

## Chapter 9

# Using Reports of Medical and Rehabilitation Experts

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## §900 *In General*

In virtually all cases, it is easier to make an evaluation of losses in a death case than in a case involving a permanent disability. In death cases, all medical expenses are known and are simply tabulated and added to the loss, and there are no future mitigating earnings to be considered. In a disability case, however, there are three experts whose opinions and reports are vital: the medical doctors, particularly the treating physician, the vocational rehabilitation expert, and the rehabilitation nurse expert.

### §901 *The Medical Expert*

In a good medical report, there are four key elements you must look for: First, you need an opinion that the patient is "permanent and stationary." With this opinion, you can safely assume that the condition of the patient/client, will not improve. Second, a definitive statement is needed regarding whether the patient can return to the same work with no restrictions, or whether the restrictions preclude a return to the same work. If precluded from his former work, the restrictions should be detailed, such as: no stooping and lifting, no lifting of objects weighing over 25 pounds, and no prolonged standing or walking. Third, the doctor should indicate what future surgical or therapy treatments are needed, with an estimate of when the treatments or surgery are likely to be needed, the frequency of occurrence, the current cost, and the period of time needed for rehabilitation following treatments. For example, if a hip replacement will be needed, the doctor should indicate when it will be replaced, the current cost including hospital charges, the time period before another replacement will be needed, and the time in recuperation after each surgery. Fourth, if the injury is such that life expectancy is shortened, an estimate should be made by the doctor regarding the number of years by which his life expectancy is reduced.

### §902 *The Vocational Rehabilitation Expert*

The next step is to give all the reports to a vocational rehabilitation expert. This expert will examine all the restrictions placed by the doctor, test the patient for aptitude for jobs that can be done with the limitations placed by the doctor, do a job market survey to determine the availability and pay in the jobs that can be done with the injuries, and prepare a detailed report of the patient's pre-injury jobs and earnings and an evaluation of post-injury job possibilities and pay.

### *Sample: Report Extract*

The following was taken from an actual report:

Mr. Stanton has experienced a significant reduction in earning capacity as a direct result of the injury sustained 5/18/84, keeping in mind the medical limitations that have been described, as well as his educational history, work background, vocational test performances, and labor market trends in this county. Prior to the injury, he had the demonstrated earning capacity of \$3,000 per month, managing and performing engine rebuilding at the Western Motor Exchange, and he also had the training, experience, and earning capacity of a truck driver within the range of \$480 to \$600 per week.

On a post-injury basis, he has an earning capacity of \$1,000 to \$1,200 per month, although it may take two years in a community college setting in order for him to achieve a skill level commensurate with entry level management positions within the pay range indicated in an industrial/manufacturing setting.

While these two paragraphs are taken from a 15 page report, they give you the vital information that your economist will need. There has obviously been a \$1,800 per month reduction in the earning capacity of your client, plus total loss of earnings for two years while retraining, as well as the cost of retraining.

The vocational rehabilitation expert will be used primarily in personal injury cases, but you should also consider using this expert in other types of cases. For example, in a wrongful termination case, the law in most jurisdictions requires that the plaintiff attempt to mitigate his loss by obtaining employment in a job similar to that from which he was terminated. However, he is not required to relocate to do so. The rehabilitation expert is accustomed to making job surveys in specified geographic areas and can determine whether a similar job is available, what the pay will be, and how many openings are available. As an attorney, you may have some doubts about the usefulness of a vocational rehabilitation expert in a wrongful termination case. To address those doubts, the section that follows contains excerpts taken verbatim from a 1995 opinion of the California Court of Appeal, Fifth District. Only the names of the parties have been omitted. The excerpt deals specifically with the court's analysis of the testimony of the vocational rehabilitation expert, Dr. Rick Sarkisian, and this author.

### *§902.1 Court of Appeal Opinion Excerpt*

Rick Sarkisian, a vocational rehabilitation consultant, testified as an expert witness for plaintiff that there were no openings for store managers or assistant managers and very little demand for such people because stores generally promote from within to fill management positions. Based upon industry practice and the current competitive market for labor in the area, he opined that future opportunities for similar employment in the grocery store industry were not good. Dr. Gerald Martin, an expert in forensic economy, testified the present value of wages and benefits plaintiff would have earned as an employee of [defendant store] but for his termination was \$882,826.

Following the jury's unanimous general verdict in favor of plaintiff for \$882,826, defendant filed a motion for new trial, citing juror misconduct, improper admission of opinion testimony of plaintiff's rehabilitation consultant, excessive damages and insufficiency of the evidence to support the verdict. In denying the motion for new trial, the trial court stated it agreed with the verdict regarding liability. Although the court expressed concern about the damage award, it found the award was supported by the evidence. The court concluded there was no evidence of juror misconduct and the testimony of plaintiff's expert was properly admitted.

[text omitted.]

Upon reviewing the record independently, we find no actual prejudice or even the possibility of prejudice because the jurors had no real choice regarding the measure of damages.

Gerald Martin, plaintiff's expert in forensic economics and author of a litigation guide titled "Determining Economic Damages," testified to the appropriate method for calculating plaintiff's economic damages. First, he calculated plaintiff's losses from the date he was discharged to the date of trial. He determined plaintiff was earning \$53,820 in annual salary at the time he was discharged. Martin added 24% of this figure which represents the average fringe benefits package based upon government statistics, plus a three percent growth factor for future wage increases. The total value of plaintiff's losses prior to trial, according to Martin, was \$216,180.

Next, Martin concluded, based upon government statistics, plaintiff had approximately 11 years of work life remaining. He applied a three percent growth rate to account for future wage increases and reduced the resulting figure to its present value of \$660,646. He subtracted \$2,200 plaintiff earned during the short time he was a car salesman. Martin concluded the present value of plaintiff's earnings had he continued to be employed by [defendant store] was \$882,826.

On cross-examination, Martin conceded government statistics indicated the average annual wage and benefits package for a person of plaintiff's gender, age, educational background, etc., was \$43,641. When asked to assume plaintiff obtained a job paying this national average, he calculated a future wage loss of only \$272,862. However, according to Martin, no further offset for future earnings could be calculated because plaintiff had been unable to find employment.

[text omitted.]

Sarkisian, a vocational rehabilitation consultant, testified he had been counseling injured or disabled persons in the Fresno area for 17 years. His job is to provide assistance in finding new employment compatible with their circumstances. The process involves interviews, vocational testing, training and acquiring information regarding the local labor market to determine the availability of certain types of jobs. He also worked with discharged employees to help them find similar employment. He was retained to assist plaintiff in finding comparable employment, and he directed a member of his staff to conduct a survey between April 26 and May 3, 1993, to determine the availability of positions as grocery store managers or assistant managers in the Fresno area.

Over a hearsay objection, Sarkisian testified: "Our focus was to contact a number of the larger grocery store facilities in the Fresno area and simply asked them about the demand in their operations for managers or assistant managers. We were interested in things like turn-over and how people get those kinds of jobs in the grocery stores.... We found not only were there no openings, but there was also a very limited demand in general for store manager and assistant manager jobs. In fact, three of the stores we contacted...told us if they do have a management position, they usually promote from within, usually a department manager such as a meat manager or produce manager, up to a store manager job or they will recruit a manager from another...store to work in their store as a manager. So in a nutshell, we found that there was a very limited demand for store managers; and when jobs become available, it's often a promote from within or obtain from within policy to fill those jobs."

When asked if he had an opinion regarding plaintiff's future chances of obtaining employment similar to what he held at [defendant store], Sarkisian testified: "I think they're very poor. That's based upon the outcome of our survey. It's also based upon my 17 years of experience in Fresno doing vocational rehabilitation. Frequently over the years that has involved members of the retail grocery trade, especially injured clerks, and so we try and get them lighter jobs in management and we've routinely failed at that. And it's also based upon continuing high levels of unemployment in Fresno County and the relatively high degree of competition for relatively few jobs."

[text omitted.]

An expert witness can testify about information upon which an opinion is based, including special knowledge, skill, experience, training and education which is perceived or personally known to the expert, whether or not the information is itself admissible, provided that it is the type of information that may reasonably be relied upon by an expert in forming an opinion. [Cal. Evid. Code, §801.]

A survey such as that conducted by Sarkisian is a reasonably logical means of gathering information necessary to determine the availability of management level positions in the grocery industry which was, of course, his goal. Indeed, such information would be absolutely necessary in order to form an opinion of current employment opportunities. Defendant asserts the problem lies in Sarkisian's apparent assumption that the statements made in response to survey questions were true and his testimony to this effect. According to defendant, the survey responses were being offered not merely as the basis for his opinion about future employment prospects, but for their truth—there are no positions available and positions, when available, are filled from within.