SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Meat Holdings Pty Ltd v Douglas & Ors* [2005] QSC 145
PARTIES:	**AUSTRALIAN MEAT HOLDINGS PTY LTD ACN 011 062 338 (applicant) v DR J B DOUGLAS, DR P MORRIS, DR J C SLAUGHTER in their capacity as members of the GENERAL MEDICAL ASSESSMENT TRIBUNAL/PSYCHIATRIC (first respondents) Q-COMP and its Successor THE WORKERS COMPENSATION REGULATORY AUTHORITY (second respondent)**
FILE NO/S:	BS4650 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order for review
DELIVERED ON:	31 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2005
JUDGE:	Mullins J
ORDER:	**Application dismissed**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – MEDICAL PROVISIONS – MEDICAL PANELS, BOARDS, REFEREES ETC – where employee made application for damages certificate to self-insurer under *WorkCover Queensland Act* 1996 (Qld) – where self-insurer did not issue damages certificate to employee – where application referred by self-insurer to a General Medical Assessment Tribunal – where employee provided additional medical reports to Tribunal – where counsel for employee made oral submissions to Tribunal – where self-insurer denied opportunity to respond – whether self-insurer had right to be heard *WorkCover Queensland Act* 1996 *Workers' Compensation and Rehabilitation Act* 2003 *J v Lieschke* (1987) 162 CLR 447 *Kioa v West* (1985) 159 CLR 550

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
York v General Medical Assessment Tribunal [2003] 2 Qd R 104

COUNSEL: J A Griffin QC for the applicant
D O J North SC and S A McLeod for the first and second respondents

SOLICITORS: Abbott Tout for the applicant
Bradley & Co for the first and second respondents

[1] **MULLINS J:** The applicant, as the employer of Mr Ketchup and a self-insurer for the purpose of the *WorkCover Queensland Act* 1996 ("the Act") referred Mr Ketchup to the General Medical Assessment Tribunal/Psychiatric ("the Tribunal") comprised of the first respondents in order to obtain an assessment of whether Mr Ketchup had sustained a work related injury and, if so, for assessment of any permanent impairment of any psychiatric condition secondary to physical injuries sustained by Mr Ketchup in the course of his employment on 18 May 2001. The Tribunal made its decision on 29 April 2004 that the matters alleged for the purpose of seeking damages constituted an injury to the worker, that the nature of the injury is chronic adjustment disorder with anxiety and that the worker has sustained a degree of permanent impairment assessed at 7 ½ percent. The applicant applies for a statutory order for review, primarily on the ground that it was prevented by the respondents from attending and/or participating at the Tribunal hearing.

[2] The second respondent is The Workers' Compensation Regulatory Authority that was established under the *Workers' Compensation and Rehabilitation Act* 2003 ("the 2003 Act") as a body corporate with the functions conferred by s 330 of the 2003 Act including to support and oversee the efficient administration of medical assessment tribunals. The 2003 Act commenced on 1 July 2003. Under s 592 of the 2003 Act the Workers' Compensation and Regulatory Authority is deemed to be the successor in law of Q-COMP which was the review unit established by WorkCover Queensland ("WorkCover") under the Act. It was common ground at the hearing of the application that Mr Ketchup's claims arising out of the incident on 18 May 2001 have to be determined by reference to the Act as it stood at that date and Reprint No 4C is therefore the relevant version of the Act for this matter.

Relevant facts

[3] On 18 May 2001 Mr Ketchup, in the course of his employment as a labourer/knife hand at the Townsville plant of the applicant, sustained injuries as a result of an electric shock. Mr Ketchup subsequently made an application for compensation for injury to his neck and right shoulder/arm which was accepted by the applicant in respect of the neck injury.

[4] By application dated 16 May 2003 Mr Ketchup applied for a damages certificate in respect of the injury described as:

> "Psychiatric or psychological condition, secondary to physical injuries sustained in the course of my employment on 18 May 2001 which has been diagnosed as depression."

The applicant was unable to conclude Mr Ketchup sustained an "injury" within the meaning of the Act and advised Mr Ketchup by letter dated 17 November 2003 that it was unable to issue a damages certificate in terms of s 265 of the Act in respect of the psychiatric injury. By letter dated 27 November 2003 the solicitors for Mr Ketchup advised the applicant that Mr Ketchup did not agree with the decision of the applicant and required the matter to be referred to the Tribunal, in accordance with s 265(8) of the Act. On 23 February 2004 the applicant referred the matter to the Tribunal which required the Tribunal to make the decisions required in ss 440(2) and 442(2) of the Act.

[5] By letter dated 13 April 2004 to the second respondent, the applicant on the basis that it was an interested party as the insurer of the claim requested that a representative of the applicant be permitted to be present at the Tribunal hearing in relation to the claim in order to listen and/or see any submission made by Mr Ketchup and/or his representative. The second respondent relied on s 453 of the Act and refused to grant the request.

[6] Under cover of letter dated 14 April 2004 Mr Ketchup's solicitors forwarded to the second respondent five further medical reports which Mr Ketchup wished to place before the Tribunal. Three of those reports were obtained after the applicant had refused to issue a damages certificate to Mr Ketchup for the psychiatric condition claimed by him. The second respondent by letter dated 14 April 2004 forwarded copies of those five medical reports to the applicant. In its letter dated 15 April 2004 to the solicitors for Mr Ketchup, the applicant requested copies of the submission that Mr Ketchup would be giving to the Tribunal. Mr Ketchup's solicitors adopted the position that there was no obligation for Mr Ketchup to provide the applicant with copies of any written submissions, but pointed out that Mr Ketchup's submissions to the Tribunal would be made orally.

[7] By letter dated 15 April 2004 the applicant repeated its request to the second respondent to have a representative present at the Tribunal hearing so that the applicant would be able to respond to the submissions either at or after the hearing. In the alternative, the applicant requested that it be provided with a copy of any written submissions made by Mr Ketchup or his representative or a copy of a transcript of any verbal submissions made and that it be given the right to respond to such submissions before the Tribunal made its decision. The second respondent responded by letter of 16 April 2004 refusing to grant the applicant's requests.

[8] The Tribunal convened on 19 April 2004 to hear the matter. Mr Ketchup attended the hearing with counsel who made submissions to the Tribunal. Mr Ketchup was interviewed and provided information to the Tribunal. The Tribunal in making its decision took into consideration an extensive number of expert medical reports, other reports, statements of Mr Ketchup and a photocopy of the applicant's claim file. The Tribunal's written decision is dated 29 April 2004.

Statutory framework

[9] The concept of self-insurance by an employer in respect of the obligations of an employer under the Act was introduced in chapter 2 part 5 of the Act. Section 98 of the Act explains what is self-insurance:

> "**(1)** Self-insurance allows an employer, under a licence under this part, to provide their own accident insurance for their workers, instead of insuring with WorkCover.
> **(2)** A self-insurer has all the liabilities that WorkCover would have, if this part did not apply, for injuries sustained by the self-insurer's workers arising out of events that start or happen before the issue of the licence and during the period of the licence.
> **(3)** Certain functions and powers of WorkCover are provided to a self-insurer to enable the self-insurer to meet obligations in providing accident insurance.
> **(4)** The way the self-insurer performs the functions and exercises the powers is regulated by WorkCover."

[10] Section 119(1)(a) of the Act relevantly provides for a self-insurer to have the same functions and powers of WorkCover under specified provisions of the Act (including chapter 7 parts 3 and 5) in relation to the self-insurer's workers. This enables the self-insurer to manage the statutory and common law claims of its workers.

[11] Chapter 7 of the Act regulates the medical assessment tribunals. The object of the chapter is to provide for an independent system of medical review and assessment of injury and impairment sustained by workers: s 424 of the Act. The Tribunal is one of the medical assessment tribunals. A tribunal makes a decision on the matter that is referred to it by WorkCover or the self-insurer. The types of matters that can be referred to a Tribunal are set out in s 437 of the Act. A tribunal has the power to make a personal examination of the relevant worker or arrange for the examination to be made by a doctor nominated by it: s 447 of the Act.

[12] The Act does not specifically provide for WorkCover to be heard before a medical assessment tribunal (nor is that expressly excluded). Section 453 of the Act provides:

> "**Right to be heard before tribunals**
> **453.** On a reference to a tribunal, the worker may be heard before the tribunal in person, or by counsel, solicitor or agent."

[13] It has been observed that a tribunal interposes between a potential claimant for damages and the ultimate defendant (WorkCover or the self-insurer), an independent assessment of the merits of a potential claim at an early stage: *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104, 110 [16] ("*York*").

Applicant's submissions

[14] The applicant submits that the express right conferred by s 453 of the Act on a worker to be heard by a tribunal does not exclude a self-insurer from being heard by that tribunal. Although s 453 of the Act confers a right on the worker to be heard, it is argued that falls short of expressing an intention that only the worker had the right to be heard by the tribunal. As the applicant had an interest in the outcome of the Tribunal's decision on the matter referred to it relating to Mr Ketchup, it is submitted that procedural fairness required the applicant to be given an opportunity to be heard by the Tribunal. The interest of the applicant was that, if the Tribunal determined that Mr Ketchup had sustained the psychiatric injury which he claimed

to have done, the applicant may have to pay compensation and/or defend a common law claim for damages.

[15] Mr Griffin QC who appeared on behalf of the applicant relied on *J v Lieschke* (1987) 162 CLR 447 ("*Lieschke*") to support the proposition that the right of the applicant to be heard could be excluded only by an unambiguous statutory provision. The appellant in *Lieschke* was the mother of children who had been apprehended by the first respondent and brought before a Children's Court on the basis that each of them was alleged to be a neglected child. The magistrate refused to give the appellant leave to appear at the stage of the proceeding when he was determining whether there was a *prima facie* case, but indicated that if he found a *prima facie* case he would permit the parents then to intervene. The relevant legislative provision provided that if a *prima facie* case had been made out that a child was a neglected child, then the parents were given an opportunity to call evidence and hear the evidence tendered by or on behalf of the child. It was held that the provision carried no implication that the legislature intended that the principles of natural justice be excluded in respect of the proceeding prior to a *prima facie* case being made out, as the parents' interests were affected by the proceeding at that stage, as it was their authority in respect of their children that was under challenge.

[16] *York* was concerned with the content of the rules of natural justice in a hearing before the general medical assessment tribunal that had to determine a number of matters, including whether the matters alleged by Mr York constituted an injury to him. Mr York was represented by his solicitor. The evidence that was before the tribunal was all favourable to Mr York. The doctors comprising the relevant tribunal questioned Mr York. The tribunal determined that the matters alleged for the purpose of seeking damages by Mr York did not constitute an injury. It was held that, in order to afford procedural fairness that was required in this case by the tribunal, Mr York's solicitors should have been given the opportunity to argue against, or even lead further evidence in Mr York's favour, on whatever provisional or preliminary views adverse to Mr York the tribunal held. The rules of natural justice therefore required the tribunal to advise Mr York's solicitor of the possibility that it would not accept the favourable diagnoses to Mr York.

[17] Because of the acknowledgement in *York* of the requirement for a tribunal to afford natural justice in the course of its hearing, the submission is made on behalf of the applicant that the requirement applies equally to the self-insurer and the employee and it should have been given the opportunity to respond to the matters disclosed in the further medical reports and during the hearing before the Tribunal which may not have been provided to the applicant previously.

Second respondent's submissions

[18] The second respondent relies on the lack of any provision in the Act for any role on the part of WorkCover and, by extension under s 119(1) of the Act a self-insurer, upon a reference by WorkCover or the self-insurer to a tribunal and that it was the applicant's decision to refuse to issue a damages certificate in respect of the claim for psychiatric injury by Mr Ketchup that resulted in the reference to the Tribunal.

[19] Mr North of Senior Counsel who appeared with Mr McLeod of Counsel for the second respondent describes the applicant as the primary decision maker and argues

that, in the absence of express statutory language giving the decision maker some further role, it was not appropriate, after the decision was referred to the Tribunal, for the applicant to be heard in support of the correctness of its decision, relying on *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35-36. The second respondent therefore submits that the issue is not whether any right to procedural fairness for the applicant before the Tribunal has been excluded by the Act.

[20] The second respondent relies on the history of medical assessment tribunals to support its approach to the role of the applicant on the reference to the Tribunal.

[21] The *Workers' Compensation Act* 1916 ("the 1916 Act") was amended in 1960 by the insertion of s 14C which introduced a Cardiac Board to address a problem that had emerged where workers were finding it difficult to establish that cardiac disease was work related. The General Manager of the State Government Insurance Office (Queensland) which carried on the business of accident insurance for the purpose of the 1916 Act was authorised to refer to the Cardiac Board any claim for compensation in respect of alleged injury by cardiac disease or the aggravation or acceleration of cardiac disease. The Board was given jurisdiction to determine whether or not the matters alleged by the claimant constituted an injury under the 1916 Act and, if so, the nature of the injury and the extent of the incapacity occasioned by the injury and whether such incapacity was permanent or temporary. Under s 14C(3) of the 1916 Act the claimant was given an express entitlement to appear before and be heard by the Cardiac Board and to be represented by counsel, solicitor or agent.

[22] Section 14C of the 1916 Act was substituted in 1966 to provide for a General Medical Board and six specialty Medical Boards. The General Manager was empowered under s 14C(4) to refer to the appropriate Medical Board any claim for compensation under the 1916 Act in respect of any alleged injury. The matters that could be determined by the Medical Board were analogous to those which the Cardiac Board had previously been allowed to determine. Section 14C(10) of the 1916 Act continued the entitlement of the worker to appear before and be heard by the relevant Medical Board and to be represented by counsel, solicitor or agent.

[23] Similar provisions were continued under the *Workers' Compensation Act* 1990 and maintained under the Act. The Explanatory Note for clause 453 of the *WorkCover Queensland Bill* 1996 stated:

> "*Clause 453* replaces section 181 of the *Workers' Compensation Act 1990* and has not changed except for being updated according to current drafting practice. It gives the worker the right to be heard before the tribunal either in person or by a representative."

The applicant's role in relation to the Tribunal

[24] Both parties relied on *Kioa v West* (1985) 159 CLR 550 and, in particular, that part of Mason J's judgment at 584-585:

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute … What is appropriate in terms of natural justice depends on the circumstances of the case and they

> will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting …
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations…
> When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provisions and the interests which I have already mentioned."

[25] The question that has to be determined is what the Act, as a matter of construction, requires of the applicant in relation to the decision-making of the Tribunal. The difference in the submissions made by the parties on this application is due to how each has characterised the role of the applicant. The applicant emphasises its interest as the defendant to any claim for common law damages arising from the work accident and the party responsible for payment of statutory benefits. The second respondent emphasises the role of the applicant as the decision-maker, before the matters were referred to the Tribunal.

[26] The statutory framework under the Act for the reference by a self-insurer of matters to be determined by a medical assessment tribunal is the same as that which applies to WorkCover under the Act and has applied to its predecessors under each of the various Acts for which the Act was the successor. The history bears out the express object found in s 424 of the Act that the references by WorkCover or the self-insurer to the medical assessment tribunals enable an independent system of medical review of assessment of injury and impairment.

[27] A tribunal's jurisdiction is enlivened only on the reference to it of a matter by WorkCover or the self-insurer under s 437 of the Act. In this case the reference followed the decision of the applicant that it could not conclude that Mr Ketchup's psychiatric condition was an "injury" within the meaning of the Act and therefore refused to give Mr Ketchup a damages certificate under s 265(1) of the Act which

was a necessary pre-requisite for bringing a common law claim for damages for that injury.

[28] A self-insurer takes on that role under the Act in the knowledge of the statutory framework that exists in relation to claims by a worker for statutory benefits and damages for personal injury arising out of work accidents. Although the process of reference of matters by WorkCover or a self-insurer to medical assessment tribunals is not a structured appellate process, it is decision-making by stages with the Act providing for the role of WorkCover and the self-insurer in the decision-making at the stage prior to the reference to the tribunals. The fact that there are opportunities for the worker to place further material before the tribunal and for tribunal members to use their medical expertise in considering the matters referred to the tribunal does not necessarily require that WorkCover or the self-insurer be given a role before the tribunal.

[29] It does not follow from the many authorities dealing with procedural fairness including *Lieschke* and *York* that were relied on by the applicant that a finding has to be made that the applicant should have been given an opportunity to be heard before the Tribunal, if the intention of the Act is that the applicant's role in the reference to the Tribunal ceased upon making the reference.

[30] The difficulties in this matter for the applicant arise from the dual nature of its role as self-insurer and employer, being the manager of the claim made by Mr Ketchup, as well as the potential defendant of any common law claim for damages made by Mr Ketchup. It is consistent with the recognition of the role of tribunals given in *York* that the applicant should be characterised as not having a partisan role in the matters the subject of the reference to the Tribunal at the stage of the decision-making by the Tribunal on that reference. The applicant's role was not one which attracted the application of the rules of natural justice, when the Tribunal was considering the reference made to it by the applicant in respect of Mr Ketchup. The outcome of this application is determined by the nature of the applicant's role in making the reference to the Tribunal, in order to allow the Tribunal to undertake the decision-making that is entrusted to it at that stage.

Order

[31] It follows that the application must be dismissed. Subject to hearing submissions on the question of costs, it follows that the applicant should pay the respondents' costs of the application to be assessed.