

CASES AND TRIBUNAL DECISIONS

Group Cover – when will your ADL definition apply?

Daffy v MLC Nominees Pty Ltd & Anor [2016] VSC 606

[Link to decision](#)

This recent decision of the Victorian Supreme Court deals with a common scenario facing claims teams, being, fixing the point in time when TPD cover changes from the 'any occupation' definition to the more onerous 'Activities of Daily Living' (ADL) definition.

This contractual transition in the nature of the TPD cover is found in most group life policies and usually follows upon a member reducing work below a certain level.

Background

Mr Daffy held the position of General Manager for Southern Star Designer Windows Pty Ltd (SSDW). He held 50 per cent of shares within the company. In October 2010, whilst in the course of his employment moving a glass sliding door, Mr Daffy injured his back, requiring hospitalisation and was absent from his work for approximately four weeks. As a result of a dispute with the company's other shareholders, unrelated to his injury, Mr Daffy's employment was terminated on 24 May 2011.

As an employee of SSDW, Mr Daffy was automatically entitled to group insurance cover taken out by the First Defendant as Trustee of the employer's superannuation fund. Mr Daffy contended that he was absent from work, solely as a result of his injury from late July 2011 onwards and that he was incapacitated to the extent as to render him unlikely to ever engage in any gainful occupation for which he was reasonably qualified. He lodged a claim for TPD in May 2012, which was subsequently rejected by the insurer in January 2013.

The Policy provided for different schedules and eligibility requirements depending on the Member's employment. In particular, Schedule 1 provided for an 'any occupation'

TPD benefit for when injury or illness was suffered within the course of employment. Schedule 6 was an 'Automatic Rollover Plan' which applied to Members who had left the employment of the participating employer and had not elected to cease their insurance cover. Schedule 6 employed a more onerous 'Activities of Daily Living' (ADL) definition.

The insurer argued that due to the specific terms of the policy, all liability for the 'any occupation' TPD definition ceased upon the cessation of the underlying employment. Cover could still continue, but only under the more onerous ADL definition. The plaintiff in this case, not being TPD at the termination of his employment, could only qualify for the ADL definition.

Decision

Whilst the insurer's argument had technical merit, the Court could not accept it was in keeping with the intention of the Policy and as a matter of practicality, found that the entitlement to claim for a TPD benefit under the policy arose when the 'disabling event' occurred i.e. the underlying injury, which was before the employment ceased (see paragraph 171 of the judgment). The net result of course was that the plaintiff remained eligible for the 'any occupation' TPD benefit.

In arriving at this decision, the Court also found that a person does not necessarily cease their occupation when they ceased working with a particular employer. It should be noted however that the findings in this regard are clearly specific to this particular policy.

The Court ultimately found the plaintiff TPD and in doing so, touched on the issue of evidence subject to

the date of assessment (which the Court found to be by reference to the level of incapacity at the end of the plaintiff's 6 months qualifying period). The Court accepted subsequent medical evidence could be taken into account by the insurer in forming the relevant opinion, but did not explicitly qualify this by stating that the subsequent evidence must be probative to the level of incapacity as at the assessment date.

Implications

Whilst this case turned on the interpretation of clauses specific to the Policy to hand, it does provide guidance regarding the importance of clear drafting of policies as well as avoiding inconsistencies and ambiguity. A clause within the Policy document arguably impacted on the effectiveness of the automatic rollover plan in Schedule 6 and provided scope for interpretation as to when the ADL coverage came into operation. This gave rise to a result not intended by the insurer.