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COUNTY OF ADAMS

GLEN TAYLOR AND SHEILA TAYLOR,)
)
Plaintiffs) Cause No. 01C01-9801-CP-058
)
vs.)
)
TOMATO PRODUCTS, INC. and RED)
GOLD, INC., a merging corporation,)
)
Defendants.)

AFFIDAVIT OF EDWARD P. BERLA', PHD AND JOHN P. TIERNEY, MA

COME NOW Edward P. Berla', PhD, and John P. Tierney, M.A., being first duly sworn upon their oaths state the following:

Defendant has filed a response to our affidavit in this case dated November 6, 2001. This response centers on the following key areas:

1. Reliability of the U.S. Census Bureau data
2. Supporting medical testimony
3. The effect of disability
4. The philosophy and logic underlying our analysis

The response makes it clear that the defendant does not understand key elements of cases of this type (e.g., the requirements of a calculation of lost earnings, the nature of survey data, the lifetime effect of disability on employment). Each of the points above is refuted briefly in the discussion that follows.

1. Reliability of the U.S. Census Bureau Data

1.1. Survey Data and Use of the CPS

In an attempt to invalidate our use of CPS data, defendant notes weaknesses of the U.S. Census Bureau's Current Population Survey (CPS) data in some of the articles included in our first affidavit. As anyone knowledgeable about survey data knows, no survey data are absolutely perfect. Researchers accept this fact, and it is one of the reasons for the very existence of the field of statistics.

In presenting this argument, defendant seems to have forgotten that the researchers quoted used the very data defendant is trying to discredit. If they really felt that the CPS data were inadequate, why did they use them? The researchers acknowledge the CPS as the best data available for studying the impact of work disability on employment. No researcher would spend the tremendous amount of time required of these calculations if he or she felt that the data were not adequate for the purpose. (See the Attachments C, D, and E with our original affidavit for researchers supporting use of the CPS.)

Affidavit of Edward Berla' and John Tierney

Defendant's complaint seems to stem from a need for a very precise formula to apply these population statistics to an individual plaintiff. This is the same quandary vocational and economic experts must face when applying any statistic, not just worklife expectancies.

Averages from various populations have long been accepted in the courts as a means for estimating the future (e.g., life expectancy, average earnings, earnings growth rates). No statistic, no matter how fine-tuned, can provide an exact predictor of an individual's future (note U.S. Supreme Court decision *Jones & Laughlin Steel v. Pfeifer* in our original affidavit). 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 we did in our analysis on Mr. Taylor.

As noted by Marcia Angell in *Science on Trial* (1997, p. 115):

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.

1.2. The Concept of Disability

1.2.1. *The definition of disability*

Defendant is correct that the CPS does not deal with disability as defined in the Americans with Disabilities Act (ADA). Where they err is in thinking that this somehow impacts our analysis on Mr. Taylor. The definition of disability contained in the ADA would not be appropriate for the type of analysis needed in Mr. Taylor's case.

The ADA defines disability as existing in persons with a physical or mental impairment that substantially limits one or more of the major life activities. This definition, however, is not the appropriate definition of disability to use when assessing lost earnings and worklife expectancy due to injury. The ADA definition is too broad because it includes people who do *not* have limitations in the kind or amount of work they can perform, people unlike Mr. Taylor. For forensic purposes, when assessing loss of lifetime earnings, the most relevant data pertain to those persons who have a work disability, the focus population of the CPS. In analyzing the effect of Mr. Taylor's work disability on his earnings, we used data based on the more relevant definition of work disability contained in the CPS. This definition, simply stated, is a mental or physically impairment that limits the kind or amount of work a person can perform.

1.2.2. *Varying levels and types of disability*

Defendant further attempts to discredit the CPS by noting that it does not differentiate between levels of disability. This is incorrect.

The CPS measures persons with a work disability and breaks these into groups for those who are severely disabled and not severely disabled. When quoting the 6-point definition of work disability from the U.S. Census Bureau's 1989 publication (*Labor Force Status . . .*), defendant left out the very next sentence. This sentence states, "If one or more of the final four conditions was met, the person was considered to have a severe work disability" (page 2). The publication uses this definition to list various statistics for all persons with a work disability, as well as

Affidavit of Edward Berla' and John Tierney

statistics for persons with severe and not severe work disabilities. The worklife expectancy statistics that we employed in this case use the Census Bureau's definitions of severe and not severe disability.

Defendant states that we lumped all people with disability into one big pool and used that statistic. This is incorrect. We did not use statistics for the severely disabled quadriplegics, as defendant implies. In our analysis of Mr. Taylor, we used statistics for people who are defined as not severely disabled, which by definition eliminates those with severe disability (as defendant's quadriplegic) and those who are not employed and unlikely to become so.

Defendant also implies that the CPS data are somehow flawed because of the existence of those with temporary disability. For the existence of temporary disability within the CPS to distort worklife expectancy, one must assume that persons with temporary disability have a significantly different rate of employment during the disability period than persons with permanent disability.

Private research (see Attachment A) using CPS data from 1996 through 1999 concludes that there is potential for some segment of the disabled categories to be only "temporarily" disabled. However, the potential for distortion of the overall rates of participation and employment is minimal.

2. Supporting Medical Testimony

Defendant states that in conducting the assessment on Mr. Taylor, we did not consider all of the medical evidence or acknowledge that he was released to return to work. All of the medical information submitted to us was considered, and these were listed in our report of December 2000.

It is true that Mr. Taylor was released to return to work, but this does not mean that his problems were completely cured. Dr. Ronald G. Caldwell's note of December 2, 1997, releases him for work, but also notes that he would be seen at a later date for a permanent partial impairment rating. These ratings are not given if a person has completely recovered from injury. Dr. Caldwell's note of January 2, 1998, notes that Mr. Taylor returned earlier than expected because of problems with the knee swelling and giving out. Dr. Caldwell suggested use of a hinged knee brace at this time. On April 2, 1998, Dr. Caldwell gave a permanent partial impairment rating for Mr. Taylor left lower extremity due to his injury. Using this medical opinion of permanent partial disability, our analysis translates the physical impairments into the limitations in the world of work, resulting in the losses projected in our report.

3. The Effect of Disability

Defendant notes that in one year post-injury (1999), Mr. Taylor earned in excess of \$40,000. We are aware of this fact and dealt with it directly in our original report on the case (December 27, 2000). Since we have already dealt with it there, we will not go into great detail here. Defendant has ignored the fact that at the time of our report, Mr. Taylor had been unemployed for 6 months; he was unable to maintain this high-paying job on which defendant wants to base his earning

Affidavit of Edward Berla' and John Tierney

capacity. Also, based on a re-interview on April 11, 2002, Mr. Taylor remains unemployed and notes that his symptoms have not improved.

Defendant apparently does not understand the effect of disability of a person's *lifetime* employment, which is what we have been asked to assess. Neither does defendant appear to understand what is required of an assessment of lost earnings. As experts, we were asked to assess Mr. Taylor's lifetime loss as a result of injury, not just the loss that occurred during a short period of time. Mr. Taylor is still fairly young (now age 40) and has many years ahead of him that the injury and resulting limitations will impact.

Defendant states that the jury is able to assess the long-term effect of disability on Mr. Taylor's employment. This effect, however, is not something that a jury would reasonably know. Using just actual earnings since injury (Which year would they pick? The \$8,000 year? The \$40,000 year? The \$0 year?) is not the way this analysis should be done to meet the needs of the court. Without knowledge of the effects of disability, how could a jury possibly estimate lost time or earnings that Mr. Taylor might experience 20 years from now? The short snapshot since injury does not speak to the effects of time and aging on employment of those with disability. Our analysis addresses these issues through the application of probability statistics derived from a population most like the plaintiff.

4. The Philosophy and Logic Underlying Our Analysis

Defendant states that, because our philosophy does not change from case to case, that our opinions are unreliable. In making this assertion, we assume defendant is referring to the narrative attached to our report that describes our general approach to analyzing cases of lost earnings.

Our basic philosophy in analyzing cases does not change; it should not. We do not change our basic understanding of the effects of disability on employment in order to meet the needs or desires of parties in individual cases. What does change is the *application* of this philosophy and knowledge to meet specifics of each case. As experts in this case, we used this philosophy and knowledge of the field and combined it with Mr. Taylor's characteristics in order to derive a reasonable estimate of his loss of lifetime earnings. Our basic philosophy has been applied to numerous cases and accepted in numerous jurisdictions (see Attachment B).

Defendant states that we "consider a quadriplegic the same as person who has a bulging disc." We have never stated this and do not believe this (see Section 1.2.2).

Defendant says that our logic is flawed, and that, since Mr. Taylor can perform sedentary work, that there is no loss of worklife. Defendant further states that the CPS "does not provide adequate information to make the assessment of a decreased worklife." Neither of these statements is true.

CPS data do show that time loss is reasonable (<http://www.census.gov/hhes/www/disable/disabcps.html>). The data provide participation and employment rates for persons with and without work disability, which demonstrate that even those whose disability is not severe (likely to be working or able to work) show significantly reduced time actually working. In conducting the analysis, these facts were considered along with specifics related to Mr. Taylor. In addition,

Affidavit of Edward Berla' and John Tierney

research shows that those with a permanent partial disability are more likely to lose jobs and less likely to find reemployment when out of work. This phenomenon is exacerbated by aging and by lower levels of education (see Attachment A).

As noted in our original report, Mr. Taylor has only an 8th grade education, which in itself will seriously limit his access to a wide range of jobs. In addition, his work history is primarily of a laboring type, work that he is no longer able to perform because of his current limitations. In fact, based on the analysis submitted with our original report, he is only capable of performing 0.3% of the jobs in his local labor market. This is an extremely small number of jobs. Combined with the fact that Mr. Taylor has been unemployed since June of 2000 and that his symptoms have not improved, it is unlikely that he will be able to find or maintain any type of employment in the future. The loss submitted with our original report can be thought of as an "at best" scenario at the time the report was submitted.

Defendant expresses the mistaken belief that we have somehow double-dipped by reducing both Mr. Taylor's earnings and his worklife expectancy. We reduce both earnings and worklife because they represent two differing elements of a person's employment: time and money. As mentioned above, the CPS data show that persons with a work disability are less likely to be working, even when they are not severely disabled. The same web site provides average earnings for persons with and without work disability that show that, even when people with a work disability work year-round, full-time, they earn less than their counterparts without disability. This effect of disability on both earnings and time worked is known by vocational and rehabilitation professionals.

5. Conclusion

Defendant's apparent attempt to make Mr. Taylor whole cannot actually make him whole. In attempting to accomplish this, they have given many limited facts that are out of context or inappropriately applied.

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) and the Survey of Income and Program Participation (SIPP) from the Census Bureau,¹ the National Health Interview Survey (NHIS) from the National Center for Health Statistics,² and the N.O.D./Harris Survey of Americans With Disabilities.³ The disability effect is the cause of such events as the passage of the well-known Americans with Disabilities Act (ADA),⁴ the existence of the Department of Labor's Office of Disability Employment Policy,⁵ and the practice of rehabilitation counseling, just to name a few.

Our analysis of Mr. Taylor's lost earnings takes these known facts into account.

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

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

³ <http://www.nod.org>

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

⁵ <http://www.dol.gov/dol/odep>

Affidavit of Edward Berla' and John Tierney

FURTHER, THE AFFIANT SAYETH NAUGHT.

Edward P. Berla', PhD
Vocational Economic Analyst

John P. Tierney, MA
Vocational Economic Analyst

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

Notary Public

My Commission Expires _____

Affidavit of Edward Berla' and John Tierney

Attachment A

Gibson, David S. "Daubert, Disability, and Worklife Expectancies," Monograph, Vocational Econometrics, Inc., 2001.

Gibson, David S. and John P. Tierney. "Disability and Worklife Expectancy Tables: A Response." *Journal of Forensic Economics*, Fall 2000, p. 309-318.