IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

OWEN JOHNSON, Plaintiff, VS. **GRENADA DEL MAR CONDOMINIUM ASSOCIATION,** Defendant.	)	**CIVIL NO.: SX-02-CV-752** **ACTION FOR DAMAGES** **JURY TRIAL DEMANDED**

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein filed on February 5, 2007. For the following reasons, Defendant's motions will be denied.

I. FACTUAL BACKGROUND

Plaintiff is a licensed master electrician and president and sole owner of Owen Johnson Electric, Inc. ("Owen Johnson Electric"). On November 26, 2002, Plaintiff filed his Complaint for damages against Defendant based on a negligence theory of liability. Plaintiff alleges that on October 30, 2002, he was injured when he fell from a ladder while working on a light post located on Defendant's premises. Plaintiff claims he was a business invitee of Defendant and Defendant was negligent in failing to construct or maintain the light post in a reasonably safe condition and in failing to warn Plaintiff of the dangerous condition of the light post.

After the October 30, 2002 incident, Owen Johnson Electric has continued to be a profitable business, but Plaintiff claims he now forced to work in a strictly supervisory and administrative capacity as a result of his injuries. Plaintiff claims that prior to the injuries, he was the primary laborer for Owen Johnson Electric, but after the injuries his journeyman now performs most of the manual labor with assistance from one or more hired helpers.

The parties engaged in extensive discovery. Plaintiff supplied Defendant with a "Rehabilitation Assessment" dated April 1, 2004 prepared by Susan K. McKenzie, Rehabilitation Consultant ("McKenzie Report"), and a report dated April 16, 2004 prepared by Alan J. Bronstein, CPA ("Bronstein Report").

The McKenzie Report concluded that Plaintiff's October 30, 2002 injury had a "serious impact" on Plaintiff's employability and detailed two scenarios for estimating Plaintiff's future wage loss. "Scenario 1" calculated Plaintiff's future wage loss based on his need to hire replacement labor for the aspects of the job he can no longer perform. The McKenzie Report estimated the cost of replacement labor to be approximately $25,801.00 per year. "Scenario 2" calculated Plaintiff's future wage loss in the event that Plaintiff is no longer able to maintain Owen Johnson Electric as a viable business. "Scenario 2" calculated Plaintiff's pre-injury wage earning capacity to be $92,360.00 annually based on Owen Johnson's net earnings and Plaintiff's personal compensation over the two years prior to the incident. Plaintiff's post-injury wage earning capacity was calculated to be $0.00 annually based on the statement of Dr. David Weisher, Plaintiff's treating physician, that Plaintiff was 100% disabled from working as a master electrician. The McKenzie Report also listed future medical needs of Plaintiff based on Dr. Weisher's testimony.

The Bronstein Report was prepared based in part on the McKenzie Report's conclusions. The Bronstein Report utilized the pre-injury earning capacity of $92,360.00 and post-injury earning capacity of $0.00 contained in the McKenzie Report to calculate Plaintiff's total loss of income opportunity to be $882,292.00. Including future medical needs, the Bronstein Report calculated Plaintiff's total losses to be $1,132,966.00. On April 6, 2005, Bronstein updated his report to include two calculations based on the scenarios described in the McKenzie Report. Bronstein calculated Plaintiff's total losses based on the McKenzie Report Scenario 1 replacement labor theory to be $486,425.00. Plaintiff's total losses under Scenario 2 based on Plaintiff's inability to obtain other employment were estimated to be $781,081.00.

II. PROCEDURAL HISTORY

On January 20, 2005, Defendant filed a *Daubert* Motion to Exclude the Opinion and Testimony of Susan McKenzie and Alan Bronstein.

On February 23, 2005, Plaintiff Owen Johnson's Opposition to Defendant's Motion to Exclude the Expert Testimony of Alan Bronstein and Susan McKenzie was filed.

Defendant Grenada Del Mar's Reply to Plaintiff's Opposition to Defendant's Motion to Exclude the Opinion and Testimony of Alan Bronstein and Susan McKenzie was filed on March 11, 2005.

On January 9, 2007, the Court held a *Daubert* hearing on the issue of the testimony of Susan McKenzie and Alan Bronstein. Both parties appeared via counsel and presented oral arguments. At the conclusion of the hearing, the Court ordered McKenzie to prepare an updated report given the lapse of time between the original McKenzie Report and the date of the hearing and serve it on the parties by January 19, 2007. An updated report ("McKenzie Updated Report") was completed and exchanged by the deadline. The McKenzie Updated Report calculates Plaintiff's pre-injury wage earning capacity to be $67,760.00 annually. Like the original McKenzie Report, the McKenzie Updated Report also provides two scenarios to calculate Plaintiff's future wage loss. "Scenario 1" estimates Plaintiff's future wage loss based on his need to hire replacement labor for the jobs Plaintiff is no longer able to perform. Scenario 1 estimates Plaintiff's replacement labor costs to be $34,977.00 annually. "Scenario 2" calculates Plaintiff's future wage loss in the event that Plaintiff is no longer able to maintain

Owen Johnson Electric as a viable business. Scenario 2 again estimates Plaintiff's post-injury earning capacity to be $0.00 in the event that the company loses its current workers and is forced to close. The McKenzie Updated Report estimates Plaintiff's future medical needs to be $600.00 annually.

Defendant filed a Supplemental Memorandum in Support of *Daubert* Motion to Exclude Expert Opinions of Susan McKenzie and Alan Bronstein on November 9, 2006.

On February 5, 2007, Defendant filed a Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein along with an accompanying Memorandum.

On February 9, 2007, Plaintiff Owen Johnson's Opposition to Defendant's Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein was filed.

On February 26, 2007, Defendant filed a Reply Memorandum in Support of Defendant's Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein.

III. DISCUSSION

The Court will first address Defendant's motion to exclude the McKenzie Updated Report as an untimely disclosure under the rules of civil procedure. Next, Defendant's motions to exclude the McKenzie Report and McKenzie Updated Report based on improper factual foundation will be discussed. Finally, Defendant's motion to exclude the Bronstein Report based on improper factual foundation will be addressed.

A. THE MCKENZIE UPDATED REPORT WAS NOT UNTIMELY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Practice and procedure in the Superior Court is governed by the Federal Rules of Civil Procedure absent local rules to the contrary. Super. Ct. Rule 7. Federal Rule 26(a)(2) requires parties to submit written reports by experts containing "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2). Expert reports must be supplemented by the time the party's pretrial disclosures are due under Rule 26(a)(3). Fed. R. Civ. P. 26(a)(2)(E); Fed. R. Civ. P. 26(e)(2). Rule 26(a)(3)(B) begins, "[*u*]*nless the court orders otherwise*, [pretrial] disclosures must be made at least 30 days before trial." Fed. R. Civ. P. 26(a)(3)(B) (emphasis added).

By Order entered April 7, 2006, Plaintiff's expert disclosures were due on July 14, 2006 and pretrial disclosures were due on November 13, 2006. However, at the January 9, 2007 *Daubert* hearing, the Court allowed Plaintiff until January 19, 2007 to supplement the original McKenzie Report. Exercising its discretion under the Federal Rules, the Court determined that the McKenzie Report needed to be updated given the lapse of time between the date the report was prepared and the time of the *Daubert* hearing. Hr'g Tr., 69-70, Jan. 9, 2007. To eliminate any risk of prejudice, the Court also allowed Defendant to supplement its arguments as to the admissibility of McKenzie's opinion. The Court has discretion under the Federal Rules to extend the deadline to supplement expert reports, and Plaintiff supplied Defendant with a copy of the McKenzie Updated Report by the deadline ordered by the Court at the January 7, 2009 *Daubert* hearing. Fed. R. Civ. P. 26(a)(3)(B). Since Plaintiff complied with the Court ordered deadline to supplement the McKenzie Report and Defendant was given an opportunity to respond to the updated report to eliminate the risk of prejudice, Defendant's motion to exclude the McKenzie Updated Report will be denied.

B. THERE IS A SUFFICIENT FACTUAL FOUNDATION TO ALLOW THE MCKENZIE UPDATED REPORT TO BE CONSIDERED BY THE JURY.

Since the Legislature of the Virgin Islands repealed the Uniform Rules of Evidence, the Federal Rules of Evidence apply in the Superior Court. *Chinnery v. People*, S.Ct. Crim. No. 2009-037, 2011 WL 3490267, at *8 (V.I. May 27, 2011). Under the Federal Rules, the role of the trial judge is to act as "gatekeeper" to ensure that all expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Evidence is relevant if it assists the trier of fact in understanding the evidence or in determining a fact at issue. *Id.* Evidence is reliable if it is based on the methods and procedures of science rather than subjective belief or unsupported speculation. *Id.* at 589-90. This gatekeeping function also applies to non-scientific expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). The Federal Rules "embody a strong and undeniable preference for admitting any evidence that has the potential for assisting the trier of fact." *Id.*

Federal Rule 702 governs the admissibility of expert testimony and has a "liberal policy of admissibility." *Id.*; *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d. Cir. 1994). Rule 702 has three major requirements: (1) the proffered witness must be an expert; (2) the expert must testify about matters requiring specialized scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact. *Kannankeril v. Terminix Int'l. Inc.*, 128 F.3d 802, 806 (3d Cir. 1997). The Rule 702 inquiry is "a flexible one" that focuses on the principles and methodology used by the expert — not the conclusions they generate. *Daubert*, 509 U.S. at 594-95. The admissibility inquiry focuses on the expert's methods and reasoning; credibility decisions are left to the jury. *Kannankeril*, 128 F.3d at 806; *In re Paoli*, 35 F.3d at 743-46. *Daubert* states that a judge should find an expert opinion reliable under Rule 702 if there are "good grounds" for the expert to hold the opinion, even if the judge believes the opinion is incorrect. *Daubert*, 509 U.S. at 588; *In re Paoli*, 35 F.3d at 745.

The final step in the *Daubert* inquiry is to weigh the expert's testimony under Federal Rule 403, which permits exclusion if its probative value is outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury. *Daubert*, 509 U.S. at 596; Fed. R. Evid. 403.

The heart of Defendant's argument to exclude the expert testimony contained in the McKenzie reports is that there is an insufficient factual basis to support McKenzie's conclusions. Defendant particularly focuses on Scenario 2, wherein McKenzie opines that Plaintiff's post-injury wage earning capacity is $0.00 based on the statements of his treating physician and reliance on journeymen and helpers to perform the manual labor involved in his business. Defendant claims that the facts that the business income of Owen Johnson Electric and the net income to Plaintiff have actually increased since the injury prove that Plaintiff's future earning abilities have not been harmed by the injury. In essence, Defendant argues that since Plaintiff has actually been earning money since the injury, there is no factual basis for McKenzie's conclusion that Plaintiff has no future earning capacity. Defendant's arguments address the reliability requirement of the Rule 702 inquiry, which excludes evidence that is based on unsupported speculation or subjective opinion.

Defendant's position contradicts Third Circuit case law. The test for loss of future earning capacity is set forth in *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 362 (3d Cir. 1998), and *Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 484 (3d Cir. 1989). A plaintiff may recover for loss of future earning capacity if his injuries have narrowed the range of economic opportunities available to him. *Wilburn*, 139 F.3d at 362. "[A] plaintiff need not, as a prerequisite to recovery, prove that in the near future he will earn less money than he would have but for his injury. Rather, a plaintiff must show that his injury has caused a diminution in his ability to earn a living." *Gorniak*, 889 F.2d at 484. A diminution in ability to earn a living includes a decreased ability to weather discharge or layoff or to voluntarily leave an employer for other employment. *Id.*

Since the injury, there is evidence that Plaintiff has been unable to continue working as a master electrician in the same capacity as he was prior to the injury. Both Plaintiff and his wife, who is familiar with the daily operations of the business, testified that Plaintiff has been unable to perform hands-on electrical work as a result of his injuries and has been forced to assume a managerial role while his journeyman and helpers work in the field. Def's Ex. 3.[1] Plaintiff claims that this has narrowed the range of economic opportunities available to him since he would be unable to transition back to working as a master electrician if Owen Electric's business declines. Pl.'s Opp'n Feb. 23, 2005, at 2-3.

The *Daubert* inquiry focuses on the expert's methodology in reaching her conclusions. In this case, McKenzie prepared two different scenarios to assist the jury in assessing damages for loss of future earning capacity. Scenario 1 is based on the presumption that Plaintiff's personal earnings have decreased as a result of his need to hire additional workers to replace his own manual labor as he is no longer able to work as a hands-on electrician. Scenario 2 is based on the presumption that Plaintiff's ability to obtain other employment in the event of an economic downturn has been eliminated as a result of the injury.

The Court is satisfied that there is a sufficient factual basis for both scenarios contained in the McKenzie report to be considered by the jury. Deposition testimony by Plaintiff and his

[1] All references to Defendant's exhibits refer to the original *Daubert* Motion to Exclude the Opinion and Testimony of Susan McKenzie and Alan Bronstein filed January 20, 2005. All references to Plaintiff's exhibits refer to Plaintiff's Opposition to Defendant's Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein filed February 9, 2007.

wife provide evidence that additional workers were hired by Owen Johnson Electric to replace the manual labor lost when Plaintiff began working in the office after the injury. Plaintiff is entitled to make this Scenario 1 argument and allow the jury to decide whether hiring additional labor reduced Plaintiff's future earning capacity. Two of Plaintiff's treating physicians — Dr. Weisher and Dr. Subramaniam — agreed that Plaintiff's injuries left him 100% disabled from work as a master electrician. Pl.'s Ex. 2; McKenzie Updated Report 5, 7. The Court believes this constitutes a sufficient factual basis to support Scenario 2 contained in the McKenzie Updated Report. Again, credibility determinations are left to the jury under *Daubert*, and Defendant may attack McKenzie's conclusions at trial. But the extent of the *Daubert* inquiry is the methodology employed by the expert in forming the conclusions — not the conclusions themselves. *Daubert*, 509 U.S. at 594-95. The Court is convinced that there are at least "good grounds" for both scenarios in the McKenzie Updated Report to be considered by the jury. *Id.* at 588.

Defendant relies on *Henry v. Hess Oil Virgin Islands Corp.*, 163 F.R.D. 237 (D.V.I. 1995), and *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000), in support of the position that the McKenzie Updated Report is inadmissible. In *Henry*, the Court found the report of a vocational psychologist and an economic expert's calculations on loss of future earnings to be inadmissible under *Daubert* and Rule 702. *Henry*, 163 F.R.D. at 245-46. Like the present case, the expert's report contained two scenarios for the jury to consider. *Id.* The first scenario calculated loss of future earning capacity based on a diminished ability to work short of complete disability. *Id.* The second scenario calculated loss of future earning capacity based on 100% disability. *Id.* at 248. Since neither of the plaintiff's treating physicians found him to be 100% disabled, the court held that submitting the second scenario to the jury would be misleading and prejudicial. *Id.* The Court held that the expert's report and the economist's calculations based on the report were inadmissible under Rule 403. *Id.*

Similarly, in *Elcock*, vocational experts testified that the plaintiff was either 50-60% or 50-75% disabled, but the economist calculated the plaintiff's future economic loss based on 100% disability, relying on the jury to discount the expert's estimate accordingly at trial. *Elcock*, 233 F.3d at 755-56. Again, no expert or treating physician had testified that plaintiff was 100% disabled. The court held that the economist's report was not based on a sufficient factual foundation in violation of Rules 702 and 703 and implied that allowing the 100% disability figure to go to the jury carried the danger of misleading the jury in violation of Rule 403. *Id.* at 756.

This case can be distinguished from *Henry* and *Elcock* because of the fact that Plaintiff's treating physician, Dr. Weisher, did in fact conclude that Plaintiff was 100% disabled as a result of his injuries. Pl.'s Ex. 2. A second physician, Dr. Subramaniam, concurred with Dr. Weisher's opinion. Pl.'s Ex. 3, at 5. The Court finds that the Rule 403 risks of prejudice and misleading the jury are neutralized by the supporting opinions of the treating physicians that form the basis of the McKenzie Updated Report's conclusions. This is not a situation where the expert's scenarios were unsupported by the opinions of other experts. The scenarios presented in the McKenzie Updated Report are corroborated by other evidence presented in the case. Scenario 1 is based on testimony that Plaintiff has had to hire additional employees to make up for his inability to perform master electrician work after the injury and Scenario 2 is based on the conclusions of the two treating physicians that Plaintiff is 100% disabled from resuming work as a master electrician.

Additionally, the *Wilburn* and *Gorniak* cases allowed plaintiffs to recover for future economic loss under similar factual scenarios. In *Wilburn*, the plaintiff continued to work at the same position at a greater salary after he was injured. *Wilburn*, 139 F.3d at 362-63. The court held that the fact that plaintiff continued to work at the same position after his injury did not preclude recovery for loss of future earning capacity; rather, it was a factor to be considered by the jury when deciding whether plaintiff's economic prospects had narrowed. *Id.* at 363. Similarly, in *Gorniak*, the plaintiff was employed as a materials handler prior to the injury, and after the injury was assigned to work as a ticket clerk due to physical limitations caused by the injury. *Gorniak*, 889 F.2d at 482. The plaintiff made seven more dollars per day working as a ticket clerk than a materials handler. *Id.* The plaintiff's employer argued that there was no reasonable basis for recovery based on future economic loss since the plaintiff had demonstrated he was employable in less-strenuous positions. *Id.* at 483. The court held that the plaintiff could still recover for future economic loss and the jury should be able to consider the effect the plaintiff's injuries had on his ability to obtain other employment. *Id.* at 484. Although these cases were decided before *Kumho Tire*, the Court does not believe the holdings are limited by *Kumho Tire*.

Like the plaintiffs in *Wilburn* and *Gorniak*, Plaintiff has been able to continue working for the same employer and there is evidence to suggest Plaintiff's income may not have declined after the injury. However, Plaintiff has presented evidence that the injury has physically limited his ability to perform the functions required of a master electrician. *See* Pl.'s Ex. 1. According to the law of the Third Circuit under *Wilburn* and *Gorniak*, the jury should be allowed to consider how Plaintiff's injuries have narrowed his economic opportunities regardless of whether Plaintiff's earnings have actually decreased after the injury. *Wilburn* and *Gorniak* provide examples of how a plaintiff's economic opportunities can narrow even though there has been no actual loss of earnings. The jury should be allowed to consider evidence of whether Plaintiff's economic opportunities have narrowed as a result of the injury and decide if Plaintiff is entitled to recover for loss of future income based on those lost opportunities.

Since a sufficient factual basis exists for both scenarios presented in the McKenzie Report that neutralizes the risk of prejudice or misleading the jury, the Court finds that the McKenzie Updated Report is admissible under Federal Rules 702 and 403.

C. THERE IS A SUFFICIENT FACTUAL FOUNDATION TO ALLOW THE BRONSTEIN REPORT TO BE CONSIDERED BY THE JURY, BUT THE REPORT MUST BE UPDATED BASED ON THE MCKENZIE UPDATED REPORT.

The Bronstein Report is based primarily on the conclusions of the McKenzie Report. Essentially, the Bronstein Report puts McKenzie's conclusions into terms of dollars and cents. The Bronstein Report utilizes Scenario 2 to calculate dollar figures for Plaintiff's total loss of income opportunity. Bronstein Report 2. The Bronstein Report also calculates Plaintiff's total losses based on the original McKenzie Report's future medical expenses estimates. *Id.* The McKenzie Updated Report contains far fewer future medical expenses than those listed in the original McKenzie Report. Pl.'s Ex. 3, at 15; Def's Ex. 1, at 11. Additionally, the McKenzie Updated Report calculated Plaintiff's replacement labor costs to be $34,977.00 per year, whereas the original McKenzie Report calculated Plaintiff's replacement labor costs to be $25,801.00. Pl.'s Ex. 3, at 15; Def's Ex. 1, at 10.

Having determined that the McKenzie Updated Report is admissible under the Federal Rules, the Court determines that the Bronstein Report is also admissible since the primary basis for the calculations in the Bronstein Report were McKenzie's conclusions. However, since the time the Bronstein Report was prepared, McKenzie's conclusions have been updated. Since the Bronstein Report contains calculations of Plaintiff's total future economic loss based on the original McKenzie Report and McKenzie's estimates of future medical expenses and replacement labor costs changed in the McKenzie Updated Report, Bronstein's calculations no longer reflect McKenzie's conclusions. The Court will allow Bronstein to supplement his report by recalculating Plaintiff's total future economic losses based on the conclusions in the McKenzie Updated Report within twenty (20) days of the date of this Order.

IV. CONCLUSION

The Court finds that the expert testimony of Susan McKenzie and Alan J. Bronstein are admissible under *Daubert* and the Federal Rules of Evidence. However, since McKenzie's conclusions have been updated since the filing of the original report and Bronstein's report is based on McKenzie's conclusions, the Bronstein Report must be updated prior to trial.

Accordingly, for the reasons stated above, Defendant's Motion to Exclude Plaintiff's Untimely Disclosure of Susan McKenzie's Supplemental Expert Opinions, and Renewed *Daubert* Motion to Exclude McKenzie and Bronstein shall be denied under separate Order of even date. Plaintiff shall have twenty (20) days to provide Defendant with updated conclusions from expert Bronstein based on McKenzie's updated conclusions.

Dated: April 24th, 2012

DARRYL DEAN DONOHUE, SR.
PRESIDING JUDGE

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: ______________________
Court Clerk Supervisor
4/25/12