

SUPREME COURT OF QUEENSLAND

CITATION: *Barrera v The Orthopaedic Assessment Tribunal & Anor*
[2002] QSC 012

PARTIES: **JOSE GERMAN LARA BARRERA**
(applicant)
v
**DR REYE, DR IVES AND DR KHURSANDI in their
capacities as members of the ORTHOPAEDIC
ASSESSMENT TRIBUNAL**
(first respondent)
AND
WORKCOVER QUEENSLAND
(second respondent)

FILE NO: 10493/00

DIVISION: Trial

DELIVERED ON: 1 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2001

JUDGE: Helman J.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW
LEGISLATION – application for orders – whether breach of
natural justice in Tribunal’s failure to notify of adverse
conclusion
Judicial Review Act 1991, s. 4, s. 7, Part 3 (ss. 20-30), Part 5
(ss.41-47)
WorkCover Queensland Act 1996, ss34, 437, 438,
454, 456, 561, 588
WorkCover Queensland Amendment Act 1999, s. 8
*Commissioner for Australian Capital Territory Revenue v.
Alphaone Pty Ltd* (1994) 49 F.C.R. 576 CONS

COUNSEL: Mr J.S. Douglas Q.C. and Mr D.G. Rangiah for the applicant
Mr P.A. Keane Q.C. and Mr S.A. McLeod for the

respondents

SOLICITORS: Murphy Schmidt for the applicant
Bradley & Co for the respondents

- [1] **HELMAN J:** This application under the *Judicial Review Act* 1991 arises from a decision made on 3 November 2000 by the Orthopaedic Assessment Tribunal under s. 438(2) of the *WorkCover Queensland Act* 1996. The applicant claims:
- (a) Certiorari and/or an order under section 30(1)(a) of the *Judicial Review Act 1991* quashing the decision;
 - (b) An order referring the Applicant's application to the Orthopaedic Assessment Tribunal, differently constituted, for determination according to law;
 - (c) A declaration that the purported decision of the First Respondents was ultra vires and/or void;
 - (d) Further or other orders;
 - (e) Costs.

The grounds of the application are: first, that the decision was made in breach of the rules of natural justice; and secondly, that the Tribunal 'failed to construe section 438(2)(a) as requiring a decision on the question of whether the Applicant had at any time suffered an injury as a result of the circumstances set out in the Applicant's application for compensation, and not merely the question of whether the Applicant was suffering an "injury" within the meaning of that expression in the Act at the time of the determination'.

- [2] The first order sought, a certiorari order, would be an order under Part 5 (ss. 41-47) of the *Judicial Review Act*, which provides for prerogative orders and injunctions; and the second order would be a statutory order of review under Part 3 (ss. 20-30). It was not challenged before me that those forms of relief would be available if the applicant's case were made out. There was no submission made to me that the decision was not a decision to which the *Judicial Review Act* applies as that expression is defined in s. 4 of that Act; nor was it submitted that the applicant was not a person aggrieved by the decision as defined in s. 7 of the Act, or a person entitled to make an application under Part 5 as one whose interests are, or would be, adversely affected in or by the matter to which the application relates, as provided for by s. 44.
- [3] It is convenient to mention here another matter not in issue before me. Section 456 of the *WorkCover Queensland Act*, as it applies in relation to an injury resulting to a worker from an event happening before 1 July 2001 (see s. 588), provides that a tribunal's decision about an application for compensation referred to it is final and cannot be questioned in a proceeding before a tribunal or a court, except under s. 454, which provided for further references on fresh evidence. It was not challenged before me that s. 456 would have no application if the applicant were to succeed on either of the grounds of his application.

- [4] By an application dated 22 September 1998 the applicant sought worker's compensation for an injury allegedly suffered at his employer's premises at 76 Pentex Street, Salisbury. The injury was described as 'sprain & strain'. 'Repetitive work' was given as its cause. The applicant, who was born on 4 December 1966 gave five years as the time he had been employed by the employer, and 21 September 1998 as the day he stopped work because of his injury.
- [5] On 6 January 1999 the second respondent rejected the applicant's claim for compensation. By an application dated 3 March 1999 the applicant sought a review of that decision, and by a letter dated 28 April 1999 a review officer of the second respondent's Statutory Review Unit notified the applicant's solicitors that the second respondent's decision had been set aside and the applicant's claim remitted to it 'for further investigations'. In a letter dated 31 January 2000 the applicant was notified that his claim had been rejected again. By an application dated 8 February 2000 the applicant sought a review of that decision. By a letter dated 6 April 2000 a review officer of the Review Unit notified the applicant's solicitors that the second respondent's second decision rejecting the applicant's claim had been set aside and would be referred to an Orthopaedic Assessment Tribunal for determination in accordance with s. 437(a) of the *WorkCover Queensland Act*, which provided that the second respondent might refer a worker's application for compensation for an alleged injury to the appropriate tribunal. The applicant then applied to the Industrial Magistrates Court asserting that the Review Unit did not have the power to refer the claim to the Orthopaedic Assessment Tribunal. On 3 August 2000 that contention was rejected, and on 3 November 2000 the applicant's claim was considered and determined by the Tribunal.
- [6] On a reference under s. 437(a) the Tribunal must decide, as s. 438(2) provides:
- (a) whether the matters alleged in the application for compensation constitute an injury to the worker and, if so, the nature of the injury; and
 - (b) whether an incapacity for work resulting from the injury-
 - (i) is total or partial; and
 - (ii) is permanent or temporary; and
 - (c) if the tribunal decides that the worker has sustained an injury under the table of injuries resulting in permanent impairment and WorkCover asks - the nature and degree of the impairment.

The word 'injury' was defined in s. 34(1) as a 'personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury'. Section 34(1) was amended by s. 8 of the *WorkCover Queensland Amendment Act 1999*, but by operation of s. 561 of the *WorkCover Queensland Act* the amendment does not apply to the applicant's case. The Tribunal's determination was that 'the matters alleged in the application for compensation do not constitute an injury to the worker'.

- [7] The Orthopaedic Assessment Tribunal had before it the second respondent's complete file which included a number of reports by doctors together with evidence submitted on behalf of the applicant by Ms Anastasia Moody, a solicitor employed by the applicant's solicitors. She had, under supervision, the conduct of his claim. Ms Moody put submissions before the Tribunal. The applicant was questioned by members of the Tribunal and then they made a physical examination of him. Ms Moody made notes of the questions and answers. A copy of her notes is exhibit ALM-03 to her affidavit filed on 13 December 2000. The applicant was asked *inter alia* what his 'main problem' was and he replied 'wrist pain and elbow pain'. The applicant told the members of the Tribunal that he tried to keep working but could not continue because of the pain. Asked whether he had worked 'since', the applicant replied that he had worked four months before, that he had tried to work for one month, but could not do it. He was asked whether the pain had changed at all since he ceased work and he replied, 'No'.
- [8] The earliest report before the Tribunal was one dated 8 October 1998 by Dr Gervin Samarawickrama, specialist in occupational medicine. Dr Samarawickrama recorded that he first saw the applicant on 22 September 1998 when, after hearing the history related by the applicant and examining him, Dr Samarawickrama concluded that pain and discomfort in the arms, shoulders, and neck about which the applicant complained were 'consistent with strained muscles of both upper limbs from heavy repetitive work over several years' – a 'cumulative trauma disorder of the upper limb'. Dr Samarawickrama reported that the applicant had 'features' consistent with bilateral rotator cuff tendinitis, lateral epicondylitis, and dorsal wrist pain; but '[a]t this stage he did not have symptoms and signs of carpal tunnel syndrome'. Dr Samarawickrama said that in the absence of proper treatment 'at this stage, prognosis is poor'. The applicant was referred for physiotherapy.
- [9] Dr Geoffrey Bendeich, orthopaedic and hand surgeon, in a report dated 6 November 1998 recorded his examining the applicant on 27 October 1998 – later reports suggest, however, the date is wrongly recorded and should be 21 October 1998 – concerning 'pain in both lower arms'. Dr Bendeich, who had examined the applicant previously, said that, as on those occasions, he could find no orthopaedic cause for the applicant's continuing symptoms 'which are bizarre and do not fit any recognisable pattern of injury'. 'Clinical examination', Dr Bendeich continued, 'reveals no pathology to account for his symptoms which have not improved despite being off work for five weeks. I can find no evidence of any work related injury in either arm'.
- [10] It will be seen then that soon after the applicant left work in 1998 there were two contrary opinions from doctors about his condition. On the one hand Dr Samarawickrama's opinion was that the applicant had a disorder attributable to his repetitive work. On the other hand Dr Bendeich, who did not question the presence of the applicant's symptoms, expressed the opinion that there was no recognizable pattern of injury or evidence of any work related injury.
- [11] Dr Alison Reid, neurologist, then carried out nerve conduction studies on both of the applicant's upper limbs. The only disorder found in those studies was, as Dr Reid recorded in a report dated 30 November 1998, 'mild median nerve irritation at both wrists'. Those results led Dr Samarawickrama to record in a report dated 5 December 1998 that although clinically the applicant did not show signs of

carpal tunnel syndrome the nerve conduction studies confirmed that he suffered from 'early CTS'. In a report dated 19 January 1999 Dr Samarawickrama said that 'it was likely that in addition to 'Repetitive Strain Injury' the applicant also had 'early carpal tunnel syndrome'.

[12] Dr John Walters, orthopaedic surgeon, examined the applicant, and, in a report dated 27 January 1999, said that the applicant had 'symptoms consistent with bilateral carpal tunnel syndrome'. Dr Walters referred to electromyographic studies showing 'a mild loss in median nerve conduction at both wrists'. He expressed the view that the applicant's work buffing and polishing with hand-held tools had been 'a significant contributing factor to his pathology'. Dr Walters sought approval for bilateral carpal tunnel decompressions. Dr Walters's diagnosis then was made largely in reliance on the results of Dr Reid's studies.

[13] Dr Gregory Couzens, hand surgeon, in a report dated 10 February 1999 expressed the opinion that the applicant had bilateral carpal tunnel syndrome. Carpal tunnel syndrome had been 'diagnosed clinically and confirmed on electro-physiological studies', Dr Couzens said. Dr Couzens did not think there was 'any doubt of the liability of the work place regarding the development of the bilateral Carpal tunnel syndrome'. He recommended that the applicant undergo 'bilateral endoscopic Carpal tunnel releases'. It seems clear that, in arriving at his diagnosis, Dr Couzens relied, as Dr Walters had, on Dr Reid's studies.

[14] Dr Bendeich, in a further report dated 23 April 1999, recorded that he had read the reports of Drs Walters and Couzens. Dr Bendeich said it would appear that 'the clinical picture in' the applicant had changed since he last examined the applicant in October 1998, when he could find no evidence of median nerve compression in the carpal tunnel. Dr Bendeich suggested that he examine the applicant again or, if that could not be arranged, that the applicant be referred to Dr Reid 'for examination and report'.

[15] Dr Reid was engaged for the purpose of 'consultation, updated neurophysiology, and report' as she recorded in her report dated 7 June 1999. Dr Reid's report is especially important in assessing this application because her nerve conduction studies were relied on by other specialists, so that I shall set it out in full:

I saw this thirty-two year old left handed man at my Silverton rooms today at your request for the purpose of a detailed consultation, updated neurophysiology and report.

Mr Lara came to Australia from El Salvador eight years ago. He still seems to have little English and came along with a very helpful interpreter who provided the history.

HISTORY: Mr Lara has worked for Atlas Steels Pty Ltd for 5½ years. His job involved buffing and polishing "D" bars as well as using a saw.

He first developed pains in his arms in 1997 and made a couple of claims for compensation which were rejected.

Last year he had more symptoms pertaining to his arms although there was no specific incident or injury in the work place. He made

another claim for compensation and ceased work in mid-September 1998.

LIFE STYLE FROM SEPTEMBER 1998 TO JUNE 1999:

Mr Lara's general medical health is excellent. He is married and has three children, the youngest being 7 months of age. The family live in a rented property at Acacia Ridge.

Mr Lara told me that he tries to help as much as possible because he "doesn't want to feel useless". However, when he tries to do things to help his wife his upper limb symptoms become aggravated. He says that washing dishes and vacuuming aggravate his upper limb pain.

CURRENT COMPLAINTS: Mr Lara has symptoms pertaining to both upper limbs being worse on the right side. Since leaving work he says:

"It is exactly the same – nothing has changed".

- 1 Both forearms swell up and become painful.
- 2 He has pains in the wrists.
- 3 He has numbness and a sensation of ants crawling in the middle and ring fingers of both hands.

EXAMINATION: Mr Lara is a very fit looking muscular young man. He has normal contours of the neck and shoulders and a normal range of movements. There are no sites of soft tissue tenderness in the arms. On inspection of the hands there were no abnormalities of colour, temperature or sweating. He had a full range of painless wrist and finger movements. The neurological examination of the arms was normal.

INVESTIGATIONS: The median nerves were re-checked at my rooms today. The parameters have improved since the previous study of November 1998. I enclose both sets of data for your perusal. Currently the electrical parameters of the left median nerve are within normal limits. The distal motor latency of the right median nerve is within normal limits but the palmar sensory latency is very slightly prolonged.

CLINICAL IMPRESSION: In November 1998 neurophysiology showed mild median nerve irritation at both wrists.

Mr Lara has now been out of the work force for several months and neurophysiology has normalized on the left side and shows mild median nerve irritation on the right.

Mr Lara, however, remains highly symptomatic and reports no clinical improvement.

This man's upper limb complaints are totally disproportionate to the mild abnormalities found with neurophysiology.

Frankly I am not convinced that there is a specific causal relationship between Mr Lara's upper limb symptoms and the neurophysiology. I do not think that the very mild electrical abnormality on the right can possibly account for his florid upper limb symptoms and his alleged inability to do much around the house.

Furthermore I am not convinced that a carpal tunnel release will render this man asymptomatic and will get him back promptly to work.

There are certain reports on file, for example, Dr John Walters (27 January 1999) and Dr Gregory Couzens (10 February 1999) which would indicate that this man has straightforward carpal tunnel syndromes and that he should undergo carpal tunnel releases.

By contrast Dr Geoffrey Bendeich (9 December 1997) has been far more cautious stating that he felt the symptoms were bizarre and did not fit any recognizable pattern. I would tend to agree with Dr Bendeich particularly as Mr Lara has not reported any improvement despite many months out of the work force.

It is my impression that the now very, very minor right sided neurophysiological abnormality is incidental and the likelihood of Mr Lara responding beautifully to carpal tunnel surgery and getting back to work, even in the very best of surgical hands, is not very promising.

[16] Dr Bendeich examined the applicant again on 22 June 1999. His opinion, recorded in his report of 1 July 1999, was as follows:

Although current symptoms in the right wrist and hand are more suggestive of possible median nerve compression in the carpal tunnel there are no signs of note on physical examination and no supportive evidence on recent nerve conduction studies performed by neurologist Dr Alison Reid. While the repetitive nature of his work would certainly predispose to the development of median nerve compression in the wrist tunnel symptoms are out of all proportion to the clinical findings and there are some inappropriate symptoms. One would have expected any work related condition to have settled after being off work for nine months. There is nothing to suggest that current symptoms are work related. In any event I doubt if surgery to decompress the median nerve in the wrist would succeed in getting him back to work.

[17] Dr Walters examined the applicant again on 16 May 2000, as he recorded in a report dated the following day:

Current review was on 16.5.00. Mr Lara said his symptoms had been essentially unchanged during the previous twelve or eighteen months. His main complaint was of pain in both wrists and elbows,

and this was constant. He said he arms felt swollen, and he had paraesthesiae extending down the volar aspect of both forearms. He said the problem was worst in winter, and he would often rub cream into his arms at night.

Clinical examination was unremarkable in that there was no muscle wasting in the forearm or thenar muscles. There was no definite sensory change, but there was subjective alternation in feeling in the radial three digits of the left hand on both the palmar and dorsal aspects. There was moderate reduction in grip strength, but this is largely subjective observation. The Tinel and Phalen's tests were negative.

Although in January 99 I considered Mr Lara to have carpal tunnel syndrome, his current symptoms are rather widespread in both upper limbs, and there are no objective signs to implicate median nerve compression. It is certainly unusual that there has been no improvement in his situation despite not having worked for almost twenty months. Repeat EMG studies by Dr Alison Reid in mid 99 were regarded as essentially normal. There had been an improvement since the previous study of November 98. On the right side there was a minor abnormality related to sensory conduction.

I do not feel that any further investigation or treatment is warranted. Initially he did have symptoms of bilateral carpal tunnel syndrome, which I considered were related to his work using vibrating polishers. Subsequently however there has been no stated improvement in his condition, despite not having worked for a prolonged period. His symptoms have become more generalised in both upper limbs, with pain both in the wrists and elbows. Currently there is no objective evidence of median nerve compression, and I think that it is difficult to substantiate any ongoing work related disability.

- [18] In a report dated 3 July 2000 Dr Couzens clarified his opinion concerning the cause of the applicant's condition:

It would be my opinion that the injury, being carpal tunnel syndrome, was caused over a period of time and it would not be possible to identify a specific period during that time of employment between March 1994 and September 1998 which caused the carpal tunnel syndrome.

The nature of the tasks he performed and the duration of which he performed those tasks contributed to the development of his carpal tunnel syndrome.

- [19] The Tribunal's decision in full was as follows:

The Tribunal determined that the matters alleged in the application for compensation do not constitute an injury to the worker.

He has had ongoing pains in the upper limbs and intermittent numbness in the hands since about 1997. He ceased work, because

of these symptoms, on 21 September 1998. Apart from a period of one month in another occupation, he has not worked since then. His symptoms are said not to have changed at all in that period.

He complains of pains in the wrists, elbows and shoulders, with occasional pain in the neck. The Claimant also complains of numbness of the volar aspects of the forearms and the whole of the index, middle and ring fingers. He notices occasional altered sensation in the palms. His numbness is mainly noticed at night with no other specific activities producing this symptom.

Examination shows full movement of the neck, shoulder girdle, shoulders and upper limbs. There is no wasting or swelling. Tests for carpal tunnel syndrome produced slight sensory change at the tips of the index, middle and ring fingers on sustained wrist flexion but are otherwise negative.

The Tribunal considers that the symptoms complained of do not fit a pattern consistent with the effects of injury and examination does not reveal any evidence of injury

[20] On behalf of the applicant it was argued that he was not accorded procedural fairness in that the Tribunal failed to notify him of the adverse conclusion about his condition it reached after its examination of him and before handing down its decision. In the circumstances of this case however the Tribunal had I think no obligation to do so because the decision reached was open on the evidence of the reports before it. In *Commissioner for Australian Capital Territory Revenue v. Alphaone Pty Ltd* (1994) 49 F.C.R. 576 at pp. 591-592 the obligation was explained:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

The opinion shared by Drs Bendeich and Reid was that given the applicant might have had the symptoms of which he complained, those symptoms did not constitute a workplace injury. It follows that the Tribunal's decision was open on the known material before the examination of the applicant.

[21] On my reading of the reasons of the Tribunal they were that the applicant did not have a workplace injury at the time of its determination and had never had such an injury. That conclusion is, as I read the reports of Drs Bendeich and Reid, also the one at which they had arrived. I see no reason to conclude that the Tribunal confined its consideration to the applicant's condition on 3 November 2000 thereby misunderstanding its duty. It follows that the second ground argued for the applicant must also fail.

[22] The application will therefore be dismissed.