
**VOCATIONAL
ECONOMICS,
INC.**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 01-239-JBT

CHARLES R. WRIGHT, JR.,

PLAINTIFF

MEMORANDUM OPINION AND ORDER

V.

WERNER ENTERPRISES, INC., ET AL.,

DEFENDANTS

I. INTRODUCTION

On May 7, 2001, plaintiff filed this personal injury action against defendants Werner Enterprises, Inc. and Renee A. Osborne in Fayette Circuit Court, alleging that on or about May 24, 2000, on Interstate 75 in Fayette County, Kentucky, defendant Osborne negligently operated a semi-tractor trailer and truck owned by defendant Werner Enterprises, Inc., resulting in its collision with plaintiff's vehicle and bodily injuries to the plaintiff. Plaintiff sought compensatory damages including impairment of his power to earn money in the future.

On June 5, 2001, defendants removed this action from Fayette Circuit Court, pursuant to 28 U.S.C. § 1441, alleging that the federal district court had original jurisdiction of this matter under 28 U.S.C. § 1332.

This action is scheduled for trial on September 3, 2002.

This matter is before the court on the defendants' motion to exclude the expert testimony of John P. Tierney [DE #19]. On August 26, 2002, after this motion had been fully briefed, the court conducted a Daubert¹ hearing to assess the qualifications of John P. Tierney, plaintiff's vocational expert, who was present and testified at this hearing.

¹ Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993).

II. FACTUAL BACKGROUND

Plaintiff alleged that he sustained physical bodily injuries and economic loss as the result of the collision between his vehicle and the defendants' vehicle on May 24, 2000. One of the components of plaintiff's economic loss claim is the impairment of his power to earn money in the future. At the time of this collision, plaintiff was 32 years of age and was a student at the University of Kentucky, having completed three years of college working towards a bachelor's degree in chemical engineering, with approximately 33 hours remaining to complete the chemical engineering degree. Plaintiff alleges that he sustained lower back and neck and head injuries in this collision and that due to these injuries, he has been unable to return to school and complete his degree in chemical engineering.

Plaintiff identified John P. Tierney, of the firm of Vocational Economics, Inc. Louisville, Kentucky, as his vocational economics expert who proposes to testify about plaintiff's lifetime economic loss due to the work disability he has as a result of this collision. Mr. Tierney performed a vocational economic assessment of plaintiff's impairment of his power to earn money in the future and concluded that if plaintiff is able to complete his chemical engineering degree, the present value of his economic loss resulting from his impaired earning ability is \$612,561 and that if plaintiff is unable to complete his chemical engineering degree the present value of his economic loss resulting from his impaired earnings ability is \$926,386. See Exhibit A to Defendant's Motion to Exclude the Testimony of John P. Tierney – DE #19.

III. DEFENDANTS' MOTION TO EXCLUDE JOHN TIERNEY'S TESTIMONY

Pursuant to Rules 702 and 703 of the Federal rules of Evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999), defendants move to exclude the expert testimony of John P. Tierney contending that (1) the underlying basis for his methodology in arriving at plaintiff's economic loss is flawed, and (2) there is no "fit" between the assumptions underlying his opinions and the facts of this case.

Plaintiff opposes defendant's motion to exclude Tierney's proposed expert testimony, asserting that Tierney is qualified to make the vocational economic assessment he made in this case, that his methodology is not flawed, and that his methodology and data fit the facts of this case.

Applicable Law

The Sixth Circuit Court of Appeals, in examining the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has directed that "[t]he first and universal requirement for the admissibility of expert opinion testimony is that the evidence must be reliable and relevant." *Cook v. American Steamship Company*, 53 F.3d 733, 737-38 (6th Cir. 1995). As the Sixth Circuit explained, "the reliability requirement is met if the trial judge makes a preliminary finding under Fed.R.Evid. 104(a) that the scientific or technical theory which is the basis for the expert's opinion is indeed 'scientific, technical, or . . . specialized knowledge,'" while the relevancy requirement is met "if the trial judge determines, under 104(a), that the expert's opinion 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* At 738. Furthermore, the trial court's preliminary fact-finding under Rule 104(a) includes the determination of whether the witness's knowledge, skill, experience, training, or education "are such to qualify him or her to testify as an expert at all. . ." *Id.* As has been recognized, under Fed.R.Evid 702, a "determination of the reliability of expert testimony must include scrutiny of the proffered expert's qualifications . . ." *Rice v. Cincinnati, New Orleans & Pacific Railway Company*, 920 F. Supp. 732 (E.D.Ky. 1996). Thus, before a witness may testify as an expert, the Court must first determine that the witness possess sufficient knowledge, skill, experience, training, or education to qualify as an expert in the particular field within which the witness proposes to testify.

As noted in *Daubert*, the district court is charged with the "gatekeeping: function of assessing whether a proposed expert's testimony is the result of the intellectual rigor of a professional or whether the proposed expert is simply a hired gun. *Tyus v. Urban Search Managemen*, 102 F.3d 256 (7th Cir. 1996). This "gatekeeping" function applies to all expert testimony. *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001).

Analysis

A. John Tierney's qualifications

John Tierney, age 65, received a master's degree in guidance and counseling 1971 and has done extensive post-graduate study and research in vocational counseling, vocational rehabilitation counseling, and economic assessment.

In addition to his education, Mr. Tierney was worked for many years in field of vocational counseling and vocational rehabilitation counseling. For eleven years (1976-1987), Mr. Tierney was employed by the Metropolitan Sewer District in Louisville, Kentucky, and managed its in-house vocational rehabilitation program. Subsequently, from 1986 to 1992, Mr. Tierney was under contract as vocational expert with the United States Department of Human and Health Services, Social Security Administration, wherein he provided expert opinion testimony regarding the employment potential of claimants who had applied for Social Security disability benefits. Mr. Tierney has been a vocational economic analyst with Vocational Economics, Inc., since 1980, wherein he assesses one's earnings capacity.

Mr. Tierney has been the author or co-author of numerous articles published in various professional journals and/or has made presentations of papers at professional conferences on more than twenty occasions.

In summary, Mr. Tierney has more than 25 years experience in working with persons with disabilities. He has been qualified as an expert in cases pending in fifteen states. During the past four years, he has testified as an expert in numerous cases, and he has never been disqualified to testify as a vocational expert.

Consequently, the court concludes that John P. Tierney is qualified to render expert testimony in this case as a vocational economic analyst.

B. Methodology

In determining plaintiff's lost earnings capacity that he will sustain over his lifetime as the result of his alleged work disability, Mr. Tierney considered the specifics relating to the plaintiff

(such as his age, gender, location, education, earnings proxy, work history, and disability status) in combination with relevant population statistics (the 1990 Decennial Census and the U.S. Census Bureau's Current Population Survey ("CPS")) to derive earnings and employment information for individuals with and without work disabilities.

Defendants contend that Mr. Tierney's methodology is flawed because (1) it included gender, location, earning proxy, and disability status, and (2) it did not employ the government worklife expectancy tables.

1. Gender

Plaintiff is a male, and it is common knowledge that men and women have different patterns of work and earnings. Therefore, the court concludes that the use of make statistics is appropriate and would increase the accuracy of the assessment.

2. Location

The starting point for Tierney's assessment of plaintiff's earnings capacity is Kentucky-specific data from the 1990 Decennial Census. The data used pertain to the relationship between Kentucky and national earnings; this relationship was then applied to current national data to derive current Kentucky dollars. Tierney's assessment presumes that the relationship between Kentucky and national earnings has remained relatively constant since 1990, and there is no evidence that Kentucky trends have deviated from national trends since 1990.

To determine plaintiff's economic loss stemming from his work disability, it is necessary to compare what his lifetime earnings would likely have been if he had no work disability with what his lifetime earnings will likely be considering his work disability.

Defendants submit that Tierney's calculations are flawed because they are not based on recent Kentucky data. Although it is possible that there are data on the earnings of chemical engineers in Kentucky, that data is not broken down as to Kentucky chemical engineers with a work disability and those without a work disability; therefore, such data would not be as relevant to plaintiff's case as Mr. Tierney's use of nationwide data, as adjusted by the relationship between Kentucky and

national earnings, which does have a breakdown between earnings with a work disability and earnings without a work disability. Therefore, the court concludes that defendant's argument as to the location factor is without merit.

3. Earnings

Instead of plaintiff's actual earnings, Mr. Tierney used a proxy and statistics to determine plaintiff's earnings capacity. The reason for the use of a proxy due to plaintiff's relatively young age of 32 and the fact that he was a college student working toward a degree in chemical engineering was because his actual, historical earnings as of May 24, 2000, would not provide a fair assessment of his earnings capacity, since his earnings capacity prior to receiving a bachelor's degree in chemical engineering would be much less than his earnings capacity after having received said college degree. Thus, in this case, the proxy is a better barometer of plaintiff's earnings capacity than his actual, historical earnings as of May 24, 2000.

Defendants also object to Tierney's use of an *average* figure based on education or occupation to estimate plaintiff's earnings capacity. In this case, plaintiff was not yet established in his given field as a chemical engineer; therefore, the court concludes that the use of Tierney's use of statistical averages is most appropriate.

4. Disability status

In analyzing this case, Tierney categorized plaintiff as an individual with a nonsevere disability, as that term is defined by the U. S. Census Bureau. This categorization necessarily excluded from consideration all persons whose disabilities are severe or prevent them from working at all. Thus, Tierney applied to plaintiff only those statistics for individuals most similar to him, *i.e.*, those who have a work disability but are still able to work. This approach provides a more highly refined predictor of the lifetime effects of plaintiff's work disability than would be achieved if the analysis employed statistics for those whose disabilities are severe or prevent them from working altogether. Defendants' objection to this aspect of Tierney's methodology is without merit.

5. Worklife expectancy tables

Defendants object to Tierney's use to the New Worklife Expectancy Tables, arguing that he should have used government worklife tables that were published in 1986 and were based on data from 1979-1980. In his deposition, Mr. Tierney testified that although the New Worklife Expectancy Tables were published by his company, they are based on more recent government data, and they are formatted in a different way than the older government tables.

Since the New Worklife Expectancy Tables utilize more recent government data than the government tables published in 1986, the court concludes that it was appropriate for Mr. Tierney to use those tables rather than the stale information contained in the 1986 government tables. Defendants' objection is without merit.

6. Current Population Survey ("CPS")

Defendants also object to Tierney's use of the U.S. Census Bureau's CPS for deriving earnings and employment information for people with and without a work disability.

The CPS is conducted monthly by the Census Bureau and has a multi-purpose use within the federal government. The CPS survey is the primary source of employment data for individuals in the United States, such as the government's monthly unemployment rates that are widely quoted by the media. As plaintiff points out, according to joint web site maintained by the Bureau of Labor Statistics and the Census Bureau:

The CPS is the primary source of information on the labor force characteristics of the U.S. population. The sample is scientifically selected to represent the civilian noninstitutional population. (emphasis added).

www.bls.census.gov/cps/overmain.htm

Beginning in 1981, in March of each year the CPS is expanded to collect additional information on income and employment. Plaintiff advises that the CPS is the basis for the rates of participation and employment used in the New Worklife Expectancy Table through expanded questions that specifically address work disability.

Consequently, the court concludes that the defendants do not have a clear understanding of the CPS, the information it contains, and the percentage of the population it represents. Defendants' objection to Tierney's use of the CPS is without merit.

C. Tierney's "fit" between the assumptions underlying his opinions and the facts of this case.

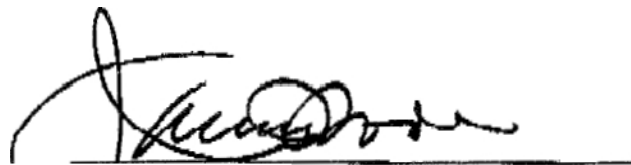
Based on a review of Tierney's methodology and the factors he considered in arriving at plaintiff's projected economic loss over the course of his lifetime as the result of plaintiff's work disability, the court concludes that Tierney's analysis, assumptions and approach were a good "fit" to the facts of this case. Defendants' argument to the contrary is without foundation.

IV. CONCLUSION

Based on the testimony of John P. Tierney, the court concludes that he is qualified to offer expert testimony in this case as a vocational economic analyst and that the methodology he employed in reaching conclusions regarding plaintiff's projected loss of lifetime earnings, under various scenarios, is relevant and reliable. In that it is based on sufficient facts or data that are the product of reliable principles and methods appropriately applied and tailored to fit the facts of this case.

Accordingly, **IT IS HEREBY ORDERED** that defendants' motion to exclude the expert testimony of John P. Tierney [DE #19] is **DENIED**.

This 28th August, 2002.

A handwritten signature in black ink, appearing to read "James B. Todd", is written over a horizontal line.

JAMES B. TODD.
UNITED STATES MAGISTRATE JUDGE