

If the job fits...
Assessing suitability for work
under TPD definitions

**Presented by Nicholas Matkovich
and Diren Fernando**

9 March 2017

Introduction to Presentation

1. Evolving Principles Around TPD Definitions
2. 'Reasonably fitted...'
3. Jones v United Super Pty Ltd [2016] NSWSC 1551
4. Comments on the Jones Decision - Appeal lodged
5. Approaching the Issue of Vocational Assessment
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One example of a TPD Definition

Hannover Life Re of Australasia v Dargan [2013] NSW CA 57

“1.3 Total and Permanent Disablement in respect of an Insured Person who was gainfully employed within the six months prior to the Date of Disablement is where:

1.3.1 the Insured Person is unable to follow their usual occupation by reason of an accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience.

Evolving Principles around TPD Definitions

- Insurance Products under Group Schemes growing
- The applicable benefit can be large
- Increased frequency of claims (and declined claims). Some of these claims proceed to litigation
- Judgments which have analysed some part of the TPD Definition:
 - Full-Time v. Permanent Part-Time
 - Date for assessment
 - “unlikely ever”
 - Part-Time v. Casual
 - “fitted”

Reasonably fitted...

- Policy definitions may utilise different wordings such as “reasonably fitted”, “reasonably suited”, “reasonably qualified”
- There is authority that there is no difference in meaning in those terms
- A person can be reasonably fitted for employment by reason of education or training or experience or a combination of those factors

Jones v United Super Pty Ltd [2016] NSWSC

- The Court held that the occupation must have a connection with the insured's past work history
- According to the Court, it refers not to any work for which the insured might have physical and mental capacity to perform without further training, but to work for which the insured has been prepared and shaped by education, training and/or experience
- The definition directs attention to the insured's vocational history to date, and to occupations for which that vocational history fits the insured
- Obiter comments by the Court that the concept of 'work' in the definition is limited to work which is available locally
- According to the Court, here, the insurer's reasons did not go beyond a conclusion that **physically** the insured should be able to perform the tasks of the suggested jobs

Jones v United Super Pty Ltd [2016] NSWSC

- Judgment on Appeal
- Does the Decision extend the current law?
- Does the Decision go too far in its approach?
- Our view of the Decision will be influenced by what we consider was the basis of the guarantee to pay the TPD Benefit under the Policy

Vocational Assessment Task

- Giving instructions; directing the focus of the expert; ensuring adequate explanation of connection
- Base level entry positions
- Transferrable skills analyses
- Examples: Jones was a roof plumber
The Surgeon who can no longer operate

Where to from Here

- If our analysis is correct, then further words or individual words in TPD Definitions are likely to receive judicial attention
- Next issue? How to take account of early to mid-career occupations, when considering an insured's vocational history?
- Other issue? Settling the geographical location question
- Is there an unconscious underlying principle of Courts trying to achieve a fair and balanced outcome for all stakeholders?
- Eligible set for TPD Benefits is likely to narrow / broaden?
- Further tightening of the wording of TPD Definitions: allow re-training to be taken into account ; specify when the Date of Assessment is to occur

Our Takeaways

- Check and confirm that you have the correct TPD Policy Definition, and keep referring back to it. TPD Policies differ in their precise wordings
- In the claims assessment process, work with the qualified vocational assessor to obtain the strongest opinion / report which you can achieve on behalf of the insurer
- Be able to clearly articulate the connection between the insured's vocational history and the recommended position(s)
- Note *Jones v United Super Pty Ltd* is currently under appeal



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