

actually obtain work in the real world.²⁰ In preparing the claim, you need to think carefully about what evidence you can gather that establishes why, in the real world, the claimant has no real chance of finding employment.

26.1 Where there is a vocational assessment report that suggests certain occupations would be suitable, consider:

- (a) Has the claimant's treating practitioner been given an opportunity to comment upon the physical capacity to perform the suggested occupations?
- (b) Does the claimant have capacity to perform all the duties of the suggested occupations to a competitive standard or will they require special accommodations? Will a prospective employer be likely to provide those special accommodations?
- (c) Has the assessor considered the combined effect of all the persons restrictions or just focussed on the main injury?
- (d) How does the claimant's psychological state affect their ability to engage in those occupations?
- (e) How do the claimant's medications affect their ability to engage in those occupations?
- (f) Does the claimant have the ability to be punctual and reliable in their attendance at work?
- (g) Do those occupations really exist any more? Are there sufficient vacancies to make those occupations more than a theoretical possibility?

26.2 Where an insurer suggests that a person could perform a role with limited hours or with limited responsibilities, consider:

- (a) Does that occupation exist as a part-time role or is it realistically only full time?

²⁰ See an excellent summary of the principles in *Wheeler v FSS Trustee Corporation* [2016] NSWSC 534, [79]; *Banovic v United Super Pty Ltd* [2014] NSWSC 1470, [78]; *Hellessley v Metlife Insurance Ltd* [2017] NSWSC 1284, [157].

- (b) Does that occupation or industry realistically allow for certain limited duties?
- 26.3 As the question is not purely a medical question, evidence from non-medical sources may be relevant and indeed key. Consider for example:
- (a) Evidence from the claimant or their family about their punctuality and levels of everyday activity.
 - (b) Evidence from a recruiter or employer specialising in that person's industry about the availability of the suggested work or the realistic likelihood of being able to perform the work with the required restrictions.
 - (c) Evidence from a different vocational assessor who can identify shortcomings in the report the insurer relies upon.
27. Third, in cases where the insurer is not satisfied that there will not be future improvement, remember that the passage of time since the injury is relevant to assessing the probability of future improvement. If medical reports express hope that there will be improvement with certain treatment, consider:
- 27.1 Was the medical practitioner actually predicting improvement or just expressing an aspirational hope?
 - 27.2 How long has it been since that opinion was expressed?
 - 27.3 Have those treatments now been tried?
 - 27.4 Would those practitioners still express the same opinion now given that the predicted improvement has not eventuated?
28. Fourth, long term continued inability to work or to find work can be a 'key guide' as to the likelihood of finding work in the future.²¹
- 28.1 Has the claimant been actively looking for work? How many suitable positions have they found and applied for and over what period?

²¹ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, [18]; *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96, [158]; *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2014] NSWSC 632, [148].

- 28.2 Has the claimant had vocational assistance to search and apply for work? If so, did the organisation assisting them express any view about their likelihood of finding work?
- 28.3 Are there any reports (medical or vocational) that comment on the claimant's motivation to find work?

'Reasonably fitted by education, training or experience'

29. A job which a person may be able to perform without further education, training or experience is not necessarily one for which he or she is reasonably fitted by education, training or experience.²² The definition refers not to *any* work for which the insured might have physical and mental capacity without further training, but to work for which the insured has been prepared and shaped by education, training and/or experience.²³ For the suggested future occupation to take a claimant outside the definition, it must be one for which the claimant has been 'prepared and shaped by his or her past vocational history'.²⁴
30. Having some of the requisite individual skills does not equate to being fitted for the employment as a whole: capacity to perform remunerative work is different from capacity to perform a work task. It does not follow that because a person is physically capable of performing one or more work tasks that there is an ability to engage in remunerative work.²⁵
31. Further, a person's education, training or experience is assessed at the time of the disablement, not at the time of assessment. This means that occupations which require retraining are not relevant to the assessment of the claim (although some short refresher of existing skills is not considered retraining).²⁶ It also means that a person who gained new qualifications between the date of disability and the assessment of the claim and is working in some new field can still be considered totally and permanently disabled within the meaning of the policy.²⁷

²² *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233, [146].

²³ *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233, [147].

²⁴ *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233, [150].

²⁵ *Hannover Life Re of Australasia Ltd v Colella* [2014] VSCA 205, [30]; *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233, [169].

²⁶ *Hannover Life Re of Australasia Ltd v Dargan* (2013) NSWLR 246.

²⁷ *Chammas v Harwood Nominees Pty Ltd* (1993) 7 ANZ Ins Cas 61-175.

32. Where a vocational assessment has suggested alternative employment, consider:
- 32.1 Did the claimant have all the qualifications necessary for the role at the time of disablement? This is particularly important where the vocational assessment was obtained during a WorkCover claim where the issue of retraining may not be relevant.
 - 32.2 Do the qualifications and experience the claimant appears to have on paper really reflect their skills? In particular:
 - (a) Does a certain certificate actually qualify a person to do the job that a vocational assessor asserts that it does?
 - (b) Has a certificate gained many decades ago actually ever been used or renewed?
 - (c) Has the assessor made inaccurate assumptions about the skills or experience the claimant has based on their job title?
 - (d) Was a role they were nominally performing on a return to work program just a 'made up job' that did not involve the real skills required for that role on the open labour market?
 - 32.3 Is the role one for which the claimant has been shaped by their vocational history or has the insurer just relied on entry level jobs that anyone can do without any training such as retail or telemarketing?
 - 32.4 Do the so called 'transferable skills' the vocational assessor has identified really translate into the suggested role? For example, are the administration skills a self-employed tradesperson used in their own business going to be sufficient for them to perform a clerical role in an office environment?

Conclusion

33. Once the TPD definition is properly understood, it becomes clear that it is not sufficient just to pile up medical reports setting out the severity of a claimant's injury. Indeed, in many cases, the dispute is not whether a person is injured or what their restrictions are. The real dispute is whether, given their injury and restrictions, the person is unlikely ever to work in an occupation for which they are reasonably fitted by their education, training or

experience.

34. As far as possible, medical evidence should be directed to the definition. When seeking reports, it is necessary to ask doctors to comment specifically upon the definition and upon issues that affect a person's likelihood of obtaining work such as:
 - 34.1 What physical restrictions does the claimant have?
 - 34.2 What psychological issues affect their ability to work?
 - 34.3 How do their medications affect the ability to work?
 - 34.4 Will the person be able to work at a reasonable pace and how often will they require rest breaks?
 - 34.5 Will the person be able to attend work regularly and punctually?
 - 34.6 How many hours will the person be able to work?

35. Where previous medical evidence expressed hope of improvement and significant time has lapsed without the predicted improvement, it is important to get updated evidence about whether the medical opinions have now changed.

36. It is also essential to consider non-medical sources of evidence such as:
 - 36.1 The claimant and their family or friends.
 - 36.2 Recruiters or industry specialists.
 - 36.3 Former employers or work colleagues (if they remain on good terms).
 - 36.4 Job-seeking assistance agencies.
 - 36.5 Vocational assessors.

37. Evidence should be gathered early so that a strong claim can be submitted from the beginning. Where a claim has previously been submitted and rejected because of poor evidence, it is necessary to strengthen the evidence and seek reconsideration before issuing proceedings. The new evidence should be directed to addressing each point the insurer relies upon. Ideally, this should be done in one go. A slow drip-feed of evidence with multiple requests for reconsideration is counterproductive as it is likely to draw out the

process by many years, frustrate the client and cause the insurer to become further entrenched in its opinion.

Nawaar Hassan

Hayden Starke Chambers

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