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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEPHEN C. JACKSON, et al)
PLAINTIFFS,)
)
V.) CASE NO. NA 99-106-C S/H
)
ROADWAY EXPRESS, INC.,)
DEFENDANT.)

**RESPONSE TO DEFENDANT'S MOTION TO
EXCLUDE TESTIMONY OF LARRY E. GRABBE
AND GEORGE V. LAUNEY**

Comes now the Plaintiffs, Stephen C. Jackson and Rebecca C. Jackson, by counsel, Merritt K. Alcorn, and for their response to the Defendant's Motion to Exclude testimony of Larry E. Grabbe (hereinafter "Grabbe ") and George V. Launey (hereinafter "Launey"), requests the court to allow the testimony of Grabbe and Launey at trial. Grabbe and Launey's testimony exceeds the minimum requirements set forth in the United States Supreme Court case of Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S.Ct. 2789 (1993).

INTRODUCTION

The admission of expert testimony is governed by the Federal Rules of Evidence (hereinafter "FRE") 702 and the United States Supreme Court case of Daubert. See Id. The Supreme Court interpreted FRE 702 to require that the trial judge ensure the evidence admitted is relevant and reliable. See Id. at 589. The trial court analyzes the reliability of the expert testimony by determining "whether the expert is qualified in the relevant field and to examine the methodology the expert has used in reaching his conclusions." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 153 (1999).

Plaintiff's experts, Grabbe and Launey, are both qualified experts in their relevant

fields and have the requisite knowledge to issue opinions in this case on the particular subjects in which they will be testifying at trial. In determining whether an expert may testify "a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area." Saad v. Shimano American Corp., 2000 WL 1036253 (N.D. Ill. 2000).

On June 17, 1999, Stephen C. Jackson (hereinafter "Jackson") was injured in an automobile accident involving a vehicle owned and operated by Defendant. Plaintiff's experts, Grabbe and Launey, are to testify as to Jackson's remaining worklife expectancy, future salary expectations taking into account Jackson's disabilities, and Jackson's future loss wages.

Grabbe formulated an opinion on Jackson's ability to obtain and maintain employment after the accident and in light of his disabilities. Grabbe also calculated Jackson's remaining worklife expectancy and salary expectations as a result of the accident. Grabbe conducted a vocational assessment of Jackson's employment status after Jackson's accident and has formed an opinion based such assessment to which he will testify to at trial. For the past twelve (12) years Grabbe has been performing vocational capacity assessments on both a case-by-case basis and a contractual basis. (See Grabbe's Resume). His occupation consists of performing vocational assessments, career counseling, career testing, pre-employment testing, training and hiring. (See Grabbe's deposition, pg. 10-11).

Since 1988, Grabbe has performed over 600 vocational assessments for litigation and non-litigation purposes. (Grabbe's Deposition, pg. 17). Grabbe has received his masters in College Student Personnel and an Educational Doctorate in Higher Education Administration. (See Grabbe's Deposition, pg. 30). Grabbe has specialized in career planning and other career related work for a number of years. (See Grabbe's Deposition, pg. 31-32).

A person with "relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness." Tuf Racing Products, Inc. v. American Suzuki Motor Corp., 223 F.3d 585, 590 (7th Cir. 2000). The notion that an expert requires particular credentials is "radically unsound." Id. Grabbe is well-qualified to provide expert testimony on Jackson's ability to obtain and maintain employment, based on Grabbe's experience.

Grabbe also used the New Worklife Expectancy Tables in formulating Jackson's worklife expectancy in light of his disabilities. Grabbe is qualified to apply the New Worklife Expectancy Tables to determine Jackson's loss of worklife. Grabbe uses these particular tables in vocational assessments that he prepares for litigation. (See Grabbe's Deposition, pg. 18). He has used the New Worklife Expectancy tables in litigation between 75 and 90 times. (Id. at pg. 19). Grabbe was trained in using the tables in a full day seminar by the author of the New Worklife Expectancy Table with only four others in the seminar. (See Id. at pg. 62). Grabbe's experience with the New Worklife Expectancy Tables makes him qualified to apply the tables in formulating his opinion as to Jackson's remaining worklife.

Launey performed an economic evaluation of Jackson in order to render an opinion on Jackson's lost earnings. Launey has his Ph.D. in Economics, has published articles relating to the valuation of lost earnings, and has been an expert witness in testifying as to tort damages numerous times since 1993. (See Launey's Resume). Launey is well-qualified to provide expert testimony on Jackson's lost earnings, based on Launey's experience and education.

Not only are Grabbe and Launey both qualified as experts in the areas they will be testifying to at trial, but they also utilized reliable methods in reaching their opinions and conclusions. Under Daubert, the court must assess the methodology underlying the expert's

testimony by determining whether the testimony is scientifically valid and whether the methodology can be applied to the facts in issue. See Daubert at 591. As discussed below, the methodologies utilized by Grabbe and Launey are both reliable and can be properly applied to the facts of this case.

I. **THE METHODOLOGY UTILIZED BY DR. GRABBE AND LAUNEY TO FORM THEIR OPINIONS IS RELIABLE.**

The New Worklife Expectancy Tables are used to determine the worklife expectancy for persons with and without disabilities. (See The New Worklife Expectancy Tables, pg. 5.)

Defendant argues that the New Worklife Expectancy Tables are unreliable, as is the Current Population Survey (hereinafter "CPS") used as data in the tables. Daubert provides flexible factors to determine if evidence qualifies as reliable; including peer review and publication, whether the theory can be or has been tested, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field. See Daubert at 593-595. The focus of admitting expert testimony must focus on the method of the theory. Id. at 595.

The New Worklife Expectancy Tables were published by Vocational Econometrics, Inc. and were created by A.M. Gamboa, as well known vocational expert and vocational economic analyst. The New Worklife Expectancy Tables utilize the factors of age, gender, occupational disability, and education to determine the worklife expectancy of an individual.

Grabbe used the New Worklife Expectancy Tables to determine Jackson had 10 worklife years remaining if he was not disabled and 6.3 remaining worklife years as a male with disabilities, resulting in a 37% worklife loss. (See Grabbe's Vocational Assessment,

pg 5).

The United States Supreme Court looked at the issue of determining lost wages and stated that "[g]iven the complexity of trying to make an exact calculation, litigants frequently follow the relatively simple course of assuming that the worker would have continued to work up until a specific date certain." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523,533-534, 103 S.Ct. 2541 (1983). Grabbe utilized the New Worklife Expectancy Tables to determine Jackson's worklife expectancy on statistics based on the United States population, fitting certain specific attributes similar to Jackson.

Defendant argues this method is unreliable because it does not take Jackson's specific disabilities into account, nor his educational level. The Seventh Circuit stated it should evaluate what the particular expert did rather than hypothetical tests another expert might use. Adams v. Ameritech Services, Inc., 231 F.3d 414 (7th Cir. 2001).

Grabbe first sets forth Scenario 1 in his assessment, where he utilizes the New Worklife Expectancy Tables, and labels Scenario 1 as a statistical model. Grabbe applied the tables based on Jackson's exact age, gender, his 12 years of education, and his "not severe" disability, defined as disabled but capable of work. (See The New Worklife Expectancy Tables, pg. 19). Jackson was limited in his capability of performing certain jobs, but was still capable of work.

In Adams, the court discussed the use of statistical evidence and whether the statistics were sound enough methodologically to take into account at trial. Id. at 425. In Adams, the court addressed an expert's use of statistical analysis of employer's reduction in workforce. Id. The court states that statisticians may have good reasons to view data in different ways and these may differ from what another expert might have done. Id. at 425.

In Bazemore, the United States Supreme Court admitted the use of a statistical study and stated "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility." Bazemore v. Friday, 478 U.S. 385, 400, 106 S.Ct. 3000 (1986). In Grabbe's Scenario 1, he based his calculations on statistics provided in the New Worklife Expectancy Tables, which take into account employment statistics of others in the United States who are similar in age, gender, educational level, and occupational disabilities to Jackson.

Defendant states Grabb's methodology is flawed since it is too general to rise above speculation. Defendant states Grabb's data is not impairment specific. First, Scenario 1 does take Jackson's impairment into account as Jackson is disabled with the capacity to work. Also, Grabb formed Scenario 2, the Real Life Model, with Jackson's specific impairments in mind. Grabb listed jobs that Jackson probably was unable to perform due to Jackson's educational status, limited movement, and other limiting factors Grabb took into consideration.

Grabb first had Dr. Roy L. Goode, Jackson's doctor, fill out a Residual Functional Capacity Report. (See Grabbe's Deposition, pg. 39). The report addressed such things as whether Jackson was able to sit, lift, restrictions on reaching, Jackson's sensitivity to changes in temperature, how many hours a week Jackson was capable of working, and other factors relevant to Jackson's disability and occupational limitations. Grabb used the Dictionary of Occupational Titles to locate jobs that Jackson was able to perform, given his education, limitations and restrictions. (See Grabbe's Deposition, pg. 55). The Dictionary of Occupational Titles shows what sort of strength is required for the job and what other factors the job involves such as reaching, lifting, etc. (See Grabbe's Deposition, pg. 55). Grabb used specific facts relating to Jackson's occupational limitations to apply in Scenario 2.

Grabbe also takes into account Jackson's education in determining the salary range and jobs available to Jackson. Grabbe took a range of employment options in the area Jackson resides and applied his knowledge, experience as a career specialist, and the Dictionary of Occupational Titles to determine the occupations that require specific educational requirements and occupations which require movements and actions Jackson is unable to either perform or perform for a long period of time. Grabbe lists jobs that Jackson would be able to perform, based on the employment options available within a 50 mile radius of Jackson's home and states the occupations Jackson is qualified for would pay no more than \$7.00/hour. (See Grabbe's Deposition, pg. 95; Grabbe's Vocational Assessment, pg. 5-6). Grabbe concludes that "the best "new" job that Stephen Jackson could "perhaps" obtain would be one with a generous pay rate of \$10/hour." (See Grabbe's Vocational Assessment, pg. 6).

Using Scenario 1, the statistical model, and Scenario 2, the real world model, Grabbe opines a range of lifetime of loss earnings that Jackson might endure, based on his worklife expectancy and job opportunities and salaries available to a person with limitations matching Jackson's restrictions. Grabbe utilized specific facts at issue and utilized a reliable method in his opinions.

Defendant states one article, Disability and the New Worklife Expectancy Tables from Vocational Econometrics, 1998: A Critical Analysis, *Journal of Forensic Economics*, 12(3), 1999, 239-254, as a reason for the New Worklife Expectancy Tables to be considered unreliable. There have been several articles published responding to the above article, as well as other articles supporting the use of the New Worklife Expectancy Tables. See Gibson, David S. and John P. Tierney, Disability and Worklife Expectancy Tables: A Response.

Journal of Forensic Economics, 13(3), 2000, 309-318; Clauretje, Terrence M. Review: The Worklife Expectancy Tables: 1998. *Journal of Legal Economics*, Winter 1997/1998, 75-76.

The numerous articles on the New Worklife Expectancy Tables emphasize the reliability of the expectancy tables on the basis that it has been subject to peer review. See Daubert at 593-595.

Grabbe has been working with the New Worklife Expectancy Tables since 1989, mainly in litigation. (See Grabbe's Deposition, pg. 18, 58). Grabbe has served as an expert witness in cases and has never has his testimony refused at trial. (See Grabbe's Deposition, pg. 10, 35).

Daubert does not rest on the assumption that an expert's method need to be universally accepted, rather Daubert considered reliability factors such as whether the method had been subject to publication, known or potential rate of error, and the degree of acceptance. Daubert, 509 U.S. at 589-595. The New Worklife Expectancy Tables meet these reliability factors.

The Current Population Survey (hereinafter "CPS") is the official source of statistics on employment and unemployment for the United States Government. The New Worklife Expectancy Tables incorporate data obtained in the CPS, which is conducted by the United States Department of Commerce, Bureau of the Census. (See New Worklife Expectancy Tables, pg. 5).

In conducting the survey, persons with disabilities were defined as those that have a "health problem or disability which prevents them from working or which limits the kind or amount of work they can do." (See New Worklife Expectancy Tables, pg. 7). This definition fits Jackson directly into the "not severe" disability category developed by the New Worklife Expectancy Tables and is sufficient to provide reliable data for the New Worklife Expectancy

Tables to rely.

The Survey is conducted monthly and have been conducted for over 50 years. (Id. at pg. 8). It is based on scientifically selected samples of households. Id. The CPS is a survey conducted by the Bureau of the Census and it is reliable data for the New Worklife Expectancy Tables to utilize as data to incorporate into part of its overall statistics.

Launey uses Grabbe's worklife reduction percent in formulating Jackson's loss of future earnings and Launey uses Grabbe's salary determinations in his calculations. Launey's use of Grabbe's numbers does not make Launey's opinion unreliable. Launey is an expert in economics. He adopted Grabbe's conclusion that if Jackson should lose or resign from his present job and try to find another job, the best job Jackson could obtain would be a generous \$10/hour. (See Launey's Deposition, pg. 25). Launey also employed the Bureau of Labor Statistics Worklife Tables to determine Jackson's worklife expectancy, which utilizes age, gender, race, and education. (See Launey Deposition, pg. 32). Again, Launey is a qualified expert who is utilizing statistical tables to determine Jackson's remaining worklife. In O'Shea v. Riverway Towing Company, 677 F.2d 1194 (7th Cir. 1982), the court stated that "we recognize that the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive." Id. at 1200. The court found that it would "not reverse a reward of damages for lost wages because of questionable assumptions unless it yields an unreasonable result-." Id. at 1200. As a well educated economist and an expert who has been calculating loss of future earnings for many years, Launey relies on statistical tables to formulate his opinions. Launey is not making questionable assumptions, but is incorporating Grabbe's well-thought out conclusions, in forming Launey's own conclusion.

Grabbe's and Launey used proper methods in forming their opinions. Defendant core

argument for the exclusion of both Grabbe's and Launey's testimony is Grabbe's use of the New Worklife Expectancy Tables. If Defendant's counsel believes their conclusions to be shaky, the proper course would be for Defendant's counsel to use cross-examination, presentation of contrary evidence, and other appropriate means to attack admissible evidence. See Daubert, 509 U.S. at 596.

II. DR. GRABBE'S ASSUMPTIONS FIT THE FACTS OF THIS CASE.

Grabbe has used the New Worklife Expectancy Tables to formulate his "Scenario 1." The New Worklife Expectancy Tables are used to formulate the worklife expectancy of persons with and without disabilities in the United States. (See The New Worklife Expectancy Tables). .Worklife expectancies are statistical averages.

Grabbe first formulated Scenario I and used statistics to determine the remaining worklife of a male, 53 years of age, with 12 years of education, and suffering from a disability. The New Worklife Expectancy Table is the only worklife expectancy table that even takes disabilities into account. (See New Worklife Expectancy Tables, pg. 5). It uses occupational disability as one factor, which is broken down into three subsets: not disabled, not severely disabled, and severely disabled. (Id. at pg. 18). Grabbe determined Jackson to be "disabled" because in the New Worklife Expectancy tables, the tables state that it is appropriate to use "disabled" when the individual is occupationally disabled but is employed or capable of being employed. (See New Worklife Expectancy Tables, pg. 19). This definition of "not severely disabled" fits Jackson's current occupational disability.

Grabbe's application of Jackson's correct age, gender, educational level, and occupational disability all fit the facts of the case. The New Worklife Expectancy Tables are

based on statistics, which are similar to fit Jackson's situation. Grabbe also did a "real life model" of Jackson to obtain a range of lifetime loss of earnings, taking into account Jackson's specific limitations.

Grabbe's methodology does "fit" the facts specific to this case. Grabbe's testimony is reliable and meets the Daubert standard and should be admitted. Launey's expert opinion is similarly based on reliable methods and should also be admitted.

III. NEBRASKA'S SUPREME COURT DECISION IN PHILLIPS IS NOT DETERMINATIVE OF THE RELIABILITY OF GRABBE'S METHODOLOGY IN FORMING HIS TESTIMONY.

Defendant states one case, Phillips v. Industrial Machine and Nicholas Cusick, 597 N.W.2d. 377 (Neb. 256), as a reason for Grabbe's methodology as being unreasonable. First, at the time this case was decided, Nebraska did not follow Daubert and the standards it applies to expert testimony. In this case, Grabbe and Launey's testimony is based under the Daubert standard.

The court excluded the testimony of the expert, Marcisio, in Phillips because Marcisio's opinion that Phillips was disabled was unsupported by medical evidence. Grabbe, on the other hand, had Jackson's doctor, Roy L. Goode, fill out a Residual Functional Capacity Report stating specifically Jackson's disabilities. Grabbe's opinion was supported by medical evidence of Jackson's disabilities.

In addition, Defendant argues the unreliability of the New Worklife Expectancy Tables by quoting extensively from Justice Gerrard, who wrote the concurrence. The New Worklife Expectancy Tables, used by the expert in Phillips, was the older version of the table and did

not break down disability into severe and not severe categories. Justice Gerrard's concurrence focused on the older version of the New Worklife Expectancy Tables and has no bearing on the reliability of the version of the Tables used by Grabbe. Therefore, the opinion in Phillips is distinguished from the expert testimony in this case.

WHEREFORE, the plaintiff, Stephen C. Jackson, by counsel, Merritt K. Alcorn, requests the Court to allow testimony of Cecil H. Lane at trial.

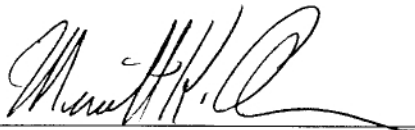
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Merritt K. Alcorn, hereby certify that on the 26th day of August, 2002, a copy of the foregoing was served on Gene F. Zipperle, Esquire, Crafton, Martin, Ogburn, & Zipperle, Republic Bank Place, Suite 200, 661 South Hurstbourne Parkway, Louisville, Kentucky, 40222-5079 by placing a copy in the United States Mail with sufficient postage to insure proper delivery.



Merritt K. Alcorn