

## CASES AND TRIBUNAL DECISIONS

# Court Scrutinises Insurer's Decision

*Folmer v VicSuper Pty Ltd & Anor* [2018] NSWSC 1503

[Link to decision](#)

## Summary

The Supreme Court of New South Wales has recently delivered a judgment concerning a claim for a Total and Permanent Disablement (TPD) benefit. The proceedings were heard by Justice Hallen.

## Background

The plaintiff, Ms Susan Folmer, commenced work with Aspire Mental Health Services as a community development officer and counsellor in late 2007. She was a member of the Victorian Superannuation Fund (the Fund). VicSuper Pty Ltd was the trustee of the Fund.

The plaintiff was tertiary qualified and had experience working as a counsellor, youth support worker, disability support worker, case/social worker and researcher.

It was claimed the plaintiff ceased work on or about 25 January 2008 as a result of suffering psychological conditions. The plaintiff claimed a TPD benefit under a group life policy (the Policy) issued by the Insurer to the trustee.

The plaintiff's claim condition appears (in part) to arise from a motor vehicle accident in March 2006, in which it was alleged she was driving under the influence of alcohol. It was claimed the plaintiff's subsequent dealings with the Police caused a worsening of her symptoms. In July 2008, the plaintiff was charged and convicted of making a false statement about injuries she claimed the Police had inflicted on her. The Court noted that the precise details of the plaintiff's cessation of work were not outlined in the evidence.

The plaintiff also suffered an injury to her back in September 2009 following an assault by her partner, which (it was claimed) also affected her psychological conditions. An arachnoid mass was also discovered on her thoracic spine. The plaintiff claimed her psychological conditions and back condition caused her to withdraw from further university courses she had commenced after ceasing work.

The trustee and insurer declined the TPD claim (including confirming the decisions on reconsiderations).

## The TPD Definition

The Policy contained the following TPD definition:

*"... in relation to an Insured Member who has been in gainful work at any time*

*during the two years immediately preceding the Date of Disablement:*

*(a) (i) the Insured Member has been continuously unable to work because of injury or illness for the TPD Waiting Period; and*

*(ii) in the Insurer's opinion (after considering medical and other evidence satisfactory to the Insurer) the Insured Member is unable ever again to work for reward in any business, occupation or regular duties for which he or she is reasonably qualified by education, training or experience;"*

The "TPD Waiting Period" under the Policy was 6 months. The Policy (relevantly) defined "business, occupation or regular duties" to mean full-time business, occupation or regular duties.

## The Dispute

The insurer declined the TPD claim on the basis that:

- The plaintiff had not shown, on the medical evidence, that she ceased work because of an injury or illness; and
- The evidence did not show the plaintiff's condition prevented her from performing work with her education, training or experience.

The plaintiff alleged the insurer had breached its duties in forming the opinion and sought declarations that she satisfied the definition of TPD in the Policy.

The allegations against the Trustee were abandoned at the hearing and the matter proceeded against the insurer only.

## The Decision

In relation to the reasonableness of the insurer's decisions (referred to as the 'first stage' enquiry by his Honour), the Court carefully analysed the insurer's reasons in light of the evidence.

His Honour found the insurer's decisions should be set aside on the following bases:

- Evidence to the insurer had found that Dr Stillger's report (the plaintiff's GP) had not described the symptoms the plaintiff was suffering in 2008 and that report did not explain why the contemporaneous clinical notes did not record significant symptoms at the relevant time. His Honour found the view formed by the insurer was not open to it as *"the symptoms from which the Plaintiff had been suffering for a significant period were adequately identified in the Patient Progress Notes and other medical records to which reference has been made"*.
- There was little evidence showing the Insurer had given real consideration to the ongoing consequences of the plaintiff's medication. The evidence showed the plaintiff was taking medication to treat her psychological condition before and through the 6 month period from January 2008.
- The Insurer had not given detailed consideration to the definition of *"business, occupation or regular duties"* to be performed on a *"full-time"* basis, as required by the Policy. It was found the Insurer had no basis to reject a Job Capacity Assessment Report (obtained on behalf of the plaintiff) which found the plaintiff was only likely to be able to work a maximum of 14 hours per week. His Honour found the Insurer did not obtain any vocational evidence in response or identify any full time business, occupation or regular duties that she could fulfill with her education, training or experience.

His Honour concluded his analysis of the reasonableness of the insurer's decision by stating:

*"Taken overall, the decision in the TPD Final Claim Summary reflected a failure by the Insurer to consider whether, in the real world, "full-time business, occupation or regular duties" for a person suffering from the psychological condition from which the Plaintiff was suffering, and who was taking both anti-depressant, and anxiolytic, medication, was reasonably available. In this regard, the opinion formed by the Insurer was not open to it acting reasonably and fairly in the consideration of the claim."*

Having set aside the Insurer's decision, his Honour went on to decide whether the plaintiff satisfied the definition of TPD in the Policy. His Honour found the plaintiff had satisfied the TPD definition in light of the evidence. The Court therefore made declarations the plaintiff was entitled to the TPD benefit under the Policy.

## Implications

This decision is a reminder about the high level of detail and analysis the Court will apply to an insurer's decision. The Court will expect an insurer to obtain evidence regarding each relevant part of the TPD definition and consider a claimant's condition and restrictions as a whole, to including any medication that may affect a claimant's capacity to return to the type of work defined in the Policy.