ANALYSIS:

What is a "complete inability" within the meaning of section 5(2)?

The phrase "complete inability" has received much arbitral attention. In *Terry and Wawanesa Insurance Company*, the arbitrator held as follows:

> 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).* As Arbitrator Sampliner pointed out in *Lombardi*, a literal reading of total disability clauses has been rejected in many previous cases and 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.* In my view, Mr. Terry has convincingly demonstrated in his attempt at a work trial that he is completely unable to engage in a sedentary job for which I find he was reasonably suited. *He would be unable to consistently attend and sustain a reasonable number of hours of employment as a taxi dispatcher or any similar job.*[14][emphasis mine]

In *Spicer and State Farm Mutual Automobile Insurance Company* the arbitrator held the following:

> The injuries must prevent the applicant from performing the duties of the alternative work, not simply make the job more difficult, or make the applicant somewhat less productive. However the test is not limited to whether the applicant is physically capable of performing each component task of the job without risking further injury. *The question is whether the applicant is substantially able to do the alternative job, considered as a whole, including reasonable hours and productivity.*[15][emphasis Mine]

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[14](FSCO A00-000017, July 12, 2001)

[15](OIC A-10158, May 24, 1995)

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.

Does Mr. Passarello meet the section 5(2) test for "complete inability"?

In the present case, witnesses from both sides agreed that Mr. Passarello suffered from chronic pain syndrome. Dr. Zarnett, the insurer's orthopaedic surgeon, determined that Mr. Passarello had not only developed chronic pain, but also permanent restrictions with respect to prolonged standing, bending and lifting. Dr. Koeffler, the insurer's psychologist, diagnosed Mr. Passarello with Pain Disorder Associated with Psychological Factors and a General Medical Condition. Nevertheless, both these witnesses opined that Mr. Passarello did not meet the post 104-week test because they believed he could perform a sedentary job of light or limited physical demand (as identified in the vocational evaluation of Marcel Jean).

The flaw with these opinions is that neither addresses whether Mr. Passarello would be able to do this work for an eight hour day on a full time basis, as required in the "real world".
Dr. Koeffler erroneously believed that Mr. Passarello worked as much as five hours a day five times a week in 2006, although Mr. Passarello's testimony was that his hours increased to four to five hours a day, three to four days a week in April of 2006, they decreased to ten to twelve hours per week in 2007. Dr. Koeffler also relied on Marcel Jean's vocational evaluation report and his list of suitable employments, but Mr. Jean testified that he did not take into account the hours of work a person needed to perform per day when evaluating them for the post 104-week test. Mr. Jean agreed that the Functional Capacities Evaluation only showed that Mr. Passarello could work two to six hours a day, and could not conclude that he could work up to eight hours a day.

Dr. Zarnett acknowledged that Mr. Passarello did not demonstrate the ability to maintain work at the "light" level for an eight-hour day, although he found that "[f]rom and orthopaedic perspective, there were no findings upon examination, which would preclude Mr. Passarello from performing work at this level."[16] He also extrapolated from Mr. Jean's report (which detailed Mr. Passarello's part-time work) to conclude that there was "no contraindication to increasing his [Mr. Passarello's] hours."[17] Again, Mr. Jean never considered whether a person could work an eight hour day in the enumeration of his list of suitable jobs. Therefore, I am not convinced by these opinions that Mr. Passarello could work eight hour days, five days a week.

Marcel Jean, in his report, highlighted findings in the Functional Capacity Evaluation in regard to self-limiting behaviour:

> Based on this evaluation, Mr. Passarello did not demonstrate the ability to sustain this LIGHT level of work for an 8-hour day. However as 2 of 3 of the endurance tasks were self-limited this is not considered to be a valid finding.[18]

I am not convinced that this observation of "self limiting" behaviour means Mr. Passarello was able to perform work at the LIGHT level for an eight-hour day. Even Mr. Jean admitted that self-limiting behaviours could be due to pain, depression and anxiety.

In this regard, I prefer the evidence proffered by Mr. Passarello himself. First, I note that all witnesses, including Dr. Zarnett, Dr. Koeffler and Mr. Jean, testified they found Mr. Passarello to have been credible. None discerned evidence of malingering on his part. Dr. Koeffler, psychologist, administered validity testing and found that he completed it appropriately with "no indication of undue attempt to exaggerate his cognitive difficulties or to present as unduly impaired."

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[16]Ex I-3, Tab 18, Orthopaedic Surgeon's Report, February 24, 2006 at page 4

[17]*Ibid.*, at page 4

[18]Ex I-3, tab 18, Vocational Evaluation Report, Marcel Jean, February 24, 2006 at page 2

I also found Mr. Passarello a credible witness. He testified at length before me in a forthright manner, describing his work history and his continued attempt to work at and to maintain his business after his accident in 2000. The evidence convinced me that before his accident, he was a successful, self-made entrepreneur who built his business from a modest beginning. I accept his testimony in regard to the hours he worked, and the duties, level and intensity of the work he performed.

I accept also that he attempted to return to work part time, commencing some two years after his accident, and that because of pain and the other impairments resulting from his accident, he was only able to perform the sedentary administrative and managerial components of his former job. There was no evidence that at any time during the seven years when he continued the business that he worked eight hours a day, five days a week. At the most, it seems he was able to work four to five hours a day three to four days a week, but this declined to about ten to twelve hours per week in 2007.

I also accept his testimony that after his accident, business went downhill, despite his efforts. Arbitrators have held that the most reliable indicator of the ability to return to work is an actual physical attempt and I find that Mr. Passarello made an honest attempt to return to perform the sedentary, light level, administrative duties of his previous job. He was not able to do so on a full-time basis.

This conclusion is supported by findings in the Insurer's own reports. Marcel Jean's report mentioned that Mr. Passarello might not meet employer expectations in regard to physical tolerances. Mr. Jean recognized that Mr. Passarello was previously self-employed, and as an owner-operator, he could dictate his own hours and availability. Mr. Jean agreed that it would be harder for Mr. Passarello to return to a structured employee-employer relationship, and that all the jobs identified in his report were of this nature. Even Dr. Koeffler agreed that a self-employment situation was optimal for Mr. Passarello.

I find therefore that Mr. Passarello is incapable of working an eight-hour day on a consistent five day per week basis, because of his chronic pain situation and other impairments resulting from the accident. In the "real world", without the ability to set his own part-time hours, Mr. Passarello would likely be unable to meet employer requirements and demands in terms of reasonable hours and productivity. All the identified jobs would require Mr. Passarello to work full time hours in a structured employer-employee relationship. I find that Mr. Passarello is completely disabled from performing them.

Had I found that Mr. Passarello was capable of working an eight hour day, five days a week, I would have then had to consider whether the jobs identified by Wawanesa were suitable for him by education, training and experience. Given my finding above, it is not necessary for me to undertake that analysis.

Is Wawanesa entitled to a set-off for amounts it overpaid to Mr. Passarello against future IRBs to be paid, if any?

The Insurer raised another issue in its arguments. It argued that if I determined that Mr. Passarello was indeed entitled to post 104-week Income Replacement Benefits, I should then determine the weekly amount of that Income Replacement Benefit. At that point, I should then compare the IRB rate I determined with the $400.00 a week IRB that was paid to Mr. Passarello by Wawanesa from May 2000 to March 2006. Wawanesa argued that if the IRB rate I ultimately determined was less than $400.00 per week, then Mr. Passarello would have been the beneficiary of an overpayment. In that event, I should allow Wawanesa to recover this amount from Mr. Passarello by setting off, or deducting the overpayment from future amounts it paid to Mr. Passarello in IRBs.

According to Wawanesa, they were not seeking a repayment, because if I were to find that Mr. Passarello was not entitled to IRBs after March 2006, Wawanesa would not attempt to recover any monies from Mr. Passarello. Wawanesa asserted that it only sought to set off future payments of IRBs against the overpayment.