

THE STATE OF OHIO, }
COUNTY OF CUYAHOGA. } SS: LILLIAN GREENE, J.

IN THE COURT OF COMMON PLEAS

CHARLES TENNEY, III, etc.,
et al.,

Plaintiffs,

v.

URMILA PATEL, M.D., et al.,
Defendants.

Case No. 448548

Deposition of ROD W. DURGIN, Ph.D., taken by
Defendant Southwest General Health Center, as if
upon Cross-Examination before Angela R. Zanghi, a
Registered Professional Reporter and Notary Public
within and for the State of Ohio, at Vocational
Assessments, Inc., 600 East Superior Avenue, Suite
1300, Cleveland, Ohio, on Wednesday, the 27th day of
November, 2002, commencing at 12:39 p.m.

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1 (Defendant's Deposition Exhibit 1

2 marked for identification.)

3 ROD W. DURGIN, Ph.D.,

4 called by Defendant Southwest General Hospital, for
5 the purpose of cross-examination, as provided by the
6 Ohio Rules of Civil Procedure, being by me first
7 duly sworn, as hereinafter certified, deposes and
8 says as follows:

CROSS-EXAMINATION

11 BY MR. HUPP:

12 Q. Please state your full name for the record.
13 A. Dr. Rod W. Durgin.
14 Q. Dr. Durgin, my name is Steve Hupp. We've met
15 before. You understand the process of a deposition
16 I assume?
17 A. Yes, I do, sir.
18 Q. Question and answer session under oath. If you
19 answer a question, we presume that you understood
20 the question. Fair enough?
21 A. Fair enough.
22 Q. If you do not understand my question, please tell me
23 and I'll attempt to rephrase the question. Okay?
24 A. That will be fine.
25 Q. Doctor, we marked your current CV handed to us today

1 as Defendant's Exhibit 1. Is that true? 5
 2 A. That's correct.
 3 Q. Is that up-to-date in all aspects?
 4 A. Yes, it is.
 5 Q. Exhibit 2 you said were some documents from your
 6 file which we'll go through. Could you just
 7 describe -- I guess we should sort of submark these
 8 1 through whatever.
 9 (Defendant's Deposition Exhibits 2A through
 10 2H marked for identification.)
 11 Q. (BY MR. HUPP) Doctor, I'm handing you what's been
 12 marked all of Defendant's Exhibit 2 and we've broken
 13 it down by letters. Can you tell me essentially
 14 what those documents are first?
 15 A. Certainly. 2A is the first page of my intake form.
 16 All my intake notes were relative to my assessment
 17 of Charles Tenney, III. So 2A is just a cover sheet
 18 of standard form.
 19 2B that you marked is some of my intake notes
 20 that are part of this form. The whole form is just
 21 my intake notes.
 22 Q. Is that your handwriting on that form?
 23 A. Yes, it is. So anyway, 2A and 2B is that. Let's
 24 find C for you. 2C is the answer sheet from the
 25 Slosson Intelligence Test of Dawn Davis, the mother.

1 And 2D is the answer sheet from the Slosson 6
 2 Intelligence Test of Charles Tenney, Jr., the
 3 father. E is the Labor Market Analysis of Charles
 4 Tenney, III post-injury. And 2G is the Labor Market
 5 Analysis -- so E is the Labor Market Analysis and F
 6 is the data that I put in to get to the Labor Market
 7 Analysis. And that's post-injury. And then G, H,
 8 2G and H, is the same thing except it's the
 9 pre-injury market.
 10 Q. Non-injury, in other words, if the child weren't
 11 injured at all?
 12 A. Yes. Either way. Non-injury, pre-injury.
 13 Q. Now, these answer sheets for Dawn and Charles Jr.,
 14 those are the actual answer sheets for the I.Q. Test
 15 that you administered?
 16 A. Yes.
 17 Q. Why did you choose to administer an I.Q. Test to the
 18 parents, Doctor?
 19 A. Because we have a child here that when I saw him is
 20 one year and three months and the best determination
 21 of a child's future capacity to work and earn money
 22 is the intellectual capacity of the parents. We
 23 know that intelligence is over 80% hereditary and we
 24 know that intelligence is the driving force in
 25 looking at the kinds of jobs one can perform.

1 Q. If you can for us, would you please read the back of 7
 2 Defendant's Exhibit B. That will answer a lot of
 3 our questions I think.
 4 A. Okay. At the top it says Dawn Davis (mother).
 5 Next it says Age: 21. Then the next is Education.
 6 It says Graduated Columbia High School/Columbia
 7 Station, Ohio, in 1999. Then it says under
 8 education, Has enrolled at Ocean County Community
 9 College for January 2002, and then it says,
 10 Interest: Forensic Science. Work Experience is the
 11 next header. And it says for Dawn Davis since high
 12 school has worked several jobs. She was a nurse
 13 assistant for the elderly. Temporary service/
 14 receptionist, phones, etc., for American Greetings.
 15 She was a cashier at Walmart. Presently a
 16 photographer at a portrait studio in Walmart, and
 17 that was in New Jersey. She had been there for two
 18 months.
 19 Then the next section is Charles E. Tenney
 20 (father). Age: 29. Education: Completed 9th grade
 21 at Max Hayes Vocational Center in Cleveland. And
 22 then right at the top you see 1989 with a question
 23 mark which means he wasn't sure but he thought it
 24 was around '89. Then we go to Work Experience.
 25 Carpenter laborer for uncle one year. He worked at

1 a fire damage company for three years. Mostly 8
 2 demolition work there. And then the last one is at
 3 age 21 began collecting Social Security for learning
 4 disability/can't read or write. Then the final
 5 sentence it says he has a child from a previous
 6 situation, a daughter eight years.
 7 Q. So the reason the father was on Social Security is
 8 because he had a learning disability and couldn't
 9 read or write?
 10 A. That's my understanding, yes.
 11 Q. How was it, Doctor, he at least attempted to
 12 complete the I.Q. test? Was that read to him?
 13 A. Yes. The I.Q. test is verbally administered.
 14 Q. Then he would just select -- Is that multiple choice
 15 answers?
 16 A. No. Well, depends on the question, you know. There
 17 are no multiple choice. On an I.Q. test you do a
 18 lot of things; you're asked to verbally perhaps
 19 solve a math problem in your head or you're asked a
 20 question like who was Thomas Edison, what did he do,
 21 or you're asked to recite numbers forward or
 22 backward, a string of numbers. It's all verbally
 23 administered.
 24 Q. I saw on the Exhibit 2D this 1 through 187 and that
 25 must be what you write down while administering the

1 test, is that true? 9
 2 A. Yes. How you would interpret this form is that
 3 there are basically 187 questions for the test
 4 beginning at for someone age 4 and going up through
 5 adult, depending on the age of the person. As an
 6 administrator, you decide where you want to start
 7 the testing, where you think the person might be.
 8 You don't have to give them all the questions. I
 9 started it looks like with Charlie, the father,
 10 Charles Sr., looks to me like I started at Item 86
 11 and then he answered Items 87 and 88 correctly.
 12 That's why you don't see any marks. Item 89 he
 13 missed.
 14 Q. That's the horizontal line that we see?
 15 A. That's the negative, right. So for this to be valid
 16 I've got to get to a point where he answers ten in a
 17 row correctly, so that means after asking him three
 18 questions I had to back up. And looks like I had a
 19 couple of tries with him. I backed up to Question
 20 71, that didn't work, so I finally backed up to
 21 Question 52 which did work and I got 10 straight
 22 answers.
 23 Q. Do you know what the significance of Question 52
 24 would be, what age level that would be?
 25 A. Not without going to the book, but 52 might be -- I

1 don't know, I don't like to guess, but it's not real 10
 2 high, I'll tell you that.
 3 Q. What is the last question he would have been asked?
 4 131?
 5 A. 131, he was asked that and missed it.
 6 Q. Okay. Now, explain what you mean by these scores
 7 over here on the right-hand side.
 8 A. That's just straight. We look at the baseline 61.
 9 61 was the last correct answer he had before he
 10 missed. Questions that he passed after 61, he
 11 passed 36. So you add 61 and 36 and you get a 97.
 12 Okay. Then you take this 97 to the -- This is a
 13 standardized test so there are norming tables. You
 14 take the 97 to the standardized test and you find,
 15 if you want to look here so you can finish this
 16 form, that the 97 converts to a standard score of
 17 65, which puts him at the 1st percentile of people
 18 taking this test. Okay. That's how.
 19 Q. The same methods were used on --
 20 A. Same. Except with her I started at 100, which is
 21 sort of a dead average start to start someone, and
 22 actually with her I was almost on target so I was
 23 four or five off. Actually, I was pretty close to
 24 her. 114 was her first missed and then you just
 25 keep going and eventually she missed ten in a row

1 and we stop. 11
 2 Q. The mother Dawn had an I.Q. of 101?
 3 A. She has an I.Q. of 101 and she's at the 52nd
 4 percentile.
 5 Q. Back when I took psychology when I was in college
 6 many, many years ago 100 was an average I.Q.
 7 A. Dead average.
 8 Q. An I.Q. of 65 is mentally retarded, is that how
 9 that would classify?
 10 A. Yes, that would be.
 11 Q. Based upon your testing you did on the mother and
 12 father of this child, do you have any opinions as to
 13 what you believe this child, Charles III, will have
 14 in terms of an I.Q.?
 15 A. I think he'll fall as I stated in my report in the
 16 average range of intelligence.
 17 Q. In the range of 100 in other words?
 18 A. Somewhere within that range. The standard range,
 19 it's a 15 point standard deviation. So he would
 20 fall between 85 and 115.
 21 Q. Aside from the I.Q. test and taking a history from
 22 these parents, did you do any other testing of the
 23 parents?
 24 A. No. That was basically the data that I needed.
 25 Q. I'm looking at your report. I assume you have an

1 extra copy there. It's dated April 28th, 2002. 12
 2 A. Yes.
 3 Q. Doctor, is that the first and only report you
 4 generated in this case?
 5 A. Yes, it is.
 6 Q. Did you take any notes aside from what we have here
 7 during any of the testing of these parents?
 8 A. No. What you see is what I have.
 9 Q. In terms of reviewing the case, I noticed that you
 10 have other documents in your file. Could you tell
 11 us what those are?
 12 A. Certainly. Well, we've gone through the ones you've
 13 asked about. I assume we can move on from there?
 14 Q. Right.
 15 A. Then the next piece of data in my file would be all
 16 the medical records that I reviewed in this case,
 17 and they're cited on Page 2 of my report. So that's
 18 what those are. And then finally in my files since
 19 I did the analysis I received the depositions, both
 20 Dawn Davis and Charles Tenney, Jr. in terms of
 21 their depositions. I received those, and they're
 22 here. And I also received since I did the report a
 23 physical therapy report dated June 17th, 2002 from
 24 Southern Ocean County Hospital signed by a Kimberly
 25 Sink, MPT, she's a physical therapist, and

13

1 apparently it was the discharge notice and her
2 treatment of Charles III.
3 Q. This letter that you've just described has a fax
4 date to you of November 22nd at 9:14 a.m. on the
5 upper portion?
6 A. Yeah.
7 Q. Is that in terms of your memory when you would have
8 received that document?
9 A. Yeah. It was after I did the analysis. I didn't
10 realize what the date was.
11 (Defendant's Deposition Exhibit 3
12 marked for identification.)
13 Q. (BY MR. HUPP) Doctor, showing you what's been
14 marked as Exhibit 3, now that we've established that
15 you had received that document after your report, do
16 you need to make any amendments or changes to your
17 report as a result of having that physical therapy
18 document?
19 A. No. This doesn't change my opinion nor my analysis.
20 It just basically states they're trying to work with
21 him to give him a little more functionality relative
22 to his injury, but it doesn't effect my opinions.
23 Q. On Exhibit 2A you have some other writing. I'm
24 going to bore us by making you read that if you
25 would.

14

1 A. Certainly. I would refer to read it off mine.
2 Q. Because mine doesn't look too good.
3 A. This is just some intake notes. "During his birth
4 on 12-13-2000 Charles Tenney, III sustained a severe
5 brachial plexus injury of the right upper extremity.
6 Additionally, he sustained multiple bruises to his
7 face, the right eye, arms and chest. Chest x-ray
8 taken shortly after his birth revealed that both
9 lungs had collapsed. Additionally, he required a
10 breathing tube, chest tubes and hospitalization in
11 the ICU of Rainbow Children's Hospital as a result
12 of injuries sustained at birth.
13 The next says Parents, that word is parents
14 underlined. Then first says, Arm constantly hangs
15 at side. Next is, Unable to fully straighten the
16 arm. Unable to lift the arm to shoulder level.
17 Hand is constantly fisted. Fingers must be manually
18 opened. Cannot hold with his right hand. Unable to
19 rotate his wrist. In general, the right arm is very
20 weak.
21 Q. Is that the continuation?
22 A. Yeah, that's sort of a continuation. Then it says
23 -- It's my observation note. It says, When observed
24 walking, arm held at side and in a guarded/limp
25 manner.

15

1 Q. Okay. At this time when you examined him on that
2 date, which was December 27th, 2001, he was 15
3 months old I think?
4 A. Correct.
5 Q. Could he follow commands like open your hand, close
6 your hand, or he would be too young for that,
7 wouldn't he?
8 A. No. They asked him to do that. He understood that
9 part. And I asked him to do that.
10 Q. He did follow those commands to the best of his
11 ability?
12 A. Yeah. His hand was always closed.
13 Q. He walked around with it closed?
14 A. Yeah. Pretty much.
15 Q. Now that we're almost a year later, do you intend to
16 re-examine this child or view him again?
17 A. I don't have any plans to do that.
18 Q. Would a re-examination of the child a year later in
19 any way impact your opinions in this case do you
20 think?
21 A. Not unless there was something dramatic that
22 happened. I mean, for my opinions to change this
23 child has to be able to have full function of his
24 hand, he has to be able to close it, open it, he has
25 to be able to straighten his arm and he has to be

16

1 able to lift it over his head and he has to
2 demonstrate increased strength in the arm beyond
3 what he had. I don't think that that's going to
4 happen. If it were to happen, I would certainly
5 want to re-evaluate him. But with this type of
6 injury that rarely, if ever, occurs.
7 Q. Okay. Now, Doctor, I want to talk about your
8 analysis and how you arrived at your analysis based
9 upon this child's disability that we're talking
10 about. My understanding from your report is that
11 assuming there was no injury, assuming it was
12 pre-injury, the child would make a certain amount of
13 money and would be eligible for a certain percentage
14 of jobs in the U.S., is that right?
15 A. That's right.
16 Q. Then what you apply is the nature of his injury to
17 that calculation, reduce the calculation and arrive
18 at what your anticipation is that he would earn over
19 the course of his lifetime, is that true in general
20 terms?
21 A. Yes.
22 Q. To do that, you have a work table, a worklife
23 probability table?
24 A. Right.
25 Q. It's a couple pages long. Could you turn to that

17

1 for us.

2 A. Sure.

3 Q. I guess we'll start with it says age 19. It says

4 Obs 1. And then you have a probability life.

5 That's his life expectancy I assume?

6 A. Yes.

7 Q. Okay. Then you have probability of worklife

8 expectancy which is .57 for pre-injury and .31 for

9 the post-injury. Is that true?

10 A. That's correct.

11 Q. What is the significance of those two numbers?

12 A. Well, the significance is that as a disabled worker

13 he's going to experience reduced worklife. I mean,

14 these are Government tables. Government says, you

15 know, a couple things to us. Says that none of us

16 work consecutive years, we work worklives which they

17 call LPE, probability of; L being alive, P

18 participating, and E being actually employed in the

19 workforce. That's a worklife. And they've

20 developed worklife tables for pre-injury and

21 post-injury because their data and all the research

22 shows once you're injured two things happen to you.

23 One, you probably are not going to earn the same

24 amount of money you would have; two, and more

25 importantly, you're not going to be in the workforce

18

1 at the rate you customarily would have. You're not

2 going to have the same worklife. And that's what

3 the Government says. That is what this table points

4 out. And the way it's life participation,

5 employment, and it's generated by sex, age which

6 we've talked about, and education.

7 Now, in this case I've not included education.

8 Education doesn't come in. We don't know what his

9 education is so we're not going to include it.

10 Q. Okay. Well, by not including it, does that default

11 to something meaning less than high school

12 education?

13 A. No. Just means we just look at all the work that

14 anybody can perform by, in this case, their

15 intelligence level, their age and their sex.

16 Q. You could run this form again with a high school

17 education for instance and you would come up with

18 different income numbers?

19 A. There would be a difference, correct.

20 Q. And you could run it with maybe two years Associate

21 Degree or even a college education to get new

22 numbers?

23 A. That's correct.

24 Q. Is there a percentage you have used to quantify this

25 child as being disabled?

19

1 A. Yes.

2 Q. Explain how you arrived at that calculation for us.

3 A. Okay. Well, the Government classifies

4 employability. When you talk about percentage of

5 disabled, it's really not a way of looking at it.

6 You have to look at it by employability, how

7 employable is this individual as a disabled worker.

8 Are they fully employable on one end of the spectrum

9 or are they unemployable on the other or they're

10 somewhere along being fully employable to

11 unemployable, and the Government says here are the

12 number of categories you can use. You can use

13 disabled not severely, you can use average disabled

14 or you can use disabled severely. Those are sort of

15 the degrees. In this case looking at the type of

16 injury it is, it was my opinion that Charles Tenney,

17 III in terms of employability would be an average

18 disabled worker in the workforce.

19 Q. You've mentioned a couple times the Government. Is

20 there a specific location your attaining this

21 reference from?

22 A. Yes. The reference is on the back page, second page

23 of the report. The vital statistics of the United

24 States that you see there in the current population

25 reports the selected characteristic for persons with

20

1 a disability 16 to 74. Those are published annually

2 basically by the Government, and that's where the

3 data comes from.

4 Q. Aside from the data that you've referenced on Page 2

5 of the worklife probability tables, do you have any

6 other reference materials you've relied on in this

7 case at all?

8 A. Well, I used to get the Labor Market Analysis. I

9 use the worker trade characteristic from The U.S.

10 Department of Labor, their Dictionary of

11 Occupational Titles Program, which essentially there

12 are 12,000 different jobs that one can do in this

13 country. And for each one of those jobs the

14 Government; A, has defined the work; and B, has

15 built a vocational profile as to what the physical

16 and intellectual attributes are that are required to

17 perform that work.

18 So when I do my Labor Market Analysis like

19 these things that you marked here,

20 pre-injury 2G, when I do the Labor Market Analysis,

21 you know, I say give me all jobs, I want to look at

22 all jobs that require G greater than 2, that means

23 average degree of intelligence and below, that is

24 average and below average, that is my opinion prior

25 to the injury that was the pool of jobs available to

21
1 him.
2 Q. For the record, you're looking at 2H now?
3 A. Yes. Now back to 2G, using the Government date from
4 the National Crosswalk Service, we found out, and we
5 used in this case incidentally a National Labor
6 Market. I could have used state. I used national.
7 Typically with children I use national because we
8 don't know whether or not they'll work. We find
9 60%, 60.87%, of all jobs in the country require at
10 least an average degree of intelligence, and so I
11 use this data.
12 To answer this question, I use some other
13 Government data. It's the Workers Trade
14 Characteristic Program from the Dictionary of
15 Occupational Titles.
16 Q. Is that a public document?
17 A. Yeah. You can get it in print form or you can get
18 it on tape from the National Crosswalk Service at
19 The University of Iowa, which houses that data form.
20 Q. Doctor, you have some calculations on 2G,
21 handwritten calculations. Explain what those are
22 for us.
23 A. Okay. 2G is again pre-injury capacity to work. So
24 once I found out that 60.87% of all jobs were
25 average degree, there's data on here that says that

22
1 the median annual earnings that accrue to this work
2 is \$22,470.24 that you see in this form. So the
3 writing that you're asking about, the 22,470, is in
4 1998 dollars. So I have to grow the money to the
5 time that I saw Charles in 2001. So I grew the
6 money at the rate of 3% so that the \$22,470 in 1998
7 in 2001 dollars would be the \$24,553.83. That's
8 what the handwriting is. Just growing the money.
9 Q. At a 3% rate of growth every year?
10 A. Yes.
11 Q. And Exhibit E is the same calculation only with the
12 injury?
13 A. That's correct.
14 Q. Okay.
15 A. Same thing.
16 Q. Okay.
17 MR. MISHKIND: Off the record for one
18 second.
19 (Discussion had off the record.)
20 Q. (BY MR. MISHKIND) Doctor, aside from the opinions
21 that we've already discussed in this case, are there
22 any other opinions you intend to render at the time
23 of trial concerning Charles Tenney, III's loss of
24 future income or employability?
25 MR. MISHKIND: Let me object. You may

23
1 have skirted over there are opinions
2 expressed in the report that I'm not sure
3 you have, in fact, covered. I presume that
4 you're not attempting to exclude that which
5 is contained in his report.
6 MR. HUPP: No. If anything, I'll say
7 on the record it's an open-ended question
8 to try to further move along the deposition
9 and make sure the doctor gets to express
10 all of his opinions today.
11 MR. MISHKIND: Same objection, but go
12 ahead.
13 A. What I'm going to express in terms of opinions at
14 trial if I'm asked to is that I think that what best
15 represents Charles Tenney, III's pre-injury capacity
16 to work was those jobs that accrue or to individuals
17 with an average degree of intelligence. That means
18 that 60.8% of the jobs in the labor market fall
19 within that, and in 2001 dollars the median income,
20 median midpoint, 50% make higher, 50% make lower,
21 which I chose the median for that reason, the median
22 salary that accrued to the jobs pre-injury in 2001
23 dollars was 24,553.83. That's my opinion as to his
24 pre-injury capacity to work and earn money.
25 I'm also going to state that I believe he's now

24
1 restricted in the amount and the kind of work that
2 he can perform. I think that as a result of his
3 injury he's now restricted to a variety of work that
4 is sedentary to light in nature, requires at least
5 or no more than an average degree of intelligence,
6 and the work that he performs should require a below
7 average degree of manual dexterity and below average
8 degree of finger dexterity. Such work comprises
9 12.23% of the national labor market and pays at the
10 rate of \$23,785.59 in 2001 dollars.
11 I am also going to express an opinion in terms
12 of his employability. I believe he's an average
13 disabled worker and I think his lifetime loss of
14 expected earnings is \$708,290.40. That includes
15 fringe benefits at the national average of 27%. And
16 those are the basic opinions that I will perform.
17 I'm not sure if you asked me this question
18 because I am old, but it is my understanding this
19 trial is going forward in 2003, so prior to that I
20 probably would update the numbers to 2002 dollars.
21 I have not done that yet but I will by the time we
22 go to trial.
23 Q. I assume you will do that by adding another 3%
24 growth?
25 A. To that and add the numbers again. Nothing will

1 change except I'm going to add 3% pre and post. 25
 2 Q. Right. When you say 27% fringe benefits, what does
 3 that include? Health insurance?
 4 A. It includes your Social Security, includes your
 5 Medicare, includes your health benefits. Those are
 6 the primary elements of a fringe package.
 7 Q. Would you agree, Doctor, if the child does obtain a
 8 high school degree that would improve his overall
 9 performance in the job market?
 10 A. Performance in the job market?
 11 Q. Poorly phrased. I know.
 12 A. I know what you're asking.
 13 Q. Hypothetically if the child is going to get a high
 14 school education he's going to be in the market to
 15 make more than somebody without a high school
 16 education, would you agree with that?
 17 A. It's not so much make more. Look at it this way;
 18 the more education you have it increases the
 19 probability you'll be participating in the job
 20 market, in other words, it increases your worklife.
 21 You may make more, you may make less. Traditionally
 22 you would make more. Logically you would make more.
 23 What education does is extends your worklife.
 24 So as an example let's say with less than a
 25 high school diploma you have a 20-year worklife.

1 Those are not accurate numbers but to give you an 26
 2 example with a high school diploma you might have 24
 3 years, with college you might have 29 years. It
 4 extends the amount of time you're going to be in the
 5 workforce thus making money.
 6 Now, you could play all those scenarios. I
 7 didn't do that because we don't know what he's going
 8 to be. And what we know now is that we can look at
 9 regardless of his education what he looks like. And
 10 it works both ways. You increase the education, you
 11 also increase the dollars, increase the
 12 participation and probably increase the loss over
 13 time simply because he would be making more money
 14 than \$24,000. So when you have a child it's my
 15 opinion the best thing you do is you don't consider
 16 education. It's the fairest for everyone involved.
 17 Q. The same question, the same rationale would apply if
 18 he were to obtain a Bachelor's Degree, true?
 19 A. Absolutely.
 20 Q. Are there certain programs or job training that this
 21 child would be entitled to to assist him in
 22 obtaining employment because of the nature of his
 23 injury?
 24 A. Well, when he gets to a certain age, typically after
 25 the age of 18, he would be eligible to go, you know,

1 to the State Rehab, wherever he's living, and try to 27
 2 do that. The problem with this kind of injury, so
 3 we understand it, is that over 80% of all work
 4 requires bilateral use of the hands. That's the
 5 problem with the injury. There are not a lot of
 6 jobs you can do one handed. And that's the real
 7 problem. They can probably try to get him in a
 8 training program, whatever, but they can't give him
 9 that hand to work with. So they can adapt, they can
 10 do some things, but he's still going to have
 11 employability problems because there are not that
 12 many jobs. And people can obviously see the injury,
 13 you know, that deters employability.
 14 Q. Based upon your worklife probability tables, Page 2
 15 of that table, a pre-injury worklife probability
 16 with education not being considered, am I reading
 17 this right, is 36.5 years?
 18 A. That's correct.
 19 Q. In this child's case using his injury, he would be
 20 looking at 14.2 worklife expectancy years?
 21 A. That's correct.
 22 Q. Why is that so substantially different?
 23 A. Well, it's substantially different because that's
 24 what an average disabled worker's worklife is in the
 25 workforce. That's what the numbers tell us.

1 Q. And that's the median of all of the national 28
 2 sampling, if you will?
 3 A. Yes. That's of all the data that's collected,
 4 that's correct.
 5 Q. Just to be clear here, the earnings for a non- or
 6 pre-injury situation would be the \$1.13 million and
 7 this child's situation would be \$431,161?
 8 A. That's correct.
 9 Q. That's how you arrived at your 708 calculation?
 10 A. That's correct. Subtract one from the other.
 11 Q. Okay. Doctor, do you intend to do any other further
 12 review or any other further research prior to your
 13 appearance at trial in this case?
 14 A. Other than to adjust the numbers to 2002 dollars, at
 15 this point I don't have any intention.
 16 Q. Do you have intention in re-examining the mother or
 17 father or even Charles III prior to trial?
 18 A. No. There would be no reason to.
 19 Q. Do you have any other opinions in regard to this
 20 case that you have not had a chance to discuss
 21 today?
 22 A. I don't believe so.
 23 Q. Okay.
 24 MR. HUPP: Doctor, I think that's all
 25 the questions I have. Let me look over my

1 notes. 29

2 CROSS-EXAMINATION

3 BY MS. HENRY:

4 Q. While I was listening intently, I have some. I

5 heard things I don't understand. There was a

6 discussion about what happens if he has high school

7 education, two-year or four-year degree. You said

8 logically with education you have increased

9 probability, you'll be in the job market longer to

10 extend your worklife, logically you have the ability

11 to make more money, correct?

12 A. Yes.

13 Q. You also said it increases the loss over time. What

14 did you mean by that?

15 A. It's sort of a two-edged sword. You look at it and

16 say if he's going to get a college degree, all

17 right, then we would probably have to look at him in

18 terms of the median income that accrue to college

19 graduates, particularly college males. So therefore

20 you're raising the bar pre-injury from something

21 like \$24,000 to something like I think the median

22 income of a college graduate's somewhere in the low

23 40's right now, \$44,000. So pre-injury I got to say

24 44,000. Post-injury I've got to say, Well, he can

25 do this and this is what we'll look at, skilled

1 work, we'll look at jobs that require a college 30

2 degree and then we look at those numbers with his

3 disabilities and it's probably going to be

4 somewhere, and I'm guessing, I'm trying to give you

5 an answer to your question, let's say it's going to

6 be somewhere around \$29,000 or \$30,000 with jobs he

7 can now perform. You have 44 versus 24, 23. It

8 cuts both ways for you. That's why we don't use

9 education.

10 The only thing we know is this young person,

11 this child, can perform work that's average

12 intelligence and the work that he performs should

13 require a below average degree of manual dexterity

14 and below average degree of finger dexterity.

15 That's all we know.

16 Q. But if you increase the education level, then don't

17 you expand the jobs that are available for him in

18 the job market? As opposed to 12.3 now, don't you

19 have a lot more jobs available with the added

20 education? Isn't it more equalized the more

21 education you get?

22 A. No. In answer to your question, it would be more.

23 If I said skilled work, it would go from 60% to

24 maybe 80%. Okay. And on the other side, the same

25 thing happens; all right, if I say skilled work,

1 you're not going to see the jump when you start 31

2 saying you can't use his hands, because we know 80%

3 of the jobs require bilateral use of the hands.

4 Q. Regardless of the education?

5 A. Regardless of the education. We're going to throw

6 education in there and it isn't going to impact that

7 as greatly on the other side as it will on the

8 pre-injury.

9 I don't think you understand that as I'm

10 answering the question.

11 Q. Basically it seems like what you're saying is it

12 doesn't matter what the educational level is, that

13 basically because you have an injury like this his

14 job availability and money-making ability does not

15 expand with the more education he gets with this

16 injury, is that what you're saying?

17 A. In a sense what I'm saying is when you look at

18 various educational levels, the variability is on

19 the front end more than the back end, the pre-injury

20 more than the post-injury. Okay. Because I can

21 increase the jobs on the front end if I go to give

22 me all the jobs that require -- I put them all in

23 there now. I didn't say any skill level. But if I

24 do put in a skill level, it's going to compress it

25 more and probably raise the dollars. All right.

1 And on post-injury I don't have -- Right now we know 32

2 that what we have is 12% of the jobs for people with

3 average intelligence, and that isn't going to

4 change. It's not going to -- It's what it is. And

5 then I've got to say, Well, since we're talking

6 about a college degree, let's take out those jobs

7 that require below average degree of intelligence

8 because that's not fair. So you raise the bar a

9 little. And as you're raising the bar you're

10 diminishing or compressing the amount of jobs.

11 You're moving from 12% down to 8% or 7%, or

12 whatever. And that impacts, you know,

13 employability.

14 Q. But he would be eligible for all the jobs that you

15 consider him eligible for with an average

16 intelligence with no education in addition to all

17 those jobs that would come with an education. So

18 you would have the 12.3% as well as all the ones

19 that could come with an education, so it would

20 expand in essence his potential job market, wouldn't

21 it?

22 A. No. Narrow it because you're making another cut at

23 the data. You're making another cut at the 12%.

24 Let me explain now. Right now we don't look at

25 education. We look at all jobs.

33

1 Q. So if you stop right there, you look at all jobs
2 with no education and the average intelligence, you
3 have 12.3% of the jobs he could do, correct?
4 A. No. That's post-injury. The 12.3% comes in adding
5 below average, sedentary and below average manual.
6 Q. Let me go back. What we're looking at is the injury
7 with your consideration and an average intelligence
8 and no education figured in you have 12.3% of the
9 jobs available?
10 MR. MISHKIND: Talking about
11 post-injury, not pre-injury. I'm not sure
12 you're following the difference.
13 MS. HENRY: I am.
14 Q. (BY MS. HENRY) What I'm saying is if we look at
15 this young man based on your calculations now, not
16 putting any education in and saying his average
17 intelligence with the condition of his arm --
18 A. The disability.
19 Q. -- he can have 12.3% of the jobs?
20 A. Right.
21 Q. If he gets a high school education, he could choose
22 to do one of those 12.3% of the jobs or he would
23 have a further expansion of job availability if you
24 put a high school education in there, wouldn't he,
25 because you're not considering any education here?

34

1 You're saying with this intelligence and this injury
2 anybody could do 12.3% of the jobs that has average
3 intelligence?
4 A. Right. But every additional add-on you want to do
5 cuts into the 12%. Right now we've considered
6 everything imaginable.
7 Q. You considered being a teacher?
8 A. That's in there because we didn't restrict the
9 education.
10 Q. All right. Then that clarifies it for me.
11 A. If a teacher, which it isn't, the teacher was a job
12 that required an average degree of intelligence, it
13 would in the 12% that we have right now.
14 Q. Give me some examples of what kinds of jobs you
15 consider to be sedentary to light in nature and
16 average degree of manual and finger dexterity.
17 A. Below average degree.
18 Q. Below average degree.
19 A. I didn't cut the data from jobs in terms of specific
20 jobs, but I can tell you if you look at the
21 materials that I've provided for you, of the 12.3%
22 that the bulk of these jobs fall into an area called
23 technical sales and administrative support, 7.60%
24 fall into occupational categories, and the rest is
25 nothing significant. The next highest is 1.63%.

35

1 Q. Well --
2 A. He's going to work in jobs that are support-type
3 situations. He's not going to work as a precision
4 production craft and repair guy. He's not going to
5 work, you know, in service occupations, which is the
6 fastest growing segment in our country, because they
7 require two hands. He's going to work in some
8 administrative support. That's where he's going to
9 find the bulk of his opportunities, I should say.
10 I'm not sure if he's going to work there. That's
11 where he'll find the bulk of his opportunities.
12 He's not going to work as an operator, fabricator,
13 it's 1% of the job market. He might find a job
14 there, but it's not highly probable.
15 Q. Cashier?
16 A. Cashier is typically a two-handed job. It's
17 classified as a two-handed job.
18 Q. Why is it a two-handed job?
19 A. Because most cashiers have to use both hands, not
20 necessarily at the input of the data but total job
21 description. They've got to pack bags. They've got
22 to lift things.
23 Q. Well, just so I understand, based on your training
24 and your background and your experience, because
25 this is your thing, what are the jobs that we're

36

1 talking about in technical sales and administrative
2 support that you say this young man can do when he
3 grows up?
4 A. Well, I didn't run the data by specific jobs. I ran
5 it by occupational category. I can tell you where
6 he's going to find his work.
7 Q. But, Dr. Durgin, this is what you do for a living.
8 This is your expertise, your background your
9 training. Can't you tell me today based on these
10 categories what kinds of jobs he can do based on
11 what you know, retrain people for jobs I think you
12 said in the past, or help people go into jobs?
13 A. Yes. I don't run the data by specific jobs. I run
14 the data by category, and I've given the categories.
15 MR. MISHKIND: Let him finish his
16 answer.
17 A. And since I've not run the data, I don't feel
18 comfortable listing jobs. And I don't do that. I
19 don't think that's the best way to look at these
20 things. I'm telling you what we know that is the
21 important data that we have is what's his access to
22 jobs, not what's his access to a specific job.
23 What's his access to jobs in the national or local
24 economy, and his access is he has 12% of the work.
25 We know over half of that is going to be in

37

1 administrative support. What job it's going to be
2 there is irrelevant. We know that's where it's
3 going to be.
4 Q. (BY MS. HENRY) I understand you consider it to be
5 irrelevant. I'm asking you based on your
6 background, your training, all the experience you
7 have, what you're saying is you can't tell me what
8 type of job he could go out in the market and get
9 out in the administrative or the service or sales
10 area today, you can't tell me that?

11 MR. MISHKIND: Let me object.

12 A. No. I can only tell you where he should be looking
13 and what the opportunities are.

14 Q. (BY MS. HENRY) Okay. That's right. Thanks.

15 FURTHER CROSS-EXAMINATION

16 BY MR. HUPP:

17 Q. Just a quick follow-up, Doctor. The worklife
18 probability that you calculated for this child is 14
19 years?

20 A. Yes.

21 Q. To follow up with what you said, if he had school
22 education do you have any idea what his worklife
23 probability would be?

24 A. Not without running it. I believe it would be from
25 past experience slightly higher. I don't think it

38

1 would be significant. I think where it takes a hit
2 is if you put him into a college degree.

3 Q. When you say takes a hit, means it would go up?

4 A. More significant than between education not
5 considered and high school or education not
6 considered with a two-year. There will be some
7 variance but not great. I think there will be a
8 little more variance with a college-type situation.

9 Q. On the other hand, if you added a high school
10 education, the earnings on the pre-injury earnings
11 would increase, is that true?

12 A. If you added that with the pre-injury earning would
13 the pre-injury earnings increase. It depends how
14 -- The answer is yes and no. It's how you want to
15 do your analysis. If I added high school diploma,
16 which is what you're asking me, would I say then
17 that his pre-injury earnings are best represented by
18 the \$24,000 that I've established or are they best
19 represented by the median income that accrued for
20 males with high school diplomas. If I say the
21 second, then we're talking more money pre-injury.

22 Q. Right. But wouldn't that translate into more money
23 after you adjust for the injury?

24 A. No. After you adjust for the injury you would still
25 look at -- you would look at jobs that are

39

1 semi-skilled because that's pretty much -- there are
2 skilled jobs with a high school diploma no question,
3 but you probably would look at jobs that are
4 marginally skilled because you can't have one
5 without the other. I can't change the one without
6 changing the backside. And I could do that. I
7 think the numbers would be not what you think they
8 would be. I think the loss would be higher.

9 Q. I guess that's what prompted the question because if
10 the worklife increases and if the amount of money he
11 can earn increases, why would it be that the loss
12 would be higher?

13 A. Because right now you got a difference between
14 pre-injury 24, and post-injury \$23,000. If I did
15 the median income -- If I want to limit him to high
16 school diploma, then logically I should look at what
17 males with high school diploma make. I can tell you
18 it's going to be somewhere in the low 30's. So then
19 I go to the post-injury side. On the post-injury
20 side I've got to then look at jobs that are
21 marginally skilled, average to below intelligence
22 and all these other things. Those jobs I can tell
23 you are probably going to run somewhere around, and
24 this is a guess, but it's a good illustration, let's
25 say it's \$26,000. So you've increased the

40

1 difference between the two already pre and post
2 \$4,000. Thus, regardless of when we run the
3 worklife, you're going to have a larger loss because
4 you're dealing with a different variance between the
5 pre- and the post-earnings.

6 Q. Okay. So the way it is you have about a \$1,000
7 difference in pre- and post-earnings. If we did
8 high school, potentially it could be \$4,000 a year
9 for pre- and post-earnings?

10 A. Yes.

11 Q. What is the modifier that is taking that number from
12 your 24 or 23 or hypothetically from your 30 to 26?
13 What number modifies that to get that number to the
14 post-injury earnings?

15 A. I'm not sure I understand the question.

16 MR. MISHKIND: I'm not sure I
17 understand, either.

18 Q. (BY MR. HUPP) Is there a mathematical calculation
19 you're playing with taking the child from \$24,553
20 pre-injury to \$23,785 post-injury?

21 A. Where I would get those numbers, sir?

22 Q. Yes, sir. How do you get the post-injury earnings
23 number?

24 A. I would run another Labor Market Analysis. I would
25 say give me jobs that are marginally skilled, average

41
1 intelligence, below average degree of manual and
2 finger dexterity, sedentary to light, I would do the
3 same thing and change the skill level. Right now I
4 don't have any skill level.
5 Q. I guess what I was asking was is there a certain
6 number you would have to apply to it? It's not
7 number-based, it's based on all those jobs and the
8 median income of those jobs?
9 A. Absolutely. That's exactly right. And I don't know
10 what that is unless I run the data.
11 Q. For us to reproduce your work I would have to go to
12 these sources you cited and type in different
13 calculations, education, for instance. If you're
14 saying one wanted to do that reproduction?
15 A. Yes.
16 Q. Have you ever testified in Federal Court?
17 A. Yes.
18 Q. When is the last time you testified in Federal
19 Court?
20 A. I don't know. A couple weeks ago up in Michigan.
21 Q. In Michigan. Was that for a plaintiff or defendant?
22 A. That was for plaintiff.
23 Q. And do you know whose room you were in, what judge?
24 A. No, I don't, sir. It was a visiting judge. I know
25 that.

42
1 Q. Do you know what district or city?
2 A. Flint, Michigan.
3 Q. And how much do you charge for reviewing a case such
4 as this per hour?
5 A. Well, I don't have an hourly charge for a case.
6 It's a set fee.
7 Q. How much is that?
8 A. It's \$2,300.
9 Q. And does that include deposition testimony?
10 A. No. Today, for example, it's an hourly rate,
11 minimum of two hours, it's \$300 an hour.
12 Q. And what about for trial, what is your rate for
13 trial?
14 A. Same; \$300 an hour.
15 Q. How many cases such as this one we're dealing with
16 today have you reviewed in the last year?
17 MR. MISHKIND: You're talking
18 specifically a shoulder dystocia or
19 diminution in earnings?
20 Q. (BY MR. HUPP) How about just doing your vocational
21 assessment on any injured -- either medical
22 malpractice, personal injury, any type of injury
23 case.
24 MR. MISHKIND: Allcomers?
25 MR. HUPP: Allcomers.

43
1 A. I don't know how many. A number.
2 Q. (BY MR. HUPP) Is the number 100? Is it 200 a year?
3 300? Any idea?
4 A. I don't know. It's more than 50. I don't count.
5 Q. Aside from doing what you're doing in this case as
6 a vocational expert, do you have any other
7 employment in your profession as a vocational
8 assessment person? I know that was a very poorly
9 phrased question. Bear with me.
10 MR. MISHKIND: I think he knew what
11 you were getting at.
12 A. I have two companies, one is Vocational Assessments,
13 which we talked about here, and then I have another
14 company call COIN, C-O-I-N, COIN Educational
15 Products. And what COIN does is it develops and
16 markets educational materials all in the area of
17 career to schools and libraries and agencies in the
18 country. They're all proprietary, they're all
19 products I developed. Some are tests I developed.
20 I have computerized databases. I have internet
21 databases. It's a national company. We have it
22 housed in Toledo with a bunch of people working
23 there, then we have a national salesforce. And
24 that's my other enterprise.
25 MR. HUPP: I think that's all the

44
1 questions I have.
2 MR. MISHKIND: You don't want to read
3 or waive?
4 THE WITNESS: I will waive signature.
5 - - -
6 (Deposition concluded at 1:42 p.m.)
7 - - -
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1 THE STATE OF OHIO,)

2) SS: CERTIFICATE

3 COUNTY OF CUYAHOGA.)

4 I, Angela R. Zanghi, a Notary Public within and
5 for the State of Ohio, duly commissioned and
6 qualified, do hereby certify that ROD W. DURGIN,
7 Ph.D. was by me, before the giving of his
8 deposition, first duly sworn to testify the truth,
9 the whole truth and nothing but the truth; that the
10 deposition as above set forth was reduced to writing
11 by me by means of Stenotype and was subsequently
12 transcribed into typewriting by means of
13 computer-aided transcription under my direction;
14 that the reading and signing of the deposition by
15 the witness were expressly waived, and that I am not
16 a relative or attorney of either party or
17 otherwise interested in the event of this action.

18 IN WITNESS WHEREOF, I hereunto set my hand and
19 seal of office at Cleveland, Ohio, this 20th
20 day of December, 2002.

21

22 Angela R. Zanghi, RPK, Notary Public
23 Within and for the State of Ohio
24 1511 Terminal Tower
25 Cleveland, Ohio 44113

My Commission Expires: June 8, 2004.

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|---|--|---|--|---|--|
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