



# Skill Testing Question:

The post 104 disability test (Part 1 of 2)

By Francois Paradis, MA, CVE

## CAVEWAS Corner

*Dear fellow colleagues and readers, here is our most recent contribution to CAVEWAS Corner.*

*As many of you know, CAVEWAS (Canadian Assessment, Vocational Evaluation and Work Adjustment Society) is a member society of VRA Canada, serving in large part to represent and support the professional and developmental needs of vocational evaluators as well as professional rehab personnel specializing in work adjustment of injured workers and the like. In this section, you will find current and candid articles authored by CAVEWAS members, non-members (and future members alike) that will share, discuss, and communicate with you developments and changes affecting our membership. Amongst them issues of best practice, professional development and designation, as well as industry trends.*

*We hope you continue to find the content in this section stimulating, motivating, and informative and we encourage your ongoing participation and contributions.*

*Enjoy!*

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*If you are a CAVEWAS member and have any ideas, opinions or thoughts relevant to this section and you would like to share, discuss, and communicate them in the next issue, please contact: Jeff Cohen at [jcohen@vocationalalternatives.com](mailto:jcohen@vocationalalternatives.com) We also encourage you to join our group on LinkedIn.*

This is the first part in a two-part series defining what makes someone incapable of completing vocational duties. In this first article, the question of “complete inability” will be addressed and for the sake of brevity, the second question will be reviewed in an upcoming article.

Auto insurers in Ontario have long relied on the opinions of vocational evaluators to determine claimants’ entitlement to Income Replacement Benefits (IRB). The terms and conditions under which claimants are entitled to these benefits are outlined in the Statutory Accident Benefits Schedule (SABS). In order to continue receiving income replacement benefits after two years of disability, the claimant must meet the so called “test of complete inability,” which is stated as follows in the SABS 2010, section 6 (2) (b): “the insurer is not required to pay an income replacement benefit after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.”

Typically, a vocational evaluator is asked to assess the claimant’s employability and to answer the following question:

“Does the claimant, as a result of the accident, suffer a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience?”

While the above question may seem straightforward at first, it contains a

couple of ambiguous terms that are subject to interpretation:

1. What is a “complete inability?”
2. What is “reasonably suited” by education, training or experience?

Clarifying the above points would allow the evaluator to answer the referral question with more confidence but where are we to find such clarifications? As it turns out, the SABS provides some guidance on these questions. Additionally, the Financial Services Commission of Ontario keeps a record of arbitrations and appeal decisions that provide valuable guidance as well. Over the years, several arbitrators have offered interpretations of the complete inability test that can be used as guidelines for vocational evaluators.

What is “complete inability?”

Although the SABS specifies that a claimant must suffer “complete inability” to continue receiving IRB after the 104 weeks mark, it does not provide a definition of “complete inability” in the context of IRB. In order to clarify this point, we can refer to other sections of the SABS. For example, a definition of “complete inability,” as it relates to a claimant’s ability to carry on a normal life, is provided as follows: “a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.” The SABS further indicates that “ ‘impairment’ means a loss or abnormality of a

psychological, physiological, or anatomical structure or function." The SABS also states that one eligibility criteria for IRB within the first 104 weeks after the accident is if the claimant "was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment." Essential tasks are no longer referred to in the "complete inability" test, however.

From a review of the SABS, it can be inferred that employment is part of the activities in which a person ordinarily engaged before an accident. Also, the essential tasks of an occupation, while not specifically referred to in the "complete inability" test, should be relevant when assessing a person's ability to engage in the occupation, whether or not it is 104 weeks after the accident. Based on that reasoning, we could assume that, in order to meet the "complete inability" test, a claimant would have to suffer a physical or psychological impairment continuously preventing him or her from performing the essential tasks of any employment that is reasonably suited by education, training or experience.

As you can see, the SABS does not provide much clarification on the "complete inability" test and some assumptions have to be made in an attempt to better understand it. Other questions remain unanswered. Should we, for example, assume that a claimant must be completely unable to do any part of any jobs in order to continue receiving IRB past the two year mark?

This question has received a lot of attention from arbitrators over the years and taken literally, the claimant would indeed have to be unable to perform any function of any job to qualify for IRB. The case of Terry and Wawanesa Insurance Company (2001) helped define the parameters of the complete inability test. In her decision, arbitrator Palmer stated that: "It is not my sense of the test of paragraph 5(2)(b) that the meaning of "complete inability" is that the applicant has to suffer an inability to do more than 50 percent of the job, as Mr. Julian characterized it. Real world 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 (and an employer should be obliged to hire him for that job). A literal reading of total disability clauses has been rejected in many previous cases; a literal reading of "complete inability" would mean an insured would have to be unable to perform any function of any job to qualify. Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity, must be addressed."

### *"The test must take into account 'real world' demands"*

In L.F. and State Farm Mutual Automobile Insurance Company (2002), arbitrator Blackman stated that: "I am persuaded, on a balance of probabilities, based on the weight of all of the medical evidence and my findings set out above, that L.F. has been unable and continues to be completely unable to maintain continuing, competitive, productive employment (which encompasses close to full-time hours) for which he is reasonably suited, due to his pain and other complaints resulting from this accident. Accordingly, I find that L.F. continues to meet the post 104-week disability test and is entitled to payment of weekly income replacement benefits."

In Passarello and Wawanesa Insurance Company (2009), arbitrator Lee referred to arbitrator Palmer's above interpretation of the complete inability test and added: "Thus the section 5(2) test for complete inability encompasses more than a mere enumeration or breaking down of the component tasks of any job, and an analysis as to whether the applicant can perform those tasks individually. The applicant must substantially be able to do the alternative job, considered as a whole. It must also take into account "real world" demands, including questions of productivity, reasonable hours of work and employer expectations and requirements. In the real world, Mr. Passarello would have to work eight

hours per day, five days a week on a full time basis, in a structured employee-employer relationship answering to the demands of his employer and meet employer expectations."

As such, a review of the SABS and relevant court decisions suggest that vocational assessors should keep in mind the following factors when providing a vocational opinion on whether or not a claimant meets the "complete inability" test:

- Vocational opinions should be supported by medical evidence of physical or psychological impairment.
- The essential tasks of an occupation should be taken into account to determine its suitability. This information is provided by the National Occupational Classification.
- To be considered employable, the claimant must be able to meet the demands and expectations of employers in a competitive work environment. The claimant must be able to continuously perform a job as a whole and to meet employers' expectations in terms of productivity and work hours, typically full-time employment. ☺

For references visit our website:  
[www.vracanada.com](http://www.vracanada.com)



Francois Paradis is a certified vocational evaluator with over 10 years of experience in the field of vocational assessment. He completed a Masters of Art in Guidance Counselling at Laval University in Quebec in 1995 and became a Certified Vocational Evaluator (CVE) in 2006. Francois has been on CAVEWAS' board of directors since June 2012. He has been working actively as a vocational evaluator in the Greater Toronto Area since 2001. His experience includes providing vocational evaluation services for WSIB, HRSDC, Veteran's Affairs, Ontario Works, legal firms and Auto/Health Insurers.