Joiner, 522 U.S. 136, 146, 139 L.Ed.2d 508, 118 S.Ct. 512 (1997); see also Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 n.3 (8th Cir. 1999). A court must focus on the

'reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.' Kumho Tire Co. v. Carmichael, 526 U.S. 137, 154, 154, 143 L.Ed.2d 238, 119 S. Ct. 1167 (1999) (emphasis in original).

The district court commented that because Brunswick had not challenged the Cournot model as a scientific theory, its 'criticisms are reduced to complains about how Dr. Hall [plaintiff's expert economist] applied the Cournot model to the facts of this case.' Concord Boat Corp., 21 F.Supp.2d at 924. If a party believes that an expert opinion has not considered all of the relevant facts, an objection to its admission is appropriate. See Kumho Tire Co., 526 U.S. at 154; Joiner, 522 U.S. at 146. Even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, n11 should not be admitted if it does not apply to the specific facts of the case. See Kumho Tire Co., 526 U.S. at 154; Joiner, 522 U.S. at 146.

Based on its Daubert, supra, analysis, the Court found that Dr. Hall's expert opinion should not have been admitted because it did not incorporate all aspects of the economic market, and because it did not separate lawful from unlawful contracts, thereby rendering his opinion mere speculation.

As elucidated in the case of United Phosphorus Ltd. v. Midland Fumigant Inc , 173 F.R.D.

675 (D.C. Kan. 1997):

[A]n expert's conclusions must be supported by good grounds in each step of the analysis: 'Any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible.' (Citations omitted.) Finally, in assessing the reliability prong, the court's focus must be solely on principles and methodology, not on the conclusions that they generate. Daubert, 509 U.S. at 595.

Rule 702 also requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition is primarily a relevancy inquiry.

In Nelson, et al. v. Tennessee Gas Pipeline Co., et al., 243 F.3d 244 (6th Cir. 2001), the Court had to determine if the opinions of two experts, proffered by the Plaintiff to testify about whether exposure to PCB's caused the Plaintiff's medical problems, comported with the reliability and fit requirements of Daubert and Kumho, supra.

In Nelson, the Plaintiffs, who lived in a town near a pump station on a natural gas pipeline, alleged that they suffered ill effects because of exposure to a lubricant that contained PCBs used at the station. One of their experts, Dr. Kilburn, did a "study" comparing the symptoms of the residents of the town to a control group of non-residents, and based on this study he opined that the resident PCB exposure was the reason for the Plaintiffs' medical problems. The Court addressed the Daubert factors it used to exclude Kilburn's testimony:

"[R]ule 702 requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This question of relevance, described as "fit," "is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." Id. at 591. Thus, the trial judge, faced with a proffer of expert scientific testimony, must determine whether the expert

is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592-93 (footnote omitted). It is the proponent of the testimony that must establish its admissibility by a preponderance of proof. See Daubert, 509 U.S. at 592 n.10.

As the Court in **Daubert** stated the inquiry must be "solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595. However, as the Court later clarified,

"conclusions and methodology are not entirely distinct from one another." Joiner, 522 U.S. at 146. A district court is not required to admit expert testimony "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.

The magistrate judge carefully analyzed the question of whether Kilburn considered and accounted for confounding factors which could be responsible for the impairments and health problems found in the plaintiffs. Without contesting any specific findings, plaintiffs assert that Kilburn's statistical analysis accounted for any significant confounding factors.

The Court noted that the only determining factors that were accounted for in the study were "differences in age, education, gender, and height" between the Plaintiffs and the control group. (Nelson at fn. 9.) The Court did not think that Kilburn's analysis was scientifically justifiable because of the failure of the study to account for other possible causes of the Plaintiff's medical problems.

"This kind of cohort epidemiological study hopes to establish an association between exposure and disease, but an association does not mean there is a cause and effect relationship. **See** Reference Manual on Scientific Evid. 333, 348 (2d ed. 2000). Before any inferences are drawn about causation, the possibility of other reasons for the association must be examined, including chance, biases such as selection or informational bias, and confounding causes. Id. at 354.

Even if this methodology validly showed that plaintiffs were impaired (which defendants do not concede), it did not provide a valid scientific basis for the opinion on causation. As Kilburn admitted, these tests could not identify what caused the impairments, and there were a number of other possible causes or confounding factors." Id. at 253.

As this case shows, an expert opinion must be based on information that actually addresses the issue in contention, whether it is damages or the cause thereof, before it can be accepted as evidence.

Grabb's analysis falls far short of this requirement. As explained previously, the data used as the basis for Grabb's analysis comes from the Current Population Survey or CPS. This survey is only based on interviews with 50,000 households. Based on the current United States population of approximately 280,000,000 people, the percentage of the population actually measured is approximately 0.00001 % of the population.

There are only seven questions in the entire CPS pertaining to disability. Three of these questions are strictly limited to finding out those persons of working age in a household who receive veteran's disability compensation, medicare, and/or supplemental social security. The remaining four questions are general inquiries about a respondent's ability to do work, *i.e.* have you been prevented from working because of a health problem or disability, have you had to leave a job because of a health problem or disability, have you been prevented from working in the previous year because of a health problem or disability, and finally, do you anticipate being unable to work, for an additional six months because of a health problem or disability.

The affirmative respondents to these questions are placed in only one of two categories based on their answers of these questions: not severely disabled or severely disabled. Grabb has classified Jackson as "not severely disabled."

Grabb's opinions rely on a table with only four variables: sex, age, education, and disability status. Examining each of these variables in turn, demonstrates why Grabb's opinion is meaningless:

1. Sex - The only choices are male or female. In this case, choosing "male" only limits the statistical cohort to approximately one-half of the entire working population of the United States.
2. Age - Grabb's report statistically encompasses all 53-year old males.
3. Education - Grabb uses the Plaintiff's education as a factor to determine worklife expectancy. However, these statistics do not even take into consideration whether a person

graduated, much less, that person's individual academic performance. Further, the potential statistical population of 53-year old males with a twelfth grade education is huge.

4. Disability Status - Again, this is based on the answers given to the seven questions outlined earlier, and the only two categories used by Grabb are severely disabled or not severely disabled, with Jackson being assigned to the latter category. These questions do not discriminate between occupations, injuries or restrictions.

The reason that Grabb's methodology is flawed is that it is too general to rise above the level of speculation. Grabb's data is not impairment specific. He cannot use any specific symptom or diagnosis to determine a decrease in Jackson's worklife expectancy using the New Worklife Expectancy Tables. This means that Grabb is unable to use his methods to determine an actual worklife reduction for Jackson in the future, based on Jackson's specific physical complaints. Instead, he is forced to use a statistical average that is a blend of disabilities encompassing everything from backaches to paraplegia. These generalizations and averaging make Grabb's opinion so unreliable to the point that his opinions will not assist the trier of fact to understand the evidence or determine a fact in issue.

Thus, based on Grabb's methodology, if he were asked to determine the pre-injury and post-injury earnings loss for one hundred 53-year old males with twelve years of education, who were not severely disabled, no matter how these men were injured, or the nature of their disability, their individual future wage loss would all be the same amount. (Grabb Dep., pp. 87-88).

Under Daubert, supra, and its progeny, the Court is required to make two primary determinations. The first is whether or not the methods used by the expert are reliable, and second, as a separate inquiry, whether the evidence or testimony will assist the trier of fact to understand the

evidence or determine a fact in issue, i.e. is the opinion relevant. In this case, Grabb's opinions do not satisfy either criteria.

According to economic authorities, the underlying CPS data in the New Worklife Expectancy Tables used by Grabb to express his opinion regarding Jackson's loss of future earnings is not reliable for this purpose. Recent publications point out the deficiencies in the New Worklife Expectancy Tables and the CPS data used by Grabb to make his predictions regarding Jackson's future lost earnings. In Disability and the New Worklife Expectancy Tables from Vocational Econometrics, 1998: A Critical Analysis by Gary R. Skoog and David C. Toppino, General Forensic Economics I, II, III (1999) pp. 239-254 (attached hereto as Exhibit "E "), the authors criticized the New Worklife Expectancy Tables published by Vocational Econometrics, Inc. because of the tables inability to quantitatively differentiate between a disabled and a non-disabled person's worklife expectancy.

The basis for this criticism is that the CPS data underlying the New Worklife Expectancy Tables was not intended to be used as a disability screening device. Skoog and Toppino noted that the information from the CPS as used in the New Worklife Expectancy Tables described a person as severely disabled or non-severely disabled based on seven questions that determine whether a person (1) has a health problem or disability that prevents one from working or limits the kind or amount of work one can do; or (2) has ever retired or left a job for health reasons; or (3) has not worked in the survey work because of physical or mental illness or disability that prevents the performance of any kind of work or for at least an anticipated six months; or (4) has not worked in the previous year because of illness or disability; or (5) is under 65 years of age and was covered by Medicare in the previous year; or (6) is under 65 years of age and was a recipient of Supplemental

Social Security in the previous year; or (7) received Veteran's Disability compensation in the previous year.

Specifically discussing criteria (3) through (6), that are used to categorize a person as severely disabled, the authors pointed out the inconsistencies presented by using these criteria.

The initial CPS criterion (condition 3) - currently not in the labor force because of a disability yet with anticipated loss of work for at least six months categorized by VEI as 'severe disability' could conceivably include individuals who have sustained relatively minor or non-permanent, yet prolonged or recurrent injuries or illnesses, that are nonetheless medically considered temporary in nature. They may not lead to any permanent occupational, impairment or disability. There exists no pre-survey specific time element or question other than current work status during a survey week. Consequently, an employee out of work for literally less than one week, yet hoping for disability benefits could answer yes to this question that accordingly identifies severe disability. Inclusion of this response segment in the Tables severely disabled category would appear to substantially skew worklife expectancy downward for those individuals whose inclusion overstates the persistence of time out of the labor force. (Skoog & Toppino p. 242).

The authors pointed out problems with the other criteria used to identify severely disabled persons.

The next VEI 'severe disability' criterion (condition 4 - had not been taken the preceding year because of illness or disability) is confounded by the illness component. Illnesses include congenital blindness, heart disorders, brain damage, severe spinal disorders and other disabling conditions from birth that have always significantly impaired or even precluded employment. Such conditions are substantially different from work or personal (tort) injuries. In contrast to the chronic congenital factors (illnesses) listed, injuries are most frequently only partially as opposed to totally disabling. Yet again, there is no way to control for and eliminate 'variations' in the CPS data to permit valid use by VEI in their Tables. Failure to eliminate such illnesses introduces measurement error and statistical noise of unknown magnitudes. (Skoog & Toppino, pp. 242-243).

The authors also noted that this same problem existed with Conditions 5 and 6 (persons receiving Medicare and persons receiving SSI) in that:

The same confounding factors noted in condition 4 could also impact on conditions 5 and 6. Specifically, profound and chronic illnesses such as Down's Syndrome may be significantly depressing the outcome worklife figures. From a vocational standpoint, the greatest contraindications in the use of CPS data to estimate impaired worklife include the survey's significant failure to identify type of disability, and whether the disability is temporary or permanent. (Skoog & Toppino, p. 243).

In summary, the problems with the use of these factors to determine disability status are that:

These broad CPS categories lack specificity and reliable definitions since some of these groups presumably include some individuals without any remaining worklife expectancy (totally disabled) and others who may be temporarily disabled without any predictable reduction in worklife. (Skoog & Toppino at p. 243).

Perhaps most important in this case is that these authors point out that the CPS data is not meant to be used as a measure for the employment status of persons with disabilities.

Neither the monthly Current Population Survey data nor its more extensive March demographic supplement (the basis of the Table's worklife probability calculations) are meant for, or collected for the task of measuring the employment status of persons with disabilities. To understand this problem, note that persons are asked whether they (or a person in their household) are 'prevented from working' or 'limited in the kind or extent of work they can do' by a 'health problem.' This key question has several difficulties:

1. It is not validated with other objective measurements of disability;
2. It confounds and mixes a general impairment with other factors such as transferable work skills, physical, emotional and psychological capabilities, and labor market conditions along with environmental aspects such as workplace accommodations and availability of transportation in concluding that work is prevented;

3. The 'limits the kind or amount' is inherently ambiguous - is it before or after selection of the post-injury job or is it an innate impairment? How is a person who was limited, but for whom accommodations has been made, and which has minimized or removed the limitations supposed to answer the question?
4. It does not lend clarity to the 'health problem' in condition 1 and the 'illness' in condition 4, and may not be at all representative of the subject being assessed. Indeed if the CPS sample is dominated by respondents whose conditions of not working might include congenital back or spine problems, arthritis or rheumatism, cancer, deafness, blindness, diabetes, heart trouble, high blood pressure, mental or emotional problems, mental retardation, stroke, etc., one might ask on what basis are the employment or participation rates of workers with these conditions relevant to workers with impairments that merely caused job substitutions (requiring lifting or restricted bending or even non-exertion sedentary work)? (Skoog & Toppino, p. 245).

These authors conclude that CPS data defines disability inappropriately for forensic economics purposes because the questions asked are not intended to measure the employment and participation status of various classes of functional impairments.

An article that appeared in the June 2001 issue of the Monthly Labor Review by Thomas W. Hale, an economist in the Office of Employment and Unemployment Statistics for the Bureau of Labor Statistics titled, The Lack of a Disability Measure in Today's Current Population Survey (attached hereto as Exhibit "F"), explains why the CPS cannot form the basis for any statistical inference regarding a person's worklife and decrease in employment due to an impairment.

There are two sources of information in the CPS. The first is the basic CPS that determines the employment status of household members, and the second source is from the CPS income supplement done once a year in March which provides information about work experience, earnings

and income in a previous calendar year. The disability question from the basic CPS is as follows, "Last week did you do any work for either (pay or profit)?" The possible responses to this question are yes, no, retired, disabled, unable to work, don't know, or refused. The purpose of this question is to determine whether a respondent is employed, unemployed, or not in the labor force. If the respondent meets the criteria for employed or unemployed, any of the alternative answers such as "disabled" is erased from the file because it is inconsistent with the labor force categories of employed and unemployed. According to Hale:

Because of this, researchers have no information on the status of employed and unemployed persons from the basic CPS.

Further, the alternative answers to the discriminating question in the basic CPS are not mutually exclusive, persons who may classify themselves as retired may also have a disability which is not picked up in the responses to the basic CPS. Further, many people with disabilities respond "No" to this question rather than go into detail about their retirement or disability status. Because of these shortcomings with the basic CPS, most researchers use the supplemental data from the March CPS.

According to Hale, the work limitation question on the March supplement to the CPS is "[Do you/Does anyone in this household] have a health problem or disability which prevents (you/them) from working or which limits the kind or amount of work (you/them) can do?" - Yes or No. After this question, the respondents are asked questions to identify sources of income related to the disability, like workers' compensation, disability insurance, etc.

These questions lack validity as identifiers of persons with disabilities for several reasons:

- The primary work limitation question from the March CPS Supplement while identifying some disabled persons, also may identify persons with flu, colds, broken legs and other temporary illnesses or conditions. In such cases, the survey

question is not valid because a "yes" response to the work limitation question does not differentiate between a person with an impairment that limits the ability to work, and a person with a temporary health problem.

- In order to design valid disability questions, one must start with the definition of disability. The current CPS questions on work limitation disability income did not begin with any definition of disability. Neither the work limitation nor the income questions were designed to identify the population with disabilities, nor were they tested to determine if they do so. Because the foundation questions for the Current Population Survey were not designed to identify the population with disabilities, the Current Population Survey itself cannot be a valid source for such information.

Hale's article also identifies other uncertainties in the CPS questions that affect their validity in identifying disabled persons who are limited in their ability to work because of this disability.

The consensus of these articles is that the CPS, in both its basic form and the March Supplement information, cannot form the basis for demonstrating employment-population ratios for people with disabilities because the questions used in these surveys were not and are not designed to elicit this type of information from the survey respondents.

These are the same questions used by the New Worklife Expectancy Tables. Because these questions are not valid predictors of employment as it relates to disability or vice versa, the fact that Grabb's opinions are based exclusively on the New Worklife Expectancy Tables, makes his conclusions equally invalid.

II. GRABB'S ASSUMPTIONS DO NOT "FIT" THE FACTS OF THIS CASE.

As Grabb stated in his deposition, he did not take into account any of the specific information related to Jackson when making his predictions.

Even though there were facts on which to base his predictions about Jackson, such as his medical records or symptomology, none of these facts were taken into account by Grabb's methods. Grabb never investigated Jackson's actual work requirements, his fringe benefit packages, if any, the type of degree he obtained, the courses he completed to obtain that degree, etc. Frankly, it would have been useless for him to do so, because his method only uses four variables: sex, age, education level, and whether the person is not severely disabled or is severely disabled.

Several cases have held that testimony pertaining to loss of future earnings for an injured party can be excluded if that testimony does not withstand the strictures of Rule 702.

In Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (U.S. App. D.C. 1993), the Court excluded the testimony of the Plaintiff's damages expert under FRE 702. In Joy, supra, the Plaintiff's economic expert, Dr. Glennie, offered four different scenarios regarding the decedent's future earnings. In one scenario, the Plaintiff continued his occupation of operating a toy store, another scenario assumed that the decedent would operate his toy store and also engage in consulting and wholesaling activities, and the last two scenarios assumed that the decedent would move into consulting on a full-time basis. The Court noted that the economist's basis for concluding that the decedent would move into consulting were (1) the economist's conversation with the decedent's wife, and (2) that the decedent had once assisted a person in Texas in starting a toy store; a job for which he received no compensation except a discounted automobile. The economist's opinion that the decedent would get involved with wholesaling was based on the decedent occasionally obtaining discounts by pooling inventory purchases with other toy stores. The Court held that there was no foundation for the economist's estimates such that the conclusions were pure speculation.

Citing In re: Air Crash Disaster at New Orleans, 795 F.2d 1230 (5th Cir. 1986), the Court

stated:

As in In Re: Air Crash, there is little, if any, basis in the record for Dr. Glennie's estimates of Mr. Joy's future earning capacity. Most prominently, the assumption that Mr. Joy would move into consulting and wholesaling, appears to wholly speculative. Indeed, Dr. Glennie simply made up new lines of work for Mr. Joy. With respect to consulting, one lone instance in which Mr. Joy helped a person set up a toy store in Texas and received no monetary compensation can hardly provide a foundation for serious estimates of Mr. Joy's future earnings as a consultant. This is especially so in light of the fact that Dr. Glennie made no effort to contact the Texas store owner to determine how helpful Mr. Joy's assistance had been. Similarly, there is no evidence that Mr. Joy ever received independent compensation for his alleged wholesaling activities...

Perhaps recognizing the weakness of her position, Ms. Joy falls back on the claim that Allison was able to cross-examine Dr. Glennie and present its own economic expert to highlight the flaws in Dr. Glennie's analysis, thereby enabling the jury to 'weigh the testimony of both experts and reach its own conclusion.' *Id.* at 12. She might have added that this case is distinguishable from Air Crash in at least one respect: Dr. Glennie presented one estimate of Mr. Joy's lifetime earnings (scenario 4) that could be considered 'non-speculative' in addition to the three other estimates for which there was no adequate foundation. Presumably, the existence of a non-speculative estimate would have increased the jury's ability to arrive at an appropriate damages award.

Nevertheless, in view of the patent flaws in Dr. Glennie's testimony, we must resist 'the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it the weight it deserves.' Air Crash, 795 F.2d at 1233. Indeed, we have already indicated that we will turn a 'sharp eye' to those instances, hopefully few, where .. the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy. Coleman, 844. F.2d at 867. Note 3. (Quoting Air Crash, 795 F.2d 1234). This appears to be precisely such a case.

In closing, we note that our conclusion with respect to Dr. Glennie's testimony is unaffected by the Supreme Court's recent decision in

Daubert v. Merrell Dow Pharmaceuticals, Inc., 61 U.S. L.W. 4805 (1993). Although the court in Daubert recognized that the Federal Rules of Evidence embody a general approach to relaxing traditional barriers to opinion testimony. See Id. at 4807. (Quoting Beech Air Craft Corp. v. Rainey, 48 U.S. 153, 169 (1988)). It also emphasized that Rule 702 'clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. Id. at 4808. In particular, the court observed that Rule 702 permits an expert to testify only when 'scientific, technical, or other specialized knowledge will assist the trier of fact.' Id. (Quoting Fed.R.Evid. 702) and that 'the word knowledge connotes more than subjective belief or unsupported speculation.' Id. As discussed above, Dr. Glennie's testimony concerning Mr. Joy's future career path fails to meet this standard. Id. at 569-570.

Similarly, in Henry v. Hessler Virgin Islands Corp., 163 F.R.D. 237 (D.C. Virgin Islands 1995), the Court excluded the opinions of a vocational psychologist, Copemann, and an economist, Roberts, whose opinions were based on the vocational psychologist's report because these opinions were unreliable and lacked an adequate actual foundation under FRE 702 and FRE 703.

At the crux of the Court's decision was that the findings of the vocational psychologist, Dr. Copemann, were methodologically unreliable. Copemann's findings were based on an unreliable foundation; he had never contacted the Plaintiff's employer to determine the Plaintiff's employment status, or whether work falling into the sedentary or light category was available within the company, nor did Copemann contact any other potential employer to determine whether there were any jobs available in the sedentary to light category and what their rate of pay would have been. Further, Copemann did not produce any data to support his claim that those jobs for which the Plaintiff was qualified would only pay minimum wage, nor did he ascertain whether the Plaintiff could be retrained to do other vocations that paid more than minimum wage.

As the Court stated:

We conclude therefore, that Dr. Copemann's statement limiting plaintiff's post-injury earnings to the minimum wage or slightly greater was unreliable and lacked an adequate factual foundation under Fed.R.Civ.P. 702 and 703 (sic). Both Daubert and Paoli II require that we exclude any expert testimony, such as Professor Roberts', which is based on 'subjective belief or unsupported speculation.' Daubert, 113 S.Ct. at 2794. And Rule 703 permits us to look behind Professor Roberts' testimony to the underlying data supporting his calculations. Since Professor Roberts built his wage loss edifice on Dr. Copemann's unfounded conclusions about plaintiff's post-injury earning capacity, his testimony on economic damages was itself unreliable and thus inadmissible. Id. at 247.

This case demonstrates why Launey's opinions concerning Jackson's future wage loss should also be rejected by this Court.

Boucher v. Suzuki Motor Corp., 73 F.3d 18 (2nd Cir. 1995), excluded the testimony of an expert economist, Reagles, regarding past and future lost earnings on the grounds that the expert used unrealistic assumptions as the foundation for his opinion. In Boucher, the Plaintiff was injured when a motorcycle shipping frame fell on his arm. The Plaintiff filed suit against Honda and Suzuki claiming that the frame was defective and broke when he was lifting it, thus causing his injury.

The testimony at trial showed that from age 16 to 27, the Plaintiff was employed as seasonal help in a leather factory. He had a fluctuating income, one year earning over \$10,000.00, the next year approximately \$6,000.00, the following year \$4,600.00, etc. He then got a job as a motorcycle mechanic at a dealership making \$5.00 per hour. He was soon laid off and did not begin to work again until just before the accident. After the accident, Boucher held several other jobs, including roofer, asbestos abatement, technician, and a painter and carpenter. At trial, the Court allowed an expert with a Ph.D. in rehabilitation counseling psychology to testify about Boucher's lost earning capacity. First, the expert assumed that the Plaintiff's earning capacity at the time of the accident

was \$6.00 an hour plus an estimated 19% in fringe benefits. Using the Department of Labor Worklife Statistics, he estimated that based on a 40-hour work week for 52 weeks per year and a 4% yearly increase in pay, the Plaintiff's pre-disability future earnings capacity was in excess of \$450,000.00. The Plaintiff's expert, Reagles, then estimated the Plaintiff's post-injury future earnings assuming that he would continue working as a painter at \$8.00 an hour, without fringe benefits, and that his expected worklife was reduced to such an extent that based on working 40 hours per week for 52 weeks a year, the Plaintiff's net loss of future earnings due to the accident was more than \$130,000.00 – the difference between his pre-injury capacity and his post-injury earning capacity. Using similar analysis, the expert testified that the Plaintiff's lost earnings prior to trial were more than \$27,000.00. Honda appealed from a jury verdict that awarded the Plaintiff \$180,000.00 for lost past earnings and future lost earnings. The basis for Honda's appeal was that Reagle's opinions were based on speculation.

In finding that the District Court had abused its discretion in permitting the expert vocational psychologist to testify as to Plaintiff's future full-time employment, the Court stated:

Where lost future earnings are at issue, an expert's testimony should be excluded as speculative if it is based on unrealistic assumptions regarding the plaintiff's future employment prospects. (Citations omitted.) Admission of expert testimony based on speculative assumptions is an abuse of discretion. (Citation omitted.)

In the present case, Dr. Reagle's estimated Boucher's lost earnings capacity on the assumptions (among others) that Boucher would work 40 hours per week, 52 weeks per year, with fringe benefits and regular pay increases, for the rest of his career. Prior to the accident, however, Boucher's sporadic employment had yielded fluctuating low levels of income, with long spells of no income whatsoever. When he was employed, he received few fringe benefits, if any.

The expert's projection thus was based on assumptions about Boucher's employment prospects that represent a complete break with his work history of seasonal and intermittent employment. We cannot say whether Boucher's employment pattern was attributable to low demand for his services, to want of ambition, skills or application, or to bad luck or other causes. In any event, nothing of probative value - such as a change in family responsibilities or the acquisition of a new set of skills - accounts for the reversal assumed by the expert. True, Boucher had been employed full-time for 15 straight weeks at the time of the accident, had originally received a \$1.00 per hour raise, and had completed a motorcycle maintenance course. But this does not support an assumption that his employment prospects had undergone any fundamental change, or that his employment with Herba would no longer be seasonal (as it was in the past), and it certainly cannot support an inference that, at the time he was injured, Boucher was on the verge of a 24 year career of clock-punching.

On appeal, Boucher contends that his prospect for full-time employment was a factual matter for the jury to determine, not a ground for exclusion of Dr. Reagle's estimate of his future earning capacity, but the Federal Rules of Evidence require a greater degree of discrimination than that. See Joy, 999 F.2d at 569 ('In view of the patent laws and the [expert's] testimony, we must resist the temptation to answer objections to receipt of expert testimony with a shorthand remark that the jury will give it the weight it deserves.') (Quoting Air Crash Disaster at New Orleans, 795 F.2d at 1233). (Internal quotation marks omitted). Since Boucher's expert testimony was not 'accompanied by a sufficient factual foundation before it [was] submitted to the jury,' Gumbs, 718 F.2d at 98, it was inadmissible under Federal Rule of Evidence 702. We hold therefore that the District Court abused its discretion in permitting Dr. Reagle to testify regarding Boucher's past and future lost earning capacity based on the unrealistic and speculative assumption that Boucher would have been employed on a permanent full-time basis year in and year out had he not been injured. Id. at 21.

The Court was equally unavailing, when it excluded Reagle's testimony on the Plaintiff's fringe benefits:

No testimony or documentary evidence was offered at trial showing that Boucher received benefits of any kind from Herba in 1987 or

1988, or from his jobs at the leather mills in prior years. Dr. Mills' projections, therefore, were without a factual basis and should not have been admitted. Id. at 22.

The Court did, however, let Reagle's testimony about future worklife expectancy stand, but only because his testimony was based on tables prepared and published by the United States Department of Labor. Grabb, however, used the New Work Life Expectancy Tables.

Other cases cited in Boucher support the conclusion that if the expert's assumptions are based on speculation, his opinions are not admissible at trial. See Gumbs v. International Harvester, Inc., 718 F.2d 88, (3rd Cir. 1983), Hernandez v. M/V Rajaan, 841 F.2d 582 (5th Cir. 1988) and In Re Air Crash Disaster at New Orleans, La. 795 F.2d 1230 (5th Cir. 1986). Benjamin v. Peter's Farm Condominium Owner's Association, 820 F.2d 640 (3rd Cir. 1987).

III. AT LEAST ONE STATE SUPREME COURT HAS CONCLUDED THAT OPINIONS BASED ON THE NEW WORKLIFE EXPECTANCY TABLES PUBLISHED BY VOCATIONAL ECONOMETRICS ARE OF NO PROBATIVE VALUE.

In Phillips v. Industrial Machine, 597 N.W.2d 377 (Neb. 1999), Phillips was injured in a motor vehicle accident involving an Industrial Machine vehicle. Liability was not an issue. Plaintiff's vocational expert, Marchisio, expressed an opinion that Phillips, a 24 year old woman, was disabled, and based on the "New Worklife Expectancy Tables" published by Vocational Econometrics, she would lose approximately fifteen years of future worklife expectancy. The case went to trial and the jury returned a verdict for the Plaintiff. Upon the Defendant's Motion, the Court vacated the verdict, and ordered a new trial. Because the Court found that Marchisio's opinion that Phillips was disabled was unsupported by the medical evidence. The Court also concluded that:

[G]iven the broad definition of a disabled person as used in the New Worklife Expectancy Tables and Marchisio's vague conclusion that Phillips would work 'less' as a result of her disability, the testimony

'was so generic and lacking in certainty that it failed to make the existence of a disputed more or less probable, and was of no value to the jury. Id. at 261.

The Plaintiff appealed. Oddly enough, Nebraska at that time had not adopted Daubert. However, under that state's analysis, the Nebraska Supreme Court found that because Marchisio concluded that the Plaintiff was disabled:

He applied the New York Life Expectancy Tables which do not discern between minor and serious disabilities, or take into account whether such disability affects an individual's ability to work. Marchisio's opinion lacked probative value. Id. at 265.

The Court went on to conclude that the Trial Court did not abuse its discretion when it found Marchisio's testimony unfairly prejudicial because his testimony that the Plaintiff would work 15.3 years less than a non-disabled person "lacked foundation" and unfairly permitted the jury to infer that she was entitled to an award for this loss.

It was the concurring opinion by Justice Gerrard, that analyzed Marchisio's opinion under the Daubert standards, and who concluded that the application of the New Worklife Expectancy Tables was unfounded. As Justice Gerrard explained:

I agree, however, with the majority's conclusion regarding Marchisio's opinion that Phillips' worklife had been reduced by the specific figure of 15.3 years. This testimony, when subjected to a *Daubert/Kumho Tire* analysis, lacks the validity required under the Nebraska rules of evidence, and the district court did not abuse its discretion in determining that the erroneous admission of this evidence was prejudicial error requiring a new trial. ...

The specific figure regarding Phillips' reduced worklife expectancy, however, was derived entirely from the "New Worklife Expectancy Tables" published by "Vocational Econometrics." Marchisio's reliance on this questionable data is the methodological flaw in his analysis. ...

Marchisio testified that the New Worklife Expectancy Tables were reasonably relied upon by experts in his field. However, Marchisio's opinion about "reasonable" reliance is not determinative. A court must conduct an independent assessment of the data to determine if reliance upon them is indeed reasonable.

Many courts have addressed the reliance of expert witnesses on worklife expectancy tables that are published by the U.S. Department of Labor, Bureau of Labor Statistics, and have stated that such tables are generally considered to be reliable. See, e.g., Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18 (2d Cir. 1996); Mealey v. Slaton Machinery Sales, Inc., 508 F.2d 87 (5th Cir. 1975); Sales v. Republic of Uganda, 828 F. Supp. 1032 (S.D.N.Y. 1993); Earl v. Bouchard Transp. Co., Inc., 735 F. Supp. 1167 (E.D.N.Y. 1990), *aff'd in part and in part rev'd, and remanded on other grounds*, 917 F.2d 1320 (2d Cir.). But see In re Air Crash Disaster at Charlotte, N.C., 982 F. Supp. 1101 (D.S.C. 1997) (U.S. Department of Labor worklife expectancy tables not persuasive because they ignore demographic changes made since 1986).

Even if those courts approving of the U.S. Department of Labor tables were correct, however, their determinations are not persuasive in the present case. The New Worklife Expectancy Tables, used in this case, were not published by the U.S. Department of Labor and contain such broadly defined classifications that reliance on them is not reasonable.

The New Worklife Expectancy Tables represent a statistical model that attempts to compare the worklife expectancy of the healthy segment of the work force with the 'disabled' segment. The tables attempt to quantify how long a 'disabled' person usually remains in the work force as opposed to a healthy person.

For purposes of the tables, however, the term 'disabled' refers to a broad continuum of disabilities, from mild or transitory conditions to conditions that result in total dependence on others for care. In other words, the tables measure and average together the experiences of individuals within a tremendously diverse range of occupations and injuries such that, for statistical purposes, a police officer with a broken arm is equivalent to an attorney who develops a hearing impairment, who is in turn equivalent to a surgeon who becomes a paraplegic.

The flaw in this methodology is apparent. The degree of an individual's unique disability obviously has an effect on how long that individual will remain in the work force. The nature of a person's disability, relative to his or her particular occupation, will also have a commensurate effect on that person's employability status and worklife expectancy. A statistical average of such a broad range of disabilities, applied to an equally broad range of occupations, renders the result almost meaningless when attempting to determine what effect a disability will have on an individual person under particular circumstances. The use of actuarial tables in determining worklife expectancy should be rejected where the tables do not sufficiently relate to the unique circumstances of the person under evaluation.

In the present case, evidence was presented of facts specific to Phillips, and for Marchisio to render an opinion supported by these facts was not error. Marchisio's opinion specifically quantifying Phillips' reduced worklife expectancy, however, was not based on any facts particular to her but was based solely on data that were too generic to support a reliable opinion.

The use of statistical data by an expert in reaching an opinion is, of course, permissible, but can result in admissible evidence only where the basis for the opinion includes evidence particular to the case, demonstrating the pertinent applicability of the statistical data to the circumstances. That foundation was not present in this case. Marchisio's 'reasoning and methodology' were not valid, as the New Worklife Expectancy Tables could not 'properly. . . be applied to the facts in issue.' See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

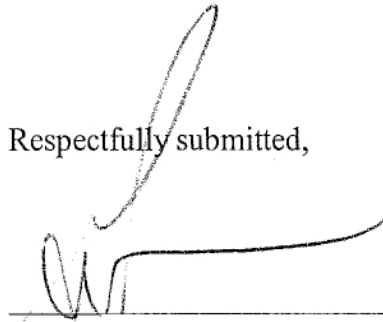
Consequently, it was error to admit Marchisio's opinion that Phillips' worklife expectancy had been reduced by 15.3 years. The *Daubert/Kumho Tire* requirement that an expert's conclusions be supported by good grounds for each step in the analysis means that any step that renders the analysis unreliable under the *Daubert/Kumho Tire* factors renders the expert's testimony inadmissible. See *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

Thus, under the Daubert standards, Grabb's opinion regarding Jackson's decreased work-life expectancy are unreliable and therefore inadmissible.

CONCLUSION

In this case, Grabb's opinions regarding Jackson's lost future earnings based on his decreased worklife expectancy should be excluded from trial, because (1) Grabb is not qualified to render this opinion, and (2) Grabb's methodology is unreliable and (3) his assumptions do not "fit" the facts of this case. Because Launey's projections are based on Grabb's opinions, Launey's testimony is also unreliable and should be excluded from trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gene F. Zipperle, Jr.", is written over a horizontal line. The signature is stylized with a large, sweeping initial "G" and "Z".

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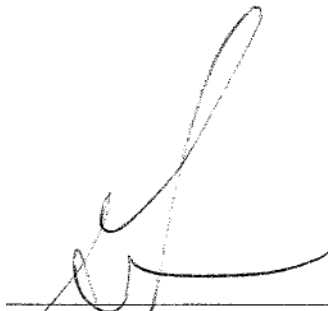
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ROADWAY ENTERPRISES, INC.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was served upon the below-named parties by mailing, postage prepaid, first class mail, a copy of such document on this the 7 day of August, 2002:

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Gene F. Zipperle, Jr.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEPHEN C. JACKSON and)
REBECCA C. JACKSON)
)
Plaintiffs)
)
v.) Case No.: NA 99-106-C S/H
)
ROADWAY EXPRESS INC.)
)
Defendant)

Upon Motion of the Defendant, Roadway Enterprises, Inc., to exclude the opinion testimony of Larry Grabb and George V. Launey regarding the Plaintiff's, Stephen R. Jackson's, future income loss and worklife expectancy, and the Court finding that under FRE 702 and FRE 703, and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), that Larry Grabb's methodology is unreliable and that his opinions do not fit the facts of this case; and therefore, Launey's opinions which are based on Grabb's analysis are equally unreliable.

IT IS HEREBY ORDERED that the Defendant's Motion is hereby **GRANTED**, and that Larry Grabb's and George Launey's opinion testimony will be excluded from the trial of this matter.

JUDGE

DATE:

TENDERED BY:

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