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## Reconsidering TPD – does it ever end?

A recent decision by the NSW Court of Appeal relating to a total and permanent disablement (TPD) claim first lodged more than six years ago highlights the need for trustees to develop rigorous processes for dealing with members' requests for claims to be reconsidered.

The Court of Appeal's decision in the case, *Gilberg v Maritime Super Pty Ltd [2009] NSWCA 325*, is the latest in a series of determinations on Mr Gilberg's TPD claim by the Superannuation Complaints Tribunal (SCT), the Federal Court and the Supreme Court of New South Wales. The most recent focuses on when and in what circumstances a trustee must reconsider a TPD claim.

Even after six years the dispute may not be over yet.

### Divided medical opinion

John Gilberg claimed a TPD benefit from the Stevedoring Employees Retirement Fund (the Fund) for a back injury incurred in the course of his employment as a waterside worker. As a consequence of the injury Mr Gilberg was unable to continue in his employment, and has not worked since. He lodged a claim for a TPD benefit with the Fund in April 2003.

Three doctors appointed by Maritime Super Pty Ltd (the Trustee) agreed Mr Gilberg was totally incapable of performing his duties as a waterside worker, but were divided on whether he would never be able to work again in a job for which he is qualified by education, training or experience.

The Rules of the Fund provided for a process under Rule 17(d) where there were conflicting medical reports. Rule 17(d) provides that:

*“after receiving the reports ....the Trustee determines that the Member is entitled to a benefit under this Rule PROVIDED THAT in the event of a division of medical opinion expressed in the medical reports ...the Trustee shall appoint (at the election of the Trustee) an additional medical practitioner and the Trustee shall base its determination solely on the medical opinion of the additional medical practitioner so appointed.” [emphasis added]*

The Trustee appointed a fourth medical practitioner as required by Rule 17(d) who did not consider Mr Gilberg was unable to ever work again in any job for which he is qualified by his education, training or experience. After the Trustee denied the claim, Mr Gilberg complained to the Superannuation Complaints Tribunal (SCT) which upheld the complaint and ordered the Trustee to pay the TPD benefit.

### **Federal Court appeal**

A successful appeal by the Trustee to the Federal Court saw the SCT's determination set aside and the Trustee's decision to decline Mr Gilberg's claim restored.

In July 2007 Mr Gilberg applied to the Trustee to reconsider his TPD claim, providing the Trustee with new medical reports from the doctors who had supported his original application indicating Mr Gilbert's condition had not improved. The Trustee refused to reconsider the claim on the basis that it had no power under the trust deed to reconsider a TPD benefit previously declined.

### **Supreme Court proceedings**

Next, Mr Gilberg issued proceedings in the Supreme Court of New South Wales against the Trustee's refusal to reconsider, claiming it was a breach of trust and that the Court should exercise the powers in place of the Trustee.

The Supreme Court concluded Mr Gilberg's claim failed for various reasons including:

- the Trustee owes obligations to all members of the Fund, not just to Mr Gilberg, and it is not in the interests of the other members of the Fund that claims properly dealt with should be open to endless re-agitation;
- if there was some right to have the matter reconsidered or a duty on the Trustee to reconsider, the application for reconsideration would need to put substantial grounds before the Trustee to enliven said right or duty and no such grounds were provided by Mr Gilberg.

### **Recent Court of Appeal decision**

Gilberg appealed this decision to the New South Wales Court of Appeal. The issues for determination by the Court of Appeal were:

The issues for determination by the Court of Appeal were:

- 1 Is there power to reopen an application for a TPD benefit under Rule 17?
- 2 What is the duty of the Trustee when an application is made to reopen such an application?
- 3 Was such a duty fulfilled in this case?
- 4 What, if any, relief should be afforded?

Justice David Hodgson stated that the first three issues were not explicitly considered by the primary judge, who instead considered the fourth issue first, with the claim subsequently failing because the supporting material provided was held to be insufficient to require a Trustee to reconsider the application. He found that there was nothing within Rule 17 to preclude a Trustee reconsidering an application because the rule provides an entitlement to Members without the suggestion that the entitlement is lost irrevocably if the Member once applies and fails.

Justice Hodgson indicated that a case, where the member's doctors predicted that the future course of the member's condition would prevent him or her ever working again while the Trustee's medical advisers predicted the opposite, would be an appropriate case for reconsideration when the member's doctors proved to be correct.

*When this occurs: "...there is nothing under Rule 17 that would...prevent the Member submitting two new reports...disclosing what course the Member's physical condition had taken; and that if those reports gave good reason to believe that the reports previously given...were mistaken in their predictions a Trustee acting reasonably would appoint medical practitioners to give further reports....." said Justice Hodgson.*

This was on the basis that Rule 17 provided an entitlement to Members, without suggesting that the entitlement is lost irrevocably if the Member has applied once and failed. Therefore unless the rules of a superannuation fund prohibit a claim being reconsidered once a final determination has been made, the trustee would be obliged to reconsider. However, Justice Hodgson went on to confirm that this did not mean that a trustee would have to reconsider every time "a member seeks to re-open a determination". In determining whether an application to reconsider should be accepted the trustee should consider the following:

- the trouble and expense to the trustee in obtaining medical reports as part of the need to reconsider;
- the circumstances that the previous determination was a final determination of the initial application;
- whether the material provided in support of the new application indicates a reasonable possibility of a different result because of:
  - circumstances that have occurred since the previous application; or
  - evidence becoming available which was not reasonably available at the time of the previous application that would make it appropriate for the trustee to decline to obtain further medical reports for the purposes of the new application and to refuse the application to reconsider.

### **No power to reconsider**

In this case the Trustee steadfastly maintained it had no power to reconsider and its rejection of Mr Gilberg's claim was "overwhelmingly coloured" by this view. Consequently, the Trustee did not address Mr Gilberg's new application as it was required to do under the trust deed of the Fund. Where a trustee has breached a trust by failing to properly consider an application by a beneficiary the applicant is entitled to an order that the trustee properly consider the application.

The Court of Appeal allowed Mr Gilberg's appeal and ordered the Trustee to consider his application for reconsideration.

This protracted case has not provided a final resolution for the parties as the Trustee must now determine whether to reconsider the claim some six years after the disablement occurred. If it does reconsider, the Trustee must then determine whether to grant the benefit and if it refuses, the process could start all over again.

Members who have had claims for TPD benefits refused can persist for many years to produce further "new" evidence. The longer this continues the more remote the evidence becomes from the member's condition on the date the injury or illness occurred. While this process can be the source of frustration for trustees it is important that they have in place well documented processes for dealing with requests for TPD claims to be reconsidered. Otherwise a refusal to reconsider can be viewed as a breach of trust as in this case.

Based on this case unless the trust deed denies members the right to have a claim reconsidered trustees will need to assess each request for reconsideration according to the principles outlined in this case.

## **Checklist**

### **Procedures for requests to reconsider TPD claims**

#### **Trust Deed**

- Review the terms of the trust deed to determine if it prohibits reconsideration of a TPD claim already determined. If not the trustee has the power to reconsider and must give the matter proper consideration.

#### **Request for reconsideration**

In determining if the claim should be reconsidered take into account the following:

- Is the application supported by evidence or information not available at the time of the previous decision that could result in a different outcome for the claim?  
Has there been a change in circumstances since the previous application that could result in a different outcome for the claim? For example where the future course of the disability was predicted to improve but has not improved or has deteriorated.  
Consider what is involved in the reconsideration (e.g. the cost to the Fund of obtaining further medical reports) and where the previous determination was the final determination, is it appropriate to reconsider the claim?  
Is the new evidence or information or change in circumstances sufficient to make it inappropriate to refuse the request to reconsider the claim?

#### **Testing**

Does the material offered in support of the new application indicate a reasonable possibility of a different outcome for the member due to:

- circumstances occurring since the previous determination; or  
the availability of evidence not reasonably available when the previous determination was made; and  
the interests of the applicant and those of other members?
- And does it justify the expense of obtaining further medical reports?