

SUPREME COURT OF QUEENSLAND

CITATION: *York v The General Medical Assessment Tribunal & Anor*
[2002] QSC 014

PARTIES: **PHILIP JOHN YORK**
(applicant)
v
**LIONEL NEVILLE YOUNG, SHIRLEY COGHLAN
AND JOAN LAWRENCE constituting THE GENERAL
MEDICAL ASSESSMENT TRIBUNAL**
(first respondents)
AND
WORKCOVER QUEENSLAND
(second respondent)

FILE NO: S 6704 of 2000

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 contradictory
preliminary opinion.

WorkCover Queensland Act 1996, s. 34, s. 265, s. 437, s. 440,
s. 442, s. 447, s. 454, s. 456, s. 561, s. 588
WorkCover Queensland Amendment Act 1999, s. 8
Judicial Review Act 1991, s. 4, s. 7, s. 20, s. 21, Part 3 (ss. 20-
30), Part 5 (ss. 41-47),

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

3. Marital conflict (which is not considered a mental disorder but is a focus for treatment).

The diagnosis of a Mixed Personality Disorder could to be entertained, but I do not believe Mr York meets full criteria for a Personality Disorder premorbidly, as there does not appear to have been a history of inflexible and pervasive longstanding problems such as either significant subjective distress, significant distress in others as a consequence of his own behaviour, or significant maladaptive responses in either affect, cognition, or behaviour.

The cause of his condition must be considered along multifactorial lines. He is vulnerable to the development of the conditions noted above by virtue of his personality type and prejudicial upbringing. I also consider that the nature of his injury with its pain and uncertainty in prognosis, especially when considered with how this has impacted upon his desired plans for the future, has acted as a clear precipitating factor for the development of his condition and an escalation in marital conflict.

In my view, Mr York could potentially benefit from sensible psychiatric intervention, which ought to involve provision of pharmacotherapy aimed at target symptoms of depression, hopelessness about the future, suicidal thinking, and an inability to adequately problem solve. He could also benefit from supportive-expressive psychotherapy and cognitive-behavioural therapy which could perhaps look at issues such as anger management and could assist him in moderating unpleasant emotional states. It is also possible that a marital intervention, such as marital therapy or couples therapy, could be worthwhile in the near future if both he and his wife are desirous of pursuing their relationship. I would estimate that Mr York may need anywhere between 12 and 50 individual psychotherapy sessions, whilst marital or couples therapy may require anywhere between six and 20 sessions. All sessions would currently be valued at approximately \$140 each. An estimate of potential psychological pharmacotherapy costing is extremely difficult to provide, but perhaps something in the order of \$250 over the next five years may be reasonable.

- [4] Dr Gray recorded that the applicant had said that his father was a 'dry alcoholic' who had become violent towards him 'on occasion', but his father was 'usually loving towards him unless he was drunk'. The applicant was aware of his parents' 'unhappiness with each other'. Under the heading 'SUBSTANCE USE' this was recorded:

Mr York is a tobacco smoker, and estimates his intake at one packet of cigarettes every three days. He occasionally smokes marijuana but denies the use of other illicit drugs. He says that he tends not to drink alcohol now, and that he rarely drank alcohol regularly, although he has drunk alcohol in a binge pattern when younger.

- [5] The applicant's solicitors sent a copy of Dr Gray's report to the second respondent with a letter dated 5 January 2000. The second respondent then obtained a report dated 2 May 2000 from Dr Gerard Byrne, consultant physician in psychiatry. Dr Byrne interviewed the applicant on 11 April 2000, and recorded that the applicant 'found it difficult to give a clear history of the sequence of events over the past few years'. The applicant told Dr Byrne that his back was better than it had

been, but still caused him some pain, and that he was undertaking drug rehabilitation:

He reported that he is currently regularly attending the Nambour Hospital for drug rehabilitation. He reported that he is now attending approximately once every fortnight for this rehabilitation, but had previously been going once or twice each week. He reported that his main difficulty had been amphetamine (“speed”) abuse, which he had been taking orally. Mr York reported that he had been selling amphetamine to support his habit and had been undertaking “enforcement work” for an amphetamine distributor and had been “holding a gun to people’s heads”. Mr York reported that he had also been using a variety of other drugs, although less consistently than he had been using amphetamines. More specifically, he reported that he had been using cannabis and intravenous heroin on occasions. He reported that he had also been using prescribed drugs including diazepam (Valium). Mr York stated that he had become “useless” whilst using “speed” and at one stage had had a “shot gun in my mouth”.

Mr York reported that he had not been using illicit substances in recent months, was not smoking cigarettes and was using little alcohol and only occasional cannabis. He reported that he felt somewhat “jumpy”, but that his mood had improved from late 1999 when he had felt quite depressed. He reported that he had impaired sleep and frequently tossed and turned at night, often waking up feeling tired in the morning. He reported that his appetite had been poor whilst he had been using “speed”, but that it was now improving. He reported that his weight had dropped to 67 kilograms when he had been using “speed”, but that his weight was now up to 75 kilograms which was more normal for him. He reported that his concentration was poor and that his energy level varied considerably. He reported that his memory function was satisfactory but that he experienced frequent nightmares, particularly about the enforcement work that he had carried out, which had involved assaulting people. Mr York reported that he was no longer suicidal. He reported that he was currently engaged in a variety of activities including swimming and reading.

Mr York reported that he experienced anxiety attacks approximately twice a week. He reported that he had previously experienced these several times a day whilst he had been using “speed”. He reported that these anxiety attacks consisted of a dissociative feeling of “tunnelling out”, breathing quickly, sweating excessively, feeling nervous and running away from situations. Mr York reported that he was quite avoidant of his former friends and was anxious about seeing them again. He reported that this was partly because he had been involved in enforcement activities for the amphetamine distributor.

Mr York reported that he had not sustained any police charges over the drug use, selling or enforcement activities he had been engaged in in late 1999.

[6] Dr Byrne's opinion of the applicant's condition was this:

In my opinion, Mr York suffers from Pain Disorder associated with both psychological factors and a general medical condition (DSM-IV; 307.89). This has been complicated by Amphetamine Abuse (DSM-IV; 305.70) and possible Amphetamine Dependence (DSM-IV; 304.40). It is also likely that he has experienced the symptoms of an amphetamine induced Anxiety Disorder (DSM-IV; 292.89) and an amphetamine induced Mood Disorder (DSM-IV; 292.84). It is likely that Mr York also suffers from personality dysfunction with mixed features, although there is insufficient evidence at cross-sectional interview to arrive at a formal DSM-IV Personality Disorder diagnosis.

Mr York's Pain Disorder appears to have arisen as a result of his response to chronic lower back pain. It is likely that his propensity to develop this condition was at least partly due to his somewhat prejudicial upbringing, although the Pain Disorder would not have arisen if he had not injured his back at work. It is more difficult to ascribe any direct casual relationship between events in the workplace and the development of his amphetamine abuse and probable dependence. Whilst it could be argued that his chronic back pain made him vulnerable to substance abuse, it is likely that personality and other factors were also important in its genesis.

Mr York's Pain Disorder does not appear to have arisen as a result of reasonable management action and may have occurred in a reasonable person under similar circumstances. In my opinion, this particular diagnosis does meet WorkCover's definition for a work related "injury". However, I am much more doubtful about his amphetamine related diagnoses. Nevertheless, appropriate rehabilitation for his amphetamine related problems is likely to be critical to any prospect of long term recovery from his Pain Disorder. Management of his Pain Disorder is likely to require a sophisticated psychological approach by an experienced clinical psychologist working in collaboration with a specialist psychiatrist. The management is likely to include both psychotropic medication and cognitive behavioural techniques. It is likely that such a treatment program will need to be continued for an extended period, perhaps six to twelve months, if it is to have any realistic prospect of improving Mr York's Pain Disorder. However, his treatment could be conducted on an outpatient basis whilst he continues to work.

I will leave any judgement as to the nature of appropriate work up to my orthopaedic colleagues. However, I can see no obvious psychological or psychiatric impediment to a graduated return to work at present.

[7] On 5 May 2000 the second respondent, not having admitted that the applicant had suffered any mental injury as a result of the incident of 4 March 1998, referred the applicant's claim to the General Medical Assessment Tribunal under s. 437(c) and (e) of the *WorkCover Queensland Act* for determinations under ss. 440(2) and 442(2). The references under s. 437(c) and (e) concerned questions relating to a damages certificate required in certain circumstances before a person may seek damages for an injury, as then provided for in s. 265. Under s. 440(2), if the second respondent has not admitted that an injury was sustained by a worker, and the nature of the injury, a tribunal to which a claim is referred must decide whether the matters alleged for the purpose of seeking damages constitute an injury to the worker and, if so, the nature of the injury. Under s. 442(2) the tribunal must decide:

- (a) whether the worker has sustained a degree of permanent impairment; and
- (b) if the worker has sustained a degree of permanent impairment –
 - (i) the degree of permanent impairment resulting from the injury; and
 - (ii) the nature and degree of the impairment.

The term 'injury' was defined in subsection (1) of s. 34 as a 'personal injury arising out of, or in the course of, employment if the employment is the major contributing factor causing the injury'. Subsection (4) related to injuries which were mental disorders:

(4) "Injury" does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances-

- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
- (b) the worker's expectation or perception of reasonable management action being taken against the worker;
- (c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;
- (d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

Section 34 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.

[8] Dr Gray reviewed the applicant's case on 20 June 2000 and supplied a report dated the following day. Summarizing his assessment, Dr Gray said:

As noted in my report of 26.10.99, this young man has developed a significant Chronic Pain Syndrome which meets DSM-IV diagnostic criteria for **Pain Disorder with a General Medical Condition and Psychological Factors**. Unfortunately, there seems to have been little resolution in this condition since I last saw him. Since that time his condition has been complicated the development of an **Amphetamine Dependence Syndrome**, which probably also gave rise to some degree of amphetamine induced anxiety or dysphoria. This is now seemingly resolved, although Mr York remains somewhat dysphoric from time to time in the absence of amphetamine. From a diagnostic perspective, apart from his substance use disorder, I don't believe there's been any change to my offerings of 26.10.99.

In relation to the causation of his amphetamine dependence, I would mention that, generally, substance abuse/dependence problems are considered along multifactorial lines. That is to say, Psychiatrists and workers in the field generally recognise that a number of interacting factors coalesce to contribute to this type of problem. One such effective and practical method of understanding, widely used in clinical practice, is to consider the etiology along the lines of:-

- (1) Factors inherent in the patient – biological and psychological.
- (2) Factors inherent in the substance – pleasure giving, pain/dysphoria relieving, instancy of response etc.
- (3) Factors inherent in the environment – availability of substance, pressures to use, consequences etc.

In Mr York's case, I would see that each of these are significant e.g. the presence of his pain, the presence of distress, the highly addictive nature of amphetamine itself, and the difficult financial circumstances he found himself in have all worked together for his amphetamine use to become quite problematic rather than just a one-off phenomenon or a pattern of occasional use. In addition, I suspect that Mr York's degree of desperation prior to him beginning in the drug scene and the rapidity with which he could earn money and achieve some sense of subjective relief were powerful factors which acted to rapidly reinforce his dependence on this substance. His pain, whilst definitely playing some part in the genesis of his dependence, was not the only factor in its causation.

In a short report dated 4 July 2000 Dr Gray said that in his opinion the major significant contributing factor to the applicant's pain disorder was the injury sustained in the workplace.

[9] At the hearing on 5 July 2000 the Tribunal had before it the second respondent's complete claim file and medical reports which included the ones to which I have referred. There were other medical reports before the Tribunal (from Drs Andrews, Dickinson, Gillett, and Denzin), but they have no substantial relevance to this application and were not referred to in the course of submissions I heard. The

Tribunal also heard submissions made on behalf of the applicant by Mr Joshua Paffey, an employee of the applicant's solicitors. The applicant was questioned by Tribunal members and Mr Paffey took handwritten notes of the proceedings:

The Tribunal was comprised by Dr Coghlan (Chairperson), Dr Lawrence (Psychiatrist) and Dr Young.

Dr Coghlan introducing the Tribunal and asking for submissions from myself. I going through submissions.

Dr Coghlan asking you to describe your accidents. You briefly describing your accident of 4 March where you tripped and fell whilst carrying a load in your arms. You then describing your 20 October 1998 accident in which you aggravated the same injury following some heavy lifting and the use of a jackhammer. You also describing your accident of late last year where you fell whilst carrying a load in your arms.

You stating that you last worked approximately one year ago. You are still an employee of the Building Industry Group Apprentice Training Incorporated. They are currently trying to terminate your apprenticeship.

You stating that you stopped work purely because of your orthopaedic injuries.

You are unable to claim workers compensation statutory benefits in relation to your accident in 1999 because WorkCover determined that it was not a new injury.

Dr Coghlan advising that Dr Lawrence would now conduct the questioning.

Dr Lawrence asking you when you started suffering from emotional difficulties. You stating the emotional side of things started after your first accident and that the emotional problems you encountered increased in severity following the accident. You stating that rehab after your first accident was good but with your return to work and the increased work and load on your back it "shattered your back". You again stating that the emotional symptoms were present from the time of your first accident.

You describe your emotional problems as being very depressed, in fact extremely depressed, suffering road rage, mood swings, "going off the handle", black moods, dark times. You saying you once locked yourself in a room because your mood was so black. You saying you noticed emotional symptoms approximately three months after the first accident. Although you saying you were not very good with time at the moment. Dr Lawrence asking you to repeat that. You again saying you not very good with time. Dr Lawrence asking you why that is. You saying you believe it's because of the drugs.

You stating your only rehabilitation has been with Dr Denzin and with the psychologist at Proactive. You believe this was of some help.

Overall you have felt very alone. Your wife has not been good in relation to your injuries. You have always been in control. You describe yourself as a very physical person. Your wife couldn't cope with you physically incapacitated.

Your GP has recommended antidepressants however you do not wish to take them because of the social stigma. You saying that they are for people with head problems. The medication you used after the first accident was Nurofen and Panadeine Forte. You took approximately 2 tablets of Panadeine Forte every four hours. You stopped taking Panadeine Forte after approximately a week and a half. You did not find that pain killers were helping you. You were smoking Cannabis in the evenings for pain relief. After the accident in 1999 a friend gave you some speed. You felt that your speed intake lasted much longer than it actually did.

Dr Lawrence asking about your trouble with the law. You stating that you once got into trouble with Police in NSW when you were game shooting because you had a firearm which was illegal at that time in New South Wales. You have also been in trouble with the police in Queensland for obstructing justice. You stating that you were in a nightclub when a friend of yours was taken away by police and you put your hand on one of the police officers and said "don't take him away". Upon doing this the police arrested you. You have also been convicted of stealing.

Dr Lawrence asking you about your violent offences. You stating that you were collecting money last year in relation to drugs and that on occasions you bashed people. You also stating that you put a gun to somebody's head in relation to drugs and collecting money last year. You stating that you were not caught by police in relation to these offences. Dr Lawrence stating that Dr Gray refers to violent offences in his report. You stating that Dr Gray is incorrect that you have never been convicted of a violent offence.

You stating that you were very angry when your grandfather died because you hadn't been able to see him prior to his death.

You stating that drugs basically split your marriage. Dr Lawrence asking you about your work history. You stating that you have had a lot of jobs. You stating that you took your carpentry apprenticeship because you wanted to work outside because you were sick of working for a manager indoors at a publishing company. You stating that as far as possible employment avenues for yourself now that you believe that you would have to be your own boss because you can't sit down all day and you can't do physical work.

You have been offered a job with Ray White Real Estate at Maroochydore through family friends. However, you believe you would not be able to handle this work because of the driving involved and the getting in and out of vehicles. That is, you believe you could not be a real estate agent because of the strain it would put on your back. You stating that you last used cannabis approximately three weeks ago. You stating that you have not used speed or heroin since December. You took Valium from between January and March. You have not taken Valium since March. You drink very rarely although you admitting you had a couple of scotch's last night because of the nervousness associated about your appearance today.

You have tried an anger management course but had to leave because you found that you were not good in groups. You believe that there were too many people at the course that were the same as you.

You stating that you did not have any problems of (*sic*) suffer from anger prior to your injuries.

Some time ago you broke your wrist and went on compensation in relation to this. During this period you had no problems with anger and had no problems with police.

Dr Lawrence asking about your family.

You stating that your father has spent a period of time in jail. It was in relation to bad business debts. You stating that your father was a multimillionaire with very large debts through his business and eventually went bankrupt.

You worked as a landscape gardener for a couple of years.

You went from working outside to working indoors in the publishing company because it meant more money to you. The publisher you were working for went broke. You then moved into carpentry.

Dr Lawrence again asking you about the enforcement work you were doing late last year. You saying you did not have any physical problems with that because you were always on speed. You found that on speed you had no pain and no morals.

You applied for work as a traffic controller but you needed to sign a declaration that you could lift over 25kgs. You do not believe that you can do this so you did not sign the declaration and therefore did not get the job.

You feel intimidated by a possible job with Ray White at Maroochydore.

You currently attending drug rehabilitation every six weeks.

You attending marriage counselling every two weeks.

You not undergoing any urinary drug testing.

You now like to see your wife and kids as much as possible. You play with the kids and an example of this is that you take them to McDonalds where they have a childrens play area.

You see quite a bit of your brothers and your father. Occasionally you help your father in his bakery. Ideally you would like to play golf all day. You are looking for work.

Dr Lawrence asking you about your medication. You stating that you were only on Affexor 150ml now. You think it helps you although it doesn't help when you forget to take it for a day. You find you sometimes forget because you move around so much. Dr Steel prescribed Affexor.

You are in receipt of Sickness Benefits from Centrelink since you were cut off from WorkCover benefits.

You are scared about your future. You are not sure what you are going to do.

You stating that your wife loves you. She wants you to be happy and together. She wants a father for her children. You believe your wife is disappointed in you because of your back injury. You describing your main symptoms as pain. You saying that the pain stops you from working and that your self confidence has decreased.

You are scared of further injury.

You assess your disability as worse than when you actually injured your back. You stating that the 7% permanent impairment rating that Dr Gillett gave you is not fair and that you were pissed off at that amount.

Dr Lawrence again asking you extensively about your father. You becoming upset at this.

Appearance ending.

Appearance lasting approximately 40mins.

[10] The Tribunal's reasons were reduced to writing:

The Tribunal determined under Section 440.(2) that the matters alleged for the purpose of seeking damages do not constitute an injury.

Mr York worked as an Apprentice Carpenter. He suffered his original back injury in March 1998 and was off work for a few

months. He returned to work but there was an exacerbation of the injury and he required further time off work. When he returned to work after further treatment, he found that the heavy work caused further problems and he was not able to continue.

When seen at the Orthopaedic Assessment Tribunal on 5 August 1999, he complained of low back pain and was diagnosed as having an aggravation of pre-existing degenerative change in the lumbar spine.

Mr York has remained off work. He states that he is unable to perform any heavy physical work because of his back pain and that lengthy sitting or standing, would aggravate his problem.

In early 1999, he became involved with extensive use of illicit drugs. Although he had used these previously, his use became more frequent and he used a variety of illicit drugs and he says he dealt in these. He did not reveal this to psychiatric assessors originally. Eventually, his wife arranged for him to be admitted to a Drug Rehabilitation Program which he still attends each six weeks for approximately one hour at a time. He has been on anti-depressant medication since attending the Drug Rehabilitation Centre and obtains this now from his local medical officer whom he sees infrequently.

Mr York states that his main symptoms now are his back pain, his fear of further injury and lack of confidence. He states that he has been offered work recently but has declined this because he feels that the nature of the work is inappropriate and he says he would be unreliable.

[11] The application is headed as for a statutory order of review, i.e., an order under Part 3 (ss. 20-30) of the *Judicial Review Act*. The first order sought is for such an order, but the second order sought appears to be for a certiorari order under Part 5 (ss. 41-47), which provides for prerogative orders and injunctions. It was not challenged before me that either form of relief would be available if the applicant's complaint about the decision of the Tribunal is made out. There was no submission made to me that the decision was not a decision to which the *Judicial Review Act* applies as 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. In the application the applicant alleges that he is aggrieved by the Tribunal's decision because he can no longer seek damages 'for the psychological conditions with which he has been diagnosed due to his inability to comply with s. 265(3) of the [*WorkCover Queensland*] Act which inability results from the decision'. That allegation of prejudice was not challenged before me.

[12] It is convenient to mention here two other matters not in issue before me. First, s. 456 of the *WorkCover Queensland Act*, as it applied to an injury resulting to a worker from an event happening before 1 July 2001

(see s. 588), provided that a tribunal's decision about an application for compensation referred to it was final and could not be questioned in a proceeding before a tribunal or a court, except under s. 454, which provided for further references on fresh evidence. As the decision of the Tribunal did not concern an application for compensation but rather to a damages certificate, it was not suggested that s. 456 applied to the decision. Secondly, it was not suggested that the provisions of s. 34(4) had any application to the applicant's claim.

- [13] There are five grounds for making the application given in it. The first is that the decision of the Tribunal was not authorized by the Act under which the Tribunal ostensibly made it, the second that the decision involved an error of law, and the third that there was no evidence or other material to justify the making of the decision. If, as was contended on behalf of the applicant, there was no evidence upon which the Tribunal could have reached the decision it did, it may be I think accepted that its decision was erroneous in law and not authorized under s. 440(2) of the *WorkCover Queensland Act*. The flaw in such a conclusion in this case however arises from s. 447 of the Act which provides in subsection (1)(a) that on a reference to a tribunal about a non-fatal injury, the tribunal may make a personal examination of the worker at any time. The questioning to which the applicant was subjected constituted such an examination in my view, and, although it is not necessarily apparent to one not qualified in psychiatry that the applicant's answers may have provided a justification for rejecting the opinions of Drs Gray and Byrne that the applicant was suffering from a mental disorder which constituted an injury as defined in s. 34, it must be accepted that s. 447 contemplated a tribunal's acting on its own assessment of the claimant's condition based on its examination of the claimant. It must also then be accepted that the expert panel constituting the Tribunal may have seen significance in things that were revealed in the examination which one not versed in the principles and practices of psychiatry might not see. That consideration leads me to reject the first three grounds of the application: while the record of the examination of the applicant does not clearly reveal the Tribunal's reason for not accepting the opinions of Drs Gray and Byrne, nor does it show that the Tribunal's opinion was without foundation on the evidence before it.

- [14] The remaining two grounds in the application are, I think, of more substance. They are:

4. A breach of the rules of natural justice has happened in the conduct the Respondents engaged in for the purpose of making the decision;
5. A breach of the rules of natural justice has occurred through the failure of the Respondents to notify the Applicant of the Respondents apparent disagreement with the only medical evidence relevant to the issue before it.

(See s. 21(2)(a) and s. 20(2)(a) respectively of the *Judicial Review Act*, the 'Respondents' referred to being the members of the Tribunal).

[15] It was obvious that the first issue before the Tribunal was the one upon which the applicant failed. Mr Paffey recognized that that was the first issue in the introduction to his submissions:

Mr York sustained an injury to his back in an accident at work on 4 March 1998 and strained this same injury in an accident on 20 October 1998. Both of his claims for compensation in relation to these accidents were accepted. He has therefore been deemed to have suffered physical injuries pursuant to s. 34 of the *WorkCover Queensland Act 1996* as a result of these accidents. As you are all aware the Orthopaedic Assessment Tribunal assessed by (*sic*) York as having suffered a permanent impairment in the order of 5% in relation to the physical injuries to his back. The Tribunal has therefore been convened today to assess whether Mr York's employment and his physical injuries arising out of that employment were the major significant factors causing his psychiatric condition, the nature of that condition, whether he has sustained a degree of permanent impairment and, if so, the degree of permanent impairment resulting from his back injury and the nature of that impairment.

[16] While it was then apparent to Mr Paffey that the question whether the applicant had suffered an injury was the first question for the Tribunal to decide, it would also have been quite reasonable for him to approach the hearing believing that the evidence before the Tribunal on that issue was all favourable to his client. It would have been equally reasonable for him to conclude that nothing had emerged when the applicant was questioned to disturb that favourable position. In those circumstances I think the Tribunal was obliged to notify Mr Paffey of a preliminary opinion contradictory of those of Drs Gray and Byrne in order to give him the opportunity to address the Tribunal on the issue, and, possibly, to call further evidence. That the Tribunal failed to do. 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.

It follows therefore that there was a breach of the rules of natural justice in this instance.

[17] The application should then succeed. I shall invite further submissions on the form the order should take and on the question of costs.