

TPD - ete, etc

the education, training and experience factor

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Elements of a TPD definition

- TPD definitions vary from policy to policy – know the policy in question
- However, there are common themes to the majority of TPD definitions
- Onus upon Member to establish entitlement to benefit (standard of proof required = balance of probabilities)
- Trust Deed & policy terms govern the definition – usually a requirement to have left employment or service because the Member is TPD
- Reciprocal onus on Insurer act reasonably and in good faith = real & genuine consideration; exercise due care & skill; act on sound reasons & evidence; provide opportunity to Member to put additional material
- ***Note different emphasis of SCT and courts.***

A Hypothetical Definition of TPD definition

An insured member will suffer TPD if they:

“..have been continuously absent from employment with the Employer through injury or illness throughout the TPD Waiting Period (3 months) and in the Insurer’s opinion (after considering evidence satisfactory to the Insurer), the Insured Member has become incapacitated to such an extent as to render the Insured Member unlikely ever to engage, or work for reward, in any occupation or work for which he or she is reasonably qualified by education, training or experience”.

- Some definitions may refer to further training or rehabilitation
- Some definitions may allow consideration of medical treatment inc. compliance
- If definition does not refer to ETE, ‘reasonableness’ suggests it would still need to be considered

Elements of Definition

(1) Qualification

- Insured person/Member
- Absent from Employment for TPD waiting period
- Through injury or illness

(2) Level of disability

- Requires formation of insurer's opinion
- Incapacitated to such extent that member 'unlikely ever' to work
- In any occupation for which reasonably qualified
- Education, training or experience (ETE)

Elements of a TPD definition

1st limb – ‘Qualification’

- **Insured person/Insured Member**
 - An Insured Member?
 - Takeover terms?
 - Automatic Acceptance Limits
- **Absent from Employment for TPD waiting period**
 - Waiting Period - does policy required Member to have ceased **all** work or just work for employer (beware ‘own occupation’ policies)?
 - Check TPD waiting period (varies)
 - Check Trust Deed requirements – has Member left service?
- **Through injury or illness**
 - Causative link required between reason for ceasing work and injury/illness
 - Redundancy/retrenchment

Elements of a TPD definition

1st limb – ‘Qualification’

How does Redundancy impact Qualification?

- Does not necessarily preclude a finding of TPD
- Examine circumstances surrounding retrenchment – does evidence support a ‘bona fide’ redundancy?
- For example, was claimant working part-time prior to redundancy or on alternative duties? RTW program? Was employer moving premises?
- May require specific questions to the Employer or collation of information from medical reports and vocational assessment
- Is the real basis for claimant accepting redundancy no more than a demonstration that the Member retained no employment capacity with the Employer?

Elements of a TPD definition

2nd limb – Level of disability

Insurer's opinion

- Heavy onus on Insurer to make fair and reasonable decision
- Must be supported by evidence (subject to review)
- Good evidence = good decision
- At review stage, Court/FICS will look to see if decision was reasonable on evidence available – not whether would have made a different decision

However, SCT will consider whether the decision is **fair & reasonable** ***“in relation to the complainant in the circumstances”***

Elements of a TPD definition

2nd limb – Level of disability

- Incapacitated to such extent ‘unlikely ever’ to work
 - ‘unlikely ever’ – on balance of probabilities
 - Courts have found ‘unlikely ever’ to mean ‘no real chance’ or ‘improbable’ (**White**)
 - Not a remote possibility (**Riley v NMLA**)
- Compare definition requirement of ‘unable ever’
 - ‘unable ever’ is generally regarded as setting higher threshold for claimant to satisfy than ‘unlikely’ (confirmed in **Cullinane v Mercer Oct ’05**) on basis that it requires consideration of capacity to ever work again
 - However, there have been cases where the courts have blurred the distinction on grounds that ‘real world jobs’ need to be considered (see **Weber v Tiss Feb ’05**).

Therefore, still some scope for debate on this issue.

Elements of a TPD definition

2nd limb – Level of disability

- **‘Unlikely ever’ – factors that may affect the ‘likelihood’ of a return to work**
 - Assessment of ‘likelihood’ of return to work must include consideration of factors such as:
 - Types of suitable work/occupations identified
 - Medical evidence – prognosis
 - Age
 - Geographic location
 - Access to transport
 - language issues/ethnicity
 - Realities of job market must also be considered - but this does not extend to identifying actual positions with specific employers
- Consider the **realistic likelihood** of the claimant to be able to attract an employer (bearing in mind the physical limitations involved) as well as the capacity to undertake work

Elements of a TPD definition

2nd limb – Level of disability

- **‘Reasonably qualified’ or ‘reasonably suited’**
 - Work which claimant can undertake within existing skill set
 - Consider transferable skills in conjunction with physical limitations - does not mean ‘suitably fit’ in terms of physical stamina only
 - Real, realistic jobs, reasonably available
 - Capacity a key issue - can consider residual capacity & no need to have previously performed the role (see ***HCF Life v Kelly*** and ***Wells v Aust. Aviation***)

‘Reasonably’ requires common sense approach when considering qualifications or experience

Elements of a TPD definition

2nd limb – Level of disability

- **Education, training or experience (ETE)**
 - Essential to obtain FULL HISTORY of ETE (resume and/or detailed job description can be useful)
 - Important to understand *exact* nature of occupation and duties involved
 - Applies to occupation performed prior to ceasing work & previous occupations
 - Without a full picture of claimant's ETE, impossible to assess 'likelihood' of a return to work nor suitability for alternative work
 - Detailed ETE information also allows IMEs/doctors/vocational experts to identify suitable work and advise if member capable of such work

SCT encourages acquisition of such evidence

ETE – Other factors to consider

Retraining and Rehab – is it part of ETE?

Recent decision in *Druery v First State Super [2005] NSW IRComm 255*

- Can take **reasonable retraining** into account when considering future work prospects;
- Reasonable in modern workplace that a return to full-time work can be achieved through a **graded job reorientation** and/or **ongoing skill training**.
- where definition requires that the claimant be *'unlikely ever'* to return to work, this requires a view to the long-term, not just short-term.
- Retraining undertaken between cessation of work and date of insurer's decision may be taken into account as ETE (***Cameron v SPSSS***)

ETE – Other factors to consider

Medical Treatment – can it be taken into account?

- General principle that refusal to undertake treatment is not a bar to TPD
- May be relevant where
 - prognosis is good but member refuses to undertake reasonable treatment
 - policy contemplates treatment

What about deferral of decision pending outcome of treatment?

- Cannot be used as excuse for delayed decision making
- If definition refers to 'unlikely', insurer/trustee needs to form view about future events in any case
- May depend on nature of treatment (whether a specific course of treatment or a test that will materially effect prognosis)

ETE – Other factors to consider

- **To what extent do you need to identify alternative work?**
 - Do not need to identify a specific occupation, or that an actual job is available with an actual employer
 - Sufficient to show capacity to perform a range of ***unspecified occupations*** (***Druery v First State Super***)
 - For example, can show capacity to perform a job “like that” of a particular occupation (***Citicorp v Smith***)

NOTE – it is no longer sufficient to rely on ability to perform unspecified ‘light duties’ or ‘sedentary work’

ETE – Other factors to consider

Full time v. Part-time work

- Generally, Member will need to be fit for a return to **full-time work**
- In some circumstances, capacity for part-time work may still satisfy definition
- It will vary according to the case & the characteristics of the occupation.
Note: there is no general principle that the insuring clause is to be read to imply a reference to full time work (See ***Szuster, Wyllie v NMLA and Alcoa v Thompson***)
- Part-time capacity may be relevant where claimant:
 - Was working part-time prior to cessation of work;
 - Has future capacity to return to full-time work through a graded return program including part-time work
 - Is younger and therefore greater likelihood of eventual return to full-time work through part-time work

ETE – Other factors to consider

Assessment of Occupation

- Use of *Australian Standard Classification of Occupations* in TPD cases (2nd edition) published by the Australian Bureau of Statistics
 - SCT notes that the above is '*valuable in assessing TPD claims*'
 - '*very useful*' in comparing the occupations nominated by IME's & specialists as being able to be undertaken, with the activities it is expected can be undertaken in a certain occupation
- Use Occupational Physicians and Vocational Assessment (encouraged by SCT)
- Remember, consider the **realistic likelihood** of the claimant to be able to attract an employer (bearing in mind the physical limitations involved) as well as the capacity to undertake work
- Labour market analysis is often useful

ETE – things to consider

- Know the definition and have accurate ETE information
- ETE information is **as important** as medical information
- Retraining & graduated return to work may be acceptable
- Consider use of *Australian Standard Classification of Occupations & Occupational Experts*
- If gaps in evidence – seek clarification from member, employer, doctor etc
- If your questions not answered – seek supplementary report
- Extent of investigation should be considered in context of size of claim.

ETE – things to consider

- Targeted letters to health professionals
 - Avoid generic questions & ‘double barreled questions’
 - Ensure health professionals fully briefed or obtain history about ETE
 - Request analysis of suitable occupations
 - OK to get specifics of any retraining & re-skilling
 - Consider what you need to know & ask questions accordingly!
 - Would claimant be able to perform job with [listed] duties?
 - If claimant is capable of part-time duties, could this eventually translate to full-time with appropriate support?
 - Obtain detailed history of occupational duties, ETE, daily activities & restrictions

Should you ask doctor’s opinion about the member being TPD?

Policy – “...in the opinion of the Insurer after considering evidence...”

QUESTIONS???

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