SUPREME COURT OF QUEENSLAND

CITATION:	*Plester v WorkCover Queensland & Ors* [2004] QCA 390
PARTIES:	**SIMON EDWARD PLESTER** (applicant/appellant) **v** **WORKCOVER QUEENSLAND** (first respondent/first respondent) **Q-COMP** (second respondent/second respondent) **ORTHOPAEDIC ASSESSMENT TRIBUNAL** (third respondent/third respondent)
FILE NO/S:	Appeal No 5521 of 2004 SC No 11538 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2004
JUDGES:	de Jersey CJ, Davies and Jerrard JJA Separate reasons for judgment of each member of the Court, de Jersey CJ and Davies JA concurring as to the order made, Jerrard JA dissenting
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – ERROR OF LAW – where the appellant appeals against the learned primary Judge's dismissal of his application for the judicial review of a decision of the Orthopaedic Assessment Tribunal – whether the Tribunal's determination, or the determination of the learned primary Judge was in error *WorkCover Queensland Act* 1996 (Qld), s 440(2), s 442(2) *Maher v Dr Lawrence, Dr Hayes & Dr Coghlan as members of the General Medical Assessment Tribunal (Psychiatric) & Ors* [2003] QCA 517; Appeal No 4806 of 2003, 21 November 2003, considered

Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors (1996) 185 CLR 259, cited

COUNSEL: K D Dorney QC, with P F Mylne, for the applicant/appellant
P A Keane QC, with S A McLeod, for the respondents

SOLICITORS: Ferguson Cannon Lawyers (Maroochydore) for the applicant/appellant
Bradley & Co for the respondents

[1] **de JERSEY CJ:** The appellant appeals against the learned primary Judge's dismissal of his application for the judicial review of a decision of the Orthopaedic Assessment Tribunal.

[2] The appellant applied to WorkCover Queensland for a damages certificate pursuant to s 265(2) of the *WorkCover Queensland Act* 1996. WorkCover issued a conditional certificate but refused to make it unconditional, because not satisfied that the appellant had sustained an injury within the meaning of the Act. The matter was referred to the Orthopaedic Assessment Tribunal ("the Tribunal") for decision.

[3] Under s 440(2) of the Act, the Tribunal was obliged to "decide whether the matters alleged for the purpose of seeking damages constitute an injury … and, if so, the nature of the injury". Section 442(2) obliged it to 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."

[4] The reference to the Tribunal stated that the appellant "applied for a Damages Certificate … in respect of a condition certified as 'rotator cuff syndrome, significant tearing of supraspinatus tendon and involvement of subacromial bursa, psychological injury' which he attributed to his employment as a Builder's Labourer …". The Tribunal determined that "the matters alleged for the purposes of seeking damages do not constitute an 'injury'".

[5] The appellant's contention was that he sustained the injury over the period July-August 1998 to 8 May 2000, in consequence of his work manually scrubbing garage floors for residences being constructed. (That employment ceased on 21 December 1999, and he was not employed thereafter.) On the other hand on 7 May 2000, while watching a football game, the appellant instinctively and suddenly raised his arms, when the ball was kicked into the crowd, and he experienced pain in the right shoulder, for which he sought medical treatment the following day.

[6] In expressing the reasons for its decision, the Tribunal accurately set out the matters for determination, by reference to s 440(2) and s 442(2), and then made the following findings as to the appellant's then condition:

> "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.
>
> 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 [*sic*] tear was seen."

Under the heading "Work-related aspects", the Tribunal then 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."

[7] The appellant criticized the Tribunal's process of reasoning in two principal respects: first, its focus on the appellant's condition as at the time of the proceeding before the Tribunal, rather than the development of that condition from 1998; and second, the Tribunal's failure to deal with factors contributing to the appellant's condition other than the "major incident" to which the Tribunal specifically referred. The appellant contended that the Tribunal committed an error of law, in these respects:

> "(a) the [Tribunal], considered expressly, or impliedly, that there was another incident in the appellant's shoulder history (which could only have been work related); and
>
> (b) as that work related incident preceded the non-work related football incident, the [Tribunal] failed to answer the question prescribed by s.440(2), concerning the earlier work related incident, about whether there was any injury, however slight and however impermanent, arising from the appellant's work at that earlier time."

At the hearing of the appeal, Mr Dorney QC, who appeared for the appellant, presented the appellant's case as substantially one of criticism of the adequacy of the reasons expressed by the Tribunal for its decision.

[8] The learned primary Judge took the view that the Tribunal had addressed the relevant questions. As he said:

> "On the [appellant's] case put to the tribunal, there were but two relevant possibilities. The first was that [the appellant] 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. …
>
> … [B]y making a finding as to which of these alternatives was the fact, and having regard to the conduct of the [appellant's] case before it, the tribunal was able to determine the first question under s 440(2), which was whether the matters alleged constituted an injury in the relevant sense."

[9] As to the contention that the Tribunal reference to "the major incident" implied there being concurrent contributing considerations, his Honour emphasized the Tribunal's ultimate finding, that "[t]he matters alleged for the purpose of seeking damages do not constitute an injury", and observed that "[t]o 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 [appellant's] condition".

[10] The Tribunal's reasons should not be read pedantically (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, 272, 291). They should be read in a composite way. In referring to the football incident as the "major" contributor to the appellant's shoulder condition, and then concluding that his injury was not significantly work-related, the Tribunal is taken to be saying that no other contributing, work-related component, if there was one, is or was of significance. There was consequently no "injury" within the meaning of the statutory provision on which the Tribunal relied (*Workers' Compensation and Rehabilitation Act* 2003), and it was not necessary for the Tribunal to go on to consider issues under s 442(2) – which refers to permanent impairment resulting from "the injury".

[11] In referring to the appellant's history, the Tribunal confirms that it did not blind itself to the appellant's experience at work, of which there was evidence before the Tribunal. Indeed, under the heading 'background' in its reasons, the Tribunal recounts the appellant's claims in relation to having suffered shoulder pain in the course of his employment. While brief, the Tribunal's findings do not betray an impermissible focus solely on the football incident, as Mr Dorney QC submitted.

[12] In my view the appellant has not demonstrated that either the Tribunal's determination, or the determination of the learned Judge, was in error. I would order that the appeal be dismissed, with costs to be assessed.

[13] **DAVIES JA:** I agree with the reasons for judgment of the Chief Justice and with the order he proposes.

[14] **JERRARD JA:** In this appeal I have had the advantage of reading the reasons for judgment of the Chief Justice, and gratefully adopt his Honour's succinct statement of the relevant matters of fact. I find myself in respectful disagreement with the conclusions agreed to by the Chief Justice and Davies JA.

[15] The information placed before the Tribunal included conflicting medical opinions. A report dated 1 March 2001 by a Dr White opined that the appellant's described condition in his right shoulder was consistent with the appellant's described work duties. Dr White said that the appellant's cleaning duties were likely to lead to a rotator cusp syndrome associated with inflammatory change and weakening; and that the football incident had caused the partial thickness tear described in the MRI scan. I note that that assessment by Dr White accepts the possibility of different causes for different clinical conditions, combining to produce one overall result as at the date of assessment by the tribunal.

[16] On the other hand, a report by a Dr Welsh dated 5 June 2001, who had assessed the appellant on 28 August and 8 September 2000, expressed the belief that the

appellant's condition was not related to his employment; and likewise a Dr Keays, whose report was dated 22 June 2001, was of the view that the appellant's ongoing problems were not work related. Dr Keays added that the appellant had not described having any significant period off work, related to his shoulder.

[17] A report by a Dr Cotton dated 8 July 2001 expressed the view that the appellant had given no history suggesting a right shoulder problem previous to the football incident, and had sought no medical attention for his right shoulder prior to it. On the other hand Dr Keays had reported that the appellant told that Doctor that he had "a lot of sickies with a day or so off" after he had started his employment in May 1998, and reports from a Dr Campbell included descriptions of right shoulder pain and discomfort before the football incident.

[18] The respondent's senior counsel submitted in both his written and oral argument that the Tribunal had concluded that there was no right shoulder injury prior to the football incident. If that is what it did conclude, I respectfully consider that conclusion was open on the information presented. However, the opposite conclusion was also available, namely that the appellant had suffered an injury to his right shoulder prior to the football incident, to which "pre-football injury" the appellant's employment was a significant contributing factor. The Tribunal could also have concluded that the appellant suffered an injury as a result of the combination of both the effect of his employment upon his right shoulder and the effect of the incident at football; and, with respect, that appears to me what the Tribunal probably did decide.

[19] I understand the appellant's argument to be that its expressed findings necessarily involved a finding that there had already been an injury occasioned to the shoulder, to which the employment was a significant contributing factor. While I agree that that conclusion is not excluded by the Tribunal's findings as I construe them, the finding the appellant contends the Tribunal made does not necessarily result from the findings I consider it made.

[20] The finding for which the appellant contends, namely that the Tribunal must have found, by implication, there had been an existing, pre-football incident, injury to the right shoulder, perhaps much worsened, or perhaps entirely overcome by the football incident, would have necessitated the Tribunal's then making a finding as to the nature of that pre-football injury, pursuant to its obligation under s 440(2); and that would then have required the Tribunal to proceed to a decision under s 442(2) as to whether the appellant had sustained a degree of permanent impairment, and if so the degree of permanent impairment resulting from that pre-football injury, and the nature and degree of that impairment. This court so held in *Maher v Dr Lawrence & Ors* [2003] QCA 517.

[21] The Tribunal's obligation to assess any discrete and obviously employment related injury is readily grasped if regard, for example, is had to the possibility that a worker may suffer an injury to, say, a right hand, to which injury employment is a significant contributing factor; and then suffer a later loss of the entire right arm, in an incident to which neither the employment, nor any employment, was a significant contributing factor. In those circumstances that worker would not lose any right to compensation and damages which had accrued before suffering the second devastating injury, and the relevant processes of the (as then in force)

WorkCover Queensland Act 1996, including s 440, could be engaged in an assessment of the extent of that employment injury to the hand.

[22] When a tribunal makes a finding of an overall state of injury resulting from the combination of a number of clinical conditions, some of those may be discrete, and capable of independent assessment as injury to which employment is a significant contributing factor. Alternatively, none may be so assessable. The decision of the tribunal in the appellant's case does not reveal whether or not the Tribunal found, or in the alternative entirely excluded, the existence of an employment related pre-football injury. Indeed, the decision of the Tribunal does not specify whether in its opinion the appellant actually suffered from any deleterious condition to his right shoulder at all, be it work related or otherwise.

[23] There is actually room for the view that the Tribunal members may have been satisfied that no deleterious condition had existed to the right shoulder at any time, although the Tribunal did not say that. What it recorded conveys a degree of scepticism of the claimed work related injury experienced prior to 7 May 2000. However, no conclusion is expressed, and the Tribunal's decision does not reveal its opinion whether the relevant injury specified in the applicant's claim for a damages certificate, namely "rotator cuff syndrome, significant tearing of supraspinatus tendon and involvement of subacromial bursa," existed either before or after 7 May 2000.

[24] In those circumstances I respectfully consider that Tribunal has not fulfilled the task imposed on it by s 440(2), namely of deciding whether the matters alleged by the appellant for the purpose of seeking damages constitute an injury to which his employment was a significant contributing factor. Giving proper regard to the direction in the joint judgment in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors,*[1] namely not to scrutinize overzealously the reasons of an administrative decision maker, I nevertheless respectfully dissent from the majority judgment in this matter, and am satisfied that the Tribunal failed to exercise its powers according to law, that being an error of law correctable upon judicial review.[2] I would allow the appeal and order that the decision of the Orthopaedic Tribunal made 23 November 2001 be set aside, remit the reference to that Tribunal to a differently constituted Tribunal to be dealt with according to law, and order that the first respondent pay the appellant's costs of and incidental to the appeal, and of the application under the *Judicial Review Act* 1991, to be assessed.

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1 (1996) 185 CLR 259 at 272

2 *State Trustees Ltd v Transport Accident Commission* (2002) 6 VR 359 at 369