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An Overview of the RAPEL Methodology for Life Care Planners in Tort Cases

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Abstract. *Personal injury litigation is intended to compensate victims for damages when a party is found liable. Included in the reparation are costs associated with future medical care, lost earnings capacity, and other quantifiable damages. This article reviews the elements for expert opinions utilizing the RAPEL mnemonic, or memory prompt, for recollection of relevant elements, and offers suggestions for effective and reasonable opinions for tort cases. Although this article is most useful for life care planners who also are vocational experts, there are many areas of importance for professionals who act solely as a life care planner.*

This article discusses the topics and issues associated with offering expert testimony in forensic rehabilitation, in particular, personal injury litigation. According to Black's Law Dictionary (1999), forensics is defined as "used in or suitable for courts" (p. 660). Dorland's Medical Dictionary defines rehabilitation as "restoration of normal form and function following injury or illness" or "restoring … to gainful employment" (Friel, 1981, p. 1140). For pediatrics, the term "habilitation" is often used since the child is not necessarily being restored to a prior level of functioning and therefore not being "re"habilitated. However, for purposes of this article, the term forensic rehabilitation will be used to convey the principles associated with the specialized practice of offering expert opinions in civil litigation. This article will also outline the relationship between the rehabilitation expert and the courtroom, including selected terms that may be important to the rehabilitation consultant who is involved as an expert witness in the legal system.

Historically, rehabilitation consultants/counselors, particularly in the vocational arena, have been employed in various aspects of disability programs since the 1920s (Snow & Weed, 1998; Weed, 2000; Weed, 2004; Weed & Field, 2001). Over the years, it became evident that rehabilitation consultants would be a valued addition to assisting people with disabilities in physical restoration plans (i.e., rehabilitation plans) leading to work-related goals. The Veterans Administration first employed rehabilitation consultants to assist with vocational education training and then expanded services to include rehabilitation counseling. The federal government also used rehabilitation consultants to assist in the work efforts of United States citizens through the state-based rehabilitation services programs. The first organized attempt at returning people to work in the private sector was realized in workers' compensation insurance in the late 1960s when the International Rehabilitation Associates (IRA), now Intracorp, utilized nurses to facilitate return to work efforts for individuals injured on the job. By the 1990s, private sector rehabilitation had extended into most areas of disability care,

including State and Federal workers' compensation, long-term disability, Social Security Disability Insurance (SSDI), health insurance, railroad injuries, longshore workers and employees who work at sea, and personal injury litigation (Weed, 1994; Weed, 1990; Weed & Field, 2001).

Most states require "qualified" experts (licensed or certified) to work with people receiving workers' compensation, and state rehabilitation programs now require qualified rehabilitation professionals to work with clients seeking assistance under the state-federal program. Counselors working as vocational experts in the Social Security system must submit credentials and be approved. However, in the personal injury litigation arena, this is not necessarily true. According to Kim Manufacturing, Inc. vs. Superior Metal Treating, Inc. (1976, p. 455), an expert witness is one "who by reason of education or specialized experience, possesses superior knowledge respecting a subject about which persons having no particular training, are incapable of performing an accurate opinion, or deducing correct conclusions." The inference is that in personal injury litigation, it is possible that an individual offered by an attorney as an "expert" in the area of rehabilitation would not be qualified in many other jurisdictions or industries based on credentials and certifications. Although most attorneys, in this author's experience, are conscientious about offering experts who are highly credentialed, there have been occasions where poorly qualified or prepared experts have participated in litigation as expert witnesses (for example, Elcock v. Kmart Corporation, 2000). Indeed, in a recent personal injury case, the vocational "expert" when challenged on his credentials, revealed no certification, no license nor graduate training specific to rehabilitation, no record of continuing education (though the general counseling degree was 20 years prior), and no professional organization memberships (stating that "I am not a joiner").

Selected Litigation-Related Terms

In litigation, an attorney first evaluates the liability of a claim, which will determine if the person who would be the targeted defendant in the lawsuit has liability (Taylor, 1997). Moreover, liability must be to the extent that some action in which the individual engaged was the approximate cause of the injury that has economic consequences. If this is the case, the attorney will begin to assess damages. First, it should be noted that jurisdictions throughout the United States are different. Federal cases, although commonly using similar rules, can have differences in the evidence rules based on interpretation by judges. In addition, each state may have their own rules and regulations with regard to what the requirements are to pursue a personal injury legal case. However, what is consistent is that the rehabilitation consultant's role is to identify damages.

Damages represent the economic consequences associated with a liable event (Elliott, 2004). Although there are many different types of damages, the most commonly encountered for life care planning experts are the following (see Table 1). General damages represent "presumed" costs associated with an injury but which are difficult to identify in a precise manner. An adult who is still able to work and earn at the wage level of pre-incident, but no longer has much choice about which jobs he or she can choose (say, loss of 90 percent of the personal labor market access), is an example. A person with a back injury who is in daily pain, although can still work, is another example. Another controversial element is hedonic damages introduced in the literature by Brookshire and Smith (1990), which many states reportedly have excluded. This approach relates to assessing the effect of an injury on one's

Table 1: Damages, selected definitions

- General damages presumed to follow from a wrong, but do not need to be actual losses
    - Lost opportunity
    - Pain and suffering
    - Hedonic damages refers to the loss of pleasures of life
    - Many states have significant limitations on hedonic and pain and suffering damages
- Special damages includes actual losses and must be claimed and proved - e.g., medical costs and lost capacity to earn.
- Punitive damages (also known as "added damages")

Source: http://dictionary.law.com/

pleasures of life. In general, the vocational expert can offer opinions about some of the characteristics associated with placement difficulties but it is difficult to assign "hard" costs to hedonic issues (see the "A" in RAPEL below).

The area of most important focus for the life care planning expert is related to special damages. One who is a qualified expert in both future medical care and vocational losses is in a position to "pull together" most of the "hard costs" associated with an injury. Identified and quantifiable losses can include not only costs associated with future medical needs and services, but also the impairment of earnings capacity as well as the cost of vocational re-training, counseling, and other costs associated with future allowable care. Note: Many, if not most, rehabilitation experts are not qualified to offer opinions to both life care planning and vocational damages and there may be two experts who are needed to coordinate efforts to provide a comprehensive damages analysis.

Punitive damages refer to egregious behavior on the part of a defendant where a pattern of deceitful conduct is uncovered. For example, in 1981 the Ford Motor Company was hit with a jury award of $125 million in punitive damages when Richard Grimshaw was severely burned from injuries incurred when, in his 1971 Pinto, he was struck at 28 mph (however, the court eventually reduced the award to $3.5 million). Ford apparently had internal memos that revealed that they knew about the design problems but chose to go ahead with production anyway (Grimshaw v. Ford, 1981).

Although an overview of various damages is provided for background information, the focus of this article is on special damages. Often, rehabilitation or life care plans are used to identify and mitigate damages from a permanent injury by offering recommendations to restore a client medically and vocationally.

Unlike criminal law where a jury must determine guilt beyond a reasonable doubt, the test in personal injury litigation is that the preponderance of evidence supports the contention by the plaintiff regarding liability and damages (Elliott, 2004; Taylor, 1997). Both sides, plaintiff and defense, may retain their own experts who can be referred to as testifying experts or consulting experts. In many cases, the defense retains consultants who are not disclosed (i.e., consulting experts) and who provide consultation and education to the attorney on relevant

issues and perhaps even help develop questions to be used at deposition and/or trial. The testifying expert is one who is expected to appear at trial and is "disclosed" to the other side. These experts are exposed to justifying their opinions to an opposing attorney or several attorneys. For example, medical malpractice cases may have many defendants (e.g., hospital, nurses, and doctors) and each defendant will have their own attorney who may ask questions during a deposition.

There typically is a basic philosophical struggle for the testifying expert. Lawyers are trained to be advocates for whichever side they are retained (plaintiff or defense). Therefore, the attorney, whether plaintiff or defense, is charged to present the best stance for the case to "win." In contrast, the rehabilitation expert's role is to represent the rehabilitation profession and offer a professional and objective opinion (Berens & Weed, 2001; Weed, Berens, & Pataky, 2003; Weed & Field, 2001). This is more difficult than it may appear, for two reasons. One is that some experts can become "caught up" in the legal arguments that the retaining attorney is offering and, therefore, appear to lose their objectivity in favor of the side of the retaining attorney. The other is that it is possible the retaining attorney is "feeding" information to the expert that supports a particular position, and withholding other information that may be relevant to the case. The rehabilitation expert must be vigilant to maximize the chances of reasonable, legitimate, and objective opinions that are defensible.

The first instrumental concept for life care planners to comprehend is to identify future care damages. It is assumed that the reader is familiar with the basic life care plan entries which cover both medical and non-medical care. Based on the author's experience, one overlooked detail seems to be the inclusion of needs that are not related to the injury. For example, clients with pre-existing hypertension that was controlled with medication typically should not have the cost of blood pressure medication included in the life care plan unless there is a causal relationship between the continued need for blood pressure medication post-incident and the incident itself. Another overlooked detail is the deduction or reduction in costs included in a life care plan for items commonly used by the general population or required by the individual prior to the incident or if the incident had not occurred (assuming the client is compensated for earnings capacity). Such items include routine medical and dental care recommended for the general population (i.e., annual physical examination, twice per year dental cleaning and exam), routine eye care (applicable in cases where eye or vision impairments are evident), and even such common items as a cell phone or personal computer. Bigger ticket costs that should also be deducted from the life care plan include the average cost of a standard home (in cases where a wheelchair accessible home is recommended), the average cost of a vehicle (in cases where a customized or wheelchair accessible van is recommended) and the cost of food and housing associated with facility based care.

Another instrumental concept that life care planners need to understand is the notion of lost earnings capacity (Weed, 1995; Weed, 1996; Weed, 2004; Weed & Field, 2001). In adult cases, many rehabilitation experts confuse lost earnings with capacity to earn. In the legal literature, it is clear that people who have no work history, such as children and homemakers, may still have a capacity to earn either when they become adults or if they were to choose to enter the workforce. Therefore, it is unreasonable to assume that an injured homemaker who is unable to go to work and was not earning an income prior to injury, has no loss of capacity to earn an income. In Rodriques vs. McDonnell Douglas (1978), it is noted that earnings capacity includes the capacity to learn or to be trained. In Klingman vs. Kruschke (1983), it is determined that a person does not have to show wage reduction to have a loss of earnings capacity. Indeed, an adult may be able to return to work at an income consistent with what

was earned at the time of the injury, but which does not represent his or her capacity to earn. An example to illustrate this point is a third year law student who is close to graduation but is severely injured while delivering pizzas. The part-time income that he earned obviously does not represent his capacity to earn once he graduates from law school. Therefore, he is compensated at the expected loss of income capacity of an attorney, rather than what he was earning at the time of injury as a pizza deliverer. Although earnings capacity involves the potential to earn, or the potential that the person might attain, these opinions cannot be "rank speculation" (Riles vs. Home Insurance Co., 1982). Methods and procedures subjected to peer review and replication by other professionals are important for establishing a solid foundation for expert opinions.

Consistent with some legal case precedents, there are certain elements that are necessary for personal injury litigation when assessing damages for individuals with a disability. In previous publications, the RAPEL method has introduced these elements (Deutsch & Sawyer, 2003; Dillman, 1987; Dillman, 1998; Weed, 1994; Weed, 1995; Weed; 1996; Weed, 2004; Weed, 2000; Weed & Field, 2001) and an overview will be provided in this article.

RAPEL Elements

RAPEL is a mnemonic that is intended to prompt consultants to readily recall which relevant topics for damages in personal injury litigation should be included (see Table 2). As noted above, special damages fall within the purview of rehabilitation consultants. In this author's experience, it is common to observe missing "data" in reports and RAPEL is a tool intended to help forensic experts remember to include all relevant information in their reports.

Table 2 RAPEL Explanation (Reprinted from Weed & Field, 1994)

The **RAPEL** Method:
A Common Sense Approach To
FUTURE CARE AND EARNINGS CAPACITY ANALYSIS

***R*EHABILITATION PLAN**: Determine the rehabilitation plan based on the client's vocational and functional limitations, vocational strengths, emotional functioning, and cognitive capabilities. This may include testing, counseling, training fees, rehabilitation technology, job analysis, job coaching, placement, and other needs for increasing employment potential. Also consider reasonable accommodation. A life care plan may be needed for catastrophic injuries.

***A*CCESS TO THE LABOR MARKET**: Determine the client's access to the labor market. Methods include transferability of computer programs, transferability of skills (or worker trait) analysis, disability statistics, and experience. This may also represent the client's loss of choice and is particularly relevant if earnings potential is based on very few positions.

***P*LACEABILITY**: This represents the likelihood that the client could be successfully placed in a job. This is where the "rubber meets the road." Consider the employment statistics for people with disabilities, employment data for the specific medical condition (if available), economic situation of the community (may include a labor market survey), availability (not just existence) of jobs in chosen occupations. Note that the client's attitude, personality, and other factors will influence the ultimate outcome.

***E*ARNINGS CAPACITY**: Based on the above, what is the pre-incident capacity to earn compared to the post-incident capacity to earn? Methods include analysis of the specific job titles or class of jobs that a person could have engaged in pre- vs. post-incident, the ability to be educated (sometimes useful for people with acquired brain injury), family history for pediatric injuries, and LMA92 computer analysis based on the individual's worker traits.

Special consideration applies to children, women with limited or no work history, people who choose to work below their capacity (e.g., highly educated who are farmers), and military trained.

***L*ABOR FORCE PARTICIPATION**: This represents the client's work life expectancy. Determine the amount of time that is lost, if any, from the labor force as a result of the disability. Issues include longer time to find employment, part-time vs. full-time employment, medical treatment or follow-up, earlier retirement, etc. Display data using specific dates or percentages. For example, working an average of four hours a day may represent a 50% loss.

Rehabilitation Plan

The “R” in RAPEL refers to a rehabilitation plan which is expected to improve or maintain the client’s functioning, as well as limit or mitigate damages sustained in personal injury. A life care plan may be offered to enhance the client’s medical prognosis and living circumstances. Items in the future care plan may include direct medical care from physicians and therapists or ancillary recommendations, such as architectural barrier removal, transportation needs, specialized recreational equipment specific to the disability, home furnishings and accessories, among others. To prepare a comprehensive plan, see Deutsch and Sawyer (2003), Weed (2004), and Weed and Field (2001). If a child or adult has the potential to be educated or trained, the life care plan should include educational support, vocational assessments, guidance and counseling, job analyses, labor market surveys, and other vocationally relevant services. A rehabilitation plan may include vocational assistance with regard to evaluation, counseling, job coaching, tuition, fees, books and supplies, as well as rehabilitation technology equipment and supplies (as appropriate). If the life care planner does not have the credentials to offer vocational opinions, then it is expected that recommendations will be solicited from a qualified vocational expert in the same manner as medical and

psychology recommendations are solicited from relevant experts

Access to the Labor Market

This section typically will not be a part of the life care plan report. The "A" in RAPEL refers to access to the labor market which is based somewhat on the SSDI concept of "employability." In determining access to the labor market, the intention is to identify the number of jobs which an individual might have access to based on a worker trait profile utilizing the U.S. Department of Labor functional categories, without regard to whether the jobs are available (Field & Field, 1992, 2004). Through the use of specialty computer programs, it is possible to determine the worker trait profile of a particular client. For a child, adjustment for expected improvement with growth and aging regarding the physical, mental, and cognitive capabilities that the child might achieve as an adult is considered. By searching the databases on various traits (which can be accomplished through several computer programs such as Skilltran [www.skilltran.com], OASYS [www.vertekinc.com], and the McCroskey Vocational Quotient System [www.vocationology.com]), it is possible to identify which job titles from the *Dictionary of Occupational Titles* (DOT) (U.S. Department of Labor, 1991), that the individual would have access to pre- versus post-injury. In addition, some computer programs are able to cross reference to census codes which will provide the number of jobs that would be available pre- versus post-injury. Next, it is possible to cross reference to the U.S. Bureau of Labor Statistics to identify the median weekly wages associated with each of the census codes in an attempt to assess the economic consequences related to loss of or reduced access to employment. (Note: The Census code arrangement has been substantially modified so some older software programs may not correctly cross-walk to economic data.)

Another scenario is that a client may have a substantial reduction in the number of jobs available, but not have a significant loss of ability to earn an income. The value of the labor market access approach is, in part, to assess the potential for actual placement in a job. For example, if the person has a large loss of access to the labor market, it is reasonable to expect s/he will be harder to place in a job and have fewer opportunities to change jobs or move up the occupational ladder when compared to the average person without a disability.

Placeability

The "P" in RAPEL refers to placeability. The determination of ease of one's vocational placement is expected to flow from access to the labor market analysis previously described. Essentially, what is the potential for the client's successful placement in a particular industry or job? Earnings capacity may or may not be affected. However, in the concept of the age earning cycle, it is possible that an individual who may have an equal expected entry-level income will have a reduced ability to "climb the ladder" and have a lower earnings ceiling than would have been expected absent the injury. Further, it is expected that easily placed people need fewer services, on average, than people who are more difficult to place. That is, individuals who have lost access to 95% of their personal labor market can be expected to require substantial services and perhaps retraining to be able to locate suitable employment.

For purposes of this article, suitable employment is defined in the following legal citations. "Employment or self-employment which is reasonably attainable in light of the individual's age, education, previous occupation, and injury, and which offers an opportunity to restore the individual as soon as practical and nearly as possible to (his or her) average

weekly earnings at the time of injury" (Workers' Compensation Law Bulletin, 1992). Some clients have successfully challenged the assumption that because they are able to perform the physical functions and they possess the aptitude to perform some occupations that it constitutes suitable employment. One case demonstrates the issue: A licensed practical nurse was injured on the job. The employer offered her a clerical position at the hospital which she eventually turned down. Although the clerical job was within her physical limitations, it was not considered "suitable employment" because "Woods is a nurse and she never expressed any interest in doing clerical work" (Workers' Compensation Law Bulletin, 1992, p. 7).

Maryland similarly defines suitable, gainful employment as "... employment, excluding self-employment that restores the disabled covered employee, to the extent possible, to the level of support at the time that the disability occurred" (Workers' Comp Law, LE, 9-670, p. 212). The law further states that in determining whether employment is suitable gainful employment, the following shall be considered: (1) the qualifications, interests, incentives, pre-disability earnings, and future earnings capacity of the covered employee; (2) the nature and extent of disability of the covered employee; and (3) the current and future conditions of the labor market. Other states including Oregon, California, and Minnesota, also have adopted guidelines which include personality and interest factors that are often over looked in vocational evaluations (sources: Oregon's Code OAR 436-120-005 [6]; California Workers' Compensation Code L.C. 4635 [f]; Minnesota MS 176.102 [13]).

Another element related to placeability is the potential of an individual to secure only one or two jobs, particularly one that has been customized to meet his or her particular functional limitations. In this situation, if the individual loses the employment, then placement in another job is difficult, if not impossible. This is known in the workers' compensation and personal injury arenas as "odd lot doctrine." Under the odd lot doctrine, any work that the client might be able to do would be of limited quality, dependability, or quantity, and there is no reasonably stable market for his or her labor activities (Gilcrease vs. J. A. Jones Construction, 1982; Loprinzo vs. Mald, Corp., 1983; Spring v. Department of Labor and Industries of State of Washington, 1982; Haynes v. State Accident Insurance Fund, 1976).

Although on the surface it may appear that a life care planner, who is not also a vocational expert, does not need to address vocational issues. However, placeability opinions may have an effect on the life care plan such that the plan may not adequately include all relevant services. In one case, a life care planer assumed the client to be completely vocationally disabled (unable to work) and provided for 24 hour care while the vocational expert retained on the same case opined the client could work at least part-time and did not need attendants 24 hours per day.

Earnings Capacity

The "E" in RAPEL refers to earnings capacity and is based on one's capability to earn an income. This differs from the concept of lost earnings because the person's actual income at the time of injury may not reflect what she or he could have achieved if an injury had not occurred (see information regarding the pizza delivery driver earlier in this article). In general, the earnings capacity of an individual is that which reasonably can be attained and held (Deutsch & Sawyer, 2003; Weed & Field, 2001). To elucidate further on earnings versus earnings capacity, refer to Figure 1, which is based on economic data compiled from noted economist, Everett Dillman (1987, 1998). This information shows that the percent relevancy for the actual earnings as the estimate for expected earnings capacity does not relate at all to

expected earnings until after age 20 (Weed & Field, 2001). Generally, by the time an individual turns 35 to 40 years of age, the earnings history may represent the person's capacity to earn a living. However, each client must be evaluated individually. For example, workers who have low intelligence and work as laborers in the construction industry may very well have reached their capacity to earn by the time they reach their 20s. However, professionals, such as attorneys, may not have reached their maximum capacity to earn until the age of 50 or 60.

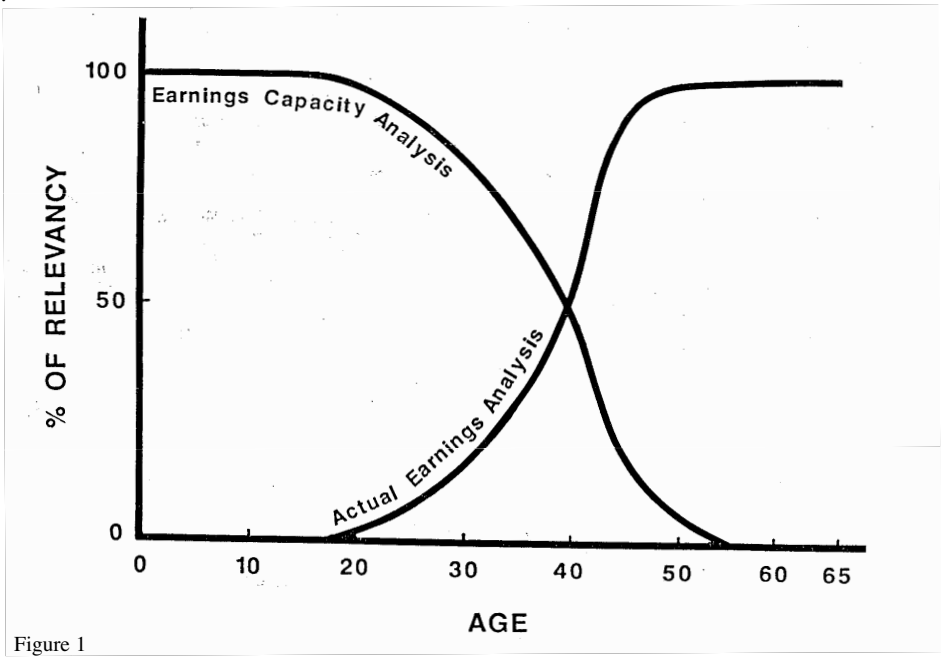

Figure 1
Earnings vs. Earning Capacity
(Reprinted from Weed & Field, 1994, 2001)

Based on a rehabilitation plan, access to the labor market and placeability factors, the individual may or may not be employable. If employable, an estimate of the person's earnings potential can be displayed in various ways. Earnings potential for children can be determined by identifying jobs or job categories similar to the child's parents and/or older siblings, or assessing the educational potential of the child pre-versus post-injury, or identifying census codes for the job titles and cross-referencing the codes to wage data from the U.S. Bureau of Labor Statistics (updated yearly) to obtain median weekly wages of jobs based on worker traits. For children and adults, another option is to manually, or via a computer program, estimate worker traits and skills to sort through vocational options (Bast, Williams & Dunn, 2002; Dunn & Kontosh, 2002; Gibson, Earhart & Lento, 2002; Field, 2002; Weed & Field, 2001; Weed, 2002). McCroskey (2003) asserts statistical support for using a computer to arrive at an opinion about expected job outcomes.

Other considerations include analyzing the job category for elements specific to the industry or employment option. For example, construction labor, landscaping, fishing, tourism, sports-related occupations, and the like are often seasonal in nature. Union-related

occupations may have clear patterns of promotion (e.g., apprentice, journeyman, master, and foreman). Also, homemakers may have chosen to stay home with children, but still have a capacity to earn. A "stay-at-home" mother (or father) with a master's degree in education certainly has the potential to earn an income and, if injured, the earnings capacity would be based on what employment opportunities would be pre- vs. post-incident.

Labor Force Participation

The "L" in RAPEL refers to the labor force participation, or worklife expectancy of the client. Although an individual with a permanent disability may not experience a loss of work life expectancy, it is more common for a person with a disability to take longer to find a job, or enter the labor market at a later date than if the injury had not occurred (U.S. Department of Commerce, 1989). Also, this person may experience more time lost between jobs because of greater difficulty to find employment, or may need to take regular time off for medical treatment (e.g., an individual with an amputated limb who requires routine prosthesis maintenance/adjustments and replacement). Additionally, it is not uncommon for people with disabilities, particularly with brain injuries, to have fatigue which may be a reason for working part-time. There also is potential for earlier retirement or difficulty in keeping a job. In general, each of these factors can be economically determined. To illustrate, assume an individual worked an average of 40 hours per week prior to injury and sustained brain damage such that the evidence demonstrates that a reasonable expectation would be to work four hours per day on average, or 20 hours per week. This would translate to a 50% loss of work life expectancy, without consideration of other factors.

Education plays a significant role with regard to work life expectancy. Under the work life estimates published by the U. S. Department of Labor (1986) and the works of Ciecka, Donley and Goldman (1995), an individual with a high school education may enter the work force at an earlier age, but an individual with a college degree will actually spend more time in the labor market, even though the college graduate generally enters the work force four years later than someone with a high school diploma. This is a result of the types of jobs that a high school graduate may obtain. As an example, construction work may very well be seasonable in nature, or there may be minor injuries that require time off, or strikes that would contribute to a loss of time in the labor market. Furthermore, the physical demands of construction work may necessitate an earlier exit from the job market than a job that is light or sedentary within an indoor or protected environment.

Life care planners need to be aware of work life expectancy opinions in cases where additional attendant care or other relevant services may be needed either as a result of part-time work or early retirement.

General Vocationally-Related Considerations

It is important to note that various statistics and research articles are available to the rehabilitation consultant to help support one's expert opinion. For instance, according to the U.S. Census Bureau (as cited in Farley, 1996), about 67% of people with disabilities, who claim that they want to work, are unable to obtain suitable employment. Correspondingly, according to the Harris Poll (1994), the Americans with Disabilities Act has not significantly enhanced the potential of a person with a disability to return to employment. On the other hand, it is noted that public accommodations, including transportation and education, have

improved. One way to ameliorate some effects of disability on employment potential is through effective rehabilitation and professional help for placement of people with disabilities. However, the vocational expert is cautioned to use statistics to support one's opinion, not the other way around. That is, just because one has a disability does not automatically mean they are expected to be unemployable or unplaceable. Each client's circumstances must be individually evaluated and, although the data suggests that the majority of individuals with disabilities do not work, that does not preclude the reasonable opinion that some individuals with a disability, if given proper support and services as outlined in a life care or rehabilitation plan, can be expected to "beat the odds" and become employed as an individual with a disability.

Other considerations for expert opinion relate to:

- Education and earnings (Ezell, 1997; Farley, 1996; Weed, Baird, Dunlap, & Lewis, 1999),
- Full-time vs. part-time work and earnings ratio, since more people with disabilities work proportionally part-time, as well as age at the time of injury and minority status (U.S. Department of Commerce, 1989),
- Differences between women and men with disabilities (Nosek, 1996),
- Job tenure based on education and age (Ezell, 1993; U. S. Bureau of Labor Statistics, 1998),
- Appearance (Hamermesh & Biddle, 1993; Johnson, Ley & Benshoof, 1993; Rubin & Rossler, 2001). (Also see Veterans Administration, 1991; & Elias v. Ford Motor Co., No. 82-1587L, Ist Cit. 1983 for a successful use of this concept in personal injury litigation),
- Height (Judge & Cable, in press),
- Educational achievement for pediatric cases (Elias, 1997; Hout, 1998; Martin, 1998; Toppino, Reed, & Agrusa, 1998; U.S. Bureau of Census, 1996; U. S. Department of Labor, as cited in Yearwood, 1999), and
- Family influences on children (Farley, 1996; Hout, 1984; Joesch & Smith, 1987; Laband &
- Lentz, 1983; McLanahan, 1997; Potok, 1995).

For general details about the references listed above, refer to the article by Weed (2000).

Another factor is the concept of "regression toward the mean" for statistical extremes (Tabachnick & Fidell, 1996). This concept is established in basic statistics where a "normal population" exists. Extremes, when repeated, positive and negative, can be expected to "regress" or return to some degree toward the mean or average. Practically speaking, this will be demonstrated in the following example. Assume a child is the result of a union between

two parents, both of whom tested at the 99th percentile of intelligence. It is statistically likely that the child will be *somewhat* more toward the average than his or her parents, i.e., regress toward the mean.

Basic Testimony Issues: Daubert and Kumho Tire Rulings

Historically, experts have been allowed to testify if the person offering an opinion has knowledge and experiences that would assist the jury in determining liability and damages. Initially, the "general acceptance theory" was offered which indicates that scientific evidence should be based on evidence generally accepted in the specific field of knowledge (Frye v. United States, 1923). In 1993, the Daubert decision provided an "enhancement" of the Frye decision as it encourages the judge to become a "gatekeeper" so that court time will not be wasted on "junk science." Under Daubert (Daubert v. Merrell Dow, 1993), the expert's opinion needs to be based on scientific or valid evidence which has been subjected to peer review and publication. However, Daubert also recognized that some propositions are too particular, too new, or of limited interest to be published. Therefore, the specific requirements include (1) whether the method consists of a testable hypothesis, (2) whether the method has been subject to peer review, (3) known or potential rate of error, (4) existence and maintenance of standards controlling technique's operation, (5) whether the method is generally accepted, (6) relationship of technique to methods which have been established to be reliable, (7) qualifications of expert witness testifying based on methodology, and (8) non-judicial uses to which the method has been put. However, the list is non-exclusive, and each factor need not be applied in every case (also see Federal Rules of Evidence Rule 702, 28, U.S.C.A.). The ruling underscored the need for "valid" scientific evidence.

In 1999, the Kumho Tire ruling extended this to non-scientific experts (Kumho Tire v. Patrick Carmichael, 1999). Under Kumho Tire, an individual was offered as an expert on defective tires. The individual's testimony was disallowed by the trial judge in part because he was unable to cite literature that would demonstrate that he used a generally accepted method. Also, he could not identify any peer who agreed that his method was valid or reliable. The reader who has more interest in this topic is referred to the legal cases cited in this article, as well as to an article by Feldbaum (1997) on the Daubert decision and its interaction with the federal rules and, specific to the life care planner, the article titled The Life Care Planner, the Judge and Mr. Daubert (Countiss & Deutsch, 2002).

It is clear that experts need to utilize data and published methods to support their opinions. In this author's view, the days are numbered for rehabilitation experts who simply attempt to justify opinions based on "my education and experience" without having supporting documentation or substantial clinical experience. Clearly, transferable skills analysis and life care planning procedures have been published in many forums, and the professional is advised to use available resources (Bast, et al., 2002; Dunn & Kontosh, 2002; Gibson, Earhart & Lento, 2002; Field, 2002; Field & Weed, 1988; Weed & Field, 2001; Weed, 2002; Weed, 2004).

Ethical Considerations

In recent years, ethics have taken the forefront in most certifications related to rehabilitation, for example, the Code of Professional Ethics for Rehabilitation Counselors doubled in size with the new Code revisions effective 2001, and increased emphasis on ethical

standards in forensic settings are included in the revised document (Weed & Berens, 2003). Many ethics guidelines across various certifications seem to overlap with each other while others have significant differences in detail. However, there are several concepts that appear to apply across the board. According to Banja (1994), Blackwell (1999), and Weed and Berens (2004) the four commonalities are:

1. **Autonomy**. This refers to the client's right to information and voluntary decision making. The rehabilitation consultant should respect the client's right to choose. However, when a lawsuit is filed, clients have generally waived their rights to confidentiality. Experts need to make clear their role (through Professional Disclosure) when conducting interviews to reduce or eliminate the potential for misunderstandings or miscommunications.

2. **Nonmaleficience**. This concept refers to the client's right not to be harmed. The most common way to harm a client in human services is to engage in sexual relations (Weed, et al., 2003). In personal injury cases, the likelihood that the consultant would be in a position to "harm" a client in this way is rare.

3. **Beneficence**. This concept presumes that clients receive appropriate care or services. This issue is specifically relevant for professionals who have trouble maintaining professional competence. Life care plans and vocational opinions must be based on existing standards of practice, comprehensive and appropriate.

4. **Justice**. This details the client's right to receive unbiased and nonprejudicial treatment. This issue is the one that is most suspect since, in personal injury litigation, the general perception (real or not) is that consultants are commonly biased toward the side that has retained them. For example, one vocational rehabilitation "professional" offered opinions regarding loss of earnings without regard to the affects of a rehabilitation plan. When asked "why?" on deposition, he reported that he was not asked to do so by the attorney even though this is considered standard practice for vocational experts.

Ethics statements of most professional organizations are lengthy and are not reproduced in this article. In addition, the reader may be a nurse, case manager, vocational expert, life care planner, or psychologist, and ethical issues are different for each. To be properly educated in this area, readers are referred to the various ethics requirements that are relevant to their particular certifications/licenses depending on which role is assumed. This may include review of documents from professional associations, certification boards, and licensure requirements.

Conclusion

Life care planning and vocational rehabilitation professionals are important adjuncts to the settlement of a personal injury case and, as a testifying expert, to educate a jury regarding the effects of an injury on a client's medical and other future care needs as well as earnings capacity. Included in the analysis may be a rehabilitation plan to increase the client's function or to mitigate some of the vocational damages, and a life care plan for enhancing the client's medical outcome (Note: The published format for life care plans includes the elements for a

Vocational/Educational Plan). Many court cases clearly have established the efficacy and the need for knowledgeable experts to offer opinions in this area. Experts interested in this arena are urged to become educated with regard to available practice guidelines, and government and other research data on which to support their opinions. Options include attending conferences such as the annual International Conference on Life Care Planning typically held in October of each year (contact www.mediproseminars.com for details and to register). Experts also are urged to be ethical and conduct their practice in an ethical manner by adhering to the applicable codes of ethics that govern their area of expertise. Further, experts are urged to follow published standards of practice and provide objective and professional services to avoid being "caught up" in the litigation process by "taking sides." If life care planning and rehabilitation experts utilize published standards and are reasonable and appropriate in their opinions, then the perceived value of experts in the courtroom will continue to be enhanced.

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