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Why a Claimant Does Not Need to Suffer a Complete Inability to Pass the Complete Inability Test (Accident Benefits)

In theory, the statutory language of Section 5 of the *Schedule* sets out a pretty strongly worded test to find entitlement to income replacement benefits post the 104 week period. An insurer is not required to pay an income replacement benefit for any period longer then 104 weeks of disability unless as a result of the accident, the insured is suffering a complete inability to engage in any employment for which he is reasonably suited by education, training, or experience. In practice, the determination as to what constitutes a "complete inability" is not as difficult a burden for the claimant to cross then the actual wording would suggest. It appears that a "complete inability" is in fact not a complete inability.

The Law

In *Lombardi v. State Farm* (2001), the Arbitrator (affirmed on appeal) determined that there are three levels of disability identified in the legislation: (a) substantial; (b) complete; and (c) catastrophic. It was found that a "complete inability" would constitute a level of impairment that is not as significant as catastrophic but more significant than substantial. Accordingly, the Arbitrator interpreted a "complete inability" to fall within a range of disability that may not necessarily require that the claimant prove that he is unable to work at all.

In *Terry v. Wawanesa* (2001) the Arbitrator concluded that the determination as to whether a claimant is able to meet the "complete inability test" revolves around the specific requirements of the job. Specifically, the Arbitrator said as follows:

> "...jobs should not be broken down into their component parts such that if an applicant is able to do a little more than half of any suitable job, that he should be found to be disentitled from receiving income replacement benefits"

Essentially, it was found that if there was an essential component of a job that a claimant could not do, despite the fact that he was able to perform the bulk of the other functions, that he would pass the "complete inability test" and be found entitled to benefits. This is a practical reflection of real life. By way of analogy, a prospective employee interviewing for a job as a high rise construction worker would not get the job if he disclosed a fear of heights. There are some elements of a job that simply cannot be modified in any practical sense.

In *Shubrook v. Lombard General Insurance Company of Canada* (2004) the Arbitrator assessed whether an Applicant suffers a complete inability from a holistic view point. It was not enough to identify a series of discreet employment abilities and conclude that an individual was theoretically able to engage in a particular employment. The term "engage in employment" as set out in the *Schedule* was interpreted to mean that the claimant would be able to participate actively in the work relationship over a reasonable

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period of time, meet normal employer expectations, work his normal shift, and perform his work within acceptable levels of performance. So, not only must a claimant be able to perform a certain job, but he must be able to perform this job well enough to meet satisfactory employer standards.

In *Horne v. CIBC* (2001), the Arbitrator set out four basic elements that must be considered:

1. The question of suitable employment is a question of fact in that the work must be suitable for the particular applicant in the context of his education and employment background.
2. If a job is substantially different in nature, status or remuneration than the applicant's pre-accident employment, it may not be an appropriate alternative even though the applicant has done a "stint" in that job in the past.
3. In defining suitable employment, one must consider the nature and status of the work compared to the claimant's pre-accident employment, hours of work, remuneration, the applicant's employment experience including the length of time spent in different jobs, the applicant's age, and his qualifications, training and know-how.
4. Job market considerations are relevant to a determination of suitable employment.

For items 1-3 it is fair to say that a doctor will not be expected to return to work as a Walmart cashier. But, is it reasonable to expect that a taxi cab driver obtain work in an office setting? For item #4, if it is determined that a claimant is able to return to work at a job in which there are very few openings, then it is possible that he may still meet the test for entitlement. This is an important consideration in light of the present downturn in the economy and lack of work available.

In *L.F. v. State Farm* (Appeal decision in 2004), The Director's Delegate found that the best evidence of an inability to do a job is an honest attempt that fails. It was also found that both the applicant and insurer share the responsibility of identifying and pursuing alternative employment. Accordingly, if a claimant attempts to return to work and is unable, and at the same time an insurer does not conduct a vocational assessment and/or offer a work hardening program, this will not reflect well on the insurer's position.

Indeed, this principal was taken even further in the decision of *Little v. Aviva Canada Inc* (2005). 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.

The decision of *Smillie v. State Farm* (2003) is a helpful one from an insurer's perspective as it places an onus on the insured to take reasonable action to attempt to return to work at a suitable occupation. In this case, the insurer proposed a number of suitable alternative occupations which were all rejected by the claimant without making an attempt to work at same. He did make some limited attempts to find work in other occupations without success. The Arbitrator found that the claimant's criticisms of the proposed occupations did not make them unsuitable employment. The claimant did not present as a credible witness and his failure to attempt to return to work at suitably proposed occupations proved fatal to his claim for income replacement benefits.

The decision of *Thangarasa v. Gore Mutual Insurance Co.* (2005) is an important decision in assessing work performed by a claimant in a family business post accident. In this case, the claimant was unable to return to his principal occupation as a labourer pre-accident but was able to continue to work at his brother's video store as a clerk where he also worked pre-accident. The evidence showed that the work performed by the claimant at his brother's video store post accident was more akin to a "sheltered workshop" and not real employment. He was unable to perform the basic tasks of a video store clerk and maintained this "job" by way of familial loyalty. Indeed, the Arbitrator went so far to say that the money received from this employment (which was never quantified) would be more akin to a gratuitous payment and could not therefore be deducted as post-accident income.

The decision of *Mack v. Kingsway* (2007) seems to have even further expanded the determination as to what constitutes a "complete inability" as the focus turned to the difference in remuneration of the claimant's pre and post accident employment. In that case a claimant had worked as a porter prior to the accident working approximately 32 hours a week and earning between $35,000-$38,000 annually. Post accident he obtained a job working as a school bus driver for two years during the school term in which each run lasts between 1 – 1.5 hours and there is a large break between the morning and afternoon shifts. He also worked as a water truck operator in the summer of 2005. He continued to work as a school bus driver at the time of the Arbitration. As between these two jobs he earned approximately 1/3 - 1/2 of his pre-accident employment.

The Arbitrator concluded that there is probably little difference between the prestige regarding his pre-accident employment as a porter compared to his post-accident employment as a school bus and water truck driver. However, there is a substantial difference in his remuneration and the claimant was found entitled to income replacement benefits based on the complete inability test. Accordingly, the fact that the claimant earned considerably less money at his job post accident was the decisive factor in that case.

Conclusion

The determination as to whether a claimant is entitled to benefits based on the complete inability test requires an insurer to conduct a multi-faceted assessment. An insurer must determine what jobs are available to a claimant, and whether the claimant is able to perform the essential functions of that job to the satisfaction of a potential employer. An insurer must determine whether this specific job is suitable for the claimant in light of his background and experience; as well as the availability of this job in light of market conditions. Although there is a duty on the applicant to mitigate his losses to find employment, it is also incumbent on the insurer to assist the claimant with this search. If a claimant does find occasional/temporary work, he may still qualify for income replacement benefits. Indeed, even if the claimant finds full time work post accident at a job comparable in prestige to his pre-accident job, he may still be found entitled to benefits if he earns substantially less money post accident.

As such, a claimant may be found medically able to work post accident, and indeed work post accident, but still pass the "complete inability test". The test for entitlement to income replacement benefits post the 104 week mark is an onerous test for a claimant to breach, but far from insurmountable. Credibility is still the most influential factor in determining the entitlement to income replacement benefits, and this consideration should never be overlooked or undervalued.

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