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**JEFFERSON CIRCUIT COURT
DIVISION EIGHT**

Timothy L. McCoy,)	
)	
)	
Plaintiff,)	
)	Case No. 03-CI-06829
vs.)	
)	
Joanie Huyear,)	
)	
Defendant.)	

Affidavit of John P. Tierney, MA

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

Defense has filed a motion to exclude my testimony. This motion centers around the following key areas:

1. Qualifications
2. Reliability
3. Relevance
4. Assist trier of fact

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

1. Background

Defense uses KRS 702 and the US Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and notes that an expert must be qualified and that the testimony must be reliable and relevant and must assist the trier of fact to understand or determine a fact in issue. I agree.

I disagree, however, with their assertion that my testimony fails on any of these levels. The purpose of my testimony in this case is to assess the effect of the March 2001 injury on Mr. McCoy's *lifetime* ability to work and earn money, not simply consider the effect the injury has had on Mr. McCoy up to now. Applying my training and experience (see Section 2), I considered personal and medical evidence (see Section 4) and statistical findings (see Section 5) in estimating this lifetime effect. In doing this, I have considered a full range of possible influences on Mr. McCoy's future.

Each of the issues raised by Defense will be addressed in the sections that follow.

Affidavit of John P. Tierney, MA

2. Qualifications

Defense questions my qualifications for testifying regarding Mr. McCoy's loss of earnings as a result of injury. My knowledge, skill, experience, training, and education all combine to qualify me as an expert. As noted in my Curriculum Vitae (Attachment A), I have a Master's degree in Guidance and Counseling and additional graduate level coursework specific to vocational counseling and vocational rehabilitation counseling. My graduate course work in economics pertained specifically to a focus relevant to the assessment of loss of lifetime earnings.

In addition to my education, I have work experience specific to placing persons with disabilities in jobs. In particular, I was employed by the Metropolitan Sewer District from 1976 to 1987 and by the River Region Mental Health/Mental Retardation Board from 1974 to 1976. In both of these jobs, I managed Employee Assistance Programs that worked toward the rehabilitation and placement of persons with disability.

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

My education and experience provide me with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition, I study and apply data available from the U.S. Census Bureau that pertain specifically to the earnings and worklife expectancy of persons with and without disabilities. This combination of education, experience, and technical data enables me to assess the loss of lifetime earnings of Mr. McCoy in a way that is beyond the realm of common knowledge.

3. Reliability

In the decision in *Daubert*, the US Supreme Court provided general criteria for determining the admissibility of expert testimony under the Federal Rules of Evidence. *Kumho Tire v. Carmichael* (526 U.S. 137 1999) specifically applies the *Daubert* criteria to the social (non-hard) sciences like vocational rehabilitation and economics. In *Kumho*, the court stressed that not all of the four *Daubert* factors for reliability (testing, peer review, error rates, and general acceptance) may apply with every case, especially in the social sciences. The trial court is left as the gatekeeper using the factors as flexible guidelines to assure the expert employs the same level of intellectual rigor as he or she would outside the courtroom when working in the relevant discipline.

Defense errs in its application of these decisions to this case in two ways. First, they seek a level of statistical reliability commensurate with the requirements one would have for a "hard" science. Second, Defense demonstrates its lack of understanding of extensive scientific research on the issues faced by persons with disability in stating that my testimony fails on this

Affidavit of John P. Tierney, MA

level. The analysis of Mr. McCoy is supported by medical opinion and by published research regarding the employment experience of real people with a work disability.

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

By its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a “rough and ready” effort to put the plaintiff in the position he would have been in had he not been injured.

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

In questioning the reliability of my testimony, Defense raises both case-specific and statistical issues, which will be dealt with in Sections 4 and 5.

4. Case-specific issues

Defense raises four case-specific problems that they feel undermine the reliability of my testimony.

4.1. Current work experience

Defense states that I “completely disregard the fact that Mr. McCoy has continued to work in his usual and customary job since the date of injury.” This is incorrect. Not only did I consider his current employment with the US Postal Service (USPS), I actually used his earnings with the USPS after injury (2003 and 2004) to determine his post-injury earning capacity.

In assessing loss of earnings, what is important is the lifetime effect of the impairment. Defense seems to believe that, just because of person has returned to work, the possibility of a lifetime loss of earnings is negated. This is simply untrue. Even if we were to assume that Mr. McCoy’s disability has not had an impact in terms of past work, it is shortsighted of Defense to think that this will never impact work in the future. Such an opinion goes against the numerous studies finding that disability does affect ability to work.

The presence of a disability is widely known to affect both earnings and worklife expectancy. This finding is documented in results from various surveys, including the Current Population Survey (CPS), American Community Survey (ACS), the Decennial Census, and the Survey of Income and Program Participation (all from the Census Bureau)¹ the National Health Interview

¹ Data from these surveys can be found on the Census Bureau website at <http://www.census.gov/hhes/www/disability/disability.html>

Affidavit of John P. Tierney, MA

Survey (NHIS) from the National Center for Health Statistics,² and the *N.O.D./Harris Survey of Americans With Disabilities*.³ The disability effect is the cause of such events as the passage of the well-known Americans with Disabilities Act (ADA),⁴ the existence of the Department of Labor's Office of Disability Employment Policy,⁵ and the practice of rehabilitation counseling, just to name a few.

Private research (Gibson and Tierney, 2000, included in Attachment D; Yelin, 1996, and Yelin and Trupin, 1997, included in Attachment B) has shown that employed persons with a work disability, both not severe and severe, are more likely to become unemployed than persons without a work disability. If unemployed, they are less likely to find employment. These differences become more profound with age. Similar findings were presented in a paper by McCollister and Pflaum (2004; Attachment C). Using data from the NHIS, they found that persons with back pain were less likely to be employed than persons without disability and that the difference increased with age.

Even if persons with a work disability find employment conducive to their disabilities, they face ongoing struggles to cope with their disabilities. These struggles may intensify with age, continuously making it more difficult to compete with their counterparts without disability. The impairments will place the individual at a disadvantage in the labor market compared to those without disability, and likely cause the person to have a harder time finding and/or maintaining comparable employment. I have considered these facts in assessing Mr. McCoy's lifetime loss of earnings.

4.2. Disability status

Defense disputes my assessment that Mr. McCoy meets the definition of work disability. Again, just because Mr. McCoy has returned to work does not mean that he is not disabled. Throughout their motion, Defense seems to believe that work disability means "unable to work" when, in actuality, it simply means that a person is limited in the *amount* or *kind* of work he can perform. This can be determined with both Mr. McCoy's experience on the job as well as with medical evidence.

In addition to noting that he delivers mail more slowly than before injury, Mr. McCoy notes that he has turned down overtime and periodically misses work because of his back injury. This is supported in the July 18, 2005 report of Dr. David Changaris, who states that Mr. McCoy was taken off work because of limitations related to the March 2001 injury on four different occasions since May of 2004. Dr. Changaris' report concludes:

Mr. McCoy will more likely than not require medical pain management on a chronic, long-term basis with or without surgical intervention. All treatment provided by this office was a direct result of the 3-29-01 MVA.

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

³ <http://www.nod.org/index.html>

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

⁵ <http://www.dol.gov/odep/welcome.html>

Affidavit of John P. Tierney, MA

4.3. Pre-existing problems

Defense states that I have ignored pre-existing problems that existed for Mr. McCoy, including a diagnosis of paranoid schizophrenia, chronic hip pain, and radicular low back pain. It is my opinion that these problems did not cause him to meet the definition of disability prior to the March 2001 injury.

Mr. McCoy's schizophrenia diagnosis occurred during a difficult period in his late teens – more than 25 years ago. He has not had any problem with this throughout his adult worklife. Observations on the other physical problems noted in the Defense motion are similar. He did experience problems following a fall in 1997, but he notes that these problems resolved. This is supported by Dr. Changaris' statement noted in the previous section, that all of his treatment was a result of the March 2001 injury.

Defense's seems to want things both ways in their criticisms. On one hand, they state that Mr. McCoy's fairly steady work record post-injury means that he is not disabled. On the other hand, they note that Mr. McCoy was disabled pre-injury because of the schizophrenia and physical problems, even though he had a steady work record despite these issues. This is contradictory.

4.4. Pre-injury earning capacity

Defense objects to my method of assessing Mr. McCoy's pre-injury earning capacity. My job in this case is to estimate the difference between the earnings he could have made absent the March 2001 injury and the earnings he can make with this injury. Since he has worked fairly steadily since injury with his long-term employer, I used actual post-injury earnings for his post-injury earning capacity.

In assessing Mr. McCoy's pre-injury earning capacity, I considered a variety of factors. Because of problems related to the March 2001 injury, not only has he been taken off work on at least four occasions, but he has had to turn down overtime as well. Thus, his earnings are below what they would have been had he been able to work at full capacity. In addition, there is research regarding the effect of disability on ability to work, which demonstrates the fact that people with a disability, on average, earn less than people without disability and that people with disability are more impacted as they age. In order to develop a meaningful assessment of the effect of the March 2001 injury over Mr. McCoy's lifetime, it is essential to consider both personal and statistical findings.

In assessing pre-injury earning capacity, I looked at the average earnings difference for people like Mr. McCoy – male high school graduates with and without disability. Every major survey dealing with disability shows that people with a disability, on average, earn less than people without disability, even when working year-round, full-time. I used a range of 8.2% to 10.8%, which comes from two major disability surveys from the US Census Bureau. Findings from the American Community Survey show that male high school graduates without disability earn 8.2% more than do male high school graduates with a physical disability. Findings from the Current Population Survey show that male high school graduates without work disability earn 10.8% more than do male high school graduates with a nonsevere work disability.

Affidavit of John P. Tierney, MA

These findings provide a reasonable estimate of the effect of Mr. McCoy's injury on his lifetime earnings, and is supported by his already existing problems with missed days and missed overtime.

5. Statistical issues

Defense criticizes my use of the US Census Bureau's Current Population Survey (CPS) in assessing Mr. McCoy's loss of lifetime earnings. My assessment actually uses two Census Bureau sources, the CPS and the American Community Survey (ACS). Defense has ignored that fact that we have used two data sources that support and confirm each other. It is assumed, since they have not mentioned the ACS, that they accept the validity and reliability of the ACS findings. Thus, even if my projections of lost earnings based upon the CPS are ignored, the unchallenged projection stands at a somewhat higher level.

My assessment of the impact of injury on Mr. McCoy's loss of future earnings is based on facts known regarding the employment experience of real people meeting the definition of work (CPS) or physical (ACS) disability. In addition to the earnings differences noted previously, data from the CPS indicate that the worklife expectancies for men like Mr. McCoy (males with a high school diploma) who have a work disability are 29% shorter than the worklife expectancies for their counterparts without a work disability.

ACS data, on the other hand, indicate that males with a high school diploma who have a physical disability have worklife expectancies that are 47.7% shorter than those without disability. Defense criticizes the lower, CPS-based estimate of Mr. McCoy's lifetime loss (\$455,566), while apparently accepting the higher, ACS-based estimate (\$596,139).

Defense raises four statistical issues that they feel undermine the reliability of my testimony.

5.1. Use of the CPS data

Defense states the worklife expectancy figures I used are based on proprietary worklife figures that have no research validation or government sanction. In addition, they refer to Dr. Conte's report that mentions "five learned treatises and/or peer review journals that have recently discredited these statistics." These discussions are incomplete and misleading.

The proprietary figures Defense refers to are the worklife tables published by Vocational Econometrics, Inc. I have not used these tables, though I have used the same underlying data, which is freely available from the US Census Bureau.

The implication that the CPS disability data are not sanctioned by the government is untrue. In addition to publishing work disability figures from the CPS on an annual basis,⁶ they go to great expense to broadcast these statistics through a website⁷ specifically designed to disseminate statistics similar to those I have used in my assessment of Mr. McCoy. The

⁶ <http://www.census.gov/hhes/www/disability/disabcps.html>

⁷ http://www.census.gov/hhes/www/cpstc/cps_table_creator.html

Affidavit of John P. Tierney, MA

government also funds research through Cornell University, specifically to study the employment outcomes for people with disabilities. Among other government studies, the Cornell research regularly uses the same two disability data sources, the CPS and the ACS, which I have used in the present case.

The following two sections discuss the value of the CPS data and professional literature related to this topic.

5.1.1. CPS use by other researchers⁸

Contrary to Defense implication, the CPS is a valuable source that is relied on for disability studies. The CPS survey is the primary source of employment data for persons in the United States, and the source of the government's monthly unemployment rates that are widely quoted by the media. In addition, various independent researchers use CPS data in research on the employment experiences of persons with a work disability.

In a presentation before the National Association of Forensic Economics (NAFE) in November 2000, John McNeil (2000), a special assistant for disability statistics for the U.S. Census Bureau, now retired, reaffirmed the application of CPS data for the study of persons with a work disability. As part of the presentation, he produced a study entitled "Employment and Earnings of Individuals 18 to 64 by Disability Status: Data from the March 2000 Current Population Survey." The study explores the participation and employment rates for persons with work disability using the same data used in *The New Worklife Expectancy Tables*. In addition, he signed an affidavit stating he sees no reason why the CPS data for work disability cannot be used in the manner applied by Vocational Econometrics, Inc. He also authored an article further supporting use of CPS data for studying worklife issues for people with a work disability (McNeil, 2002).

Herman Miller (2001) functioned as the chief of the Population Division of the Census Bureau. He has also signed an affidavit noting that the CPS data are "the most appropriate source for studying the employment experiences of people with a work disability."

Other private research funded by the government also use CPS data to study employment patterns of the U.S. population. Burkhauser, Daly, and Houtenville (2001), for example, used data from the March supplement of the CPS to compare the employment experience of people with and without disability during the 1990s business cycle. This paper was published through the Rehabilitation Research and Training Center (RRTC) on Disability Demographics and Statistics at Cornell University.⁹ The Cornell RRTC has also published several other papers using CPS data on persons with a work disability. These include multiple papers (e.g., three by Houtenville in 2000) that studied the prevalence, employment rates, and household income of people with disability, as well as a paper by Burkhauser, Houtenville, and Wittenburg (2003) that compared the employment trends of persons with work limitations using the CPS and two other government surveys.

⁸ Research noted in this section can be found in Attachment B. Included in the bibliography are studies not specifically mentioned that use the CPS for disability research.

⁹ http://www.ilr.cornell.edu/ped/dep/dep_pubs.html?cat_id=7

Affidavit of John P. Tierney, MA

The extensive use of the CPS data for research on employment issues and the similar findings from other disability data provides corroborative evidence of the validity of the CPS data. Independent researchers from various institutions and with various purposes would not all use the CPS data unless the data are meaningful.

5.1.2. Professional literature¹⁰

Defense, through mention of Dr. Conte's report, notes that the statistics I use "have recently been discredited in the professional literature," apparently believing that the simple existence of these articles discredits these statistics. Their argument, however, is both misleading and incomplete. Defense fails to mention that subsequent articles supporting the worklife statistics were published in the same professional journals.

Three of the articles (Corcione, Skoog and Toppino, Caragonne), for instance, have been published in the *Journal of Forensic Economics*. This journal, however, is not intended as an authoritative publication. It publishes multiple contrasting opinions and approaches of the forensic community. Articles supporting the data I use have been published in this same journal (Gluck, 1996; Gibson, 1998; Gibson and Tierney, 2000; a fuller version of the Gibson and Tierney article is also available – Gibson, 2001). In addition, *Medical Malpractice*, the publisher of the Staller article, subsequently published two articles (Gluck and Sachnin, 2000; Gamboa, 2001) that support the statistics I use.

Defense also fails to mention that two noted Census Bureau officials have supported use of CPS data for studying the effects of disability on work (McNeil and Miller affidavits; included in Attachment B). The worklife tables and the CPS data underlying them are the subject of multiple articles. The bibliographies (Attachments B and D) show that the worklife tables have been reviewed in professional journals and that the CPS data have been used by researchers for both forensic and non-forensic purposes.

5.2. Validity of the CPS data

Defense uses a paper available on the Census Bureau website¹¹ in an attempt to discredit the value of CPS work disability data. Despite Defense's claim, this document does not preclude use of the CPS data.

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

¹⁰ Unless previously cited, research noted in this section can be found in Attachment D. Included in the bibliography are articles supporting the worklife tables.

¹¹ <http://www.census.gov/hhes/www/disability/cps/cpstableexplanation.pdf>

Affidavit of John P. Tierney, MA

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

Defense highlights a quote from this caveat that notes the inability to derive reliability measures in a manner somebody might seek of a hard science. As discussed in Section 3, the US Supreme Court in *Kumho* addresses the fact that reliability cannot be measured precisely in soft science. It is important, therefore, for users to understand the potential imperfections in order to be able to use the data most effectively. Understanding the issues can enable an expert to use CPS (or OOH) data as one element in calculating losses in individual cases.

5.3. Use of statistical averages

Defense contends that the nature of the worklife statistic makes it difficult or impossible to apply to an individual and that the use of statistical averages for specific plaintiffs is inappropriate. In doing this, they redirect their discussion to ‘cause’ and ‘correlation’ instead of focusing on the possible, appropriate uses of available statistics.

True, disability is a complex phenomenon, but averages from various populations have long been accepted as a means for prediction – life expectancy, earnings, and others. No statistic, no matter how fine-tuned, can provide an exact predictor of an individual’s future. This is as true of worklife expectancies as it is of various measures of annual earnings and growth and discount rates. The expert must use available statistics about populations and mold them to meet the specifics of the case. As noted by Marcia Angell in *Science on Trial*:¹²

Courtroom trials are not about populations, they are about individuals. . . . We have no basis, at least in the current state of knowledge, for making a judgment about a particular woman. We therefore *must* appeal to epidemiological data – that is, studies of populations.

Economists, actuaries, insurance companies, and gambling establishments use population averages when making rational bets on human outcomes. The basic belief is that in the absence of more specific and precise information, the best predictors of outcomes are statistical averages or relative frequencies. Applied to this case, use of disability data is clearly supported by the fact that a variety of researchers, forensic and non-forensic, government and non-government, have used these data to study the effects of disability on earnings and employment.

What the criticism does point to, however, is the fact that statistics of all sorts must be used responsibly and applied by persons familiar with the issues involved. When assessing persons with disability, for instance, the user must be familiar with the effects of impairment on ability

¹² New York, NY: W.W. Norton Co., 1997, page 115.

Affidavit of John P. Tierney, MA

to work as well as the experiences of persons with disability in the labor market. I have the experience and training necessary to conduct such an assessment in a reliable manner (see Section 2)

5.4. Definition of disability

Defense claims that I have manipulated the definition of “disability” thereby rendering the word devoid of meaning. This is confusing as they fail to explain how I have done this.

My report is very clear. In applying disability statistics to Mr. McCoy, I have used two definitions of disability from two government sources of disability data (see Section 5). The definition of work disability from the CPS and the definition of physical disability from the ACS are clearly defined both in the Case Comments section of my report and in the Vocational Economic Rationale attached to it.

This is not an attempt to manipulate data, as claimed, but simply a means of presenting a range of possible lifetime earnings loss using disability data from two different sources. As noted in the previous section, it is important that these data are used by people who understand them and have expertise enough in the field to use them appropriately (see Section 2 for discussion of my qualifications).

6. Relevance

Defense contends that since Mr. McCoy has continued to work and earn money with the US Postal Service, my testimony regarding a loss of future earnings is irrelevant. I disagree.

In discussing the relevance of my testimony, Defense confuses ‘permanent’ and ‘partial’ disability. It is clear that Defense believes that the two are mutually exclusive and that ‘permanent’ means ‘total.’ No knowledgeable vocational expert would believe this to be so. They use *Quinones-Pacheco v. American Airlines* to support their claim, and state that my testimony has “the same faulty assumption . . . that the Plaintiff has a permanent disability, as opposed to a partial disability or mere impairment.”

Based on the passage Defense quotes from the *Quinones* decision, the expert claimed that the Plaintiff was totally disabled when the evidence showed otherwise. That is not the situation with the present case, in which I measure the impact of a *permanent partial* disability..

A permanent disability simply means that the disability is expected to continue throughout the individual’s lifetime. Permanent does *not* mean total. It can exist even when a person is still capable of working, or partially disabled, as is Mr. McCoy.

Mr. McCoy is *both* permanently and partially disabled. He is clearly capable of working. Based on personal evidence from Mr. McCoy and medical evidence from Dr. Changaris, however, the disability has affected his ability to work, as is evident from his disability leaves and from his need to turn down overtime. The existence of a partial disability does not exclude the possibility of a lifetime loss of earnings, as is demonstrated in the disability research discussed earlier (see Sections 4.1 and 5.1.1).

7. Assist Trier of Fact

Defense uses four court cases in an attempt to support their claim that my testimony will not aid the trier of fact. Each of these will be discussed below.

7.1. Michels v. United States

In *Michels*, the court disallowed the use of Vocational Econometrics' worklife tables by an economist. The economist used the tables to quantify a loss of worklife expectancy, despite the fact that the vocational rehabilitation expert opined that there was no loss of worklife expectancy in the case.

In addition, the court objected to the worklife publication used by the economist because it was an older version produced before the passage of the Americans with Disabilities Act (ADA). The data now used were gathered after passage of the ADA.

The court also stated that the tables used data for persons with at least a 5% whole body impairment or who were eligible for Social Security benefits. It is unclear where the court obtained this erroneous information, but the U.S. Census Bureau's definition of work disability does not consider percent of whole body impairment, and eligibility for Social Security is only one factor out of seven that are included in the definition.

7.2. Phillips v. Industrial Machine

In *Phillips*, there was no medical opinion supporting the expert's opinion that the Plaintiff had a disability. The court stated that "without any evidence that Phillips was in fact disabled, [the vocational expert's] opinion, which relied on the conclusion that Phillips was disabled, lacked foundation and probative value."

The worklife tables used by the expert in *Phillips* were an older version of the tables that did not break out disability into severe and not severe categories. The expert in *Phillips* used an average disabled statistic without regard for how the Plaintiff may differ from that statistic. Therefore, based on an insufficient medical foundation and on his inappropriate use of the worklife tables, his opinion was not relevant to the case.

The data used by me in this case are newer and have specificity lacking in the *Phillips* case. In addition, I considered the specifics of the Plaintiff's situation, such as age, education, work history, and work-related limitations, before placing the Plaintiff on the disability continuum.

7.3. Elcock v. Kmart

Defense mentions *Elcock*, but it is unclear how it relates to the present case. *Elcock* does not mention either the worklife tables or the data underlying them. The vocational rehabilitation expert in the case notes that he applied a procedure recommended by Anthony Gamboa (one of my associates) in determining the Plaintiff's loss, a procedure that the Defense did not dispute was an accepted methodology in the vocational rehabilitation field. The worklife tables are not mentioned in the decision by either the vocational or the economic expert.

Affidavit of John P. Tierney, MA

The court in this case merely held that *Daubert* hearings are appropriate for vocational and economic testimony. It remanded the case for a new trial on economic damages to include a *Daubert* hearing.

7.4. Craftsmen v. Ford

Defense refers to issues raised in *Craftsmen* without saying how these apply specifically to my analysis. It is unclear how these cases are related.

Craftsmen claimed that an illegal restraint of trade by competitors resulted in reduced sales in the mid 1990s. In *Craftsmen*, it was determined that the expert did not look at reasons other than the alleged restraint of trade to explain why Craftsmen's sales may have gone down from 1995 through 1998. He failed to consider, for example, competition that occurred at that time in the limousine production industry. This case had nothing to do with disability or with the future effects of injury on ability to work.

In this present case regarding Mr. McCoy, my purpose is to analyze the effects of injury on Mr. McCoy's *future* ability to earn money, not, as in *Craftsmen*, to explain his earnings history. In order to be done appropriately, this requires a consideration of all of the forces that may impact his ability to work in the future. Looking simply at his past experience would not provide the full picture necessary to aid the trier of fact (see especially Sections 4.1 and 4.2 above).

FURTHER, THE AFFIANT SAYETH NAUGHT.

John P. Tierney, MA
Senior Analyst

Subscribed and sworn to before me, a notary public, in this ____ of October, 2005.

Notary Public

My Commission Expires _____