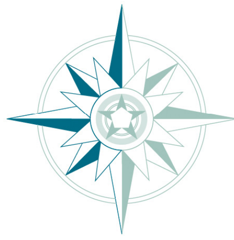

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COURT OF APPEAL ADDS TEETH TO THE COMPLETE INABILITY TEST

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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to email me and I will certainly explore the possibility of writing an article.

The Court of Appeal decision of *Burtch v. Aviva Insurance Company of Canada* (2009) is welcome reading for accident benefits insurers. This case revolved around the interpretation of Section 5(2)(b) of the *Schedule* which addresses the entitlement for the claimant to obtain income replacement benefits post the 104 week mark based on whether the claimant has suffered a "complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience". It has been shown time and time again that the claimant does not in fact need to suffer a "complete inability" to pass the complete inability test. It appears that this decision may buck that trend.

(To read my August, 2009 article regarding the Complete Inability Test click here.)

Facts and Trial Decision

In this case, the claimant was 29 years old at the time of the accident, had a grade 10 education, and was employed as a general labourer earning $25,000.00 per annum. After the accident, a pre-104 disability DAC concluded that he was unable to meet all of the physical demands of his pre-accident employment and he was found to be entitled to income replacement benefits. He was assessed by way of a post-104 disability DAC which essentially concluded that he did not suffer an injury that passed the complete inability test.

Yet, the report was far from definitive.

It said that with adequate physical conditioning that the respondent might be capable of returning to a job involving light to medium physical exertion provided that his shoulder was not elevated and he did not engage in repetitive tasks. Further the report said that the claimant should: (1) receive vocational assistance to secure alternative employment, (2) should be provided with active physical-conditioning

and (3) he should receive counselling.

The insurer then obtained a vocational assessment report that concluded that the claimant's greatest and only potential for future employment was in the field of long haul trucking. In order to qualify for this employment the claimant would need to complete a truck-driving course at a cost of $4,250.00 and obtain an i94 waiver card to allow him to cross the border. Accordingly, at the time of the assessment the claimant did not have experience, training, or the qualifications to perform this job. He had not worked at such a job in the past. Other then the insurer vocational assessor's comments regarding this being a viable option for the claimant, there was nothing to say that the claimant could obtain such a license or perform such a job. The insurer did not offer to pay for the training and the claimant did not enrol in these courses. At trial the claimant testified that he was willing to give this sort of employment a try but did not have the resources to pay for it.

The trial judge found that the Plaintiff had not qualified for long haul trucking at the time of the Post-104 DAC assessment and might never qualify. The plaintiff was found entitled to income replacement benefits post the 104 week mark.

The Appeal

The Court of Appeal disagreed.

The Court of Appeal found that it is not necessary that the claimant be formally qualified and able to begin work immediately in order for a particular employment to be considered a reasonably suitable alternative. A job for which the insured is not already qualified may be a suitable alternative if substantial upgrading or retraining is not required. Based on the medical evidence it was found that the claimant could perform the duties of the job and accordingly he did not pass the complete inability test. The fact that the insurer did not offer to pay for the training was not relevant. The sole issue was whether the claimant suffered a complete inability to engage in any employment for which he was reasonably suited by education, training, or experience. The fact that long haul trucking was considered by the Court to be a viable option for the claimant ultimately meant that the claimant had not passed the test.

Analysis and Application

In this case the claimant only had a grade 10 education, and there is nothing to suggest that he would he would pass the training to become a long-haul driver. In fact, long-haul truck driving is far from an easy job from both a physical and psychological standpoint for an able bodied person. It is also a job that requires a major overhaul to one's lifestyle and family life. It does not appear that the latter was a consideration for the Court of Appeal. He worked as a manual laborer and the insurer examiners seem to conclude that he could not return to this type of work and that he needed further treatment / counselling

altogether. Accordingly, this is a case in which the insurer medical assessments seemed to support that the claimant did have a disability that provided justification why this 29 year old had not returned to work.

This decision appears to be also in contrast to a slew of decisions that have emanated out of FSCO that have found for instance that: (1) a claimant who works post accident still may pass the complete inability test *(Mack v. Kingsway)* and (2) that not only should a claimant be able to technically be able to perform a job but that he must be able to perform the job well *(Shubrook v. Lombard General Insurance Company of Canada).*

The conclusion that it is irrelevant that the insurer did not offer to pay for the long haul truck training is in contrast to the FSCO decision of *Little v. Aviva Canada Inc.* In that case, the Arbitrator found that Applicant's duty to mitigate damages and attempt to return to work under section 56 of the Schedule included a corresponding obligation on the part of the Insurer to fund reasonable and necessary measures under sections 14 and 15. Although the Applicant was found to not be completely disabled, the Arbitrator awarded ongoing post-104 week IRBs to the Applicant up to the date of the Arbitration decision where the Insurer failed to properly assist the Applicant in obtaining the necessary retraining to return to gainful employment.

Conclusion

This is a very strong decision that adds teeth to the complete inability test. Since it is a decision from the Court of Appeal, trial judges and arbitrators will be forced to deal with it in subsequent decisions. This case stands for the proposition that if a reasonable alternative job is proposed for a claimant, that he has not performed in the past, and does not qualify for performing, that he still may not pass the complete inability test. The fact that he may not be able to afford the cost of the training, and that the insurer has not offered to pay for it, (despite the fact that the job option emanated from an insurer assessment), is not a relevant consideration.

Insurers would be wise to learn from this case that it is important to obtain vocational assessments that set out specific alternative jobs that may be available to the claimant; even if they require some reasonable training. Smart claimant's counsel will go to great lengths to distinguish their cases from the facts of *Burtch v. Aviva Insurance Company of Canada.* Effective insurers will use this case as the basis to attempt to stem the onslaught of claims for income replacement benefits based on the post-104 complete inability test.

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