VOCATIONAL ECONOMICS, INC.

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Herein as CHI LEON, and CARLOS SALCEDO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

KATHY A. MILLS WALKER, Plaintiff, v. MEL SALIGUMBA, CHI LEUNG, and CARLOS SALCEDO, Defendants.	CASE NO. 01CC10356 **MOTION IN LIMINE TO EXLUDE THE TESTIMONY OF ANTHONY GAMBOA, JR., Ph.D., MBA THAT PLAINTIFF HAS EXPERIENCED A LOSS OF WORK LIFE EXPECTANCY** MIL. No. 2 of 3 **Trial Date: 01/06/03** **Time: 9:30 a.m.** **Dept.: 24**

Defendants, MEL SALIGUMBA, CHI LEUNG and CARLOS SALCEDO (hereinafter referred to as “defendants”) hereby by move this Court for an Order prohibiting any testimony by plaintiff’s vocational rehabilitation expert, Anthony Gamboa, Jr., Ph.D., MBA, (hereinafter referred to as “Gamboa”) from Vocational Economics, Inc. (hereinafter referred to as “VEI”), that plaintiff is disabled or that plaintiff has experienced a loss of work life expectancy. Defendants make this motion on the grounds that Gamboa is not qualified to render an opinion as to plaintiff’s medical impairment or that she has suffered any diminution in her
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"work life expectancy." Moreover, Gamboa's opinions cannot be supported by their source data and are impermissibly speculative.

I.

INTRODUCTION

Plaintiff, KATHY MILLS WALKER (hereinafter referred to as "WALKER") retained Gamboa from VEI as her vocational rehabilitation expert. Typically, a vocational rehabilitation expert assesses a plaintiff's physical and mental capabilities. The typical vocational rehabilitation evaluation involves two parts, an oral interview and a series of written tests. The oral interview is used to obtain information regarding the party's employment, education and medical history. The written tests are used to measure intelligence, education, career aptitude, career preferences and psychological state. From the oral and written evaluations, the vocational rehabilitation expert formulates an opinion as to the nature and severity of the plaintiff's vocational disability.

Gamboa evaluated WALKER to determine her employability and earning potential. In his report (attached as Exhibit "1"), Gamboa indicates that the only medical record he reviewed and used in formulating his opinion was a two-page operative report form Dr. Loddengaard (attached as Exhibit "2"). Gamboa conducted no independent testing of WALKER. Aside from a brief interview of WALKER, the only other records he reviewed were WALKER's W2's from 1999, 2000 and 2001. (Exhibit "1," p.2). In summary, Gamboa's opinion is based on a brief interview with WALKER, which defendants believe was telephonic, a two-page operative report, and three W2's. (Exhibit "1," p. 2).

In his report, Gamboa notes that WALKER told him that: (1) she experiences constant pain increasing with exertion; (2) she notes limited grip strength and range of motion in her right hand and arm and reports problems with repetitive use thereof; and (3) she experiences difficulties with fine manipulation, holding/carrying items, lifting weights, pushing/pulling, reaching, and working overhead.

Based on nothing more than a brief interview, three W2's and a two-page operative report, Gamboa concludes:

> "(I)t is our opinion that Mrs. WALKER **meets the definition of occupational disability . . . .**
>
> (I)t is our opinion that her pre-injury work life expectancy was like that of an average nondisabled female with 16 or more years of education, or 16.2 years. As a result of injury, her future work life expectancy ***is like that of an average severely disabled female*** with 16 or more years of education, or 11.9 years.
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> The Work Life Probability table contains a calculation of Ms. WALKER's loss of lifetime expected earnings, an inspection of the table reveals a loss of lifetime expected earnings of $308,066.00. This figure is stated in terms of 2002 dollars and includes fringe benefits calculated at the rate of 22%." (Emphasis supplied). (Exhibit "1," p. 3).

Attached to Gamboa's Vocational Economic Assessment for KATHY WALKER, dated September 24, 2002 ("Report"), are eight standardized pages titled "VOCATIONAL ECONOMIC RATIONALE", apparently attached to every VEI report. These eight pages attempt to justify the quantum leaps that Gamboa makes in his report. The attachment indicates that the earnings and work life expectancy figures used by Gamboa and VEI are based on the Current Population Survey ("CPS") data and the Survey of Income and Program Participation ("SIPP") data as collected by the Census Bureau.

Some of the information in the eight page explanation is common sense and not overtly unreasonable. Disabled individuals presumably do have a harder time getting employed. The portion of Gamboa's explanation that has no basis in fact or science is his equation of a specific disability with a specific work life expectancy. Gamboa and VEI (which is owned by Gamboa) have created a "category" called "loss of lifetime earning capacity," which they contend compares the pre- and post-injury earning capacity of WALKER and other VEI clients. In this case, Gamboa's report indicates that WALKER, a 45-year-old female with 16 years of education, had a pre-injury work life expectancy of 16.2 years. It states that this is "the work life expectancy of an average nondisabled female with 16 years or more of education." The report further indicates that her post-injury work life expectancy is 11.9 years, which is the "work life expectancy of an average nondisabled female with 16 years or more of education." (Exhibit "1," pp. 2 and 3).

However, there is no evidence that WALKER's two-year-old neck injury equates to any level of permanent disability, and there is no evidence as to why Gamboa chose one level of alleged disability over another. In reality, such injuries have very different effects depending upon specific circumstances, which Gamboa fails to take into account. For example, in this case, plaintiff has had the same government job for over 20 years. She is a supervisor and performs only administrative duties, which are not physically demanding. Moreover, many factors other than purely physical ones (such as a person's motivation) must be considered. In addition, there is no evidence to support a 4.1

year loss of work life expectancy, or to show how it was calculated.

II.

THE COURT SHOULD EXCLUDE TESTIMONY FROM GAMBOA REGARDING PLAINTIFF'S DISABILITY AND HER LOSS OF WORK LIFE EXPECTANCY.

California Evidence Code Section 720 is instructive in determining when a person is qualified to testify as an expert. It states:

> a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
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> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

California Evidence Code Section 801 is also helpful. It states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
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> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

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The Court should exclude Gamboa's testimony that WALKER is "disabled," and that her "future work life expectancy" has been diminished from 16.2 years to 11.9 years, because there is no medical evidence to support his conclusion and because such an opinion is beyond his skill, knowledge, experience and training. As such, he is not qualified to render such an opinion. In addition, Gamboa's opinions are not supported by their source data. Accordingly, Evidence Code Sections 720 and 801 requires that such testimony be excluded.

The California Supreme Court set forth certain "general principles of admissibility" of expert testimony in the seminal case of People v. Kelly, 17 Cal. 3d 24 (1976). In Kelly, the Court stated:

> [A]dmissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. (See, Evidence Code Sections 720, 801). Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. Id. At 30.

The Kelly Court went on to articulate the appropriate test for determining the reliability of new scientific technique. It stated:

> The test for determining the underlying reliability of a new scientific technique was described in the germinal case of Frye v. United States (D.C. Cir. 1923) 293 F. 1013, 1014, involving the admissibility of polygraph tests: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to

> define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (Italics added.)
>
> We have expressly adopted the foregoing Frye test and California courts, when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community." 17 Cal. 3d at 30.

The Kelly Court explained the beneficial consequences of the Frye test as follows:

> The primary advantage, however, of the Frye test lies in its essentially conservative nature. For a variety of reasons, Frye was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles. "There has always existed a considerable lag between advances and discoveries in scientific fields and their acceptance as evidence in a court proceeding" [Citations]. Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a ". . . misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature." 17 Cal. 3d at 31, 32.

In People v. Leahy (1994) 8 Cal. 4th 587, the California Supreme Court granted review to determine whether the Kelly/Frye standard for admitting the results of new scientific techniques should be modified following the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (hereafter Daubert). The Daubert case held that Frye was abrogated by Rule 702 of the Federal Rules of Evidence (28 U.S.C.).

The Leahy Court held that Kelly should remain the prerequisite to the admission of expert testimony regarding new scientific methodology in California, stating:

> Kelly sets forth the various reasons why the more "conservative" Frye approach to determining the reliability of expert testimony regarding scientific techniques represents an appropriate one. Daubert, which avoided the issue of Frye's "merits," presents no justification for reconsidering that aspect of our holding in Kelly. Thus, we conclude that the Kelly formulation survived Daubert in this state, and that none of the above-described authorities critical of that formulation persuades us to reconsider or modify it at this time. 8 Cal.4th at 604.

A. Gamboa's Testimony That Walker Is Disabled Is Outside the Scope of His Expertise. Is Unsupported by the Evidence and Speculative.

Gamboa has determined that WALKER is "severely disabled." (Note: there appears to be some confusion in Gamboa's report. One page 2, he indicates that WALKER has had a "work life expectancy of an average not severely disabled female." On page 3, he indicates WALKER's work life expectancy reduction results from an "average severely disabled female."). However, there is nothing in the two-page medical/operative report of Dr. Loddengaard, the only medical evidence reviewed by Gamboa, to support the proposition that WALKER has any permanent disability, severe or otherwise.

In fact, in his deposition, Dr. Loddengaard testified that WALKER was "not severely disabled." (Exhibit "3," p. 48, 11. 4-6). He also testified that he had no way of knowing if WALKER's work life would be shortened, and that he did not "see any

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immediate indication that she will need to have time off work. (Exhibit "3," p. 48, 11. 23-25; and p. 52, 11. 16-17).

Dr. Wagner opined in his independent medical examination that WALKER's underlying cervical condition is degenerative in nature, and not caused by a traumatic event. (See, Dr. Wagner's report, attached as Exhibit "4," at p. 10). In her deposition, WALKER testified that she expected to go back to her regular job, and that it would not affect her ability to advance. (See, excerpts from Plaintiff's deposition transcript, attached hereto as Exhibit "5," pp. 61 and 62).

Gamboa is not a medical doctor. He does not have the skill, knowledge or experience to determine that plaintiff is disabled, severely or otherwise. That determination is sufficiently beyond his special knowledge, skill and experience. Furthermore, there is no evidence in the two-page operative report reviewed by Gamboa to support a conclusion of any disability; nor did he do any independent testing from which he can verify the existence or nonexistence of any permanent disability.

Gamboa's finding that WALKER has a permanent disability, severe or otherwise, is purely speculative. Even Dr. Loddengaard admits that it is too soon, following plaintiff's neck surgery, to tell if she will have any physical limitations. (See, Exhibit "3," pp. 57, 1. 12-p. 58, 1.6; and see, Walker deposition, p. 61, 1. 16-p. 62, 1. 18, attached as Exhibit "5"). In McGonnell v. Kaiser, (2002) 98 Cal. App. 4th 1098, the First District Court of Appeal held that the court is not bound by an "expert opinion

that is speculative or conjectural." Id. At 1106. Accordingly, this Court should exclude any evidence from Gamboa that plaintiff is disabled, under Evidence Code Sections 720 and 801.

B. Gamboa's Testimony That Walker's Work Life Expectancy Has Been Diminished Should Be Excluded Because it is Based on Data That Is Unreliable and Was Not Collected for Studying the Employment Experiences of Persons with Disabilities.

Through "voodoo economics," Gamboa has determined that WALKER has had her "work life expectancy" diminished from 16.2 years to 11.9 years. His measurement of the diminishment of WALKER's "work life expectancy" is based on the Current Population Survey (CPS) and data collected by the Census Bureau. (See, Exhibit "1," p. 5 and 6).

Disabilities reported in the CPS are determined by the 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?" (Exhibit "1," p. 6). The disability information collected by the Census Bureau is self reported, and without independent medical verification. In addition, it does not measure disability as defined in the Americans With Disabilities Act. Without independent medical verification, this information is not reliable, and cannot be used as a basis for Gamboa's opinion that WALKER's "work life expectancy" has somehow been diminished. It was simply not collected for that purpose. Gamboa's opinion is based on a fantasy disability without any medical evidence or support, and

without support or testimony from plaintiff herself, who admitted that she expects to go back to her regular job, and she does not expect her injuries to have any effect on her ability to advance in her career. (See, Exhibit "5," p. 61, ll. 16-19; and p. 62, ll. 5-8).

Diminution of "future work life expectancy," as calculated by Gamboa, has no support in existing economic or medical science. The test for determining the admissibility of new scientific evidence, as set forth in Kelly, supra, is that the science "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Kelly, 17 Cal. 3d at 30.

As the Kelly Court explained, "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a '. . . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.'" Kelly, 17 Cal.3d at 31, 32. Gamboa's methodology is not supported by science, or anyone in the fields of medicine or economics. Indeed, they have been widely criticized by experts in the field as "an unreliable and invalid source for projecting differences in pre-versus post-disability work life expectancy." Skoog, Gary R. and David C. Toppino. "Disability and the New Work life Expectancy Tables from Vocational Econometrics, 1998: a Critical Analysis." Journal of Forensic Economics, 12(3), 1999, 239-254. (Attached as Exhibit

"6"). Accordingly, under Evidence Code Sections 720, and 801, and under the Kelly test, it should be excluded.

C. Gamboa's Testimony That Walker's Work Life Expectancy Has Been Diminished Should Be Excluded Because VEI Has Created the Invalid Category "Loss of Lifetime Earnings."

As noted above, Gamboa's opinion is that WALKER's "pre-injury work life expectancy was that of an average nondisabled female, with 16 or more years of education, or 16.2 years. Gamboa also opines that as a result of her injury, her future work life expectancy is now that of an average severely disabled female with 16 years or more years of education, or 11.9 years." (Exhibit "1," p. 3). However, there are no tables for work life expectancy in the CPS data used by Gamboa as a basis for his opinion. (See, Critical Analysis attached as Exhibit "6").

The calculation of work life expectancy used by Gamboa is based on tables created by Gamboa and Vocational Economic Assessment Inc. (Exhibit "1," p. 10). There is no basis in science for the figures used by Gamboa. The tables used by Gamboa are not scientifically reliable nor are they generally accepted in the scientific community and they should be excluded. As is set forth in Kelly, the test is "general acceptance" in the particular field in which it belongs. There is no support outside VEI itself for Gamboa's methodology or his opinions in this case. Accordingly, under Evidence Codes Sections 720 and 801, Gamboa's testimony as to WALKER's loss of "work life expectancy" should be excluded in its entirety.

II.
THE COURT HAS THE DISCRETION TO PROHIBIT GAMBOA FROM TESTIFYING AS TO PLAINTIFF'S ALLEDGED LOSS OF WORK LIFE EXPECTANCY.

In Miller v. Los Angeles County Flood Control District, (1973) 8 Cal. 3d 689, the California Supreme Court stated:

> To determine that a witness qualifies as an expert the judge must ascertain "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." 8 Cal.3d at 701.

In an earlier case, Huffman v. Lindquist (1951) 37 Cal.2d 46, the California Supreme Court stated:

> It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown. [Citations.]

Accordingly, whether a particular witness has the qualifications necessary to give an expert opinion on a specific topic is an issue left to a court's discretion. The Court should exercise its discretion in this case to preclude any testimony by plaintiff's vocational rehabilitation expert, Gamboa from VEI,

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with respect to plaintiff's alleged disability and her purported loss of work life expectancy.

III.

CONCLUSION

Based on the foregoing, defendants respectfully request that the Court issue an Order precluding the introduction of any testimony by plaintiff's vocational rehabilitation expert, Gamboa from VEI, regarding plaintiff's alleged disability or her loss of work life expectancy.

DATED: December 13, 2002 LAW OFFICES OF CHARLES S. LiMANDRI

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