SUPREME COURT OF QUEENSLAND

CITATION:	*Knapp v Coles Supermarkets Australia Pty Ltd & Ors* [2003] QSC 251
PARTIES:	**VERONICA JEAN KNAPP** (Applicant) v **COLES SUPERMARKETS AUSTRALIA PTY LTD** (First respondent) **JOHN NORTH, ANTHONY KEAYS & JOHN MEIBUSCH** (Second respondents) **WORKCOVER QUEENSLAND** (Third respondent)
FILE NO/S:	372 of 2002
DIVISION:	Trial
PROCEEDING:	Application for Statutory Order of Review
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	26 March 2003
DELIVERED AT:	Cairns
HEARING DATE:	31 January 2003
JUDGE:	Jones J
ORDER:	**1. That the application be dismissed.** **2. I adjourn for further consideration the question of costs. I direct the parties to provide written submissions on the issue of costs within 14 days from the date hereof.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION - APPLICATION FOR A STATUTORY ORDER OF REVIEW – where a medical assessment tribunal had determined that the plaintiff had not sustained an injury (as statutorily defined) – where the tribunal had exceeded its jurisdiction by allegedly deciding questions of fact – whether no reasonable person in the position of the tribunal could have reached the tribunal's determination *Judicial Review Act* 1991 (Qld) s 20(c) and (e) *Hockey v Yelland & Ors* (1984) 157 CLR 124 considered
COUNSEL:	C Jensen for the plaintiff/applicant A Philp for first defendant/respondent D North with G J Houston for second and third

defendants/respondents

SOLICITORS: Farrellys for the plaintiff/applicant
Clayton Utz for first defendant/respondent
Bradley & Co for second and third defendants/respondents

[1] The applicant seeks a Statutory Order of Review in respect of a joint decision made on 23 April 2002 by the second respondents who constituted an orthopaedic assessment Tribunal ("the Tribunal") under the provisions of the WorkCover Queensland Act 1996 ("the Act").

[2] This application is made under the *Judicial Review Act (Qld)* 1991 ("JRA") on two grounds. First, that the second respondents purported to determine disputed questions of fact and therefore exceeded their jurisdiction and, second, that no reasonable person in the position of the second respondents could have reached the decision (the *Wednesbury* principle).[1]

[3] Neither the first nor second respondents wishes to be heard on the application but it is opposed by the third respondent.

[4] The applicant is desirous of making a claim for damages for injuries sustained in the course of her employment with the first respondent on 3 / 4 November 1997. She can do so only if WorkCover gives her a damages certificate under s 265 of the Act. WorkCover may only, and must, give the certificate "if it decides that the applicant has sustained an injury" (s 265(3)). WorkCover did not so decide but referred the matter to the Tribunal for decision pursuant to s 437 of the Act.

[5] The task for the Tribunal was to 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.

[6] "Injury" is for the purpose of the Act defined as follows:-

> "34(1) **"Injury"** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

[7] On 23 April 2002 the Tribunal found that the applicant had not suffered an injury. It gave its reasons for that decision in a number of documents – 23 April 2002, 14 June 2002 and 5 August 2002 – and finally in a composite statement made on 28 October 2002 pursuant to an order in this Court. The Tribunal's finding were relevantly expressed in the following terms:-

> "Having given consideration to all of the evidence presented to it and with special regard to the evidence presented directly to the Tribunal, it was the Tribunal's decision that Mrs Knapp did not sustain a back injury in the incident of 3 November 1997. Special note was given to her written statement and communication during interview.
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> The Tribunal includes the written statement given by Ms Knapp (appendix 1). The Tribunal did not find any evidence of objective abnormality in her lumbar spine and X-rays did not reveal any abnormality in either plain X-rays or CT scan.

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1 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

> It is the Tribunal's opinion that the onset of abdominal pain on the night of 3 November 1997 was not caused by any back injury at work and that when Ms Knapp walked out with abdominal pain it was not related to her lower back.
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> A back injury would have been associated with pain or stiffness and restricted movement in her back or evidence of disturbance of the neurological system, none of which was found by medical practitioners who examined her or the Tribunal.
>
> Having considered all the evidence available and after interviewing and examining Ms Knapp with the help of a qualified signer it was the conclusion of the Tribunal that.
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> 440(2) Matters alleged for the purpose of seeking damages do not constitute an injury to the worker."[2]

[8] The applicant challenges the jurisdiction of the Tribunal to make the decision on the grounds that it was engaged in fact finding on the issue of whether the injury occurred at the workplace and that it had neither jurisdiction nor the power to do so conferred upon it by the Act. The application is brought on grounds identified in s 20(c) and (e) of JRA. In the alternative the applicant argues that she is entitled to a review under s 21 of JRA based on the conduct of the members of the Tribunal in the improper exercise of the power conferred by the Act.

[9] The respondent contends that the authorities make clear that the Tribunal has jurisdiction to undertake the task which was referred to it. It argues that the applicant misunderstands the nature of the task and that her reliance upon the authorities is misplaced.

[10] Curiously each side refers to *obiter* statements by Gibbs CJ in his judgment in the *Hockey v Yelland & Ors*[3] in support for their conflicting arguments. *Hockey* was concerned with the role of the Medical Board appointed under the 1916 *Workers' Compensation Act*. There the claimant, alleging error on the face of the record, sought certiorari to have quashed a Tribunal finding that his employment did not contribute to any aggravation or acceleration of a pre-existing disease. The equivalent terms for s 440 of the Act were in s 14C(11) of the 1916 Act. The statement relied upon is found at p 138 of the judgment of the Chief Justice and is in the following terms:-

> "It is not necessary to decide exactly what is meant by the words 'the matters alleged by the claimant' in s 14c(11) of the Act, because whether the Neurology Board was required to find the facts for itself, or whether it was required to accept the allegations of the claimant as true, there was no error of law on the face of the record. At first sight it might seem nonsensical that the Neurology Board should be required to make a determination as to the effect of the claimant's allegations, whether it regards them as true or not. However, upon consideration, it appears to me that there are good reasons why the

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2 See p 4

3 (1984-5) 157 CLR 124

> subsection should be literally construed. In 1960, when s 14c was inserted in the Act, there was doubt and controversy as to the entitlement to compensation of victims of cardiac seizures.
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> …
> The intention of the legislature in enacting s 14c, which then applied only to Cardiac Boards, may well have been to allow a specialized medical tribunal to resolve conflicts of this kind, not on evidence but from its own professional knowledge. Thus if it were alleged by a claimant that the worker had suffered a coronary occlusion while bicycling to work, or running for a tram, or walking up stairs, or carrying a load, the Cardiac Board, accepting the allegations of fact as true, would determine what causative part, if any, the effort or exertion had played in the creation of the occlusion. If it decided that the coronary attack was an "injury", it was called on to determine the nature of the injury and the extent of the incapacity for work: questions also within the special capacity of medical boards to decide. If there proved to be a dispute as to whether in fact the worker had been doing what it is alleged he had been doing at the time the cardiac attack occurred, that remained as a question of fact to be decided by the Workers' Compensation Board under s 13."

[11] Counsel for the applicant argued that "matters alleged by the claimant" meant that the facts relating to the incident and complaints made about the effects of the incident must be accepted, and the Tribunal's decision must proceed on that basis. There are two difficulties for the applicant in the submission. The first is that the Tribunal is bound to consider other matters as well, including what it discovers on its own examination of the claimant. It has the obligation to consider the opinions of other medical practitioners but ultimately the question for determination is whether an injury, as defined, has been sustained. The second difficulty with the submission is that the applicant's allegations go no further than providing evidence that the applicant suffered low back pain and it is obvious from the reasons that the Tribunal took this fact into account.

[12] The ultimate assessment by the Tribunal requires the application of professional expertise to all of the circumstances. This approach was commented upon by Cullinane J in *Thompson v WorkCover Queensland and the General Medical Assessment Tribunal*[4]:-

> "It will be seen therefore that the hearing involved the application by the members of the Tribunal of their professional expertise. The members of the Tribunal examine the applicant and the conclusions formed by them as a result of such examination form part of the material which the Tribunal takes into account for the purposes of discharging its function."

[13] This understanding of the Tribunal's role is consistent with the decisions of Helman J in *Barrera v Reye & Ors*[5] and in *York v Young & Anor*[6]. In the latter case His

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4 (2002) QSC 119 at para 12
5 (2002) QSC 12
6 (2002) QSC 14

Honour's decision was confirmed by the Court of Appeal[7]. In *York* Helman J said (at para 13):-

> "… 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 with foundation on the evidence before it."

[14] An examination of the composite reasons of the Tribunal shows that its members considered a number of medical reports identified in its reasons as well as a statement by Ms Beaumont, the applicant's neighbour and that it interviewed the applicant in the presence of a qualified signer interpreter. The ultimate finding of the Tribunal is referred to in [7] above.

[15] I am satisfied in this instance there was evidence upon which the Tribunal could come to the decision which it did. So much was, in effect, conceded by the applicant. It is not to the point then that a different Tribunal may have come to a different decision. It is a matter of comment that the recording by the general practitioners of the applicant's initial complaints left much to be desired and a matter of conjecture whether a different record may have influenced a Tribunal five years later to come to a different conclusion. The Tribunal has set out the basis for its decision in the Reasons referred to above. I am satisfied that in making the decision the second respondents acted within the jurisdiction conferred upon them by the Act and that in making the decision there was no improper exercise of the power conferred upon them by the enactment.

[16] The attack upon the decision on the basis that it was "unreasonable" in the *Wednesbury* sense can be disposed of quite briefly. Having found that it was open to the Tribunal to come to the decision which it did and there being no evidence that the Tribunal acted in any perverse way in coming to its decision I am not persuaded

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7 (2002) QCA 519

the ground is made out. Counsel on behalf of the applicant raised questions about the use made of an unsigned statement made by the applicant, the contents of which statement were in conflict with other information which she gave to the Tribunal. This unsigned statement was annexed to earlier incomplete Reasons of decision provided by the Tribunal. Whilst some of these matters might have provided worthwhile discussion points in a procedure which provided for cross-examination they do not establish grounds upon which a statutory order of review would be made. The following remarks found in the joint judgment (Brennan CJ, Toohey, McHugh, Gummow JJ) in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[8] are apposite:

> "These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (38)."

[17] In the end result I am satisfied that there has not been any improper exercise of power on the part of the Tribunal members and that no ground for a statutory Order of Review has been made out.

Orders

1. I order that the application be dismissed.
2. I adjourn for further consideration the question of costs. I direct the parties to provide written submissions on the issue of costs within 14 days from the date hereof.

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8 (1996) 185 CLR 259 at 272