

New York Law Journal

Tuesday, July 31, 2001

HEADLINE: **Trial Advocacy, Cross-Exam Of Vocational Rehabilitation Experts**

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BODY:

Historically, damages relating to loss of income have been both supported and challenged by the use of experts such as forensic economists, actuaries and accountants. Each of these experts would analyze lost earning capacity by focusing on issues relating to interest rates, inflation rates, wage rates, productivity rates, fringe benefits and work life expectancies.

New Tactic: Rehab Experts

Recently, however, defendants' attorneys have become increasingly more sophisticated in challenging a plaintiff's ability to earn money following an injury for which a large economic loss has been projected. Instead of merely relying on a medical doctor's opinion in conjunction with a forensic economist, another individual is retained: a vocational rehabilitation expert. It is this expert who will seek to accomplish two things: (1) to directly challenge the validity of the economic loss suffered by the plaintiff, and (2) to indirectly challenge your credibility by suggesting that you have deliberately inflated the value of the loss suffered by the plaintiff.

Imagine the scenario in which you represent a client with severe injuries, years of medical care to come and a future of lost earning capacity because his doctors say he has a total disability. You are getting ready for a trial that should bring in a large verdict when suddenly the defense serves the name of an expert in vocational rehabilitation. This expert, who has never so much as spoken to your client, will testify that the plaintiff will in fact have a future full of employment and earnings: That he either can return to the same vocation, work in some capacity or even return to work after being retrained to do something that will pay him much more than he was earning prior to the accident.

At first glance this expected testimony might appear to make your case weaker, but do not despair. There are strategies to be used on cross-examination that can turn this around and actually make your case stronger. First, know your opposing expert. Perform jury verdict searches to discover the types of cases he has testified in previously, the amount of testimony he has given and the types of clients for whom he has testified. Then get the trial transcripts to review his actual testimony and see how he will most likely testify in your case. These transcripts can form the foundation for impeaching the expert with prior inconsistent statements.

Carefully review the expert response pursuant to the discovery rules governing expert disclosure ([CPLR 3101\[d\]](#)). This disclosure should include expected testimony on alternative employment that the expert will suggest the plaintiff can perform. Typically, even if your client has no significant transferable skills, educational achievement history or applicable training, the expert will likely testify that the plaintiff can perform a myriad of sedentary, light or medium-strength jobs. He will then testify as to the salaries paid in each position and earnings which will often match or exceed the earnings of your injured client.

Knowing the bases of the vocational expert's opinion will help you form the basis of your cross of this vocational expert. The vocational expert's bible in cases such as these is the Dictionary of Occupational Titles. [FN1] It lists virtually every job in existence in the United States, gives a detailed job description and illustrates the education, skills, training and physical strength required for each position. The following example will show how these concepts are applied in the average case.

Hypothetical Case

Assume you have a client with a herniated disc and laminectomy who previously worked for the Department of

Sanitation as a garbage collector. The defense expert comes in and testifies that with successful surgery, in his opinion, the plaintiff can still collect garbage. He also testifies however, as to other occupations your client will be able to pursue, including cashier, security guard and dispatcher. He makes clear that these positions pay \$30,000 to \$40,000 per annum. The cross should go something like this:

Q: Sir, it is your position that Mr. Jones can work, true?

Q: That he can work actually in the same capacity as a garbage collector, correct?

Q: Even though his surgeon has testified that it is dangerous for him to do any heavy lifting, you say otherwise, right?

Q: And even though his treating neurologist says he is totally disabled from employment of any kind because of his inability to sit or stand for extended periods of time without severe pain and limitations, you say he can do all sorts of work, correct?

Next you must meet the witness on his own turf. You must show him that you are fluent with the resources and research material on which he relied.

Q: First, there is a publication known as the Dictionary of Occupational Titles, true?

Q: And you reviewed that text prior to your testimony?

Q: Not only did you review it, but you based your opinion in part upon the contents of that text, right?

Q: Correct me if I'm wrong, but the Dictionary of Occupational Titles is published by the federal government actually by the United States Department of Labor, true?

Q: And it is the bible of vocational rehabilitation counselors, correct?

Q: Mr. Witness, the Dictionary of Occupational Titles or DOT, includes what are called Strength Ratings, correct?

Q: And these reflect the estimated strength requirements and physical demands of each job, true?

Q: Five terms are used which express this strength factor, right?

Q: "Sedentary Work," true?

Q: Which is the least strenuous of all groups of occupations, true?

Q: Then "Light Work," which is the next to least strenuous, right?

Q: Then there is "Medium Work" which is defined as exerting 20-50 pounds of force occasionally and up to 10 pounds of force frequently, true?

Q: The DOT goes on to describe "Heavy Work" as well, doesn't it?

Q: Heavy Work is defined as exerting 50 to 100 pounds of force occasionally and 20 to 50 pounds of force frequently, true?

Once you have set the witness up by defining the operative terms for the jury, you must knock him down.

Q: And it is your testimony, even with what Mr. Jones' surgeon calls a compromised spine with a disc that can re-herniate, compress the cord and cause paralysis with any dangerous heavy lifting, it is your testimony that Mr. Jones can return to this occupation involving heavy lifting, correct?

Q: But working for the sanitation department is more than working a job considered to be merely "Heavy Work," true?

Q: That is because the DOT describes a garbage collector as one who is involved with what is called "Very Heavy Work," right?

Q: I take it you chose to ignore these issues in determining whether Mr. Jones could return to work?

Alternate Employment

It is more likely that the vocational expert will testify that the plaintiff can engage in alternate employment. Typically, he will choose an occupation that requires little education and strength such as a security guard, a position categorized as one of "light work." Using the Dictionary of Occupational Titles, the cross should go something like this:

Q: You have also testified that Mr. Jones could make a living as a security guard, true?

Q: The position of security guard is listed in the Dictionary of Occupational Titles, true?

Q: They are also called patrol guards, watch guards and special police officers, right?

Q: They guard against vandalism and illegal entry onto property, correct?

Q: They have the responsibility of warning intruders, true?

Q: Not only that, they may, according to the DOT, have to arrest trespassers, correct?

Q: Not a job for the meek, or faint of heart, right?

Q: Or for people with a physical handicap?

Q: Arresting and restraining people is a potentially dangerous job, correct?

Q: Not something that one who runs the risk of paralysis should be doing, is it?

The expert will also testify to various "sedentary" jobs that your client will be able to perform. The Dictionary of Occupational Titles defines sedentary as work where the worker sits "most of this time." With a serious back injury, the expert can be attacked for choosing this work category for such a client:

Q: You also say that Mr. Jones would have no problem working as a dispatcher either, is that correct?

Q: A taxi dispatcher, according to the DOT, sends cabs in response to telephone requests for service, true?

Q: A dispatcher also maintains operational maps, keeps logs and arranges for relief of drivers, correct?

Q: This is known as a sedentary position, right?

Q: And by sedentary we mean the person has to sit most of the time, true?

Q: That is part of the definition of sedentary as promulgated by the federal government, correct?

Q: You would agree that if a person could not sit most of the time, that would exclude them from a job that required them to sit most of the time, right?

Q: If Mr. Jones' physicians are right about his inability to sit for extended periods of time, well, that would certainly exclude him from working as a dispatcher, correct?

Q: As a matter of fact, that would preclude Mr. Jones from working at any job categorized as sedentary, true?

Q: And sedentary jobs mean jobs requiring the least amount of physical strength or exertion, right?

Focus on Special Skills

Another way to attack the basis of the vocational testimony is by focusing on the special skills and educational requirements of the job the vocational expert has chosen for your injured client. The Dictionary of Occupational Titles refers to this concept as General Educational Development or GED. The cross-examination on this issue might proceed like this:

Q: Another issue in procuring gainful employment is the special skill of the potential job candidate, correct?

Q: As well as the educational background, true?

Q: Now the Dictionary of Occupational Titles speaks of a concept called General Educational Development or GED, right?

Q: And General Educational Development embraces the aspects of education which are required of the worker for satisfactory job performance, true?

Q: Now as a sanitation worker, Mr. Jones had a job which required the lowest GED scale, true?

Q: What that means is that to procure and maintain that job, Mr. Jones does not need either great educational background or special skills, true?

Q: Yet that job pays him \$60,000 per year with overtime, right?

Q: For all that pay and those benefits, he requires very little training, true?

Q: Very little reasoning skills, correct?

Q: Very minor abilities in language, true?

Q: And he doesn't even need any math skills, right?

Q: All according to the Bible: The Dictionary of Occupational Titles, correct?

Q: You'd agree with me, that it is quite difficult to match a job like that for Mr. Jones in this economy?

This is a good time to cross the expert on the degree of difficulty it would be for your client to procure and maintain another type of job, even if he was perfectly fit. This area includes the Dictionary of Occupational Title's Specific Vocational Preparation or SVP. This is defined as the amount of time it would take a worker such as your client to learn the techniques and acquire the information and aptitude needed for the specific job. The vocational training would include vocational education, apprenticeship training, in-plant training, on-the-job training and essential experience in other jobs. SVPs of jobs may run from less than one month to over 10 years. With the DOT handy in court, this can become a fertile ground for cross.

Another way to cross-examine the vocational expert is by highlighting the disparity in benefits packages of the job your client left with the one the expert now recommends. Most of the jobs your client will be relegated to performing lack fringe benefits. Here is an example of what you can do with this issue:

Q: By the way, there are things more important to a worker than merely salary, true?

Q: Especially to a worker with a wife and five dependent children, correct?

Q: And what is as important or even more important than salary is benefits, right?

Q: Like a pension fund?

Q: Unlimited sick time, correct?

Q: Dental benefits as well, true?

Q: Full medical benefits, correct?

Q: By full benefits I'm talking about health insurance?

Q: And unlimited dental coverage as well, correct?

Q: Not just for Mr. Jones, but for his wife and five children, true?

Q: To many people, that benefits package is worth more than any salary they could possibly make, correct?

Your Own Expert

Retaining Your Own Vocational Expert. Of course, regardless of whether or not the defendant retains a vocational expert, you might want to retain your own. In certain cases where it may be difficult to prove a diminution in future earning capacity, offensive use of a vocational expert can bridge the gap between your treating physician and your economist. Remember, the plaintiff's treating physician might be in a position to say that the plaintiff is disabled from his current type of employment, but may not have the requisite expertise to rule out other types of employment. Likewise, the economist can only project future loss or diminution in earning capacity based on the testimony that went before him. He can not say that your client is disabled or incapable of working in another capacity. Thus, in certain circumstances, it becomes critical for you to rely on your own employability expert to provide support for the ultimate opinion. But beware of when you retain this expert. It is usually better to wait until the defense retains the vocational counselor and discloses information in his or her expert response. That way they will not be entitled to an actual examination of your client or to perform tests on him. If you disclose your vocational expert first, the defendant will be entitled to such an examination. The benefit of retaining the vocational expert is that you can use his testimony either on your direct case or in rebuttal, or as a resource upon which to gather information to cross the defense experts.

Conclusion

The vocational expert is a critical witness that can be useful to either side in the litigation. As with all other experts, with the proper preparation and skills you can effectively cross-examine the vocational rehabilitation counselor. Utilizing the vocational bible, the Dictionary of Occupational Titles, you can beat the expert on his own turf.
FN(1) The Dictionary of Occupational Titles, Fourth Edition, Revised 1991, U.S. Department of Labor.