

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

THEODORE J. HOLLIDAY, JR.,

Plaintiff,

v.

Law No.: CL09-430-1

CSX TRANSPORTATION, INC.,

Defendant.

 ORIGINAL

TELEPHONIC DEPOSITION OF ROBERT W. COOK, JR., Ph.D.

March 10, 2010

Glen Allen, Virginia

HALASZ REPORTING & VIDEO
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Reported by: Sandra J. Loonam, CCR

Telephonic deposition of ROBERT W. COOK, JR., Ph.D., taken by and before Sandra J. Loonam, CCR, Notary Public in and for the Commonwealth of Virginia, pursuant to Rule 4:5 of the Rules of the Supreme Court of Virginia, and by Notice to take Deposition, commencing at 4:07 p.m., March 10, 2010, at the offices of Setliff Turner & Holland, 4940 Dominion Boulevard, Glen Allen, Virginia 23060.

Appearances:

SHAPIRO COOPER LEWIS & APPLETON
By: RANDALL E. APPLETON, ESQUIRE
attorney, of counsel for the plaintiff
appeared via telephone

SETLIFF TURNER & HOLLAND
By: GREGORY F. HOLLAND, ESQUIRE
attorney, of counsel for the defendant

I N D E X

Deponent:	Examination by:	Page:
Robert W. Cook, Jr.	Mr. Appleton	4
	Mr. Holland	--

E X H I B I T S

Exhibit No.:	Description:	Page:
(There were no exhibits marked during this deposition.)		

1 ROBERT W. COOK, JR., Ph.D.

2 was sworn and deposed as follows:

3 EXAMINATION

4 BY MR. APPLETON:

5 Q Dr. Cook, can you hear me okay?

6 A Yes, sir, I can.

7 Q My name's Randy Appleton. I represent Theodore
8 Holliday. And I'm going to ask you some questions about
9 your opinions in the case we currently have pending in
10 Richmond against CSX.

11 If you don't understand the question I ask you
12 whether because it's poorly worded or because it's by
13 telephone, let me know so you and I will be on the same
14 page. Okay?

15 A I will do so.

16 Q First of all, have you generated a report in this
17 case?

18 A No, sir, I have not.

19 Q Have you performed any type of a present value
20 calculation concerning Mr. Holliday's economic loss due
21 to the injuries he suffered on the railroad?

22 A No, sir, I have not.

23 Q So you have no opinion right now as to what his
24 present -- what the present value of any future economic
25 loss he may suffer due to that injury?

1 A No, sir. I have not prepared a report that
2 contained an opinion with regards to an amount of money.

3 Q Okay. Have you discussed this case with any of
4 the other expert witnesses in the case?

5 A No, sir, I have not.

6 Q Have you discussed with any factual witnesses in
7 the case?

8 A No, sir, I have not.

9 Q And as I understand it, your participation in
10 this case solely deals with -- with economic issues?

11 A Yes, sir; that is correct.

12 Q And have you had a chance to read through the
13 expert designation that the railroad has provided in
14 this case, which apparently summarizes your
15 participation?

16 A Yes, sir, I have.

17 Q Is that designation accurate?

18 A Yes, sir, it is.

19 Q Is it complete?

20 A I believe it is, although you may ask me some
21 questions today that would make me change that answer.
22 But I anticipate that it is complete.

23 Q Okay. And have there been any changes to your CV
24 within the last, I don't know, two or three months?

25 A No, sir.

1 Q Doctor, there were a couple of things on your CV,
2 and I sent Mr. Holland a letter dated February 15th. I
3 wanted to see if I could get some copies of some of the
4 things that you had listed. Has he had a chance to go
5 through that letter with you?

6 A Mr. Holland did not. I received an e-mail from
7 one of his colleagues here, Ms. Hatz, I believe it was.

8 Q Okay.

9 A And in that e-mail, the letter was attached.

10 Q And there were six, either it looks like
11 presentations or articles that I was requesting. Do you
12 know whether or not you have those records available to
13 you?

14 A Were there six, I thought there might have
15 been --

16 Q In the letter on --

17 A One moment. Let me turn to it.

18 Q Okay.

19 A (Witness is reviewing the document.) Yes, there
20 were six. I'm sorry. I thought there were more than
21 six.

22 I have and sent a copy of number 6 by e-mail to
23 the Setliff & Holland Firm. The others, I don't have.

24 Q Okay.

25 MR. HOLLAND: Was that not sent to you,

1 Randy?

2 MR. APPLETON: I don't remember seeing it,
3 Greg.

4 MR. HOLLAND: We'll send it to you.

5 MR. APPLETON: Okay.

6 MR. HOLLAND: The one that that Dr. Cook
7 said he had; he didn't have all six.

8 MR. APPLETON: Right, I understand. It was
9 just the last one. And that's fine, if he doesn't have
10 the other ones.

11 BY MR. APPLETON:

12 Q Doctor, does anybody else have any of the records
13 concerning the other articles or the other
14 presentations?

15 A You mean the text itself?

16 Q Well, I don't know if there's a text or not. It
17 looks like some of them were presentations that you made
18 at professional association meetings. And I didn't know
19 if there were -- was an outline or if there was actual
20 text material that was generated in connection with
21 those presentations.

22 A Some of them, there would be text. Some of them
23 are published in the proceedings of the seminar, not all
24 of them. I don't have those proceedings anymore. I can
25 try to find them if you would like.

1 Q I don't know -- I mean, can I try to find them;
2 or do you have better access to them than I would?

3 A I don't know if anybody can find the ones from
4 '83 to '84.

5 Q Yeah.

6 A But, yes, I would have certainly easier access
7 than you would. I'm -- I'm just not certain I'll be
8 able to reproduce them. But I'll certainly try.

9 Q I mean, don't kill yourself trying to find them.
10 But if you could, I wouldn't mind taking a look at them.

11 A I understand.

12 Q All right. And, Doctor, what I'm -- I'm just
13 going to go through the expert designation ultimately
14 and confine my examination to you -- or of you to this
15 case. But initially, I'd like to get some general
16 understanding from you. You've -- you have reviewed
17 Dr. Strangeways' report?

18 A Yes, sir, I have.

19 Q Do you take issue with the methodology that he
20 employed to evaluate or to assess Mr. Holliday's
21 economic loss as present value?

22 A Yes, sir, I do.

23 Q Tell me what issues you take with the
24 methodology.

25 A Well, as a precursor to that answer, I was guided

1 by two things -- I'm always guided by two things -- I
2 mean, this is a forensic economic analysis. So there
3 are certain rules that I need to abide by in the, you
4 know, the forensic or the legal venue.

5 But the second one is, can we accept what was
6 done in this report or any report with a reasonable
7 degree of economic certainty. That's the question
8 you're always asked. And second, is the methodology or
9 methodologies utilized, are they consistent with the
10 generally accepted methodology in the profession. So
11 that was sort of the guideline I set up for myself.

12 Q Okay.

13 A And then as I read through the report, I make a
14 decision whether or not, one, it can be accepted with a
15 reasonable degree of economic certainty; and, two, or a
16 corollary to that, is the methodology utilized in the
17 profession. And that's how I develop any critique I
18 develop.

19 Q Okay. And having established those two
20 predicates, what issues do you take with Dr.
21 Strangeways' methodology?

22 A We can turn -- I had it in front of me. I'm very
23 sorry. If we turn to his report, that would be the
24 easiest thing to do.

25 Q All right. As we're turning to his report, do

1 you take issue with the utilization of the real interest
2 rate method of determining present value?

3 A No, sir.

4 Q So the general type of methodology he employed,
5 you agree is acceptable? And when I say that, I don't
6 mean the specific facts that he utilized in this case,
7 but just the general principle.

8 A The utilization of real versus "nominal" interest
9 rates is fine, yes, sir.

10 Q Do you -- do you believe that the total offset
11 method is an acceptable way to determine present value?

12 A No, sir. There's no basis in theory or fact.

13 Q Okay. So do you prefer the real interest rate
14 method over the nominal interest rate method or vice
15 versa?

16 A I utilize the nominal interest rate method,
17 because I have to make nominal calculations of actual
18 wages in order to calculate benefits and the like. So I
19 always use the nominal versus the real.

20 Q Are you familiar with -- with the United States
21 Supreme Court decision of Pfeifer versus Jones and
22 Laughlin Steel or Jones and Laughlin Steel versus
23 Pfeifer?

24 A I am, sir. Yes, sir.

25 Q And it's been a while since I've looked at that

1 opinion. Do you recall any dicta that the Supreme Court
2 handed down concerning the utilization of the nominal
3 interest rate in establishing present value?

4 A I believe it was a real interest rate in that
5 opinion. And, again, I have not memorized the opinion,
6 but I believe it went something like, it is okay -- the
7 words in it were not it is okay -- it's okay to use a 2
8 percent real discount rate, something like that. There
9 was an actual number specified in the opinion.

10 Q Do you remember, though, if that opinion
11 indicated a preference to the application of the real
12 interest rate method over the nominal interest rate
13 method?

14 A I do remember that the interest rate specified --
15 I'm almost certain was a real interest rate, that 2
16 percent number, I believe. I think it was 2 percent.

17 Q But what --

18 A It was a real rate. So that would obviously
19 imply that using the real rate was fine in that opinion.

20 Q Right. But you don't recall any dicta in the
21 opinion that indicated that the nominal interest rate
22 method was less preferable than the real interest rate
23 method?

24 A No, I don't recall it being a contest between the
25 two. No, sir.

1 Q All right. So you utilized a different method to
2 determine present value than Dr. Strangeways?

3 A Yes, the nominal calculation versus the real
4 calculation. But that's not really an issue as far as
5 I'm concerned, that is, I have criticism of
6 Dr. Strangeways using the real.

7 Q Right, I understand. So your issue is with -- or
8 issues are with the factual basis or the factual
9 application of his principal to this case?

10 A Some of them factual, not all of them, no, sir.

11 Q Okay. Well -- and let's go through those. And
12 once again, I'm just looking at the designation which I
13 think characterizes where you and Dr. Strangeways' part
14 company. But you were going to get the report, and we
15 were going to go through Strangeways' report.

16 A I have it in front of me.

17 Q Okay. And point -- point to me the differences
18 that you have with Dr. Strangeways in determining
19 present value in this case.

20 A All right. Under his basic methodology, it
21 begins his analysis with 1-A. And in 1-A, he says we
22 need to establish a base-year income. And he does that
23 in Table I of his report. You can see in Table I,
24 \$79,598.

25 Q Yes, for the calculation for the base earnings in

1 2010?

2 A Yes. This is Dr. Strangeways' estimate of what
3 would have been earned -- Mr. Holliday would have earned
4 in 2010.

5 Q Right.

6 A And he takes that number, and he moves it to page
7 5, item number 12.

8 Q Okay. Now, if I'm doing this in a method that
9 you think is disruptive or confusing, let me know. But
10 what I'd like to know at this point is if you calculated
11 Mr. Holliday's base-year income, how would you do it and
12 what would your base-year calculation be, if you can
13 tell me.

14 A I can. That was exactly what I was going to tell
15 you.

16 Q Great. Okay.

17 A Having pointed out what Dr. Strangeways had
18 done --

19 Q Uh-huh.

20 A -- 79,598, I have a difference with that, so I
21 will explain the difference.

22 Q Okay.

23 A I have the Service and Compensation History
24 Statement from Mr. Holliday. It was one of the
25 documents -- excuse me. Did you receive the overnight

1 package that I sent?

2 Q I don't know the answer to that.

3 A Oh, all right. Well, you had subpoenaed the
4 records.

5 Q No, I did receive what was your file.

6 A All right. Okay.

7 In that file is the Service and Compensation
8 History for Mr. Holliday.

9 Q For the Railroad Retirement Board?

10 A Yes, sir.

11 Q Okay.

12 A And it shows the compensation annually from 1974
13 through 2007.

14 Q Right.

15 A And Dr. Strangeways, as you can see in Table I,
16 extracted three of the years.

17 Q Right.

18 A 2004, 5 and 6 --

19 Q Right.

20 A -- only. So the question that I asked when I saw
21 that extraction was, would you utilize just those three
22 years and come up with a wage base that you would accept
23 with a "reasonable degree of economic certainty" -- you
24 know, is it reasonable to do that?

25 Q Right.

1 A I also read the deposition of Mr. Holliday. And
2 he explained in his deposition that 1984 was an outlier.
3 He had undertaken a particular assignment.

4 Q You said 1984, did you mean 2004?

5 A Did I say -- I'm sorry, 2004 --

6 Q Okay.

7 A -- was an outlier.

8 Q Okay.

9 A So what Dr. Strangeways has done is he has
10 utilized that as one-third, gave it a one-third weight
11 in the analysis. But if you look at the compensation
12 history, you can see that there is no year, even
13 converted to today's dollars where Dr. Holliday --
14 Mr. Holliday, excuse me -- earned anywhere near that
15 amount.

16 Q But -- but --

17 A If you look at the last two years, it appears
18 that, according to his deposition, at least the way I
19 read it, he had undertaken to be a pusher in the yard
20 rather than going on the road.

21 I looked at his tax returns, and I saw that
22 evidently he was on the road because he had unreimbursed
23 business expenses in '80 -- in '90 -- pardon me -- 2004,
24 that he didn't have again in '5, '6. So it looked like
25 there had been a change there.

1 So one way I could have approached the
2 reasonableness is to say, Well, you know, is it
3 reasonable to assume he would not have had the
4 opportunity to earn the \$84,000 under the special
5 circumstances again during his work life. I wouldn't
6 have done that. I would have included the 84,000.

7 But I also would have included, at least the
8 other years since he became a locomotive engineer. I
9 believe that was -- I read Dr. Melberg's --
10 Mr. Melberg's report.

11 Q Yeah, I was going to say, you gave him a
12 promotion.

13 A Right. And I can't believe the exact year, but
14 we -- I mean, I can't remember the exact year, but I
15 think it was approximately 1990 that -- that he went
16 back -- he was in management or something and became an
17 engineer again.

18 So I would have included more years. I would
19 have included all of the years in which he was
20 participating in that particular craft just in -- as a
21 substitute for just three years, because '84 (sic) was
22 an outlier. And you're just giving it too much weight.

23 Q Other than considering the time frame that he was
24 in the particular craft that he was engaged in at the
25 time of his injury, do you consider how far out you were

1 projecting the future loss in consideration for the time
2 frame that you consider on the past wages?

3 A No, that wouldn't have anything to do with it.

4 Q Okay.

5 A That was --

6 Q So you look at solely the craft?

7 A Really, what you try to do is you try to utilize
8 all of the information that you have. You don't pick
9 and choose. I would have utilized everything from 1974
10 on, but I didn't think that would have been reasonable,
11 because he wasn't -- he wasn't working in the same
12 craft. He didn't have the training and experience in
13 1974 and '75 that he did by the time he finished his
14 engineer training -- went back to being a locomotive
15 engineer.

16 Q And you recognize the fact that the -- work on
17 the railroad is assigned by seniority?

18 A Yes, sir. And that was another reason that --
19 you know, it tempered my thought here, because he must
20 have chosen in 2005 and 2006 to do the work that paid
21 \$59,000 to \$60,000 when I presume, based on his 40-years
22 of seniority, he could have chosen much more lucrative
23 work.

24 Q And do you know if there was any change in the
25 rate of pay based on, apparently, the 2007 contract that

1 went into effect that Dr. Strangeways refers to?

2 A I have not seen the contract. I don't know that
3 Dr. Strangeways has seen it either. And his footnote
4 says that he looked at -- let's see.

5 Q I'm just -- I'm looking at the footnote on Table
6 I.

7 A I'm looking at the one, Locomotive Engineers and
8 Trainmen News. And this is on page 6. And I think
9 that's when he has referring in Table I to the
10 contract --

11 Q Uh-huh.

12 A -- the BLE Agreement, 2003 BLET Agreement,
13 National Agreement 2007?

14 Q Yes.

15 A When he discusses the rate of increase that he
16 uses, the contract, the five-year collective bargaining
17 agreement that ultimately he uses to conclude the .5
18 percent per year is reasonable --

19 Q Yes.

20 A -- he says he got that from Locomotive Engineers
21 and Trainmen News. So I have not seen the contract or
22 seen that news. But the answer to your question and
23 along with the way it hit, the -- there would be
24 increases involved in the rate of pay and those
25 increases would be contained in the contract.

1 Q Right. And do you know -- do you know what those
2 increases are?

3 A No. But evidently, Dr. Strangeways does, because
4 he has utilized them in constructing his index of BLET
5 wages in Table I.

6 Q Okay.

7 A So that is the index that I would use to make the
8 conversion. But I would not just have in the actual
9 wage column '4, '5 and '6. I'd have other years to
10 apply the index to, and we'd come up with a different
11 base earnings.

12 Q And do you know what -- using the premises that
13 you just identified, do you know what the base salary
14 would have been or -- based on your calculation?

15 A No, sir, I don't. But this table leads us to
16 another comment that I made in the designation, which
17 puzzled me. I would have done this differently.

18 If you look at the table, setting aside for a
19 moment on using three years. Let's just use the three
20 years that Dr. Strangeways used and for the moment say
21 that's okay.

22 Q Okay.

23 A But what he did is, he constructed the index up
24 to 2007 -- pardon me, 2006. That's how he came up with
25 the \$70,072. So he took the years 2004, 2005 and 2006,

1 and he indexed them to 2006 dollars. That's what he has
2 in the wages 2006 rate; do you see that column?

3 Q I do.

4 A So what that means is, a man that made \$84,037 in
5 '4, based upon the wage increases that I just
6 acknowledged took place --

7 Q Yes.

8 A -- would be making \$88,509 in 2006. A man that
9 made \$59,083 would make \$60,710 in 2006. That's what
10 the index is doing for us.

11 Q Okay.

12 A So now we have three numbers in 2006 dollars.
13 And we're going to add those numbers up and divide by
14 three and get \$70,072.

15 Q Yes.

16 A So now we have an average in 2006 dollars.

17 Q Okay.

18 A We're going to take that average and make it 2010
19 dollars. And to do that, we use the index for 2007, '8,
20 '9 and '10.

21 So if we took at 2010, what this tells us is if
22 we use the man's average wage in 2006 dollars,
23 \$70,072 --

24 Q Uh-huh.

25 A -- that man would make \$79,598 dollars in 2010.

1 And the idea is this is 2010 dollars. Well, it's not.
2 If you wanted to find 2010 dollars, what you would have
3 done is you would have taken the 131.8, the index for
4 2010 --

5 Q Uh-huh.

6 A -- divided that by 110.1, the index for 2004 --

7 Q Yes.

8 A -- and multiplied that by \$84,037. Then you
9 would have taken the 131.8, divided by the 112.9 and
10 multiply that by 59,083.

11 Q Take me through that again. 131.8 divided by
12 110.1?

13 A 112 -- well, that's right. What we're -- this is
14 the idea: Look at 2004. Do you see the 110.1?

15 Q I do.

16 A Consider that to be \$110.10.

17 Q Okay.

18 A Look at 2010, do you see the 131.8?

19 Q I do.

20 A Consider that to be \$131.80.

21 Q Okay.

22 A So what this mean is for every \$110.10 that you
23 made in '04 --

24 Q Right.

25 A -- you'd be making \$131.80 in 2010.

1 Q Okay.

2 A So the way to figure it out is take the 131.8,
3 divide by the 110.1, and that will give you the index up
4 to 2010. Does that make sense to you, sir?

5 Q It does. And when I do that, I come up with
6 1.97, so I guess I would round it up to 1.12?

7 A Not 1.97.

8 Q 1.197.

9 A Right. There we go. Okay.

10 Q So I'm going to round that up to 1.2?

11 A If you did the math right, I haven't done it in
12 my head -- and then you divide that by 84,037; and you'd
13 get a larger number than 88,509. Then you do the same
14 thing for 2005, 131.8 divided by 112.9. Think of 112.9
15 as \$112.90.

16 Q Uh-huh.

17 A You know, you need 131.8 for 2010, and you do
18 that for every year. And then you have it all -- you
19 don't need the average for 2004, '5 and '6 to get to
20 2010. That's the difference.

21 So I would not have done the indexing the same
22 way. And I would not have used the same three years. I
23 would not have only used three years.

24 Q Okay. What --

25 A So those are the two differences in the table

1 there.

2 Q But the -- the underlying consideration that the
3 base year is determined by the rate of pay, which is
4 affected by contractual increases and availability of
5 work and the plaintiff's choice to work, those are the
6 three things that underlie what you and Dr. Strangeways
7 are attempting to evaluate with regards to future
8 earnings?

9 A Well, you -- you use the right word. This is the
10 difference between economists and, say, vocational
11 persons. Economists take people the way we find them.
12 You know, whatever choice you made, then that's what we
13 use.

14 Q Right.

15 A So it appears that Mr. Holliday, although he
16 might have been able to make, perhaps, more than
17 \$84,000, you know, he had 40 years of seniority, he had
18 chosen the job, the location, off the road and so on, he
19 had made a choice to make about \$60,000 prior to his
20 injury.

21 So if I took him the way I found him, that's what
22 I'd use. I'd just use the two years.

23 Q Would you --

24 A But --

25 Q Would you agree with me that by doing the

1 calculation that way, you would minimize any effect in
2 the future of him choosing to once again do the work
3 that at one time garnered him \$84,000?

4 A Exactly, and that's why I said in my earlier
5 answer, I would reject that methodology I just described
6 to you.

7 Q Okay.

8 A Because that would be just as wrong as
9 Dr. Strangeways, because now I've eliminated all
10 opportunity for him to choose that other job. You know,
11 it appears that he choose it once in, what, 20 years,
12 not once in three.

13 So you're right. It wouldn't be right to totally
14 eliminate that choice. But it is wrong to make it 33
15 percent of his choices --

16 Q Okay.

17 A -- you know, that's not representative. That's
18 what we're trying to get at here, what's reasonable.

19 Q But as you and I are talking today, you can't --
20 you can describe what the difference is in the
21 methodology, but you can't quantify the difference for
22 me?

23 A I can, but I have not done so, no, sir. I've not
24 made the calculation.

25 I will add, Mr. Appleton, after Dr. Strangeways

1 has read what I've said today, he'll be able to do it.

2 Q Well, I'm hoping I can do it.

3 A Well, I'm hoping so too.

4 Q Once I read what -- and I'm not -- and that's why
5 I'm not going to put you to doing the calculation. But
6 I was just wondering if you had it there in the front of
7 you, and you can tell me, so I could -- you would save
8 me from doing it.

9 A I'm sorry. I have not done it. And that's a
10 compliment. When you said you, you know, hope you can
11 do it, I hope I've explained it, so, yes, sir, you
12 could.

13 Q Okay. Other than what you have described to me
14 as the issues you take with the calculation of
15 Mr. Holliday's base year earnings, what other issues do
16 you take with Dr. Strangeways, Dr. Cook?

17 A All right. We can move on to page 5, item 12
18 again. We have the \$79,598. We've discussed that, how
19 I would differ in my calculations of that.

20 Q Yes, we have.

21 A All right. The next thing is medical benefits.
22 Now, Dr. Strangeways, although it is not included here,
23 what he has assumed is it would cost Mr. Holliday
24 \$19,390 to purchase the medical benefits he had at the
25 railroad.

1 Now, he has 16 -- Dr. Strangeways has \$16,481.
2 But if you read his text, you will note that that is 85
3 percent of the cost. In other words, the railroad pays
4 85 and Mr. Holliday pays 15.

5 Q Right.

6 A So the total cost would be \$19,390.

7 Q Okay.

8 A So we're giving him 15 percent that's in his
9 wage. We're also giving him the 16,481. So the
10 question that, you know, passes through my mind, is it
11 reasonable that it will cost Mr. Holliday \$19,390 --
12 he's a single person -- to buy a policy, a medical
13 insurance policy for himself.

14 Well, I think a little research would demonstrate
15 that's not reasonable. Now, I understand this is what
16 it costs the railroad per employee. But that is not
17 what we're looking for. What we're looking for is what
18 would it cost Mr. Holliday. So I think that's
19 unreasonable.

20 Q Okay. Other than that thought, have you done the
21 research to see what a reasonable cost for medical
22 benefits for Mr. Holliday would be?

23 A If Mr. Holliday has taken disability, then he
24 would be eligible for the disability policy. I think
25 that's out of the -- I haven't looked up the rates.

1 Q Well, you know, there's a pretty big difference in
2 the coverage afforded by the disability -- by the
3 contractual insurance benefit that's available to
4 disabled and furloughed employees as opposed to the
5 full-time employees, don't you?

6 A Yes, sir. You are exactly right. And to do
7 this, if you wanted to be technically correct, what you
8 would do is you would try to replicate, you know, the
9 copays and so on in the policy that existed for him when
10 he was a worker. I understand that. And that's -- that
11 is a good observation on your part, yes, sir.

12 So I have not done that detailed an evaluation.
13 But that's what should be done. So we can see whether
14 or not it would cost him \$19,390.

15 Q Okay. And I'm not -- I don't want to insult you
16 by this question, but -- so it sounds to me like you're
17 guessing that Dr. Strangeways' figures are inaccurate,
18 but you don't really know that they are.

19 A Well, I have seen the calculations made by, you
20 know, insurance persons. Sometimes in these cases, this
21 question will be addressed by another expert. But
22 you're right given his -- you know, he'd have to fill
23 out a questionnaire and so on. So I can't do that
24 specifically.

25 Q Okay. Well, that's fair. And then what other

1 issues do you take?

2 A Well, the next is the \$1,200. I wouldn't
3 subtract that, because I've --

4 Q The work-related expenses?

5 A Yes, sir, because I've already said that if we
6 took him the way we found him, he wouldn't have those
7 expenses. He'd be in the yard. I mean, the only
8 expenses I saw in his tax returns were in 2004, the year
9 when he was presumably on the road. So I'd have to be
10 consistent here if we use my methodology for the base
11 wages, it wouldn't be right for me to be subtracting
12 \$1,200, which --

13 Q In -- I think that my recollection of this is
14 correct -- and I don't think you've seen
15 Dr. Strangeways' deposition testimony, Dr. Cook, because
16 I think we just took it last week.

17 But I believe his testimony was that that \$1,200
18 represented what he calculated were Mr. Holliday's union
19 dues.

20 A Well --

21 Q And presuming that union dues would not vary
22 between yard work or road work on the railroad, if that
23 is, in fact, what his annual union dues are, would that
24 be an acceptable work-related expense?

25 A Let's see, I'm trying to find the document in

1 which you sent this document as a response -- or
2 documents as a response. And they were tax returns. I
3 have them in my pile, one moment. (Witness is reviewing
4 his file.)

5 Q I may be able to save you all that if you could
6 just answer my question generally. Would you agree that
7 union dues would be an acceptable work-related expense?

8 A Yes. I'm sorry. I thought you were also asking
9 me about the \$1,200.

10 Q No. No. Let's -- whether or not it's \$1,200 to
11 me at this point is not real relevant. If my
12 recollection of what Dr. Strangeways testified is not
13 correct, it may be. But right now, I think that's what
14 he said.

15 A All right. That's fine. I agree with that.

16 Q Okay.

17 A That would be a continuing expense.

18 Q And then anything else as far as paragraph 12 you
19 take issue with?

20 A The tax calculation is a difficult one. This is
21 one that we all face. And it's really difficult when
22 you use the real increase method.

23 Mr. Holliday, in his last returns, after 2004,
24 when he no longer had presumably enough deductions to
25 itemize, he took the standard deduction and exemption.

1 Well, everything in the tax code is indexed to the
2 inflation rate. And that's something that Dr.
3 Strangeways has removed from his calculation. That's
4 how you go from nominal to real.

5 So every year, your standard deduction rises as a
6 result of inflation. Every year exemptions rise as a
7 result of inflation. Every year the tax brackets are
8 adjusted as a result of inflation. It's called bracket
9 creep.

10 So when you do the nominal calculation, you know
11 the actual amount of taxable wage, where you can't tell
12 that when you do the real calculation, because taxes are
13 on nominal values, not real values. And you can account
14 for the changes in the deductions and exemptions and
15 bracket creep.

16 So, technically, that tax return number is wrong.
17 Having said that, I don't know that it would really
18 contribute enough to the discussion to require
19 Dr. Strangeways to do that.

20 Q And you know what I'm concerned about at -- once
21 again more than the amount is -- and you agree that for
22 purposes of this FELA case that the net wages need to be
23 considered for the determination of present value?

24 A Well, I do. And this is a forensic analysis, so
25 the term net wages is tempered by, you know, the

1 forensic idea.

2 Q Right. Thank you. Are there any other
3 components to the tax deduction that Dr. Strangeways
4 should have considered that apparently he did not based
5 on his report? And what I'm trying to get to, Dr. Cook,
6 that's probably a bad question, other than quibbling
7 with, perhaps, the math, do you quibble with the method
8 that he came up with to determine the taxes?

9 A Well, I don't exactly know how he did it. But I
10 think what he did -- and this is what we were
11 discussing -- he took the current -- and he says that --
12 current, current tax rates, current deductions and
13 personal exemption.

14 So you can't use the current, which in this case,
15 I guess, would be 2009 when he did it to do the taxes.
16 But, again, that's -- that's what I would use.

17 Q Okay.

18 A I would use tax rates, regulations, deductions
19 and personal exemptions. The problem is you just can't
20 use the current ones in the future. That's all.

21 Q And it sound to me like you have bigger issues
22 with Dr. Strangeways calculations than the issue on the
23 taxes?

24 A I think so far the biggest issue that we have
25 discussed -- the biggest plural are the base-year

1 income --

2 Q Right.

3 A -- and the question of the medical care. Those
4 are the big issues.

5 Q Okay.

6 A The next one is time. You know, now that we've
7 discussed the amount of money in item 12, whether or not
8 it should or should not be \$75,881 --

9 Q Yes, sir.

10 A -- well, now you have to consider time, you know,
11 present value as a time calculation.

12 Q How far out you're going to project for us?

13 A Yes, sir. That's right. Yes, sir.

14 Q Okay.

15 A And Dr. Strangeways on page 8 in his item 19, he
16 describes what he did. And he said he used the average
17 age of retirement for workers covered by the system,
18 that was one calculation he made.

19 Q Yes.

20 A And then he said, I used 65, which is "widely
21 perceived to be a standard retirement age."

22 Now, I wouldn't do that. And I wouldn't do that
23 for the same reason that Dr. Strangeways discusses in
24 item 17 on page 6. He goes to great -- in great detail
25 here to explain to us that what we should be doing here

1 is utilizing probabilities, probability to distribution
2 statistics. And that's not what he's doing in D or E.
3 I don't know what he's doing in E, because I don't know
4 what widely perceived means. But -- and there's plenty
5 of literature that tells you 65 is not the "standard
6 retirement age."

7 But what I would have done is I would have
8 utilized a statistical methodology, a probability
9 distribution methodology for the work life just like
10 Dr. Strangeways describes for the life expectancy. It's
11 the same idea.

12 I imagine you are familiar with the Skoog Tables
13 of work life expectancies for railroad workers, that's
14 what I would have used.

15 Q And once again, can you quantify what the
16 difference would be?

17 A I can. Given the man was 58 years old and had
18 over 30 years -- almost 40 years of history behind him,
19 I doubt it would be two years difference between the
20 62 -- it would 60.something. Somewhere between 60 and
21 61, so the magnitude of the effect is not large.

22 Q Okay.

23 A But now having that, the 65, I would reject.

24 Q I understand that. And this is a question that's
25 really not just confined to this case, do you think that

1 the time frame that you used to project the economic
2 loss into the future is more reasonably calculated with
3 an elderly work force than it is a young work force? In
4 other words, would it be easier to project how long
5 somebody would work if they're 60 as opposed to if
6 they're 20?

7 A Long-term forecasts are difficult, yes, sir.

8 Q Okay.

9 A More difficult than a short-term forecast,
10 because you've -- a man that has worked to age 58 --
11 it's just like age, the probability that I'm going to
12 reach age 64 is 100 percent, I'm there. So to forecast
13 me being -- becoming 65 is much easier than forecasting
14 somebody that's 20 years old getting to be 65 --

15 Q Do you --

16 A -- because they have all of those years to die.
17 And it's the same way with the worker. I mean, you're
18 right there.

19 Q Do you consider the -- let's say the plaintiff,
20 Mr. Holliday, do you consider Mr. Holliday's discussions
21 with other employees or other family members as to how
22 long he thought he was going to work prior to the
23 injuries as having any relevance to determining his
24 work-life expectancy?

25 A I told my daughter today, I hope to live to age

1 100, so I can see my grandchildren.

2 Q Did you tell her how long you wanted to work?

3 A No.

4 Q Because that's what I'm asking you. I don't
5 think you have much --

6 A No.

7 Q -- you don't have control over when you're going
8 to leave this Earth.

9 A Well, it's the same -- it's the same way with
10 work. I mean, you know, I understand your question, but
11 even this Daubert issue, you can't do that in my
12 profession and not expect to some day be excluded. You
13 know, well, I asked the plaintiff or I asked the
14 defendant or whatever, how long they thought --

15 Q Right.

16 A -- you know, that just doesn't get you over the
17 hurdle.

18 Q Okay.

19 A And to do that, you're really exposing yourself
20 to a lot of problems. But that was done many, many
21 times in the past.

22 Q Right. And I think -- I think that's a fair
23 answer. So you -- the way I understand it, those
24 personal considerations may have some value outside of
25 the forensic realm, but you think that as far as the

1 forensic evaluation, it needs to be confined to
2 statistical results?

3 A I think the courts have said that.

4 Q Okay.

5 A And that's really a point of, you know,
6 embarkation between forensic analysis and our analysis.
7 We've got guidelines we have to -- we have guidelines --
8 excuse me -- that we must conform to.

9 Q Okay.

10 A All right. Let's see, the next one is -- you
11 asked me about the discount rate --

12 Q Yes.

13 A -- item 18. Dr. Strangeways uses TIPS. Now,
14 that's fine, but he cannot say that TIPS for age 65 are
15 the generally accepted methodologies of the profession.
16 They are not. He has force -- free to do that and give
17 a good reason why he thinks it's appropriate. But he
18 can't answer yes to is this generally accepted.

19 Q What is generally accepted?

20 A Generally accepted are treasury bonds, long-,
21 medium-, and short-term bonds, not TIPS.

22 Q Okay. Tell me --

23 A This is -- this is a question -- the -- when
24 people ask me that question, you know, is this the
25 generally accepted, obviously, I always say yes. But

1 they never say, how do you know.

2 And the way we know in my profession is the
3 National Association for Forensic Economists conducts
4 surveys on an annual basis asking people about these
5 issues, and this is one of the questions, do you use the
6 TIPS and --

7 Q And it's been rejected?

8 A Yes, that's right, in favor of the -- now, the
9 treasury bonds are fine. But he's using inflation
10 protected securities here, a very specific type of
11 treasury security. That's -- that's not used.

12 Q Can you explain to me what the difference is?

13 A These securities are indexed to inflation. So
14 every year your interest payments rise or fall with
15 inflation. For example, the "inflation rate." There
16 are many inflation rates. But when you and I speak of
17 the inflation rate, what we mean is the year-to-year
18 change in the CPIW for the third quarter of each year.
19 Well, it's zero for 2009.

20 Q Uh-huh.

21 A It's going to be zero it looks like for 2010,
22 2010 to '11. Interest rates are not zero percent.

23 So what we would be doing here is he's using like
24 a real rate, and he's saying, well, those rates will
25 change every year based on the inflation rate.

1 Or another way of saying that is if the inflation
2 rate is zero, you know, these rates won't change. Well,
3 they will change. These are just newly issued
4 securities. We're talking about securities that are
5 bought and sold in the secondary market. There are just
6 a bunch of reasons why they're not used. They're just
7 not used.

8 Q And according to Dr. Strangeways' report, are
9 they paying .43 percent on a five-year bond; is that --

10 A Only if you held it for five years.

11 Q Okay.

12 A Remember, these are -- these rates are good to
13 maturity.

14 Q Right.

15 A So what happens if you had to sell this bond any
16 time between the day you bought it and the date of
17 maturity --

18 Q Yes.

19 A -- the yield on it can be quite different than
20 .43 percent. You don't have any idea what that yield
21 will be. It depends on the interest rates that exist on
22 that day. You know, if the interest rates were -- if
23 real interest rates were, say, 2 percent, who wants a
24 bond that pays .43 percent?

25 Q Right.

1 A It would be discounted. But if the interest
2 rates were .2 percent, then this bond would be worth
3 more because it's paying .43 percent. So these are
4 yield to maturity rates, not rates that exist on a daily
5 basis.

6 Q Do you have any idea what the rates are on the
7 short-, medium-, and long-term bonds that you've
8 identified earlier? And can you give me an idea of the
9 time frame as to what a short-term bond, a medium-term
10 bond and a long-term bond are?

11 A Well, if they're less than six months, they're
12 called bills.

13 Q Okay.

14 A Anything over six months is a bond. You see,
15 they're issued multiple times each year. So if you
16 wanted to know, say, for the year -- let's see, how many
17 years did we go out here in Dr. Strangeways' table?
18 (Witness is reviewing the report.)

19 We go out to 2014, for example, I'm looking at
20 Table II. Well, you can find a bond that matures in the
21 year 2014. And you can find the yield on that bond, the
22 yield to maturity.

23 So you can buy it today, hold it until 2014,
24 those bonds were issued some time back, and you'd know
25 the interest rate. So you could overcome all of these

1 problems we're talking about.

2 Q So you would use the interest rate that would be
3 payable on a bond that matures in 2010, 2011 --

4 A And I'd find out what the interest rate was
5 today.

6 Q Right. And then apply that interest rate to your
7 calculation?

8 A For that year, yes, sir.

9 Q Okay.

10 A Now, Mr. Appleton, again, this is an exercise
11 between Dr. Strangeways and I, but because of the
12 relatively short period of time here --

13 Q Uh-huh.

14 A -- and the small, nominal rates -- the rates are
15 very low.

16 Q Right.

17 A This is not -- the magnitude of this effect is
18 not going to be large. But I'd do it differently, and
19 I'd do it differently because this is not generally
20 accepted. But when we do the arithmetic, I don't want
21 to mislead you that, you know, it's going to be tens of
22 thousands of dollars here.

23 Q And I don't take your answer as indicating that,
24 Dr. Cook.

25 A Okay.

1 Q I understand what you're telling me. And once
2 again, though, I'm interested as to whether or not you
3 can quantify the difference. You just told me that it's
4 not going to be that big, but do you have any idea what
5 the rates would be that you would apply?

6 A I think there is -- the one-year rates could be
7 lower than .43 percent today. And after 2015, I believe
8 they're a little higher than he has.

9 Q Okay.

10 A But, again, we don't really -- we can't read the
11 report and tell exactly what rate that Dr. Strangeways
12 is using for what year, because he -- when he makes his
13 calculation, his present value calculation -- this is in
14 Table II.

15 Q Yes.

16 A You know, he doesn't have the rates there. He
17 just tells you, I use these rates in item 18 to make the
18 reduction in Table II. You know, if you read item 18,
19 he says these have been used to reduce the future values
20 to present value.

21 Q I do see that.

22 A Well, it would have been helpful if he had a
23 column that said "rate." And then we'd know the rate
24 that he used for each year.

25 Q Okay. So based on reading his report, you can't

1 really quantify what the difference would be anyway?

2 A You can't. But we could work backwards if we
3 knew the time.

4 Q Right. Okay.

5 A You know, it's an arithmetic exercise, so I could
6 figure it out.

7 Q Okay.

8 A You know, he might have weighted the five years
9 different than the seven, I don't know.

10 Q All right. Any other differences?

11 A Well, there are two reports. That was the first
12 report --

13 Q Yes.

14 A -- that Dr. Strangeways provided.

15 Q Right. And then the second one considered
16 Mr. Melberg's opinions concerning, I think, loss of
17 earning capacity.

18 A Yes, sir, that's true.

19 Now, again, this -- I guess maybe we would phrase
20 this to be a forensic economic versus an economic
21 problem, because I know from the documents that
22 Mr. Holliday is receiving a pension.

23 Q Right.

24 A You know, I'm not sure if it's disability gone to
25 retirement or whatever. But he couldn't go out even if

1 he had the capacity to earn this amount -- of this
2 amount of money, he couldn't go out and earn it if he's
3 getting a disability pension. You know, there are
4 limits.

5 Q Right.

6 A So you have to take them off one or the other.
7 So I think what we're doing here is we're kind of
8 pretending that the pension doesn't exist, and that
9 allows us to make the deduction of either 17,500 or
10 23,000.

11 Q Right.

12 A You know, economists would say, well, he's
13 getting \$3,500 a month. So we ought to be reducing --
14 you know, we ought to be subtracting 40 grand a year.

15 Q Right.

16 A Neither one of these two things. So -- I mean,
17 that's -- you know, that's a problem. But you address
18 that legally.

19 Q And that's a problem Mr. Holland and I work out
20 under the --

21 A That's right.

22 Q -- Collateral Source Rule.

23 A Yes, sir. Yes, sir. That's exactly right. That
24 you will work out, and you will tell Dr. Strangeways and
25 I what to do.

1 Q But other than --

2 A Now, there is another opinion, a competing
3 opinion with Mr. Melberg's, and that opinion is
4 Mr. Broughton.

5 Q Yes.

6 A And Mr. Broughton, I think, says that this
7 gentleman could go out and earn 37,500. There's a third
8 opinion, and that opinion comes from a treating
9 physician. I cannot remember his name -- let me
10 rephrase that, He may not be treating physician, a
11 physician. And his opinion is that this gentleman could
12 go back to work as an engineer. So, you know, we have
13 to make a choice here.

14 And I guess at the end of the day, it would
15 probably be more helpful for the jury to see each of the
16 choices rather than just one of the choices -- pardon
17 me -- two of the choices. So I would probably include
18 in addition to the 17,500 and the 23,000, the 37,500
19 offset for earning capacity.

20 Q Okay.

21 A I think that's it. I hope I've covered
22 everything. And I hope I've done it clearly.

23 Q I think that you have. I appreciate your
24 patience.

25 Give me an idea, Dr. Cook, as to how often you do

1 this. You gave me your information on your past
2 testimony, and I appreciate you doing that. But -- and
3 I don't really care what kind of earnings you have off
4 of this work. But give me an idea of percentage-wise of
5 your time how much this forensic work involves.

6 A It -- well, it doesn't -- my total time, it
7 doesn't involve a large percentage, but of my work time,
8 it involves a large percentage.

9 Now, I am a professor emeritus. Two years ago, I
10 took the early retirement program, gave up my tenure and
11 went back to work as an adjunct professor. So as far as
12 the income that I earn, this is an important source of
13 income.

14 As far as whether or not I need it, I don't need
15 a penny of it. I'm working so that I can use a
16 bequest -- leave a bequest to my wife and a particular
17 child that I have.

18 Q You're the first person I've ever talked to under
19 oath that told me they didn't need to make any more
20 money.

21 A Well, I'm 64 years old. I don't -- for myself, I
22 don't need to make --

23 Q And that's why I --

24 A I just don't need to do it.

25 Q And I'm -- and I don't care how much you make off

1 of it. I'm just trying to get a percentage, if this is
2 what you do a lot of your time, a little bit of your
3 time?

4 A No, I understand. And I understand why you need
5 to ask that question. And the answer is, yes, I do this
6 with a large portion of my working time. And the answer
7 is, yes, this is a large percentage of my income.

8 Q And --

9 A That's an honest answer.

10 Q -- give me an idea as to how many times you have
11 performed this type of assessment either for Mr. Holland
12 or any other of Mr. Holland's partners or associates?

13 A Now, when you say "this type," you mean FELA,
14 railroad work?

15 Q Well, you know, I'm going into the bias with the
16 firm. So I'm really interested in any kind of cases
17 that firm may have referred you to -- or referred to
18 you.

19 A I'm sorry, when you said, "any other firm," you
20 don't mean all the cases I've ever been involved in;
21 you're just interested in the work with Mr. Holland?

22 Q No. And when I -- and the reason -- I'm just
23 concerned about Holland -- I read through your cases.
24 And it looks like you've done work for both plaintiffs
25 and defendants; is that fair to say?

1 A Yes, sir.

2 Q And it looks like a larger percentage may be for
3 defendants, but you did have some plaintiff work in
4 there.

5 A Yes, sir.

6 Q And so then I was interested in how much -- or
7 how many times you've testified either for Mr. Holland
8 or other members of his firm.

9 A I haven't testified very many times. I don't
10 think for Mr. Holland's firm I've not been to court for
11 Setliff & Holland. Depositions are few and far between.

12 You're the first person that's taken my
13 deposition in one of Setliff & Holland's cases in quite
14 a very long time.

15 Q Okay. Well, then that invites the question, how
16 many of these cases have you done for them if you
17 haven't offered testimony?

18 A A good number. I always have, you know,
19 something going with Mr. Holland I would say. I don't
20 know off the top of my head. But if you look at the
21 list of cases --

22 Q Yes.

23 A -- you can see that there are a number there that
24 say Setliff & Holland.

25 Q Right. And I was just trying to get a feel as to

1 what the ratio was with that firm as opposed to the
2 other firms that you've listed. And I can do that.

3 A Well, that -- I understand. The weight is an
4 issue. A lot of the cases that I get from Mr. Holland,
5 I don't wind up doing anything. He just says, I don't
6 think I'm going to need you to do what I thought we were
7 going to do. They settle or whatever.

8 So the other firms, usually, I have an
9 engagement. Mr. Holland calls me on many cases, and we
10 just don't wind up having a do a great deal.

11 Q Okay. And in the CV that you sent me, you have
12 the American Economic Association, Southern Economic
13 Association, Nashville Association of Forensic
14 Economics, American Academy of Economics and Financial
15 Experts and the Institute of Management Sciences.

16 A Yes, sir.

17 Q Are you still members of all of those
18 organizations?

19 A I am, yes, sir.

20 Q And what do you have to do to qualify to be a
21 member of those organizations?

22 A Pay your dues.

23 Q Okay. Have you ever held office in any of them?

24 A In the Institute of Management Sciences, I have.
25 The others, I have not.

1 Q And what office did you hold?

2 A I held an office that had something to do with
3 the programs. I put together the programs one year for
4 the -- the meeting. But the others, no. And there's
5 no, you know, court qualification or hurdle or whatever
6 to get into it.

7 Q And do those organizations publish peer-review
8 materials?

9 A Yes, the National Association for Forensic
10 Economists and the Academy, they both do. They also
11 have meetings. I participate in the meetings, make
12 presentations, go to the seminars. The Institute of
13 Management Sciences publishes proceedings, which I have
14 publications in, and they also publish a journal.

15 The American Economic Association, I have not
16 published anything in that journal. That is the
17 ultimate journal.

18 MR. APPLETON: Okay. Dr. Cook, I don't
19 think I have any other questions for you.

20 THE DEPONENT: Thank you for your time.

21 MR. APPLETON: Well, Mr. Holland may have
22 some.

23 MR. HOLLAND: No, I don't have any.

24 Do you want to read and sign your
25 deposition, or do you waive your signature?

1 THE DEPONENT: That's up to you,
2 Mr. Holland. Do you have a preference?

3 MR. HOLLAND: No, I really don't.

4 THE DEPONENT: All right. Mr. Appleton,
5 Mr. Holland, I'm going to waive.

6 Mr. Appleton?

7 MR. APPLETON: Yes, sir.

8 THE DEPONENT: I'm going to send you a bill
9 for \$500, which I'm sure you saw in my fee schedule --

10 MR. APPLETON: I did.

11 THE DEPONENT: -- which is the minimum for a
12 deposition; is that agreeable?

13 MR. APPLETON: Yes.

14 THE DEPONENT: All right. Thank you, sir.

15 MR. APPLETON: Yes, sir. Thank you-all.

16

17 And further, this deponent saith not.

18 (Reading and signature waived.)

19 (Deposition was concluded at 5:10 p.m.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2

3 I, Sandra J. Loonam, CCR, notary public in
4 and for the Commonwealth of Virginia at large, and whose
5 commission expires May 31st, 2012, do certify that the
6 aforementioned appeared before me, was sworn by me, and
7 was thereupon examined by counsel; and that the
8 foregoing is a true, correct and full transcript of the
9 testimony adduced.

10 I further certify that I am neither related
11 to nor associated with any counsel or party to this
12 proceeding, nor otherwise interested in the event
13 thereof.

14 Given under my hand this 18th day of March,
15 2010, in Richmond, Virginia.

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Sandra J. Loonam, Notary Public
Notary Registration No. 290506
Commissioned as Sandra J. Martin