

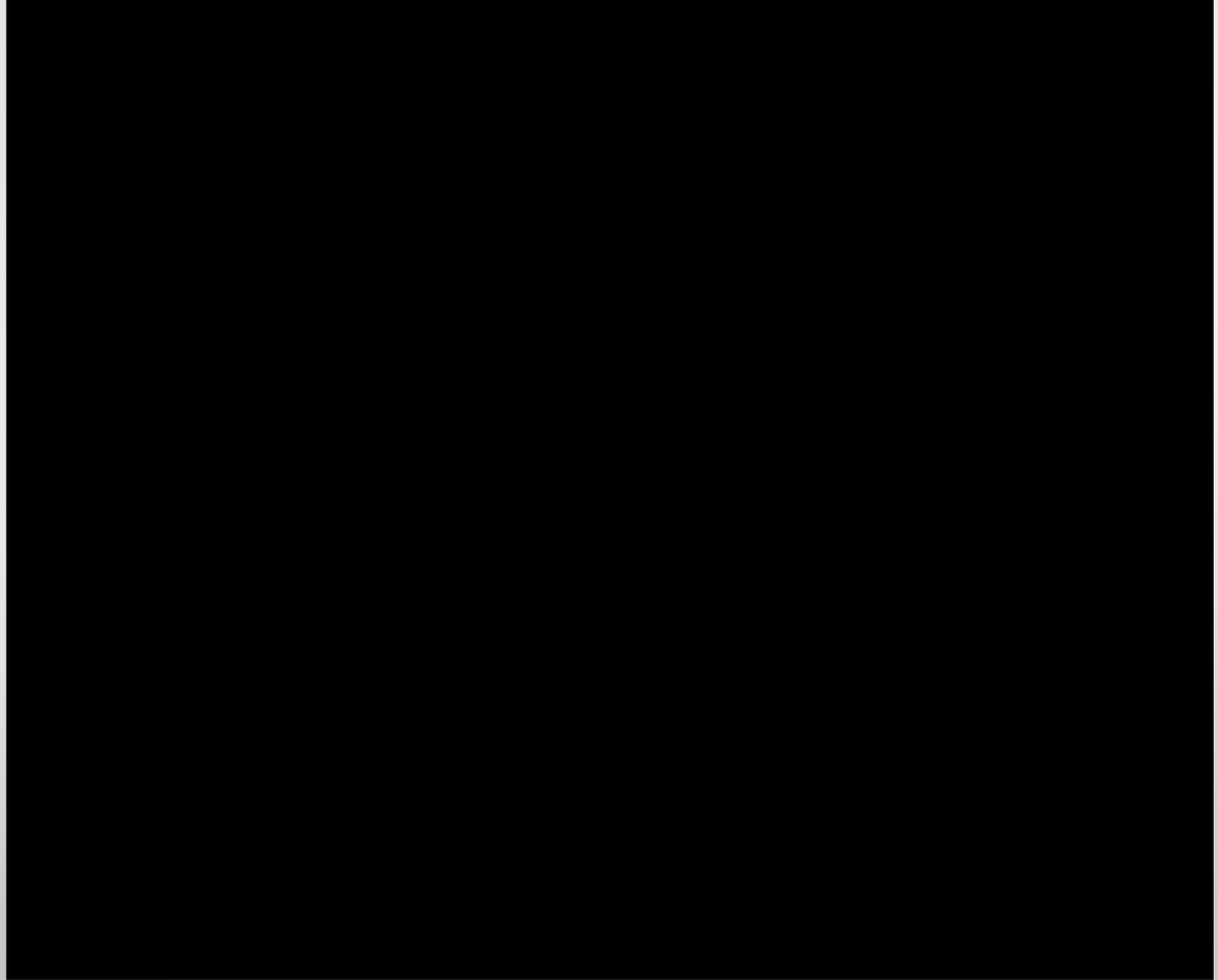


# Challenges Ahead Daubert Challenges and Clinical Judgement A Case Study

Presented by:

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Before you start a career in forensic expert work. Stop and know the rules.



# Motions in Limine

- A motion in limine is a request by a party to prevent a piece of evidence from being brought into the trial, which can include expert testimony.

# Local versus Federal Rules

- State and Federal Courts have *Rules of Civil Procedure* that govern the process of a civil action.
- The *Federal Rules of Civil Procedure* govern civil actions in federal courts.
- Most state court Rules of Civil Procedure are *similar* to the federal rules, but there may be some differences

# Daubert v. Frye

- 40 states use a Daubert Standard
- 8 states use a Frye Standard
- 3 use an “other standard”



# Frye States

California, Florida, Illinois, Maryland, New Jersey, New York, Pennsylvania,  
Washington



# Daubert States

Alaska, Arkansas, Arizona, Colorado, Connecticut, Washington, DC, Delaware, Georgia, Hawaii, Idaho, Indiana, Idaho, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Minnesota, Mississippi, Missouri, North Carolina, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming



# Other Standard

Nevada, North Dakota, Virginia

# The Frye Rule

*Frye v. United States.* The traditional standard for the admission of medical testimony was established in the *Frye* case, which involved the appeal of a criminal defendant who was convicted based on a precursor to the lie detector. This machine measured changes in the systolic blood pressure and the operator of the machine would then correlate these changes with the defendant's truthfulness. The defendant argued that this was an unfounded technique that was not recognized by scientists in the field. The Court agreed, and established this standard:

# The Frye Rule

- When special experience or knowledge is required, then the opinions of the witness skilled in that particular science are admissible in evidence
- The knowledge must be sufficiently established to have gained “general acceptance” in the particular field.
- The Frye Rule is still used by half of the states for deciding admissible testimony.

# Shortcomings of the Frye Rule

The *Frye* rule has several shortcomings:

- General acceptability excludes many new discoveries that have not had time to become accepted.
- General acceptability is hard to establish for narrow areas of inquiry where there may only be a few experts.
- It is also problematic if the plaintiff is arguing that what is generally accepted is not true.
- The *Frye* rule proved difficult to administer, encouraging judges to allow broad latitude for the admission of questionable evidence.

# Frye Case Example

Evers v. Roder, 103 P.3<sup>rd</sup> 680 (OR Appl Ct, 2004)

Case was in Oregon, a Daubert State

Court held: “Noting that *Daubert* applies, but that and Daubert challenge to the expert’s opinion will be waived if it is not raised during the expert’s deposition”.



# Group Discussion on Sample Cases



# Federal Rule of Civil Procedure

Legal Information Institute, Cornell Univ.

<http://www.law.cornell.edu/rules/frcp/>

# Disclosure

The parties must disclose, within 14 days of the *discovery conference*, the *names of expert witnesses the party may use at trial*, together with a report compiled and signed by the expert witness.

# What must an Expert Report Contain?

- ▶ A complete statement of all opinions the witness will express and the basis and reasons for them;
- ▶ The facts or data considered by the witness in forming them;
- ▶ Any exhibits that will be used to summarize or support them;
- ▶ The witness's qualifications, including a list of all publications authored in the previous 10 years;
- ▶ A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition (Federal Rule);
- ▶ A statement of the compensation to be paid for the study and testimony in the case.

# Attorney Client Privilege, What about Experts?

- If you are a consulting expert, there is no need for disclosure. Your work product is protected. Reports are considered attorney work product and are not discoverable
- Expert Witnesses—Reports are discoverable.

# Rule on Draft Expert Reports (FRCP 26(b)(4))

- ▶ (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
  - ▶ (i) relate to compensation for the expert's study or testimony;
  - ▶ (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - ▶ (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

# Rule 34 Production of Evidence

- ▶ After the initial disclosure, parties may demand certain things from other parties. These things are
  - Documents
  - Electronically-Stored Information
  - Tangible Things
  - Entry onto Land
- ▶ The other party may object that the request is unreasonable or if it is privileged.

# Failure to Produce

- Serious Matter. Court can compel production; if a party does not comply could be held in civil contempt in extreme cases.
- Duty to Preserve—Once a party reasonably suspects it is likely to be involved in a suit, it is under a common law duty to preserve evidence.
- Loss or destruction of evidence is referred to as *spoliation*. Depending upon the extent and deliberation of spoliation the court may impose penalties that will hurt the spoliating party at trial, up to and including striking a claim or defense, or instructing a jury that the spoliation can be taken into account as evidence of culpability (“adverse inference” instruction).

# Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.
- irrelevant evidence is not admissible.

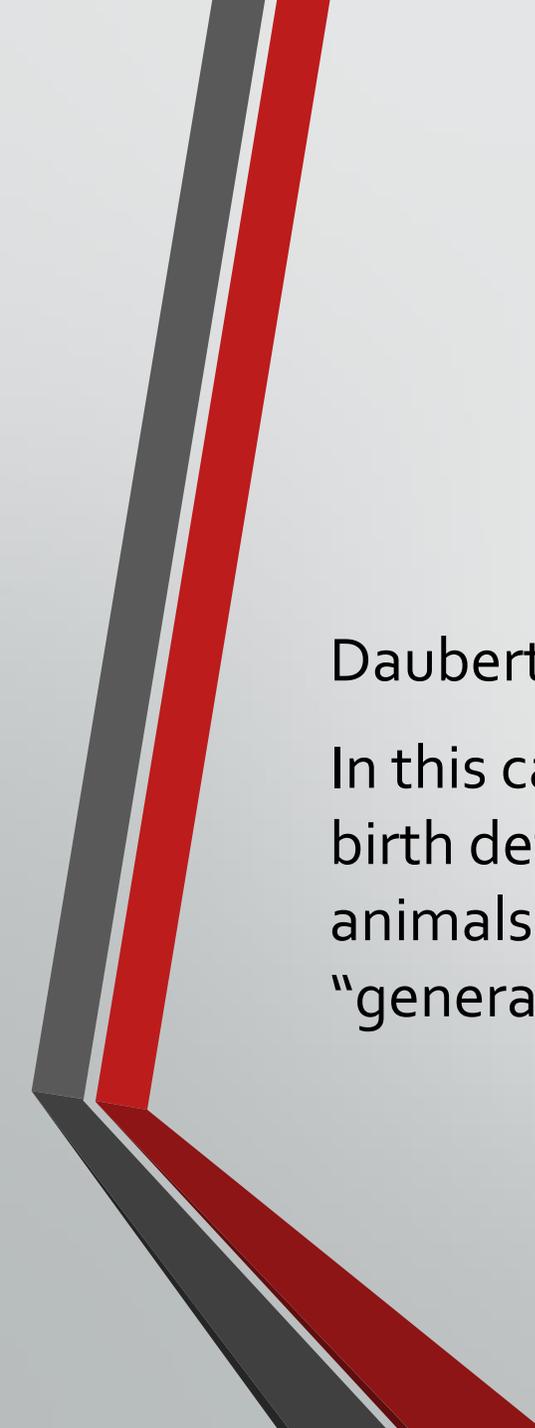
# Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

- unfair prejudice,
- confusing the issues,
- misleading the jury,
- undue delay, wasting time,
- or needlessly presenting cumulative evidence.

# Federal Rules of Evidence 702

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”



# The Daubert Standard

Daubert v. Merrill Dow

In this case, the Jason Daubert's mother ingested Bendectin, causing serious birth defects. Eight experts testified that the drug can cause birth defects in animals. However, the district court ruled that the evidence did not meet the "general acceptance" standard.

# Daubert – Key Points

- “Rule 702 is, we emphasize, a flexible one. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”
- “Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.”
- “Our discussion is limited to the scientific context because that is the nature of the expertise offered here.”

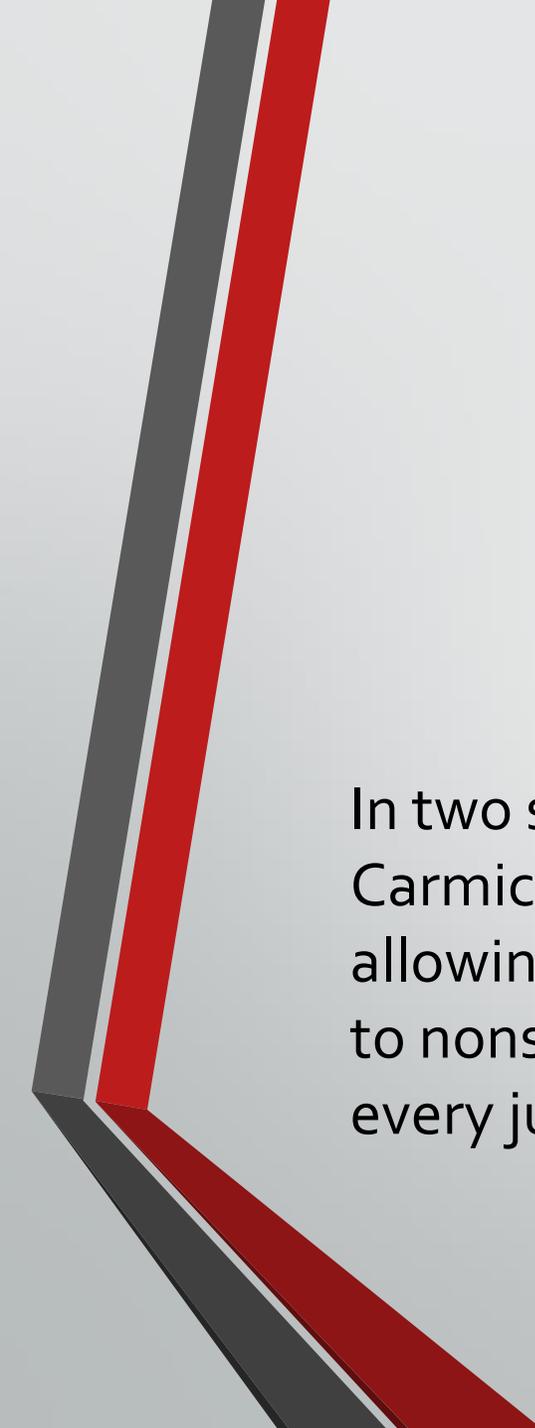
# Daubert Key Points

- “what is the difference between scientific knowledge and other types of knowledge” [technical or other specialized knowledge].
- “knowledge” is the key focus, meaning that the appropriate questions of inquiry on reliability need to relate to the facts of the case.

# Daubert

From the Daubert case came the following standards:

- Is the theory or method testable?
- Is the theory or method subject to peer review?
- Is the theory or method generally accepted by the community?
- What is the known error rate?



# Post Daubert Era

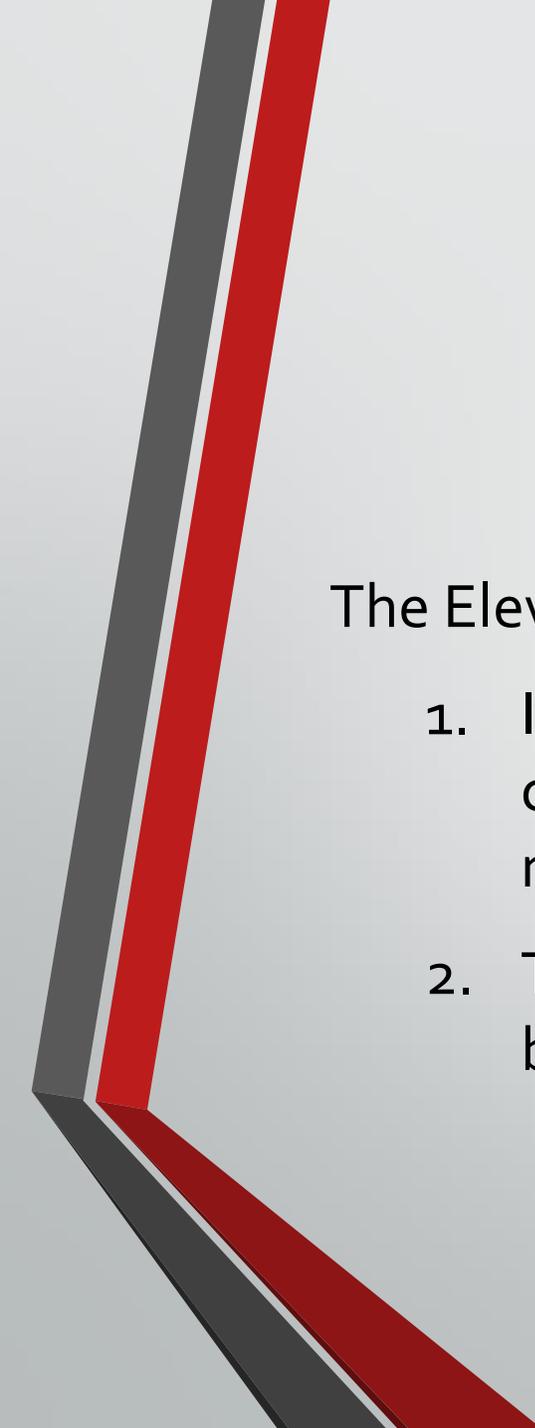
In two subsequent cases, *General Electric Co. v. Joiner* and *Kumho Tire Co. v. Carmichael*, the Court broadened the reach of trial judges under Daubert by allowing them to consider methodology and extended the gate-keeping role to nonscientific evidence. Similar to the introduction of FRE 702, however, not every jurisdiction adopted each subsequent modification.

# General Electric v. Joiner

Robert Joiner was working as an electrician. He was diagnosed with small cell lung cancer. He would sometimes have dielectric fluid splashed in his eyes. Transformers were contaminated with "PCBs", widely considered to be hazardous. He was also exposed to "furans" and "dioxin".

# General Electric v. Joiner

Mr. Joiner sued GE. The District Court ruled that there was a genuine issue of material fact as to whether Joiner had been exposed to PCBs, but granted summary judgment for petitioners because (1) there was no genuine issue as to whether he had been exposed to furans and dioxins, and (2) his experts' testimony had failed to show that there was a link between exposure to PCBs and small-cell lung cancer and was; therefore, inadmissible because it did not rise above "subjective belief or unsupported speculation." In reversing, the Eleventh Circuit applied "a particularly stringent standard of review" to hold that the District Court had erred in excluding the expert testimony.



The Eleventh Circuit reversed because of two fundamental errors:

1. It excluded the expert's testimony because it drew different conclusions from the research than did each of the experts. It was noted this should be left to the jury to decide on competing opinions
2. There was no genuine issue of material fact as to whether Joiner had been exposed to furans and dioxins.

# Joiner

The US Supreme Court reversed the District Court Opinion. The Appeals Court applied a particularly stringent standard of review (relying on *Daubert*). “While the FREs allow district courts to admit a somewhat broader range of scientific testimony, [the Rules] leave in place the gatekeeper role of the trial judge in screening such evidence.”

# Joiner

- That judges will have discretion regarding what testimony to allow or not allow under the admissibility rules. The judge is the Gatekeeper.
- Generally referred to as the “abuse of discretion” rule.



# Discussion and Case Studies



# Kumho v. Carmichael

In this case, a tire blew out and the vehicle overturned. One person died and several were injured. Carmichael, the driver, believed the tire was defective and brought suit against Kumho Tire.

# Kumho

- Carlson was the expert in the Kumho case.
- Based his opinion on the visual inspection of the tire, the day of the deposition.
- He concluded that the separation of the tire was a manufacturing defect.

# Kumho

The District Court applied the *Daubert* factors to expert's testimony and found that "those factors argued against the reliability of Carlson's (expert) testimony."

# Kumho

- The Eleventh Circuit (appeals) “held that the District Court had erred as a matter of law in applying *Daubert*”.
- “Believing that *Daubert* was limited to the scientific context, the court held that the *Daubert* factors did not apply to Carlson’s testimony, which it characterized as skill or experience-based”.

# Kumho

- The US Supreme Court concluded that, under *Daubert*, the court's gatekeeping obligation “applies not only to scientific knowledge, but also to testimony based on technical and specialized knowledge”.
- The “test of reliability is flexible, and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case”.

# Kumho

Regarding Carlson's methodology, the court found:

- There was “No indication that other experts use Carlson's particular approach.”
- There were no references to articles or papers that validate his approach.
- “Nothing in *Daubert* or the Federal Rules require a district court to admit opinion evidence connected to data only by the *ipse dixit* of the expert”.

# Other cases for review

- Paoli Railroad Yard PCB35 F.3d 717 (1994).
- Weisgram v. Marley Co. US Sp Ct, No. 99-161, 2000.

# Frye, Daubert, Kumho and Joiner

- A good understanding of these cases are imperative to every expert.

# Admissible Testimony

- ▶ Rules Established by Law
  - *Frye, Daubert, Kumho, Joiner*
- ▶ Regulations
  - FRE 702, 401, 403

# Rules & Rulings & Daubert Challenges

- ▶ Supreme Court Rulings
- ▶ Understanding Admissibility
- ▶ Recent Case Law

Source: Field (2011). *Federal Rule 702 in light of the Daubert, Kumho, and Joiner Rulings on the Admissibility of Expert Testimony.*



# Daubert Challenges

- <https://www.pwc.com/us/en/forensic-services/publications/assets/pwc-daubert-study-whitepaper.pdf>

# Daubert Challenges

- Between 2000 and 2015, 8,027 identified cases cite *Kumho Tire*. From these cases, we evaluated:
- 11,013 *Daubert* challenges to experts of all types for the same time period.
- 9,290 cite *Daubert* only
- 616 cite *Kumho* only
- 7,411 cite *Daubert* and *Kumho*



# State by State Comparison

Recommended resource with representative case examples:

<https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>

# Case Study by Michelle McBroom Weiss

Weiss, M. (2017). Vocational Evaluation of Ben Hurtin. In J. Field & T. Field (Eds.), *Forensic casebook: Vocational and economic reports* (pp. 99-132). Elliott & Fitzpatrick: Athens, GA.

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# Tennessee

- Tennessee Rules of Evidence use rule 702 and generally follows the Daubert standards determined by the Supreme Court.

# Clinical Judgement

Case Facts: This case involved a gentleman who owned a well drilling business. The business had been in his family for three generations. He had no intention of leaving the family business. He was involved in a car accident, injuring his right shoulder causing him limitations, difficulty climbing and problems performing the full duties of a well driller.

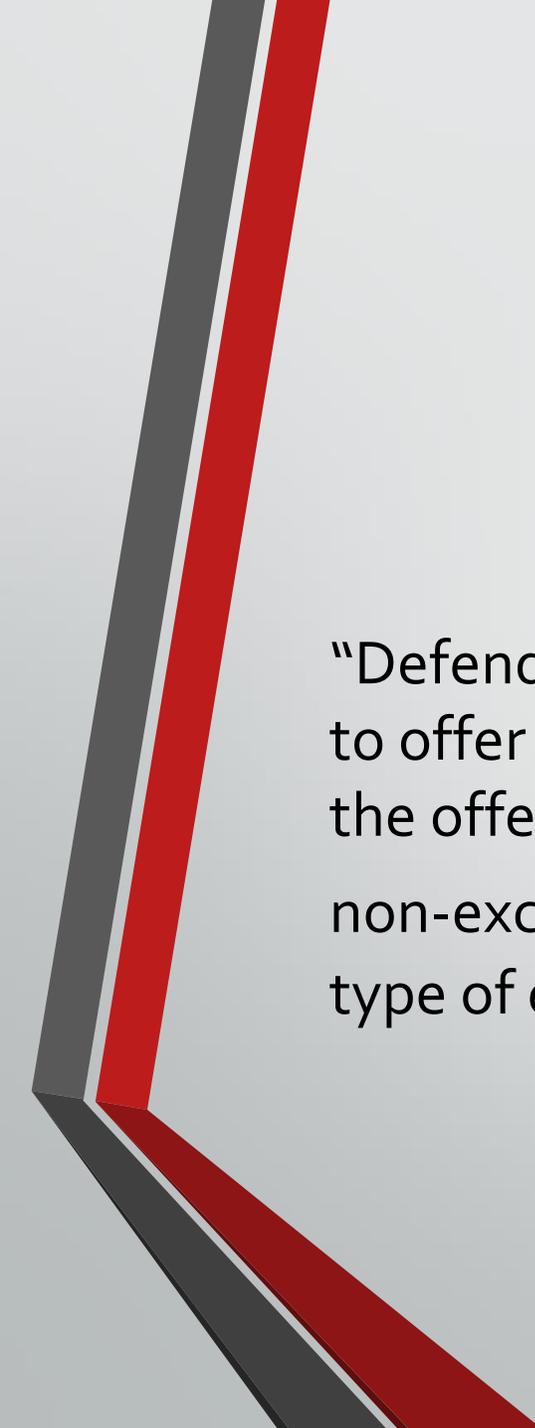
For a full review see *Forensic Casebook* (Field, J. & Field, T., Eds., 2017, 330).

# Assignment

The referral was to determine one question. Could this man do his job with or without the aid of a helper. A helper was hired after the accident, thus decreasing the profits of the business. I was not asked to determine wage earning capacity in the open labor market. To determine the answer to this question was a full wage earning capacity required?

# Was testing needed?

- A vocational evaluation was conducted, however, testing was not performed as the question of work outside the well drilling company was not a consideration.



# Motion in Limine

“Defendant does not challenge either of the proposed expert's qualifications to offer the opinion, but submits that the expert’s methodology in arriving at the offered opinions is not reliable. The Tennessee Supreme Court listed five non-exclusive factors or standards by which to determine admissibility of this type of expert testimony”:

# Motion in Limine

- Whether scientific evidence has been tested and the methodology of that test
- Whether the evidence has been subjected to peer review or publication
- Whether a potential rate of error is known
- Whether the evidence is generally accepted in the scientific community
- Whether the expert's research in the field has been conducted independent of litigation

*McDaniel v. CSX Transp. Inc.*, 955 S.W.2d 257 (Tenn. 1997)

# Motion in Limine

Further opposing counsel contended:

The Supreme Court of the State has clearly ruled that only expert testimony underpinned with scientific reliability is admissible, and that anything less fails to constitute reliable expert knowledge that would be helpful to the court and jury. Without this empirically "reliable" foundation, underpinning their mythology, the expert opinion is inadmissible.

# Know your local rules and state Supreme Court rulings

In the motion, opposing counsel cited *Chandler v. Cracker Barrel Old Country Store, Inc.*, 2007 WL 1710572, the vocational expert (whose testimony was ruled admissible) developed a profile of the subject's qualifications prior to the injury to determine what types of work a person was qualified to perform. Then, looking at any restrictions they have as a result of the injury and using Bureau of Labor Statistics, made an evaluation of job opportunities which would be available to them in their diminished state. (Emphasis added)

# Motion Allegations

Ms. Weiss readily admits that she did not follow that methodology, rather she was requested to specifically determine plaintiff's "ability to perform his job at the time (of the interview 2 years after this accident), and after (a speculative or assumed shoulder surgery that has not been performed), with or without the accommodation of a helper".

# Motion Allegations

“She admits there was no analysis of the labor market, transferable skills and ability to perform other jobs. She also notes that the medical proof submitted did not address work restrictions either immediately before the accident or immediately after the accident. Rather, work restrictions were solicited with regard to "current work restrictions (2 years after the accident) and expected permanent restrictions following Mr. Hurtin’s potential surgery"(at some time in the future). (Weiss Deposition page 11, 12).

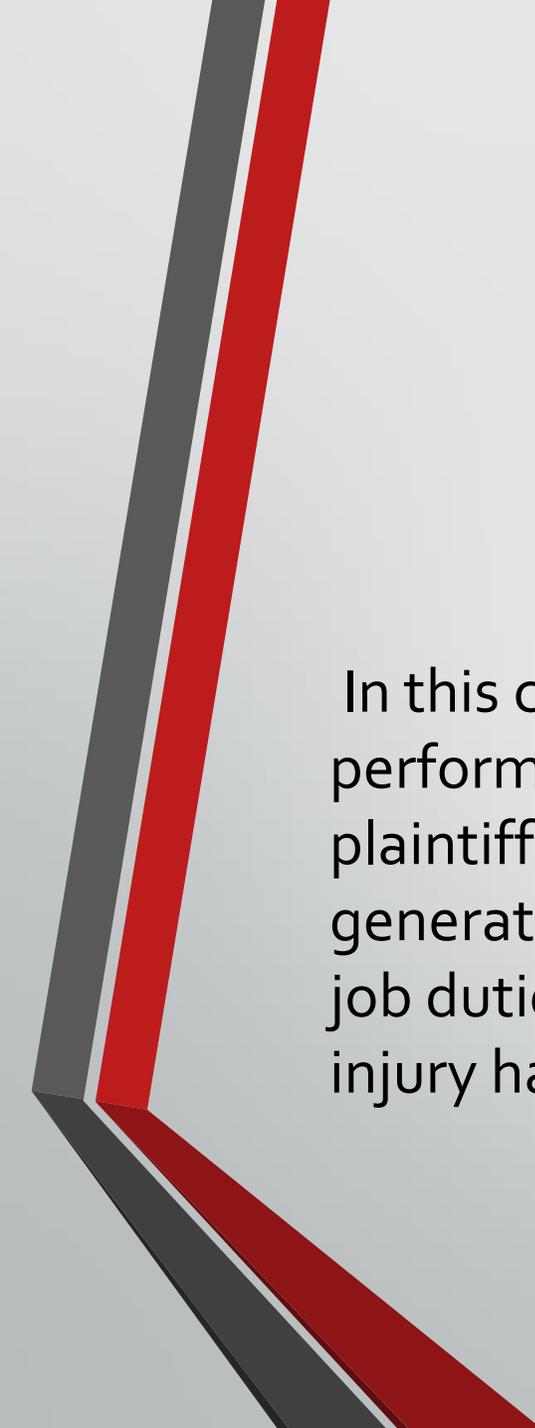
# Motion Allegations

The motion further outlined “ She admits there was no analysis of the labor market, transferable skills and ability to perform other jobs. She also notes that the medical proof submitted did not address work restrictions either immediately before the accident or immediately after the accident. Rather, work restrictions were solicited with regard to "current work restrictions (2 years after the accident) and expected permanent restrictions following (the Plaintiff's) potential surgery"(at some time in the future). (Weiss Deposition page 11, 12)”.



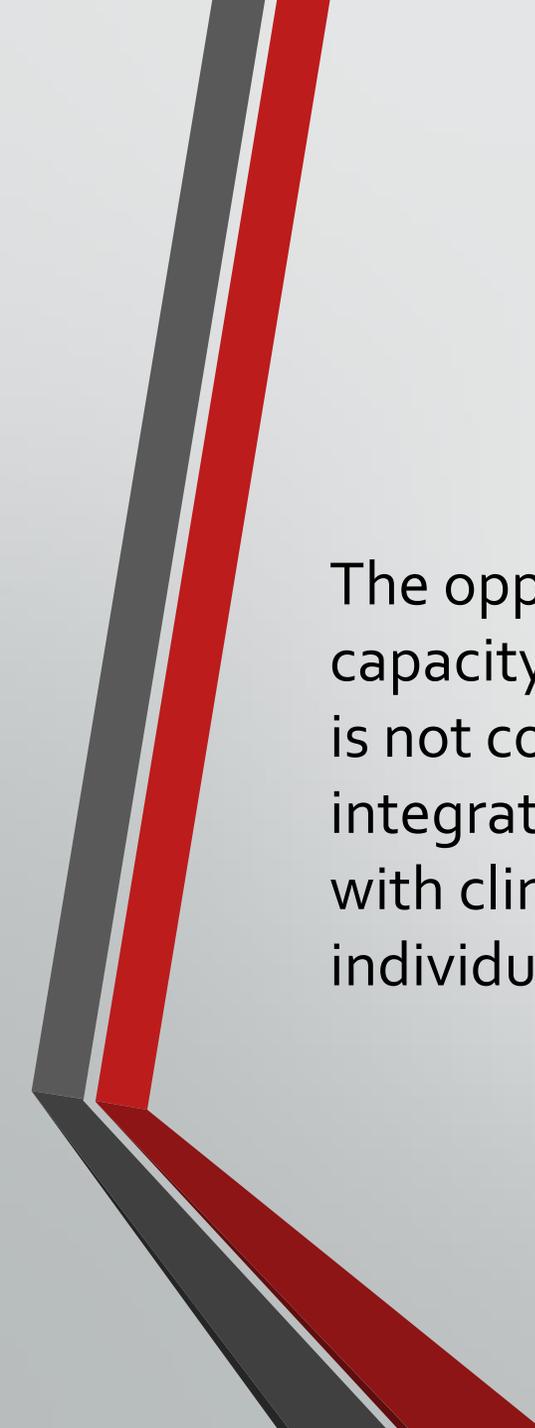
# Assist in the Response to the Motion in Limine

I contend that it is important for each of us to assist our retaining counsel with response to a motion in limine. They may or may not fully understand the methods or rationale involved in what is “generally accepted” in our field. And why clinical judgement may require that each case not be “cookie cutter”.



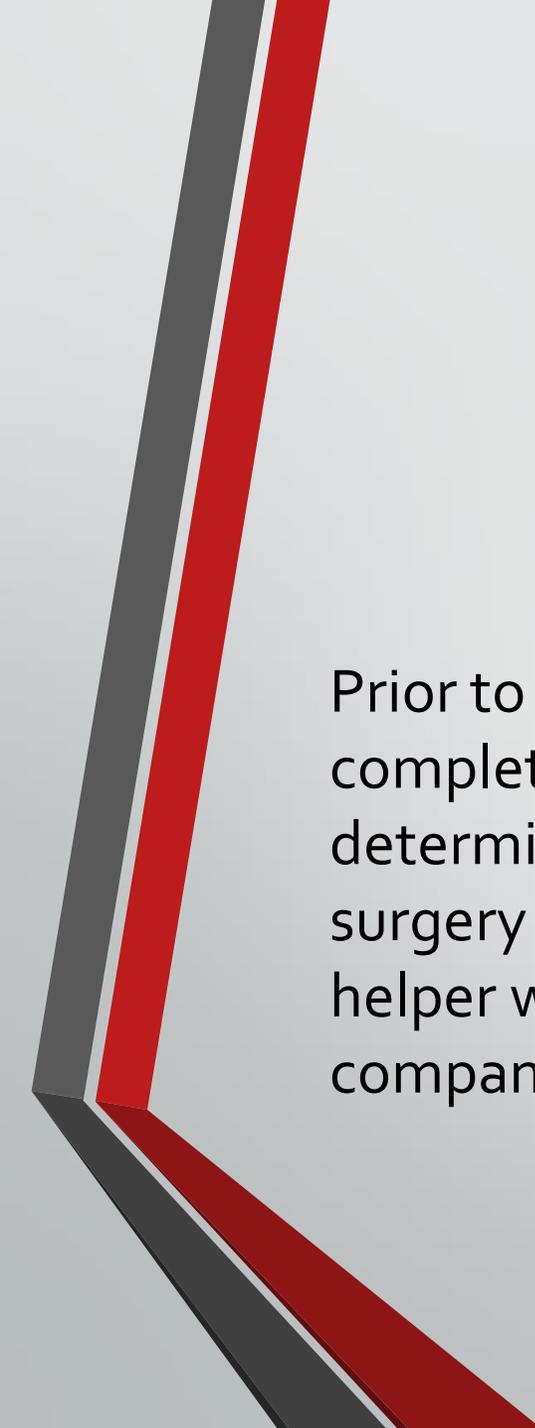
## Why a Full Loss of Earning Capacity Assessment was not warranted

In this case, the referral request was to evaluate whether the plaintiff could perform his past work of water well driller with or without a helper. The plaintiff is owner of the company and it has been in his family for four generations. At the time of the injury, he reported he was completing his full job duties, without the aid of a helper. He had one employee, and since the injury had required a helper to assist with his heavier job duties.



# Answer to Motion

The opposing counsel assumes that all cases require a full loss of earnings capacity opinion and assessment. I cited “Evidence-based vocational analysis is not cookbook vocational evaluation. Because it requires an approach that integrates, the best external evidence of an individual’s behavior and choices with clinical experience, it cannot resort to a Slavic, formulaic approach to individual analysis.” (Elhert and Berg 2010, p. 28).



## Answer to Motion

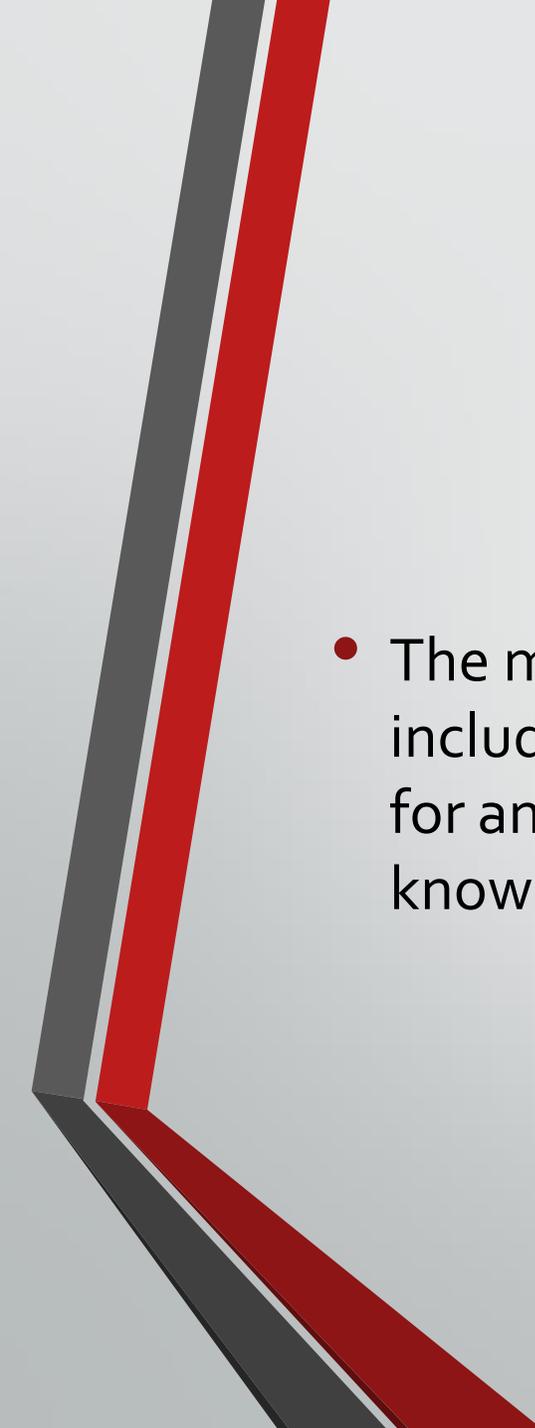
Prior to the injury the plaintiff did not have any work restrictions and was completing his full job duties. The treating physician was contacted to determine current work restrictions, as well as, projected restrictions after surgery and recovery. My need for this was to determine if the need for the helper was temporary, resulting in temporary decrease in profits for the company.

# Answer to Motion

- I followed accepted methodology by sending a restriction form, consistent with the *Dictionary of Occupational Titles*
- I deferred to the physician for work restrictions, as I am not qualified to assign work restrictions. This is congruent with the *Rehabilitation Consultant's Handbook*, which confirms the need for the clarification by a physician for permanent work restrictions. "In gathering medical proof of both permanency and exertional impairment, it is essential that the physician be asked questions regarding reduced exertional capacity from a vocational perspective. (p. 40).
- Furthermore, this is consistent with all aspects of vocational rehabilitation whether providing an opinion at Social Security disability hearings, Federal OWCP cases, the Veteran's Administration, long-term disability cases or other venues. If there is a question of work restrictions the physician is contacted.

# Know your Resources

- The DOT is used in all types of cases as a basis for opinions. This includes Social Security hearings, US. Department of Labor Office of Workers Compensation Programs (OWCP), the U.S. Veteran's Administration, state Departments of Vocational Rehabilitation and by private rehabilitation counselors in forensic cases, as examples.
- The DOT was based on 75,000 job analyses conducted by following an established procedure detailed in the *Handbook for Analyzing Jobs* and the *Revised Handbook for Analyzing Jobs*.



# Know your Resources

- The methodology for the job analyses that were conducted by the DOL is included in the RHAJ. This provides a basis for analysis if a job is appropriate for an individual by a vocational rehabilitation expert using specialized knowledge. This is a reliable and widely used method.

# Was a Transferable Skills Analysis needed?

- In analyzing if the plaintiff could complete his past work, the initial portion of a transferable skills analysis was completed which includes identifying the person's work history and developing a pre-injury profile. In the plaintiff's case, he has only had one job for the majority of his adult life, spanning over 30 years. This would be his only past relevant job.

# Methods

- I explained my use of the DOT, information from the Underwater Ground Water Drilling Association, and labor market research. These were used to determine the typical well driller job duties and is generally accepted methodology in the field of vocational rehabilitation. I cited various publications.

# Know your History

In vocational rehabilitation there is an establishment of the maintenance of work adjustment for individuals with disabilities. Dunn and Kontosh (2002) report a well-established return to work model that is often considered on pages 41-42.

- Return to work, same job, same employer;
- Return to work, different job, same employer;
- Return to work, different job, different employer.

# Pre-Injury Wage

There was a question as to why I did not consider a pre-injury wage earning capacity analysis.

Mr. Hurtin's tax returns exceeded the 90<sup>th</sup> percentile for the well driller. He has consistently performed the same job for over 30 years and is owner of his business. As a result, his pre-analysis only included well driller as his past relevant work.

# Post Injury Wage

- Post injury, I did not consider a post injury wage earning capacity as it was improbable any job would pay him more than his high wage at his family business. Even with his loss of income due to the helper, he still exceeded the 90<sup>th</sup> percentile for a well driller. He would earn less in the open labor market. The only question posted to me was if he could do his job as a well driller with or without a helper. The economist was going to use this information to further value the business and determine any loss related to the injury.

# Economist

- An Economist was used to determine the impact of the helper's salary on the business profitability and future costs.

# Is each case the same?

- Opposing counsel falsely assumes that each case is the same and the same steps or research would be required in each case. “The expert does nothing to investigate what the plaintiff would have been capable of earning but for the injury”.

# Know Case Law related to Vocational Experts

I cited *Boland-Maloney Lumber Company v. Burnett & Burnett*. In this case an economic expert's testimony was challenged by the plaintiff because the expert failed to use the plaintiff's actual career at the time of injury to calculate a loss of earning capacity, but instead used a "proxy," such as the titles of construction supervisor and construction manager. The expert, who had worked in the field of vocational counseling and rehabilitation since 1965, "based his testimony on the interview with the plaintiff, information on the [plaintiff's] employment and work history, and upon the nature of the [plaintiff's] injuries."

# Case Study

The expert argued that the worker's actual earnings were not indicative of the worker's earning power. The court ruled: *Although [expert's] testimony was not based on [plaintiff's] actual earnings at the time of injury, nothing precludes testimony by a vocational expert on the impairment of a plaintiff's power to earn money, or the use of a 'proxy' to do so where current earnings are not indicative of the plaintiff's earning power. The trial court did not abuse its discretion.*

# Case Study

- This case is important because it allows for the correct and creative approach to assessing vocational capacity and not just mere performance, i.e., a person not performing to their level of capacity” (Field 2010, p. 9-10).

# Case Study

Plaintiff's actual earnings exceed the expectations of his over 30-year career. He made an exceptional wage for someone without a college degree. The typical wage for someone with a high school diploma is \$651.00 per week according the data from the BLS for 2013. In considering even a college degree, Plaintiff by far exceeded the national average wage for individuals with a college degree, which is \$1,108.00. per week.

# Case Study

- The Plaintiff earned over \$100,000/year since 2009.
- The BLS statistics would be expected to be approximately \$1,211.00 per week or \$62,990.00 when considering his profession, he has demonstrated an ability to exceed the 90<sup>th</sup> percentile.
- Further analysis was not required and the economist was to value the business before the injury and after, which is beyond my scope of expertise.

# Know and advise regarding Code of Ethics.

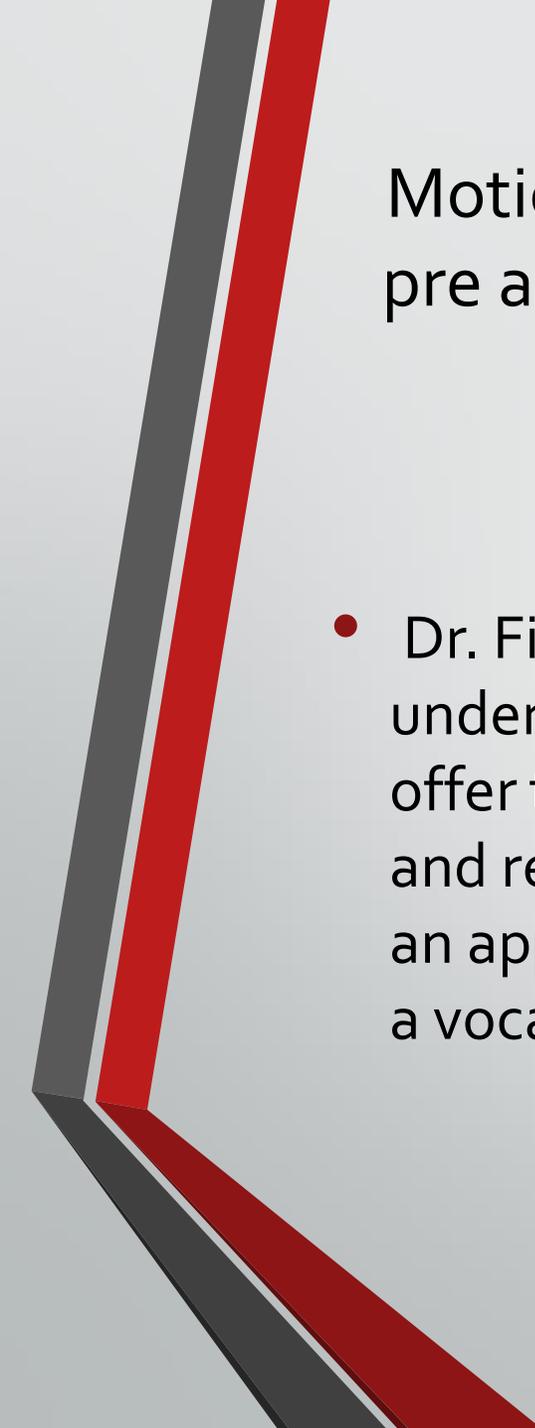
- The Commission on Rehabilitation Counselor Certification Code of Ethics requires that I remain within my areas of expertise. In section D1, Professional Competence, I am required to stay within my boundaries of competence “based on my education, training, supervised experience, professional credentials and appropriate professional experience”. This is further reiterated in section F.2.a., for qualifications to provide expert testimony. This cites that “Rehabilitation counselors have an obligation to present to the court, regarding specific matters to which they testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training and education) for their qualifications as an expert, and the relevance of those factual bases to their qualifications as an expert on the specific matters on the issue”. (CRC Desk Reference p. 113-119)

# Motion

Opposing Counsel stated my testimony was “a reiteration of the plaintiff’s testimony that he cannot perform the work of a well driller” (p. 44 deposition). This is within the jury using common sense. He further cites State v. Scott noting that “Accordingly, a court would not err by excluding an expert whose testimony consisted solely of providing a dressed – up and credentialed declaration of what would be already safely within a juror’s common sense understanding”.

# Motion Response

- Answered how my specialized skills were used within standard protocol. I did more than accept his statement he could not do his work without a helper. Standard resources were used, his description of the job, professional organizations were contacted, as well as labor market research to determine typical and usual duties in the job of a well driller.



Motion allegation: No comparison of experience of the business pre and post injury. If using good data but flawed methodology, the information is unreliable.

- Dr. Field cautions in his 2010 publication that the vocational expert needs to understand the parameters of his or her areas of expertise and be careful to offer testimony only in those areas (Field 2010, p.9). The business valuation and review of profits and expenses is outside my realm of expertise. This is an appropriate consideration for a forensic accountant or economist but not a vocational rehabilitation expert.

# Motion Allegation

The vocational expert is to translate the disability created by the accident-related injury into an assessment of earning loss caused by the inability to perform tasks as a result of the disability. The economist is not qualified to testify as to the relationship between anatomical disabilities and the impairment of future earning capacity. Opposing counsel stated that I did not provide a base for pre-injury earnings for the economist to consider.

I addressed in detail my opinion in this regard.



# Clinical Judgement

Dr. Timothy Field's publication *Admissible Testimony and Clinical Judgment the Development and the Resources Needed to Support and Sustain Opinions in Forensic Rehabilitation (2010)*. This article clearly outlines that each case is individualized. The methods and steps involved to formulate an opinion relate to the referral questions posed to the expert.



Scenarios for groups to determine if certain case reports/opinions would meet Daubert or Frye standards.

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February 3, 2015  
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100 Main Street  
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Re:            Evaluatee:            Ben Hurtin  
                  Date of Injury:        8/3/12

### Vocational Evaluation

#### I. Introduction

This case was referred to evaluate Mr. Hurtin's vocationally following his injury on 8/3/12. The referral request was specifically to determine his ability to perform his job at the time of, and after, with or without the accommodation of a helper. A detailed analysis of the labor market, transferable skills and ability to perform other jobs was not requested as Mr. Hurtin does not intend to seek alternative employment. The purpose of the evaluation was discussed with Mr. Hurtin and he signed a disclosure statement, confirming his understanding as to the purpose of the evaluation. The evaluation lasted approximately 2.5 hours. Following the evaluation, I spoke with Mr. Hurtin briefly on 2/3/15.

The following records were reviewed in relation to this case:

- Economic Evaluation Worksheet form prepared for Dr. Mark Finance, economist, by Mr. Hurtin with the assistance of Samantha Slaughter, Esq.;
- Schedule C forms from Mr. Hurtin's; tax returns for the years 2009-2012;
- Records from The Bone & Joint Clinic dated 2/17/99-3/3/99 and 8/7/12-10/30/14;
- Letter from Charlotte Wilson, Williamson County Medical Center dated 3/5/13;
- Deposition of Dr. Paul A. Thomas, orthopedic surgeon, dated 5/19/14;

- Medical records review letter from Dr. Calvin Derr, orthopedic surgeon, dated 11/24/14;
- Work Restriction Checklist forms completed by Dr. Paul A. Thomas on 1/26/15;
- Statement from Julie Shoemake, CFO, Elite Physical Therapy.

## II. Medical Summary

Mr. Hurtin's' medical treatment in regard to his reported work injury will be discussed below. The summary is not intended to be inclusive of all medical treatment, but a summary of significant treatments and particularly permanent work restrictions.

Mr. Hurtin and I discussed his prior medical history and injuries. He had a work injury in 1996 in which he turned a drill rig over. He injured his left shoulder. He was treated by Dr. Phillip Wolinski. He stated he was released with no permanent work restrictions. Following his recovery, Mr. Hurtin had a "little tightness" but no pain. He stated the only limitation he had was an inability to raise his arm fully above the shoulder level. Mr. Hurtin never returned for treatment of the left shoulder after he recovered and was released by Dr. Wolinski. Mr. Hurtin had a drilling accident in 1999 that resulted in a right clavicle fracture. He treated with Dr. Derr at the Bone and Joint Clinic. He was released by Dr. Ronald Derr, orthopedic surgeon, on 3/3/99.

In 2010, Mr. Hurtin had another drilling accident at a rock quarry. He stated it had rained and there was running water over the rock and he slipped. He grabbed a lever to steady himself. The lever controlled the drill. This came down, hitting his right foot. This resulted in a below the knee amputation by Dr. William Obremskey at Vanderbilt Orthopedic Clinic. Mr. Hurtin now wears a prosthesis. He stated after this accident, he was not assigned any specific permanent work restrictions. He returned to work without difficulty. He had a minor injury in July 2011 in which he cut the tip off of his left ring finger. He has had no problems or restrictions following this injury. Mr. Hurtin reported that at his last CDL physical, he was required to get a statement from Dr. Obremskey regarding any restrictions from his below knee amputation and prosthetic. He was able to pass the CDL.

Mr. Hurtin reported that his current injury occurred as part of a motor vehicle accident on 8/3/12. He injured his left shoulder. He stated he did not return to Dr. Wolinski for treatment, as he no longer has a practice in Nashville. Mr. Hurtin was treated by Dr. Paul Thomas, an orthopedic surgeon. Dr. Thomas' medical records and deposition were reviewed. Dr. Thomas first treated Mr. Hurtin on 8/7/12. His initial diagnosis was left shoulder severe osteoarthritis, acute exacerbation. In September an MRI was ordered. The study revealed a full thickness rotator cuff tear with severe glenohumeral osteoarthritis. A left reverse total shoulder arthroplasty was recommended. Mr. Hurtin has not had the surgery to date.

On 2/26/13, Dr. Thomas reported that the osteoarthritis was preexisting, but that the tear was related to the accident, making his symptomatology much worse. He advised that Mr. Hurtin has a severe deformity of the glenoid and recommended a CAT scan before surgery to document the glenoid integrity. He recommended that Mr. Hurtin be evaluated by Dr. Ian Byram prior to the surgery.

The most recent note provided from Dr. Thomas is dated 10/30/14. At that time, Mr. Hurtin pain was persistent and severe. Throughout the records, Dr. Thomas had noted that it is worse with activities and relieved with rest. He explained that the only treatment is a reverse total shoulder arthroplasty. Extensive rehabilitation is expected and up to six months recovery time.

Dr. Thomas confirmed the above treatment and recommendations in his deposition. He did not address work restrictions. I requested that forms be sent to Dr. Thomas for an opinion in regard to current work restrictions and expected permanent restrictions following Mr. Hurtin's surgery. Dr. Thomas completed the forms and provided the following opinion.

Current restrictions:

- No limits with standing, walking or sitting;
- Driving was not addressed;
- No lifting on a frequent basis;
- Occasionally lifting 1 pound;
- Carrying 1 pound up to 10 feet;
- Push and pull with the left hand 1 pound;
- No climbing;
- Occasional stooping;
- Occasional kneeling;
- Occasional crouching;
- No reaching;
- Occasional handling;
- Frequent fine fingering.

Permanent Restrictions Post Surgery

- No limits with standing, walking or sitting;
- Driving on a constant basis;
- Frequent lifting of 5 pounds;
- Occasional lifting 10 pounds;
- Carrying 5-10 pounds with no distance limit;
- Push and pull with the left hand 5-10 pounds;
- No climbing;
- Constant stooping;
- Constant kneeling;

- Constant crouching;
- Occasional reaching;
- Constant handling;
- Constant fine fingering.

Dr. Thomas noted the pushing and pulling limits are for the left upper extremity. The total limitations appear to be in regard to the left upper extremity. His full bilateral capabilities have not been given. The above restrictions are a limited range of sedentary and light work. It is expected that the maximum work capacity would be a limited range of light work even with greater lifting capacity with the non-injured arm.

A medical records review was completed by Dr. Calvin Dyer, orthopedic surgeon, Tennessee Orthopedics. Dr. Dyer addressed and summarized Mr. Hurtin medical information related to the shoulder injury in 1997 and current 2012 injury. He opined that the shoulder has long-standing arthritic changes that were not anatomically changed by the current accident; He agreed that Mr. Hurtin would be a candidate for shoulder replacement but conservative care might be reasonable, given his age. He did not provide an opinion related to work restrictions.

Mr. Hurtin is 58 years old. He is approximately five feet nine and one half inches. He weighs 185 pounds. He is right hand dominant. He reported subjective complaints during our meeting. These problems are listed below.

- Numbness occasionally down his left arm;
- Difficulty reaching above the shoulder, more severe than preinjury;
- Difficulty kneeling;
- Difficulty lifting more than 20 pounds bilaterally with the right arm lifting and the left arm helping balance;
- Difficulty carrying more than 20 pounds with the weight being carried with the right hand and balanced by the left hand;
- Agrees with Dr. Thomas with regard to his left arm capabilities (listed above);
- Can lift up to 40-50 pounds with the right hand alone, example of lifting a water bucket with a handle;
- Difficulty climbing stairs, is slower since his prosthetic, but not due to his shoulder problems;
- Difficulty climbing ladders due to his shoulder;
- Difficulty sleeping at night, has sharp pain that awakens him if he rolls over on the shoulder, he wakes 2-3 times nightly;
- Sharp pain if his arm is bumped;
- Rainy or humid weather makes him ache more;
- Headaches, twice weekly;
- Pain in the shoulder averages a level 5-6 on a scale of 1-10;

- Most severe arm pain when he rolls over on the left shoulder in his sleep he will have a sharp stabbing pain that awakens him.

Mr. Hurtin reported that his headaches require that he take medication and lie down for approximately two hours. He has had to leave work, but it is rare as the headaches often occur late at night or first thing in the morning. He reported that Dr. Thomas has informed him that these are likely related to stress or his shoulder pain.

Mr. Hurtin reported that before his 2012 injury he could lift 100 pounds, he had no problems other than decreased range of motion in his left shoulder. He could raise it a little over shoulder level but had difficulty with full overhead reaching. This has worsened and he cannot raise his arm past the shoulder level.

Mr. Hurtin reported that his last appointment with Dr. Thomas was approximately two months ago. He stated that Cortisone shots were provided in the past and did not last more than two days. He has been offered prescribed medications but he has an aversion to taking medication. He discussed that was prescribed pain medication following his prior surgeries. He found that pain pills make him sleepy, "groggy" and "loopy." He feels like he "cannot think straight." In addition, the medications cause constipation. Due to his past experience, he has opted to take over the counter medication, as needed. He takes BC Powder and Aleve. He would like to proceed with his surgery so that he can decrease his pain and increase his functional abilities.

Mr. Hurtin is concerned about the timeframe for him to be off work to recover from the proposed shoulder surgery. Dr. Thomas noted on 10/30/14 that Mr. Hurtin will undergo extensive rehabilitation and it can take up to six months for him to heal. Mr. Hurtin obtained a statement from Julie Shoemake at Elite Physical Therapy. She has documented that it is expected that he will have therapy three times a week for twelve weeks.

During Mr. Hurtin's past surgeries and recovery time, he has lost work due to his inability to provide timely service. During his leg amputation, he had a unique opportunity to temporarily hire a licensed driller. The individual had retired and was willing to help for his three months of recovery. This included well drilling and supervising Mr. Hurtin's nephew, a lesser experienced, unlicensed driller. He reported that he would not be able to service clients during his down time. As the licensed driller he must be onsite. The only task he would allow is for his driller and helper to drill holes for blasting at quarries; however, his main business is well drilling.

### III. Family/Social History

Mr. Hurtin is 58 years old. He has been married for 25 years. Mrs. Hurtin owns the local Beautiful Woman store in Small Town. The Hurtin's have two daughters, ages

22 and 18. The eldest daughter is a registered nurse. The youngest daughter works with Mrs. Hurtin at Beautiful Woman and is attending Motlow State Community College.

The Hurtin's have lived in their two-story home in Small Town, Tennessee since 2000. Mr. Hurtin reported he does not have any problems around the home, although he finds that he cannot help with as many of the chores. In the past he completed the lawn care tasks. Now he has difficulty with weed eating and can only perform this activity for 10 minutes. He now has a nephew or his helper assist him. During the summer months when they are busier at work, he hires someone to help with the lawn care.

Mr. Hurtin reported that before the 2012 accident he did not have many hobbies. His business took most of his time. When his children were younger, he attended their activities. He enjoys his family and noted he has a great niece that was born last May. He cannot lift her but can hold her, if someone gives her to him. He attended church on a regular basis and would often help with workdays at the church. He stated he could no longer help volunteer at the church.

Mr. Hurtin reported that he purchased his grandparents farm. He raises cattle and enjoyed spending time on the farm and considered it his way of "getting away." He visited to the farm approximately twice weekly. He enjoyed feeding the cattle and repairing fences. He can no longer repair fences and needs extra help on the farm.

#### IV. Educational/Vocational History

Mr. Hurtin graduated from Small Town High School in 1974. He reported he excelled in school. He received scholarships to attend Middle Tennessee State University and to the University of Tennessee. He opted to not attend college, but rather, to work with his father in the family well drilling business. Mr. Hurtin reported that his decision disappointed many of his high school teachers, as he was an exceptional student.

Mr. Hurtin is a member of the National Ground Water Association. He has state licensures and national certifications, which require continuing education. Mr. Hurtin is interested in pump instillation, which will require further certification. If he expands his business to provide the extra service, he will hire technicians in this regard.

Mr. Hurtin reported that he has worked for Hurtin Well Drilling since 1976. This is a family business and he is the fourth generation, as his great grandfather founded the company in 1890. He worked for his father until his father retired at age 71. Mr. Hurtin reported that even as a child, as young as age four, he went to work with his father, helping as much as possible.

Mr. Hurtin briefly left the business and worked for Hefty Brothers Construction from 1974-1975, The Hefty family were family friends. He worked on road crew helping to build I-24 toward Clarksville. He next worked for his uncle at Hurtin Tire Shop from 1975-1976 as a laborer changing tires. Mr. Hurtin decided to return to the family well drilling business.

Mr. Hurtin is the owner and works as a well driller. We reviewed the *Dictionary of Occupational Titles* (DOT) definition for well driller and he was in agreement with the description. He has a CDL, as this is required to drive the drill rigs. Most of his work is flat rated but he bids on government contracts once or twice a year. The code of estimator was reviewed and he agreed with this title. He stated he can read blue prints and bid a job, but it is a minor part of his job. Most of his bids are verbal. Due to his years in the business he knows the local geology and is able to appropriately estimate jobs. He reported he only reviews blue prints once or twice annually.

Mr. Hurtin discussed that he is in agreement with the physical demands outlined by the DOT for well driller. This includes the classification that the job demands are heavy. The only exception was that the classification of occasional crawling and crouching would be rare or the lower end of the occasional classification. He believes the reasoning, math and language would be higher to bid the jobs and also the reports he must complete on all well projects. He stated the reports are handwritten.

The physical demands listed in the DOT are below:

Occasional is defined as 1-33% of the workday

Frequent is defined as 34-66% of the workday

Constant is defined as 67-100% of the workday.

The physical demands of the well driller title are below:

STRENGTH: Heavy

Exert force of 50-100 lbs. occasionally, or 25-50 lbs. frequently, or 10-20 lbs. constantly.

OTHER PHYSICAL DEMANDS:

CL - Climbing - Occasional

BA - Balancing - Occasional

ST - Stooping - Occasional

KN - Kneeling - Occasional

CR - Crouching - Not Present

CW - Crawling - Not Present

RE - Reaching - Frequent

HA - Handling - Frequent

FI - Fingering - Frequent

FE - Feeling - Occasional

TA - Talking - Occasional

HE - Hearing - Occasional

TS - Tasting/Smelling - Not Present

Mr. Hurtin reported that due to the length of time the company has been in business, he does not have to market the business. His wife does his bookkeeping. His nephew, Sam Smith is has worked with him since he graduated from high school in 2009. Mr. Smith shadowed Mr. Hurtin, much like Mr. Hurtin shadowed his father, until he was able to work and worked with him part time prior to his graduation. Mr. Hurtin has enjoyed mentoring him and noted that he was still training his nephew when the accident happened. He feels guilt as he has difficulty with the continued training of his nephew due to his inability to complete the physical tasks

Mr. Hurtin discussed specific duties that are hard for him. A recent example was that there was a problem on the drill tower. This is 35 feet high. He could not climb to get to the problem and stated advising his nephew and the helper, it took ten times as long as he could not get to the problem and demonstrate the process to repair the problem. He gave examples of heavier tasks that he cannot perform. One example is lifting tools and casings. The well castings weigh 13 pounds a foot and are 21 feet long or 273 pounds. He stated they must manually load these onto the truck. He stated unloading the tools requires lifting 35-40 pounds. He has problems tightening bolts.

Mr. Hurtin reported that following his 2012 injury, he was required to hire a helper to help with the heavier job demands. Steve Strong has worked for him part time as a helper for approximately two years. He reported that the work is seasonal and that he could not hire the helper full time, He guaranteed him 25 hours of work. He stated that Mr. Strong had left Hurtin Well Drilling earlier in January due to a need for full time work. Mr. Hurtin has hired James Taylor to begin working as a helper in March. He reported he had to hire him on a full time basis. He stated he has mechanical skills and is expected to be able to do more than Mr. Carter.

Mr. Hurtin reported that his own vocational training has been on the job. He has state licensure that requires annually renewal. Mr. Hurtin holds the licensure but is able to give employees a "drillers card." This allows the worker to drill under his supervision. Mr. Hurtin goes out on every job due to the liability involved with any mistakes. He noted his nephew, Sam Smith, has the drillers card. He is not proficient and Mr. Hurtin needs to supervise and instruct him and the helper. Both Mr. Hurtin and Mr. Smith can drive the driller to worksites as they both have CDLs. Currently, Mr. Hurtin stated he is unable to drive the driller and Mr. Smith is doing this task. It is uncertain if Mr. Hurtin will be able to pass the medical physical to maintain his CDL in the future.

Mr. Hurtin has certifications through national organizations. He maintains the required continuing education units (ceus) for the licensure and certifications. He has certifications through the National Ground Water Association as follows:

- Certified Well Driller (CWD) – Encompasses general industry knowledge, as well as practice and expertise in at least one drilling method.

- Certified Vertical Closed Loop Driller (CVCLD)— An individual who knows the skills and competencies associated with constructing a loop well used in geothermal heating and cooling systems.

Mr. Hurtin is also licensed through the state of Tennessee for both designations. His license number is 1000.

Mr. Hurtin is a member of the International Ground Source Heat Pump Association. He has the following certification through this organization.

- Accredited Vertical Loop Installer – The accreditation includes skills in the following areas:
  - GSHP System Design and Layout Basics
  - System Materials
  - Pressure Drop Calculations
  - Thermal Conductivity
  - Drilling Processes
  - Containment Procedures
  - Grouting Concepts
  - Air and Debris Purging
  - Pipe Joining Techniques
  - Project Bidding
  - Partnerships

Mr. Hurtin has recently accepted a part time job as a member of the Board of Directors of the Small Town Bank. He started in this job in April of last year. His salary is \$23,000.00 last year. He reported that he earns \$1500.00 per month and there is a bonus at Christmas time. Last year the bonus was \$5000.00. He stated that this job involves one meeting per month, lasting approximately two hours. In addition, there is an occasional conference call. This does not impact his current work and he would have accepted this job, if offered, prior to his injury. He would not have had any problem completing it and his duties at Hurtin Well Drilling.

Mr. Hurtin is Chairman for the Planning Commission for the City of Small Town. This is a volunteer job with no income derived. This involves one meeting monthly.

Mr. Hurtin also owns rental properties that generated income for him. In the past he was able to complete the minor maintenance tasks for the properties. He now pays his helper from the well drilling business to help. He stated his increased expenses are hard to determine, as it was unpredictable year to year what maintenance problems would arise.

V. Tested Skills and Abilities

Vocational testing was not administered in this case. Mr. Hurtin is not planning to leave his current business and has no plans to seek alternative employment or to retrain.

Mr. Hurtin past work history was reviewed using the *Dictionary of Occupational Titles* (DOT), *the Transitional Classification of Jobs* (COJ) and the SkillTRAN *Pocket Guide*. He has been a well driller since 1976.

<u>Skill</u>	<u>Level</u>	<u>Grade Equivalent</u>
Reasoning	4	High School Level
Math	3	7 <sup>th</sup> -8 <sup>th</sup> Grade Level
Language	3	7 <sup>th</sup> -8 <sup>th</sup> Grade Level
General Intelligence	3	Average

Mr. Hurtin reported that he would think the above language skills should be higher as he provides written reports for each well drilling job. These are handwritten but detailed. Mr. Hurtin also completes estimating tasks. An estimator is classified as skilled with high school levels of the above skills. It requires above average intelligence. This would be an estimate of Mr. Hurtin minimal skills required in his job. For maximum skills, testing would be required.

VI. Transferable Skills/Labor Market/Vocational Plans

Mr. Hurtin's past work history was reviewed utilizing the Oasys and SkillTRAN Job Browser Pro Computerized programs. The programs incorporate a host of vocational resources to include: *The Dictionary of Occupational Titles*, *Transitional Classification of Jobs*, *Revised Handbook for Analyzing Jobs*, *Occupational Outlook Handbook* and information from the U.S. Bureau of Labor Statistics. A transferable skills analysis was not conducted, as Mr. Hurtin does not plan to leave his current job. The only question is if he would need a helper or if he could do his job without a helper.

Mr. Hurtin's job of well driller is heavy and skilled. He is required to drive the equipment to job sites and this requires a CDL. Driving trucks or equipment that require a CDL are medium semiskilled work. The well driller code includes operating the drill machinery and is classified as heavy and skilled. He has a minor portion of his job that is estimating which would be sedentary and skilled.

Review of information from the above resources, along with information from the National Ground Water Association shows similar job tasks, which would be heavy in nature. A sample of job openings in the field also verifies similar job tasks.

Mr. Hurtin's current restrictions and projected permanent restrictions after surgery would not allow him to return to work and complete his full job tasks without accommodation, which in his case has been a helper.

Mr. Hurtin is in a specialized field with few openings in Tennessee or nationwide. The Bureau of Labor Statistics provides job numbers and shows 280 employed in Tennessee for the category drillers, except oil and gas. Local job numbers were not available. The occupation is expected to have average growth nationally.

## VII. Wage Analysis

Mr. Hurtin has continued to work full time following his injury. He is the licensed driller and has the responsibility of insuring the work is completed accurately. He completes as many tasks as he can and then instructs his employees. His nephew works as a driller under Mr. Hurtin's license and does not have the experience level to work independently. The helper has less skills and predominately works as a laborer.

Information from the U.S. Bureau of Labor Statistics shows the following wages for well drillers and driller helper in Tennessee. There was no published wage data for the local area, which is the South Central Non Metropolitan area of Tennessee.

The information for Water Well Driller is found under OES Statistical Group: 47-5021 - Earth Drillers, Except Oil and Gas

### **May 2013 - STATEWIDE Occupational Employment Survey (OES):**

#### **Tennessee**

Hourly Mean = \$19.76 ± \$0.79 CI\*

Weekly Mean = \$790 ± \$32 CI\*

Annual Mean = \$41,090 ± \$1,644 CI\*

Hourly - 10%ile = \$13.59	Weekly - 10%ile = \$544	Annual - 10%ile = \$28,270
Hourly - 25%ile = \$15.72	Weekly - 25%ile = \$629	Annual - 25%ile = \$32,690
Hourly - 50%ile = \$18.21	Weekly - 50%ile = \$728	Annual - 50%ile = \$37,870
Hourly - 75%ile = \$21.72	Weekly - 75%ile = \$869	Annual - 75%ile = \$45,180
Hourly - 90%ile = \$30.28	Weekly - 90%ile = \$1,211	Annual - 90%ile = \$62,990

No wage data is available for this OES Group in South Central Tennessee nonmetropolitan area

\* CI - Confidence Interval

With 68% probability, the actual value falls within ± the given range of the sample estimate.

DATA SOURCE: Bureau of Labor Statistics - U.S. Department of Labor - April 1, 2014 - Revised 9/9/2014 by BLS, <http://www.bls.gov/oes>

Wages for driller helper are listed under OES Statistical Group: 47-5081 - Helpers--Extraction Workers

**May 2013 - STATEWIDE Occupational Employment Survey (OES):**

**Tennessee**

Hourly Mean = \$15.81 ± \$0.57 CI\*  
Weekly Mean = \$632 ± \$23 CI\*  
Annual Mean = \$32,880 ± \$1,184 CI\*

Hourly - 10%ile = \$12.42	Weekly - 10%ile = \$497	Annual - 10%ile = \$25,830
Hourly - 25%ile = \$14.06	Weekly - 25%ile = \$562	Annual - 25%ile = \$29,250
Hourly - 50%ile = \$15.81	Weekly - 50%ile = \$632	Annual - 50%ile = \$32,890
Hourly - 75%ile = \$17.38	Weekly - 75%ile = \$695	Annual - 75%ile = \$36,140
Hourly - 90%ile = \$18.32	Weekly - 90%ile = \$733	Annual - 90%ile = \$38,090

No wage data is available for this OES Group in South Central Tennessee nonmetropolitan area

\* CI - Confidence Interval

With 68% probability, the actual value falls within ± the given range of the sample estimate.

DATA SOURCE: Bureau of Labor Statistics - U.S. Department of Labor - April 1, 2014 - Revised 9/9/2014 by BLS <http://www.bls.gov/oes>

Mr. Hurtin excelled at his business and as business owner exceeded the maximum listed through BLS for the job title. His tax returns were reviewed from 2009-2013. These documents show the following profit:

2009 \$104,893  
2010 \$104,779  
2011 \$102,368  
2012 \$133,341  
2013 \$124,785

Mr. Hurtin will have recovery time following surgery. During this time there will be minimal work that can be completed, without his supervision. As outlined above the only work he will allow without him onsite is drilling holes for blasting at a quarry.

The timeframes for recovery were documented by Dr. Thomas as six months. The physical therapist verbally outlined that he may be able to return to supervision sooner, written documentation would be helpful to outline and confirm this time frame for wage loss analysis.

Mr. Hurtin reported that his work expenses have increased due to the need for the helper. This not only is related to the salary provided but increased expenses, such as, workers compensation insurance.

Mr. Hurtin reported he plans to work until age 72. His plan was to work one year past his father's achievement of retiring at age 71.

Dr. Finance, an economist, is performing a detailed business analysis to outline the lost wages and increased work expenses related to the 2012 injury. The full wage loss analysis is deferred to Dr. Finance.

VIII. Opinions

It is my opinion that Mr. Hurtin cannot perform his job as a well driller without the accommodation of a helper. This will not change following his surgery.

XII. Recommendations

Thank you for allowing me to evaluate Mr. Hurtin. If further medical information becomes available, please forward for any vocational impact for Mr. Hurtin.

Sincerely,

Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D  
Vocational Consultant

## References for the Vocational Evaluation of Ben Hurtin

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IN THE CIRCUIT COURT OF RURAL COUNTY, TENNESSEE

**Ben Hurtin and Dana Hurtin, Plaintiff,**

VS.

NO. 2013-CV-500

**Estate of Jim Alexander, John Alexander and Matthew Martin,  
Defendant.**

MOTION IN LIMINE  
TO EXCLUDE EXPERT TESTIMONY

Comes now the Defendant in the above captioned cause, and moves the Court *in limine* for an Order to exclude the testimony of vocational expert Michelle McBroom Weiss and economist Mark Finance as their testimony does not meet the elements of an expert as outlined in Rule 702 Tennessee Rules of Evidence and McDaniel v. CSX Transportation Inc., 955 S.W.2d 257 (Tenn. 1997).

For good cause defendant submits the deposition of Michelle Weiss and Mark Finance together with the attached memorandum.

WHEREFORE, the Defendant prays that the Court to fulfill its gatekeeper function and exclude the irrelevant and unreliable expert testimony.

Respectfully submitted,

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ANDREW C CHEATUM  
Attorney for Defendant  
P. O. Box 129  
Small Town, TN

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent by Mail, postage prepaid, to Sledge Hammer, 100 Main Street, Small Town, TN  
March 23, 2015.

Andrew C. Cheatum

**IN THE CIRCUIT COURT OF RURAL COUNTY, TENNESSEE**

**Ben Hurtin and Dana Hurtin, Plaintiff,**

**VS.**

**NO. 2013-CV-500**

**Estate of Jim Alexander, John Alexander and Matthew Martin,  
Defendant.**

MEMORANDUM IN SUPPORT

MOTION IN LIMINE  
TO EXCLUDE EXPERT TESTIMONY

This case arises from a motor vehicle accident wherein the plaintiff was struck by a ricocheting vehicle after it was impacted by the defendant Jim Alexander, deceased. Plaintiff alleges that he suffered injuries in the accident and in support of this claim has designated vocational expert Michelle McBroom Weiss and economist Mark Finance to testify as experts.

Defendant submits that the court fulfills a gatekeeper function to exclude irrelevant and unreliable expert testimony. This function begins with Rule 702 Tennessee Rules of Evidence which provides that experts with specialized knowledge may give opinion testimony, if it will substantially assist the trier of fact in understanding the evidence or determining a fact in issue. Questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court, and may only be overturned if there is abuse of discretion.

The fact issue for the jury to decide in this case is plaintiff's "loss of ability to earn" (present and future) as the direct result of the injuries sustained in the motor vehicle accident. The jury, pursuant to the court's charge, can consider any evidence relating to the plaintiff's earning capacity including "health, age, character, occupation, past earnings, intelligence, skill, talents, experience and record of employment". The extent of an injured person's loss of earning capacity is generally arrived at by comparing what the person would have been

capable of earning, but for the injury and what the person is capable of earning after the injury. *Overstreet v. Shoney 's Inc.*, 4 SW. 3<sup>rd</sup> 694 (Tenn. App. 1999).

As the plaintiff was involved in a personal business, he may recover damages for profits lost as a direct result of plaintiff s inability (because of the injury) to devote time to the business. The measure of lost profits is a comparison of profits before the accident and after the accident to determine if a diminution of profits occurred due to the absence of the plaintiff. If the plaintiff s services were replaceable the measure of damages is the cost to hire a substitute.

Rule 703 Tennessee Rules Evidence requires the court to disallow an expert's testimony "if the underlying facts or data indicate lack of trustworthiness" or if the evidence will not "substantially assist the trier in fact to determine a fact in issue". The court must assure for itself that the opinions are based on relevant scientific methods, processes, and data and not upon an expert's mere speculation.

Defendant does not challenge either of the proposed expert's qualifications to offer the opinion, but submits that the experts' methodology in arriving at the offered opinions is not reliable. The Tennessee Supreme Court listed five nonexclusive factors or standards by which to determine admissibility of this type of expert testimony:

1. Whether scientific evidence has been tested and the methodology of that test
2. Whether the evidence has been subjected to peer review or publication
3. Whether a potential rate of error is known
4. Whether the evidence is generally accepted in the scientific community
5. Whether the expert's research in the field has been conducted independent of litigation

*McDaniel v. CSX Transp. Inc.*, 955 S.W.2d 257 (Tenn. 1997)

The Supreme Court of the State has clearly ruled that only expert testimony underpinned with scientific reliability is admissible, and that anything less fails to constitute reliable expert knowledge that would be helpful to the court and jury. Without this empirically "reliable" foundation underpinning their mythology, the expert opinion is inadmissible.

Federal and state law supports the application of these standards to vocational experts and economist. There is a well-accepted body of learning and experience in the vocational field and the expert's testimony must be grounded in that learning and experience to be reliable. The expert must explain how his/ her conclusion and methodology are grounded in that body of experience. The vocational expert, Ms. Weissa admits that this is the methodology that must be followed for the testimony to be admissible. (Weiss Dep. page 27, 28) Therefore, in determining and rendering an opinion on vocational capacity, the expert uses his or her own vocational experience, to analyze the relevant labor markets, medical records and medical history, governmental statistics standard vocational text and test. In *Chandler v. Cracker Barrel Old Country Store, Inc.*, 2007 WL 1710572 the vocational expert (whose

testimony was ruled admissible) developed a profile of the subject's qualifications prior to the injury to determine what types of work a person was qualified to perform. Then, looking at any restrictions they have as a result of the injury and using Bureau of Labor Statistics made an evaluation of job opportunities which would be available to them in their diminished state. (Emphasis added)

**NOTE: Believe that inline citations are incorrect sometimes in this section**

Argument

Ms. Weiss readily admits that she did not follow that methodology, rather she was requested to specifically determine plaintiff's "ability to perform his job at the time (of the interview 2 years after this accident), and after (a speculative or assumed shoulder surgery that has not been performed), with or without the accommodation of a helper". She admits there was no analysis of the labor market, transferable skills and ability to perform other jobs. She also notes that the medical proof submitted did not address work restrictions either immediately before the accident or immediately after the accident. Rather, work restrictions were solicited with regard to "current work restrictions (2 years after the accident) and expected permanent restrictions following Mr. Hurtin's potential surgery"(at some time in the future). (Weiss Deposition page 11, 12)

The opinion that plaintiff "cannot perform his job as a well driller without the accommodation of a helper" (Weiss page 18) has no basis or relationship to the before and after injury. No doubt the vocational expert deviated from the methods or procedures that are well-accepted in the vocational field for determining "loss of work capacity". Her testimony computes damages that are not compensable in this case. This witness did nothing to investigate what the plaintiff would have been capable of doing or earning but for this injury. She did nothing to determine his employability before the accident to compare with his employability after the accident. She did not determine the difference between his preinjury earning capacity and his postinjury earning capacity. (Weiss page 27, 38) That information is the gravamen of this action.

Plaintiff's job description as a "well driller" under the *Dictionary of the Occupational Titles* (DOT) and wage analysis from the US Bureau of Labor Statistics is considered, but again, there is no comparison of work before and after the accident. It is noted in the medical proof, that she reviewed, plaintiff has been a candidate for a shoulder replacement for approximately 18 years and still remains on the job. Testimony as to plaintiff's loss of future earning capacity offered by this expert is not based upon facts but on the speculation of surgery that may never happen. Further, she swap's from vocational disability to "work expenses" of a helper that more readily applied to a business lost profits. (Which she did not address. Weiss page 20)

Essentially this witness's testimony is simply the reiteration of Mr. Hurtin's testimony that he cannot perform the work of a well driller after the accident. (Weiss page 44) This testimony is within the comprehension of the jury using its common sense. The Supreme

Court in *State v. Scott* 275 SW. 3rd 395 (Tenn. 2009) stated that when the expert testimony is merely an iteration of what would be within the juror's common sense, the admissibility of such evidence does not assist, much less substantially assist, the trier of fact in understanding the evidence or determining a fact in issue. "Accordingly, a court would not err by excluding an expert whose testimony consisted solely of providing a dressed-up and credentialed declaration of what would be already safely within a juror's common sense understanding." *State v. Scott* 275 SW. 3rd 395, at 411

An award for lost profit damages depends on whether the evidence provides a satisfactory basis for estimating what the injured party's probable earnings and expenses would have been had the wrongdoing not occurred. The best evidence of lost profits is a comparison of the experience of the injured party's own business before and after the wrongdoing. There was no calculation or comparison of profits before and after the accident to determine if there was any diminution of profits to the plaintiff's absence. If an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable. Likewise, an expert's testimony is unreliable, even when the underlying data is sound, if the expert employed a flawed methodology or applied sound methodology in a flawed way. *Wagner Motors Inc. v. Waverly Church of Christ*, 159 SW. 3rd 42 (Tenn. App. 2004)

The economist's sole source of information came from the Vocational Expert Ms. Weiss, and therefore same is not reliable rendering his calculations as flawed and inadmissible.

*In Acuff v. Vinsent*, 443 SW.2d 669 (Tenn. App. 1969), the court recognized the plaintiff's services rather than the capital invested or labor of others was the predominant factor in producing profits. The court ruled that evidence of diminution of profits was not admissible as proof that the plaintiff suffered a loss of earning capacity. Although it would reflect "value" of his earning capacity; the fact of whether or not plaintiff actually suffered a loss of earning capacity had to be established by other competent evidence.

The economist expert relies upon the vocational expert to translate the disability created by the accident related injury into an assessment of earning loss caused by the inability to perform tasks as result of that disability. The economist is not qualified to testify as to the relationship between the anatomical disabilities and the impairment of future earning capacity. *Morgan v. Cashion*, 638 S.W.2d 391 (Tenn. App. 1982) Without the vocational expert providing that critical information, the economist cannot establish a "base" for projecting preinjury earnings with which to compare to the "base" for the projection of post injury earnings.

The economist is simply trying to adapt the information he received from the vocational expert and create damages inconsistent with methodology making his testimony misleading and untrustworthy.



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March 25, 2015

Sledge Hammer, Esq.  
Samantha Slaughter, Esq.  
100 Main Street  
Small Town, TN

RE: Motion in Limine to Exclude Expert Testimony

Dear Mr. Hammer and Ms. Slaughter:

The motion outlines that “If the underlying facts or data indicate a lack of trustworthiness or will not substantially assist the Trier of fact to determine a fact in issue and the court must make scientific, process and data and an experts mere speculation” the testimony should be excluded.

I would submit that my testimony is reliable and uses generally accepted methodology in the field of vocational rehabilitation to evaluate the question posed to me at the time of referral. It offers valid opinions in this case based on the assignment. I will highlight the allegations and respond thereafter.

**Mr. Cheatum states that he “. . . does not challenge either of the proposed expert’s qualifications to offer an opinion.”**

My qualifications were attached with my curriculum vita and provide for 22 years in the field of vocational rehabilitation. I have consulted on forensic cases since 1993-1994. I graduated from a CORE accredited master’s degree program and have the accepted national certifications to provide expert evaluations and testimony.

**Mr. Cheatum states that my methodology in arriving at the offered opinions is not reliable and as a result cites the five nonexclusive factors or standards by which to determine admissibility to this type of expert testimony:**

1. **Whether scientific evidence has been tested and the methodology of that test;**
2. **Whether the evidence has been subjected to peer review or publication;**
3. **Whether the potential rate of error is known;**
4. **Whether the evidence is generally accepted in the scientific community;**
5. **Whether the expert's research in the field has been conducted independent of litigation.**

**Mr. Cheatum cites McDaniel v. CSX Transportation Inc.**

In this case, the referral request was to evaluate whether Mr. Hurtin could perform his past work of water well driller with or without a helper. Mr. Hurtin is owner of the company and it has been in his family for four generations. He worked with his father, who is now retired and hired his nephew as a driller in 2009. He was injured in a motor vehicle accident in 2011. At the time of the injury, he reported to me that he was completing his full job duties, without the aid of a helper. Since that time, he has hired a helper, in addition to his other employee. He reported this was needed to assist him with the heavier aspects of his job.

The request was not unusual as vocational experts are often called upon to provide expert testimony based on one service versus a full vocational loss of earnings capacity. The request is based on the facts of the case and the questions that are being posed to the expert. Regardless, accepted methodology to answer the question posed would be followed. Mr. Cheatum assumes that all cases require a full loss of earnings capacity opinion and assessment. "Evidence-based vocational analysis is not cookbook vocational evaluation. Because it requires an approach that integrates, the best external evidence of an individual's behavior and choices with clinical experience, it cannot resort to a Slavic, formulaic approach to individual analysis." (Elhert & Berg, 2010, p. 28).

After a review of the records, outlined on pages one and two of my report, I requested that his treating physician be contacted for work restrictions as there was not an opinion in the material provided. I provided forms and requested he provide current restrictions and projected permanent restrictions following the proposed surgery. The forms coincide with the physical demands of work outlined in the *Dictionary of Occupational Titles* (DOT) and *Revised Handbook for Analyzing Jobs* (RHAI). These resources are widely used in the field of vocational rehabilitation and used in expert testimony.

I did not know if Dr. Paul Thomas' opinion would result in the requirement of the use of a helper. If this was his opinion, I wanted to know if the restrictions would be permanent so that I could evaluate if a helper would be needed permanently. The request for the restrictions currently and then postsurgery would help me make a determination in that regard. I deferred to the physician for work restrictions, as I am not qualified to assign work restrictions. This is congruent with the *Rehabilitation Consultant's Handbook*, which confirms the need for the clarification by a physician for permanent work restrictions. "In gathering medical proof of both permanency and exertional impairment, it is essential that

the physician be asked questions regarding reduced exertional capacity from a vocational perspective. (p. 40). Furthermore, this is consistent with all aspects of vocational rehabilitation whether providing an opinion at Social Security disability hearings, Federal OWCP cases, the Veteran's Administration, long-term disability cases or other venues. If there is a question of work restrictions the physician is contacted.

The *Rehabilitation Consultant's Handbook* discusses the vocational evaluation process in Chapter 5. This includes an interview and receiving information related to the evaluatees prior jobs. Confirmation of the job duties can be determined through interviews, consultation of standardized published resources to include the Onet, DOT and *Classification of Jobs* (COJ) (p. 79). The consultant then must review other reports, to include medical records, to determine the disabling conditions and their corresponding functional limitations and analyze the individual's ability to perform his job or other work.

The DOT is used in all types of cases as a basis for opinions. This includes Social Security hearings, US. Department of Labor Office of Workers Compensation Programs (OWCP), the U.S. Veteran's Administration, state Departments of Vocational Rehabilitation and by private rehabilitation counselors in forensic cases as examples. Dr. Mary Barros-Bailey served as the Chair of the Occupational Information Development Advisory Panel, a discretionary committee chartered by the Social Security Administration, during its existence from 2009-2012. Dr. Barros-Bailey surveyed the International Association of Rehabilitation Professionals to provide information to the OIADAP Committee. This information was compiled in the last 5 years and gives a chart of agencies and types of cases that the IARP membership used DOT as the primary source of occupational information. The chart is attached.

"In the CFR, SSA takes administrative notice of the DOT as reliable job information available from various governmental and other publications (20 CFR 404.1566(d) and 416. 966(d)). Social Security Ruling 00-4p clarifies SSA standards for the use of vocational evidence involving other reliable sources of occupational information (SSR, 2000). The ruling states that SSA adjudicators must obtain a reasonable explanation for any conflicts between occupational evidence provided by vocational experts or specialists and the DOT. Adjudicators must then explain in their determinations or decisions how the conflicts were resolved. Also, SSR 00-4p states that SSA regulatory definitions and policy for strength and skill levels and for TSA are controlling in the adjudication. These regulatory definitions are based on DOT constructs" (Truthan & Karmen, 2003).

The DOT was based on 75,000 job analyses conducted to build it following an established procedure detailed in the *Handbook for Analyzing Jobs* and the *Revised Handbook for Analyzing Jobs*. SSA requires the use of DOT by vocational experts, as does the U.S. Department of Labor for the vocational rehabilitation counselor who evaluate and work on their cases. It is as part of the Social Security Disability hearing process and is further used by the Department of Labor in their worker's compensation hearings and in many other venues to include vocational expert testimony. The methodology for the job analyses that were conducted by the DOL is included in the RHAJ. This provides a basis

for analysis if a job is appropriate for an individual by a vocational rehabilitation expert using specialized knowledge. This is a reliable and widely used method.

In analyzing if Mr. Hurtin could complete his past work, the initial portion of a transferable skills analysis was completed which includes identifying the person's work history and developing a preinjury profile. In Mr. Hurtin's case, he has only had one job for the majority of his adult life, spanning over 30 years. This would be his only past relevant job. The traditional DOT approach to transferable skills analysis (*Rehabilitation Consultant's Handbook*, pp. 102-103) requires identifying a person's work history, then choosing the appropriate DOT code or codes, profiling the jobs by using the *Transitional Classification of Jobs* (TCOJ). Profiling the job and then creating a residual functional capacity or (restrictions for consideration). This enabled me to make determinations if Mr. Hurtin could perform the physical demands of the well driller job as it is defined by the DOT, as he has described it, reviewing information from the O\*Net and information from the National Ground Water Association and review of a sample of job openings. All sources confirmed his job was in the heavy range of work, as defined by the U.S. Department of Labor. This method is cited in The *Rehabilitation Consultant's Handbook*, and various articles. (Truthan & Karmen, 2003; Dunn & Kontosh, 2002; Field & Dunn as part of Robinson, 2014).

In vocational rehabilitation there is an establishment of the maintenance of work adjustment for individuals with disabilities. Dunn and Kontosh (2002) report a well-established return to work model that is often considered on pages 41-42.

1. Return to work, same job, same employer;
2. Return to work, different job, same employer;
3. Return to work, different job, different employer.

If the individual is returning to work at the same employer, same job, with or without accommodation, the need to access transferable skills to consider other jobs is not warranted. Likewise, labor market research would not be required.

In addition, as part of my analysis I provided information for Dr. Mark Finance, economist related to Mr. Hurtin's ability to perform his past job of well driller. I then provided information from the U.S. Bureau of Labor Statistics (BLS) in relation to the job of well driller and well driller helper. Mr. Hurtin's tax returns exceeded the 90<sup>th</sup> percentile for the well driller. He has consistently performed the same job for over 30 years and is owner of his business. As a result, his preanalysis only included well driller as his past relevant work.

A wage loss analysis was not part of my referral request. To accurately determine his wage capacity a business valuation would be required, in order to accurately determine his wage earning capacity pre and postinjury. My opinion is that he cannot perform this job without the use of a helper. As a result, the wage loss analysis was deferred to Dr. Mark Finance, economist. The information I provided would allow him to have a basis for

his opinion in regard to Mr. Hurtin's ability to work as a water well driller and expected wages for the accommodation of a helper.

My analysis was completed by using the SkillTRAN and Oasys computer programs. This included the preprofile with worker traits, job duties and demands. The programs also provided wage data from the Bureau of Labor Statistics. Both programs are widely accepted and have been peer reviewed by the Journal of Forensic Rehabilitation (American Board for Vocational Experts) and The Rehabilitation Professional (International Association for Rehabilitation Professionals). SkillTRAN's resources and methodology is discussed in depth. Further, the programs are outlined in resources, such as the *Foundations of Forensic Vocational Rehabilitation and in the Rehabilitation Consultant's Handbook*.

It is important to emphasize that these programs are resources/tools that help me process information to which you reach a conclusion or opinion. I also use clinical judgment to apply factors, such as the appropriate job codes, information about education, etc. During the analysis, I also use professional judgment to determine if the individual can perform their past work or in evaluating the results for appropriate alternate jobs, if needed). The programs require clinical judgment and specialized knowledge to classify the jobs and make adjustments in the beginning and during the analysis. In addition, I evaluate the results and make recommendations that best apply to the evaluatee.

Discussion of SkillTRAN Reliability, Validity, and Economic Data Version 2014.03.17 published by Jeff Truthan and provided on the SkillTran Website and addresses the reliability of the computer programs.

“Reliability is a measure of the consistency of a test, method, procedure or process. When any of these is repeated multiple times, how often the same results are produced is reliability. Reliability studies of computer software are an essential part of the software developer's quality assurance process. SkillTRAN's process for analysis of transferable skills follows a clearly defined set of programmed computer code. An advantage to computer programs is that when a computer receives data, it will repeatedly follow the same exact programmed steps each time the process is initiated. If the same data is entered each time (e.g., work history and post-injury restrictions) and the same process is requested (e.g., TSA), then the output of the computer program will be the same. The output may change, however, if underlying data files used in the process have been altered such as the Dictionary of Occupational Titles [DOT] (1991a), worker characteristics, employer listings, wage data, employment numbers, etc. When the underlying data files are held constant (unchanged), then the TSA search process is 100% reliable.”

With regard to wage data, SkillTRAN incorporates the government data for wages and employment numbers. The error rate for the wage data would be provided directly from the government sources. The Current Population Survey (CPS) data reports its Standard Error of Measurement (SEM). Occupational Employment Survey (OES) data is reported with the Relative Standard of Error (RSE). The error rates reported by these agencies are

identified in each SkillTRAN report as the citation of the Confidence Interval (i.e., the  $\pm$  value after each employment number or mean wage). SkillTRAN uses the same government data, but reformats the information so that it is more useful for specific counseling, planning, and forensic purposes.

Complete information about specific government data incorporated into various SkillTRAN software products can be obtained directly from these government sources. Each of these sources has detailed information about the technical development of their data set:

- *Occupational Outlook Handbook* (OOH) – <http://bls.gov/ooh/>
- *Current Population Survey* (CPS) – <http://bls.gov/cps/>
- *Occupational Employment Survey* (OES) – <http://bls.gov/oes/>
- *Long Term Employment Projections* (EP) - <http://bls.gov/emp/>

I did not evaluate transferable skills jobs, as this would not be related to the referral assignment. Transferable skills would help identify new types of jobs that his job skills would allow him to perform. He has no plans to leave his company or his job of well driller. A transferable skills analysis was not warranted to answer the referral questions. This is consistent with Dr. Timothy Field's article, which cites "whatever an expert does in developing a case must be related to the facts of the case. Methods and/or protocols which are selected should be reliably conducted to address the facts as understood." Dr. Field quotes Anthony Choppa noting that the methods and assessment performed falls within the clinical judgment of the expert (Field, 2006), in addition this follows the standard method of the lack of need for a transferable skills analysis when the individual is returning to their same job, with or without accommodation cited in the article *Understanding Transferability and Occupational Classifications: Implications for Vocational Forensics* (Dunn & Kontosh, 2002, pp. 1-2).

In consideration of a full loss of earning capacity, the RAPEL method is widely accepted and used. This method developed by Dr. Roger Weed and has been widely published and peer reviewed. The method was first published in 1994. Example sources that mention the method include *The Rehabilitation Consultant's Handbook*, *The Vocational Expert Handbook*, *Foundations of Forensic Rehabilitation*. The initial step is to complete a rehabilitation plan. That includes consideration of the client's vocational and functional limitations, cognitive abilities, and emotional functioning. It may include testing, counseling training fees, rehabilitation technology, job analysis, and job coaching and job placement considerations. This step of the evaluation can also include reasonable accommodation. The need for evaluation of each of these items depends on the case and the judgment of the counselor (pages 214-215 of the *Rehabilitation Consultant's Handbook*).

Vocational rehabilitation counselors are often called upon to evaluate if someone can return to work at their employer following an injury, with or without accommodation. This is part of the analysis for Mr. Hurtin. At that point, if they can return to work at the job at the time of injury the remaining portions of the method do not apply. This is the case in

OWCP cases, for example, if a worker is injured at a federal agency and a case is assigned to a field rehabilitation counselor. The first part of the assignment is to interview the client, assess their vocational profile, and work with the employer to identify alternate jobs or reasonable accommodations that can be made to keep that worker at their employer. If that is not possible, then a transferable skills analysis is conducted, vocational counseling, labor market research and ultimately a plan for job placement or retraining is developed. This same step process is used for insurance carriers on long-term disability cases. Vocational rehabilitation counselors are often utilized with our specialized knowledge of job to consider job accommodations. Another venue where our skills as experts are used are in employment law matters where reasonable accommodations are often part of our referral questions. I have worked with OWCP since 1995; with various long-term disability carriers since 1992 and various employers trying to accommodate injured or disabled workers. My opinion has been used not only in litigation cases but in order to assist with return to work with accommodations.

To evaluate the job of water well driller and Mr. Hurtin's ability to use this job, I used the *Dictionary of Occupational Titles* (DOT) and its partner publications to include the *Revised Handbook for Analyzing Jobs* (RHAJ) through use of the SkillTran Job Browser Pro and the Oasys computer programs. The publications have a deep foundation in vocational analysis and this remains true today. The *DOT* has its foundations in the 1930's. It has been used for transferable skills analysis and the methodology developed by Social Security (SSA). The most recent publication is from 1991. The first step in my analysis was to classify the jobs by using the DOT. This is consistent with SSA, Department of Labor Office of Workers Compensation Programs and vocational rehabilitation programs through state departments of vocational rehabilitation and the US Veteran's Administration. It is the standard for defining job demands and worker traits. SSA judges ask the vocational expert is if the person can do their past work as the individual performed it but also as it is performed in the National Economy. (Vocational Expert Handbook). The basis of the opinion is from the DOT and the SCO. This is congruent with SSR 004p, which mandates that the vocational expert use the DOT to classify the job. Job demands are found in the DOT and its partner publications the *Transitional Classification of Jobs* and *Revised Handbook for Analyzing Jobs*.

In review of the DOT it is essential to also obtain the individual's description of the job. If possible the employer's description, but in Mr. Hurtin's case, he is the owner of the company.

**Chandler v. Cracker Barrel Old Country Store 2007 was cited in the Motion in Limine and the method the vocational expert utilized is discussed. The vocational expert developed a profile of the subject's qualifications prior to the injury to determine the types of work the individual was qualified to perform. Then, looking at any restrictions they have as a result of the injury and using Bureau of Labor Statistics made an evaluation of job opportunities which would be available to them in their diminished state." The specific method applied was not discussed.**

Mr. Cheatum falsely assumes that each case is the same and the same steps or research would be required in each case. “The expert does nothing to investigate what the plaintiff would have been capable of earning but for the injury” (Field, 2010).

“In *Boland-Maloney Lumber Company v. Burnett & Burnett*, an economic expert’s testimony was challenged by the plaintiff because the expert failed to use the plaintiff’s actual career at the time of injury to calculate a loss of earning capacity, but instead used a “proxy,” such as the titles of construction supervisor and construction manager. The expert, who had worked in the field of vocational counseling and rehabilitation since 1965, “based his testimony on the interview with the plaintiff, information on the [plaintiff’s] employment and work history, and upon the nature of the [plaintiff’s] injuries.” The expert argued that the worker’s actual earnings were not indicative of the worker’s earning power. The court ruled: *Although [expert’s] testimony was not based on [plaintiff’s] actual earnings at the time of injury, nothing precludes testimony by a vocational expert on the impairment of a plaintiff’s power to earn money, or the use of a ‘proxy’ to do so where current earnings are not indicative of the plaintiff’s earning power. The trial court did not abuse its discretion.* This case is important because it allows for the correct and creative approach to assessing vocational capacity and not just mere performance, i.e., a person not performing to their level of capacity” (Field, 2010, pp. 9-10).

In Mr. Hurtin’s case his earnings from 2009-2013 were provided from his tax returns. These wages were evaluated using the wages from the Bureau of Labor Statistics for his occupation. His wages exceeded the 90<sup>th</sup> percentile for his occupation. There was no need for further wage data exploration as his skills were very specialized and consideration of other jobs would only decrease his earning capacity. For example, it would not make sense to consider the low wages of entry level jobs as part of his earning capacity, although he would have access to the ones in his area preinjury or postinjury that would accommodate his post injury restrictions. The wage data information was provided for the economist for his analysis of Mr. Hurtin’s wage loss, when considering the need for a helper to do the portions of his jobs that he was restricted from doing. As he was the business owner, a more detailed preearning capacity was required than would be allowed as part of my expertise.

Of note, In Mr. Hurtin’s case his actual earnings exceed the expectations of his over 30-year career. He made an exceptional wage for someone without a college degree. The typical wage for someone with a high school diploma is \$651.00 per week according the data from the BLS for 2013. In considering even a college degree, Mr. Hurtin by far exceeded the national average wage for individuals with a college degree, which is \$1108.00. per week. With this knowledge there was no need for further preearning analysis. Page 13 of my report lists Mr. Hurtin’s income as over \$100,000 since 2009. His maximum wage with the BLS statistics would be expected to be approximately \$1211.00 per week or \$62,990.00 when considering his profession of well driller. Further analysis was not required and the economist was to value the business before the injury and after, which is beyond my scope of expertise.

The U.S. Bureau of Labor Statistics data is the most reliable data regarding wages and has been cited by Mr. Cheatum in his motion in reference to the Chandler v. Cracker Barrel Old Country Store, Inc. I use this data in my litigation cases but also as part of work with the Federal OWCP program. The job numbers provided by the BLS are used in the Social Security administrative law hearings. They are widely relied upon by vocational experts in many venues.

The Commission for Rehabilitation Counselor Certification Code of Ethics requires that I remain within my areas of expertise. In section D1, Professional Competence, I am required to stay within my boundaries of competence “based on my education, training, supervised experience, professional credentials and appropriate professional experience.” This is further reiterated in section F.2.a. for qualifications to provide expert testimony. This cites that “Rehabilitation counselors have an obligation to present to the court, regarding specific matters to which they testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training and education) for their qualifications as an expert, and the relevance of those factual bases to their qualifications as an expert on the specific matters on the issue.” (Neulicht, pp. 113-119)

### **Job Description no comparison of work before and after the accident.**

Mr. Hurtin did not have a formal written job description as the owner of small company. He stated he was performing his job of well driller without difficulty prior to the accident and work restrictions were not assigned prior to the 2011 injury. He had prior injuries but was always able to return to work. This information is provided by Mr. Hurtin but there is no other source of home to inquire. His prior medical records were provided without reference to permanent restrictions prior to this injury. To verify and not solely rely upon his testimony the DOT, TCOJ, RHAJ, O\*Net have been previously noted were referenced. These documents have been peer reviewed and widely accepted in the field of vocational rehabilitation. In addition, information regarding job openings for water well drillers were reviewed and information from the National Ground Water Association was reviewed. These are reliable resources to assist me with using my specialized knowledge and to make an accurate opinion in regard for Mr. Hurtin to perform his job.

Mr. Hurtin does not have an American’s with Disabilities Act claim, however, the act and the governing body, the EEOC provide standards for considering if accommodations are needed. In part, the essential functions of the job need to be identified, the physical demands of the job and at times a job analysis or interview of the employer. Information is provided on the governmental websites and also within various books, to include *Job Analysis and the ADA: A Step-by-Step Guide*. Page 3 of this document outlines that the DOT be used to assist in determining job requirements and discusses that determining job demands are important to determine if a job modification or accommodation is needed by the employee. The methods to do so, if a formal job analysis is required, is outlined further in the book with references to the worker traits outlined in the DOT and RHAJ. The book outlines reasonable accommodation on page 134 and outlines that typical accommodation, dependent on injury could include transferring lifting tasks to others workers. The book outlines that an interview with the employer to confirm job duties may

be warranted. In this case, I met with Mr. Hurtin who is self-employed and provided standard methodology to determine if he required accommodations.

**Reviewed information candidate for shoulder replacement for 18 years and still remains on the job.**

Mr. Hurtin has prior shoulder surgery and was informed that he may need future shoulder replacement. Medical opinions in relation to when the shoulder surgery would be required and the impact of the injury would be deferred to the medical providers in this case. Mr. Hurtin reported he was able to continue working, without accommodation prior to the 2011 injury. The medical records revealed no medical treatment for the shoulder since 1999, until this accident. He did not have any formal work restrictions. Mr. Hurtin reported he was able to complete his DOT physical with regard to his prior injury, a below the knee amputation. Dr. Obremskey's statement of 2/14/11, provided an opinion with no limitations and good use of the prosthetic. This was provided to me on 3/23/15 and confirms that there were no restrictions from Dr. Obremskey.

**Testimony to future earnings capacity is not based on facts but on the speculation of surgery that may never happen. Further she swaps from vocational disability to work expense of a helper that more readily applied to business lost profits, which she does not address.**

I was not requested to perform an earnings capacity evaluation. The surgery is proposed and I have provided two opinions, one based on his abilities without surgery and one with the surgery.

**Mr. Cheatum states my testimony is a reiteration of Mr. Hurtin's testimony that he cannot perform the work of a well driller (p. 44 deposition). This is within the jury using common sense. He further cites State v. Scott noting that "Accordingly, a court would not err by excluding an expert whose testimony consisted solely of providing a dressed – up and credentialed declaration of what would be already safely within a juror's common sense understanding."**

I have applied specialized knowledge gained through over 20 years of providing forensic analysis and vocational rehabilitation services. In addition to my CORE accredited master's degree program, my national certifications require continuing education in the field of vocational rehabilitation to maintain my certifications. My experience is outlined on my curriculum vita. My experience includes vocational analysis since 1991 to consider accommodations and ability to return to work at a preinjury employer. In addition, I have been a vocational expert with the Social Security Administration since 1995, also testifying if individuals can return to any of their prior past relevant work. I have consulted with private employers in the same regard. I have used generally accepted methodologies and peer reviewed resources and publications in formulating my opinion. This was previously discussed in detail.

**No comparison of experience of the business pre and post injury. If used good data but flawed method the information is unreliable.**

Dr. Field cautions in his 2010 publication that the vocational expert needs to understand the parameters of his or her areas of expertise and be careful to offer testimony only in those areas (Field, 2010, p. 9). The business valuation and review of profits and expenses is outside my realm of expertise. This is an appropriate consideration for a forensic accountant or economist but not a vocational rehabilitation expert.

A preinjury wage capacity can be determined by an individual's preprofile of jobs and transferable skills. Mr. Hurtin was already earning above the 90<sup>th</sup> percentile for the OES group 47-5021 - Earth Drillers, Except Oil and Gas, which includes water well driller, as provided in my report. He had an established earning capacity and the preearning capacity was well documented without need for further analysis. Further, I was not requested to perform a wage capacity analysis.

**The vocational expert is to translate the disability created by the accident related injury into an assessment of earning loss caused by the inability to perform tasks as a result of the disability. The economist is not qualified to testify as to the relationship between anatomical disabilities and the impairment of future earning capacity. Mr. Cheatum stated that I did not provide a base for preinjury earnings for the economist to consider.**

This above statement is not relevant, as a full earnings capacity assessment was not requested. This was inappropriate as the referral question posed to me was if Mr. Hurtin was able to return to work at his preinjury job with or without the accommodation of a helper. If he were not returning to work or was planning to leave his business or sell his business, then it would be important to consider other vocational options. This could include transferable work skills, potential retraining options and review of local job opportunities. The BLS data that was cited would be helpful in this type of case.

In each case, clinical judgment is required. Vocational rehabilitation counselors in the public sector, private sector and in forensic work must first determine if an individual can perform their past work with or without accommodation. This requires using generally accepted methodology in the field and resources. This is the first step in an analysis. If the individual can return to work, then the additional transferable skills analysis is not warranted. In this case, if Mr. Hurtin could not maintain his business and work as well driller (with or without accommodation) it would be expected that Mr. Hurtin would have a greater wages loss than he is currently experiencing. Dr. Finance, Economist, expert report has addressed wage loss due to business cost incurred for the accommodation of a helper. Without the use of a helper for the heavier demands of this job, Mr. Hurtin would not be able to work as a water well driller. Mr. Hurtin is required onsite due to his extensive water well drilling knowledge and because he is the licensed driller. This is consistent with page 9 of my deposition.

Dr. Timothy Field's publication, *Admissible Testimony and Clinical Judgment the Development and the Resources Needed to Support and Sustain Opinions in Forensic Rehabilitation (2010)* clearly outlines that each case is individualized. The methods and steps involved to formulate an opinion relate to the referral questions posed to the expert.

Additional resources, which verify my methods and confirm peer review, are listed in the attached resource list. The list is not all inclusive of all relative resources but is a representative sample. In as a diplomat to the American Board of Vocational Experts, my reports and methodology has been peer reviewed as part of the ABVE/D certification process. In addition, my reports have been peer reviewed and used as part of training sessions for the American Board of Vocational Experts and the International Association of Rehabilitation Professionals. In addition to the work being utilized for other speakers, I have also presented at both organizations.

Respectfully Submitted,

Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D

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Ben Hurtin

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