



Skill Testing Question:

The post 104 disability test (Part 2 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 We also encourage you to join our group on LinkedIn.

In the first part of this article, we addressed the question of "complete inability," as it relates to a person's ability to complete vocational duties. In the second part of this article, we will address the question of "suitable employment" in the context of the post 104 disability test.

How is the question of suitable employment to be interpreted? Evaluators can first refer to the SABS, which indicates that suitable employment should be reasonably suited to the claimant's education, training or experience and that the claimant's "personal and vocational characteristics" should be taken into consideration to identify suitable employment. These include: employment history; education and training; vocational aptitudes; vocational skills; physical abilities; cognitive abilities; and language abilities. The SABS also states that the insured person must be able and qualified to perform the essential tasks of the employment. Additionally, the place of employment should be within reasonable distance of the insured person's home to engage in said employment.

Evaluators can also refer to relevant court decisions to understand what constitutes suitable employment. For example, in reference to the above-mentioned "personal and vocational characteristics," some arbitrators have pointed out that the age of the claimant should also be taken into account to identify suitable employment.

In the case of Angolano and Liberty Mutual Insurance Company arbitrator Renahan stated that: "The definition of

'personal and vocational characteristics' is not limited to the items listed in section 1 of the schedule. Mr. Angolano was 60 years old when Liberty made the offer for loss of earning capacity. I find that Mr. Angolano's age is a personal and vocational characteristic which I should also take into account to determine whether it would be reasonable to expect Mr. Angolano to engage in any particular employment."

The case of Caruso and Guaranty Company of North America also outlines the criteria for suitable employment as follow: "The work must be suitable for that applicant, viewed fairly and realistically in the context of his or her educational and employment background. It may include jobs that are different from the work that he or she was doing at the time of the accident, but only if they are reasonably suitable or appropriate for the applicant. Work is not necessarily suitable because an applicant has done a stint of it in the past. If a job is substantially different in nature, status or remuneration, it may not be an appropriate alternative."

The above case does not specify what would constitute substantially different remuneration. However, Mr. Allen J. Wynperle, barrister and solicitor provided the opinion that if the post-accident job leads to less than 80 per cent of pre-accident earnings, counsel has a reasonable chance of proving that the job does not qualify as suitable employment. According to Cronk and Associates, the general guideline of 66.67 per cent to 80 per cent of pre-accident earnings can be used to identify suitable post injury employment.

In some instances, the evaluator may not be able to identify alternate

occupations for which the claimant qualifies by way of his/her education, training or experience. At such times, the evaluator may wonder if it is appropriate to recommend occupations that would require retraining.

The SABS of 2010 provides some help by stating in section 16 (2) that: *“Measures to reintegrate an insured person into the labour market are considered reasonable and necessary, taking into consideration the person’s personal and vocational characteristics, if they enable the person to; (a) engage in employment or self-employment that is as similar as possible to the employment or self-employment in which he or she was engaged at the time of the accident or (b) lead as normal a work life as possible.”* Section 16 (3) specifies that such measures include vocational or academic training. Other measures include *“workplace modifications and workplace devices, including communications aides, to accommodate the needs of the insured person.”*

Arbitrators have also commented on the appropriateness of retraining. In the case of Gagnon and Jevco Insurance Company, arbitrator Evans stated that: *“Retraining for a new occupation is reasonable only if it is unreasonable to expect the insured person to return to his or her pre-accident occupation. Since all parties agree that Mr. Gagnon cannot return to his former occupation, it seems reasonable that he should have been given retraining for a new occupation.”*

The case of Patrick and State Farm Mutual Automobile Insurance Company highlights the importance of choosing a retraining program that builds on the claimant’s previous career. Mr. Patrick, whose pre-injury work was as a roofing crew supervisor, had enrolled in a four-year bachelor degree of engineering. He wished for State Farm to cover the cost of his retraining. Arbitrator Sampliner stated that: *“The definition of ‘similar’ surrounded by the modifiers indicates to me that the drafters intended the insured person to look for retraining that builds on his or her previous career(s). Mr. Patrick presented no evidence from a rehabilitation or vocational expert to support his testimony that his retraining as a professional engineer is ‘as similar as possible’ to his pre-accident job as a roofing crew supervisor. I take notice that a qualified professional engineer is far better educated, trained, earns more and has higher status than a roofing*

crew supervisor. Mr. Patrick has failed to establish that his claim for retraining as a professional engineer is ‘as similar as possible’ to his pre-accident job as a roofing crew supervisor. Accordingly, I find that his claim for retraining is not a reasonable or necessary rehabilitation expense.”

The case of Little and Aviva Canada also points out the importance of considering a claimant’s aptitudes and vocational interests, especially when retraining leads to employment that is not similar to the claimant’s pre-injury occupation. Mr. Little used to work as an office furniture installer. Following his motor vehicle accident, he wished to be retrained as a computer network technician whereas his insurer felt he would qualify for retail work. In this case, arbitrator Muir stated that: *“Whether or not an occupation is as similar as possible to an insured person’s pre-accident work is, to some degree, a matter of perspective, and includes both objective and subjective elements...the provision is, I find, intended to confer a benefit, that is, to protect insured persons from being forced into any job that they can do. From Mr. Little’s perspective the work of a computer network technician is similar to his pre-accident work, as it represents the possibility of a career—a substitute for a career lost when he could not return to the work that he had done for 15 years. He testified as well that it would allow him to work independently in various locations as opposed to, for example, working in a retail environment. According to Mr. Mills’ reports, Mr. Little’s plan would draw on his strong problem solving and mechanical reasoning abilities identified by both disability management and the disability DAC. Retail sales, the only work he could do with no retraining of any kind, would not draw on those skills to any significant degree. Mr. Mills also noted that Mr. Little could take this training without any academic upgrading, an attraction for Mr. Little given his age and limited formal education. It is not evident to me that Mr. Little’s choice is so dissimilar that Aviva can avoid funding it for that reason alone.”*

Based on the information reviewed, evaluators should keep in mind the following:


- A suitable occupation must take into account the claimant’s personal and vocational characteristics

- The claimant should be capable of performing the essential tasks of the job and not only portions of it
- The claimant should be able to meet employers’ expectations in terms of quality of work, productivity and work hours, typically on a full-time basis
- Employment opportunities should be available in the claimant’s area or within reasonable distance
- A suitable occupation should provide earning prospects that are reasonably suited to the claimant’s pre-accident earnings.

If no suitable occupation can be identified for the claimant, based on his/her education, training or, experience, evaluators should feel confident in recommending occupations that require retraining, as per the SABS’ provision. Retraining should allow the claimant to pursue employment that is as similar as possible to his/her pre-injury work. If that is not possible, the evaluator should demonstrate that the retraining would lead to employment that is reasonably suited to the claimant’s vocational characteristics, such as his/her aptitudes and vocational interests. That employment should also provide earning prospects that are reasonably suited to the claimant’s pre-accident earnings.

The SABS and FSCO’s records of arbitrations provide an ongoing source of guidance for evaluators to arrive at sound and defensible vocational recommendations. ☺

For references visit our website:
www.vracanada.com



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