SUPREME COURT OF QUEENSLAND

CITATION:	*Plester v WorkCover Queensland & ors* [2004] QSC 165
PARTIES:	**SIMON EDWARD PLESTER** (applicant) **v** **WORKCOVER QUEENSLAND** (first respondent) **Q-COMP** (second respondent) **ORTHOPAEDIC ASSESSMENT TRIBUNAL** (third respondent)
FILE NO/S:	S 11538 of 2001
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Orthopaedic Assessment Tribunal
DELIVERED ON:	4 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2004
JUDGE:	McMurdo J
ORDER:	**That the application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – ERROR OF LAW – where an applicant claimed to have suffered an injury to which his employment contributed – where specialist tribunal was required to consider whether work was a significant contributing factor to his injury – whether tribunal erred in law by not answering the required question – whether it took into account an irrelevant consideration *WorkCover Queensland Act* 1996 (Qld), s 34, s 265(2), s 440(2), s 442(2) *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 203 *Maher v Dr Lawrence & Ors* [2003] QCA 517, distinguished
COUNSEL:	K D Dorney QC with P F Mylne for the applicant P A Keane QC with S A McLeod for the respondents
SOLICITORS:	Ferguson Cannon O'Connor Lawyers for the applicant

Bradley & Co for the respondents

[1] **McMURDO J**: This is an application for judicial review of the decision of the Orthopaedic Assessment Tribunal, which concluded that the matters alleged by the applicant for the purpose of seeking damages did not constitute an injury within the *WorkCover Queensland Act* 1996 (Qld) ("the Act"). The applicant's case is that the tribunal reached that conclusion by a process of reasoning which involved an error of law and a consideration of an irrelevant matter. The relief ultimately claimed is an order that the matter be remitted to a differently constituted tribunal to be dealt with according to law.

[2] On 30 April 2001, the applicant applied for a damages certificate pursuant to s 265(2) of the Act. He then claimed to have suffered an injury, or injuries, as follows: "rotator cuff syndrome, significant tearing of supraspinatus tendon and involvement of subacromial bursa, psychological injury". For the purpose of these proceedings, it is common ground that the claimed psychological injury can be ignored. He claimed that this injury had resulted over a period from approximately July/August 1998 to 8 May 2000, which he also specified as the date on which a doctor was first consulted and medical treatment was first sought in relation to the injury. Against the question in the application form "Did the worker stop work because of this injury?", he first answered "Yes" before amending that to "No".

[3] The application for the certificate thereby suggested that he had worked at least until 8 May 2000. In fact, he had been no longer required by his former employer after Christmas 1999 and he had been unemployed thereafter. The termination of his employment was apparent from material put before the tribunal, including his own statement.

[4] However, there had been another incident which had affected his right shoulder. It occurred on 7 May 2000, when the applicant was a spectator at a football match. When the ball was kicked into the crowd, he instinctively and suddenly raised his arms and he felt pain in his right shoulder. According to his written statement tendered to the tribunal: "As I (put my arms up) I felt immediate severe pain in my right shoulder. This pain did not abate overnight and I consulted Dr Heath on 8 May 2000". So the occasion when he first sought treatment was the day after the football incident, that being the end of the period in which the injury was said to have resulted.

[5] WorkCover issued a conditional damages certificate, but subsequently refused to make the certificate unconditional because it was not satisfied that the matters alleged constituted an "injury" within the meaning of the Act. The application was referred to the tribunal to be determined according to s 440 and s 442, which provided in part as follows:

> "440(2) If WorkCover has not admitted that an injury was sustained by a worker, and the nature of the injury, the tribunal 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.
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> …

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."

[6] A hearing took place before the tribunal on 23 November 2001. The applicant was then represented by a solicitor, who made thorough submissions, including extensive written submissions. Several medical reports and other documents were tendered and the tribunal carried out its own clinical examination of the applicant.

[7] The tribunal gave its decision in writing. It began by correctly expressing the matters for determination by reference to the terms of s 440(2) and 442(2). After setting out the material before it and summarising the background facts as put forward by the applicant, the tribunal made certain observations and findings as to the applicant's then condition in these terms:

> "Examination revealed an extremely well muscled torso and pectoral region and neck. There was no decrease in musculature on the right side of the body as compared with the left. In particular the pectoralis, trapezius, scapular muscles, deltoid and biceps were very prominent and bulged with every movement. There was vague discomfort to palpation of the right shoulder. There was a slight decrease of internal rotation but otherwise movements were full. There was no significant neurological deficit. Examination of the cervical spine revealed a decreased range of movement. There was a loss of full extension and rotation to the right. There was deep tenderness in the cervical spine.
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> An MRI of the cervical spine showed a prominent disc protrusion, which has not been treated surgically. An MRI of his shoulder showed some mild changes in the tendons of the rotator cuff, which may indicate a degree of degeneration, but no discreet tear was seen."

[8] Then, under a heading "Work-Related Aspects", the tribunal said:

> "As the major incident in Mr Plester's shoulder history was the injury which occurred at the football match when he put his hand up suddenly to stop a ball from hitting him there appears to have not been a significant work related component to his injury."

The tribunal then concluded that: "The matters alleged for the purpose of seeking damages do not constitute an injury".

[9] The application to review this decision must be considered under the *WorkCover Queensland Act* 1996 and not the *Workers' Compensation and Rehabilitation Act*

2003.[1] The 1996 Act defined the term "injury" within s 34. Prior to 1 July 1999, an injury was defined as a "personal injury arising out of, or in the course of, employment if the employment is *the major significant factor* causing the injury" (emphasis added). After that date, injury was defined as "personal injury arising out of, or in the course of, employment if the employment is *a significant contributing factor* to the injury" (emphasis added). Because the applicant alleged that he suffered his injury over a period that commenced before and ended after 1 July 1999, it was submitted on his behalf that "the Tribunal therefore should also have borne in mind that looking at this particular set of facts, that the legislation really had two different tests for such a continuing injury". However, as I read the Tribunal's decision, it has determined the matter upon the later definition of injury which, of course, is more favourable to the applicant.

[10] There is considerable dispute as to how the tribunal's decision should be understood, and in particular as to what findings the tribunal made. Its decision may be interpreted by reference to the applicant's case as it was argued in that hearing, including the evidence tendered in support of that case.[2] It was not part of the applicant's case that he had suffered a shoulder injury from which he had fully recovered by the time of the football incident. And the applicant conceded that the football incident was at least a factor contributing to the condition of his shoulder, which had persisted from the time of that incident. The applicant's submission to the tribunal was that further to the effect of the football incident, it should be accepted "that work would be a significant contributing fact to Mr Plester's right should injury, (so) the matters alleged for the purpose of seeking damages constitute an injury."[3] This submission was supported by at least one medical opinion tendered to the tribunal, according to which:

> "The injury sustained to the right shoulder is consistent with the work duties he described and the likely sequence of events appears to have been that the cleaning duties led to a rotator cuff syndrome associated with inflammatory change and weakening. The incident at the football game presumably caused the partial thickness tear described by the MRI scan."[4]

[11] On the applicant's case put to the tribunal, there were but two relevant possibilities. The first was that he had suffered an injury for which the significant contributing factors were his employment and the football incident. The second was that the football incident was the only significant contributing factor. That alternative had support from some of the medical evidence such as an opinion in these terms:

> "(There is) no history to suggest a previous right shoulder problem. I do not believe this presentation represents an aggravation but an acute injury consistent with the stated cause while at a football game in May 2000."[5]

So by making a finding as to which of these alternatives was the fact, and having regard to the conduct of the applicant's case before it, the tribunal was able to

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1 See s 603 of the 2003 Act

2 cf *Australian Energy Ltd v Lennard Oil NL (No 2)* [1988] 2 Qd R 230

3 Written submissions to the tribunal para 14

4 Report of Dr White dated 1 March 2001

5 Report of Dr Cotton dated 8 July 2001

determine the first question under s 440(2), which was whether the matters alleged constituted an injury in the relevant sense.

[12] The applicant argues that the tribunal answered the wrong question, and did not address the essential question of whether he suffered an injury of which his employment was a significant contributing factor. His submissions are critical of the tribunal's having reasoned from a reference point of his condition at the date of the hearing and determining what the cause of that condition was; it is said that this diverted the tribunal from a consideration of the correct question. To explain this argument, it is necessary to refer to *Maher v Dr Lawrence & Ors* [2003] QCA 517, upon which the applicant relied, submitting that this tribunal had made the same error as that which the Court of Appeal found in the decision of the Neurology/Neurosurgical Assessment Tribunal in that case. In *Maher*, the applicant's principal basis for claiming damages was an alleged permanent neurological impairment, which the tribunal rejected as being work related. But in its decision, that tribunal identified a distinct basis for a potential damages claim, which was that the applicant had suffered some impairment of memory over a short period after losing consciousness in the relevant accident. The Court of Appeal held that the tribunal's reasons were to be read as involving a finding that the appellant was injured when he lost consciousness, with a consequent memory loss.[6] The Court held that the tribunal had erred in not then making any assessment of the neurological impairment, if any, associated with that injury. The facts in *Maher* illustrate the significance, in some cases, of the distinction between an inquiry as to whether a work related injury was suffered, and an inquiry as to whether the claimant's condition at the date of the tribunal's hearing was work related. In the present case, however, the case put to the tribunal permitted this tribunal to answer the question of whether there was a work related injury by reference to the claimant's condition at the time of the tribunal's hearing.

[13] The applicant submitted that it was not inconsistent with the tribunal's reasons for the tribunal to have accepted that the applicant did suffer an injury within the meaning of the Act. Then, in the course of oral argument, it was submitted for the applicant that there is indeed a discernable finding that he suffered an injury within the meaning of the Act. Each of these arguments heavily relied upon the tribunal's reference to the football incident as "the major incident in Mr Plester's shoulder history". It was argued that this implied that there was at least one other incident relevant to that history, and that there was at least one other contributing factor which could only have been the applicant's employment. That is not how I interpret the tribunal's reasons, and in particular the critical conclusion, set out above at [8]. In the same sentence, the tribunal concludes that "there appears to have not been a significant work related component to his injury". This finding is a rejection of the applicant's case that the condition of his shoulder was attributable in part to his employment.

[14] The alleged error of law is said to have been a failure to answer the question prescribed by s 440(2). It follows from what I have said that this question was answered, and in a way that involved no error of law. There was a further submission that the tribunal took into account an irrelevant consideration, in that it was irrelevant to consider that "the major incident in the applicant's shoulder history was the injury which occurred at the football match". It was argued that that

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6 Para [19]

was irrelevant, because the relevant inquiry was as to what happened, if anything, to his shoulder before the football incident. However, in the process of reasoning which I have described, it was plainly relevant to take into account the fact that the football incident was at least a cause of the condition of his shoulder. To identify the football incident as "the major incident" in the relevant history was to describe it as of itself providing a plain and logical explanation for the applicant's condition. In my view, the tribunal's decision does not reveal that it took into account any irrelevant consideration.

[15] Accordingly the application should be dismissed. I shall hear the parties as to costs.