SUPREME COURT OF QUEENSLAND

CITATION:	*Griffin v State of Queensland* [2016] QSC 43
PARTIES:	**NEIL JOHN GRIFFIN** (applicant) **v** **STATE OF QUEENSLAND** (first respondent) **DR IVERS, DR OUTERBRIDGE AND DR SUGARS CONSTITUTING THE ORTHOPAEDIC ASSESSMENT TRIBUNAL** (second respondent)
FILE NO/S:	SC No 5684 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	11 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2016
JUDGE:	Douglas J
ORDER:	**1. Order that the second respondent's decision be set aside;** **2. Further order that the matter be referred to an Orthopaedic Assessment Tribunal differently constituted for further consideration according to law;** **3. Further order that the first respondent pay the applicant's costs of the application.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – PROCEDURE – where liability had been accepted for lumbar soft tissue injury/aggravation – where the tribunal diagnosed the injury as aggravation of pre-existing degenerative changes involving the lumbosacral spine – whether the tribunal failed to consider the lumbar soft tissue injury WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF

CLAIMS – PROCEDURE – where the tribunal did not explicitly identify the relevant Diagnosis Related Estimate or percentage uplift – whether the tribunal complied with the procedures required by the Guidelines for Evaluation of Permanent Impairment

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REASONS FOR ADMINISTRATIVE DECISIONS – ADEQUACY OF REASONS – where the applicant suffered two injuries – where the tribunal determined that permanent impairment was due to the first injury – whether the tribunal's reasons were adequate

Acts Interpretation Act 1954 (Qld), s 27B
Workers' Compensation Act 1916 (Qld), s 14C(6)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 179, s 500, s 505, s 516(1)

Chapman v General Medical Assessment Tribunal – Thoracic & Xtracare [2007] QCA 381, distinguished
Comcare v Levett (1995) 60 FCR 14, considered
Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462, cited
Di Girolami v Garentone Pty Ltd [2001] VSC 57, cited
Ergon Energy Corporation Limited v Rice-McDonald [2010] 1 Qd R 516, considered
Thompson v WorkCover Queensland [2002] QSC 119, cited
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480; [2013] HCA 43, considered
York v General Medical Assessment Tribunal [2003] 2 Qd R 104, cited

COUNSEL:	M Black for the applicant S McLeod for the first respondent
SOLICITORS:	Maurice Blackburn Lawyers for the applicant GR Cooper, Crown Solicitor for the first respondent

Background

[1] The applicant, Mr Griffin, was a bus driver. The respondent, through WorkCover Queensland, accepted liability for an injury that he suffered on 3 June 2014 in the course of his employment. It was described as "Lumbar soft tissue injury/aggravation pre-existing condition". WorkCover assessed his permanent impairment from the injury as

0%. That conclusion was clearly derived from the assessments of two separate neurosurgeons, Dr Coroneos and Dr Coyne.

[2] The pre-existing condition was one that he had suffered in February 2006. He underwent a spinal fusion operation in June 2006 that included "an L4/5 discectomy and a posterior spacer at that level".[1] After that procedure, his evidence was that his leg and back pain settled and he was able to return to work.

[3] The 2014 injury the subject of this proceeding was one that occurred when the bus he was driving hit a bump. His seat collapsed, causing him to strike the floor with his buttocks. He experienced back pain extending into his right thigh and calf. He was able to continue working initially until his bus struck another bump, after which his pain worsened and he ceased working. He continues to suffer pain and now needs some assistance when dressing. He also has difficulty lifting bags or groceries. He does no gardening or activities in his yard and has a limited ability to drive.

[4] After WorkCover's decision, he requested it to refer his matter to a medical assessment tribunal. The tribunal determined that the nature of his injury was aggravation of pre-existing lumbar spondylosis and concluded that he had not sustained a degree of permanent impairment from it. In arriving at that conclusion, the tribunal applied the *Guidelines for Evaluation of Permanent Impairment* (1st ed) ("GEPI") to assess his basic impairment as 5%. The tribunal members then increased that basic impairment by 3% to reflect his difficulty with home and self-care, apparently pursuant to paras 4.30 and 4.31 of GEPI, to calculate a value of 8% impairment of the whole person. The tribunal's reasons went on to apportion "the whole of the available permanent impairment" to the previous injury suffered in 2006.

[5] The passage of the tribunal's reasons particularly relevant to the assessment of the applicant's degree of permanent impairment ("DPI") is as follows:

> "In assessing permanent impairment the Tribunal has consulted Table 15-3 of the Guides to Evaluation of Permanent Impairment Fifth Edition, page

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[1] See p 4 of the Medical Assessment Tribunal Decision; ex JH4 to the affidavit of Janene Hillhouse filed 21 September 2015.

> 384. DRE lumbosacral AMA category II has been chosen for the reasons given above.
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> A basic impairment from this DRE is five (5) percent.
>
> Consulting the Guidelines to the Evaluation of Permanent Impairment First Edition (GEPI) paragraph 4.30, the Tribunal has found a further uplift of three (3) percent to reflect difficulty with home and self-care.
>
> Consequently, a value of eight (8) percent impairment of the whole person has been calculated.
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> The members of the Tribunal have considered the previous injury to the back and requirement for surgery, which is the subject of a separate claim.
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> The Tribunal have taken this into account and have apportioned the whole of the available permanent impairment (eight (8) percent of the whole person) to the previous injury. This leaves a value of zero (0) percent whole person permanent impairment to cover the injury diagnosed as an aggravation of pre-existing degenerative changes involving the lumbosacral spine which occurred in June 2014."

[6] In seeking to review that decision, the applicant argues, in effect, that the tribunal failed to assess the degree of permanent impairment of the lumbar soft tissue injury referred to it, failed to approach its task as it should have, particularly under paras 1.51 and 1.52 of the GEPI and failed to provide adequate reasons for its decision. In advancing those arguments, Mr Black for the applicant drew attention to the tribunal's application of the 3% increase to the assessment of the plaintiff's impairment, reflecting his difficulties with home and self-care. Those were problems which, he submitted, on the evidence before the tribunal, did not exist before his second injury.

Legislative framework

[7] Section 179 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) deals with the assessment of permanent impairment in a worker who has made an application under s 132 of the Act. "Permanent impairment" is defined in s 38 as "an impairment that is stable and stationary and not likely to improve with further medical or surgical treatment". The DPI is decided in accordance with the GEPI made under s 183 of the Act[2] and is used

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[2] See also Schedule 6's definition of "DPI".

to calculate the amount of compensation then payable to the worker under s 180 of the Act.

[8] Section 500 deals with the reference of a matter to tribunals, including the question of a worker's permanent impairment under s 179. Section 505 requires the tribunal to decide whether the worker has sustained a DPI and, if so, the degree resulting from the injury and the DPI for the injury. Section 516(1) requires that the "tribunal must give a written decision for any matter referred to it with reasons for the decision". Section 27B of the *Acts Interpretation Act* 1954 (Qld) requires that, when giving reasons, a tribunal must "set out the findings on material questions of fact" and "refer to the evidence or other material on which those findings were based".

First ground for the application: failing to consider lumbar soft tissue injury

[9] This first submission reflected an earlier decision of *Chapman v General Medical Assessment Tribunal – Thoracic & Xtracare*[3] where the Court of Appeal considered the operation of the former *Workers' Compensation Act* 1916 (Qld). The general manager under the previous Act had referred a matter to the tribunal on the basis of an accepted diagnosis of asbestosis. Section 14C(6) of the earlier Act required the board, where the general manager had admitted that the matters alleged by the claimant constituted an injury, to determine whether any incapacity for work occasioned by the injury was total or partial, permanent or temporary and the nature and extent of any permanent partial disability as a result of the injury. In the case, the general manager had referred the matter to the tribunal on the basis of an accepted diagnosis of asbestosis, but the tribunal determined that the worker had "interstitial lung disease and emphysema" unconnected with exposure to asbestos and had not suffered any incapacity or permanent disability from the injury. The court held that once the insurer had accepted a certain injury, there was no public or private justification to permit a tribunal to reopen the correctness of that conclusion.[4]

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[3] [2007] QCA 381.

[4] See *Chapman v General Medical Assessment Tribunal – Thoracic & Xtracare* [2007] QCA 381 at [14].

[10] Mr Black submitted for the applicant that s 505 should be similarly construed to cover this case where the insurer had accepted liability for an injury of "Lumbar soft tissue injury/aggravation pre-existing condition". The tribunal diagnosed the injury as "aggravation of pre-existing degenerative changes involving the lumbosacral spine". He argued that, in thus classifying the injury, the tribunal gave no consideration to the "soft tissue injury" referred to it and failed to fulfil the statutory task entrusted to it by s 505(2) of the Act requiring it to decide whether the worker has sustained a DPI and, if so, the degree of it resulting from the injury and the DPI for the injury.

[11] The factual difference between this situation and that presenting in *Chapman's* case is significant. Its reasoning is not applicable to these facts.

[12] It seems to me to be a logical consequence of the treatment of the application by the tribunal that it had formed the view that any soft tissue injury suffered by the applicant was irrelevant to the degree of permanent impairment that he had suffered. This reflected the medical evidence from Drs Coroneos and Coyne and, one expects, the application by the members of the tribunal of their own professional expertise.[5] Even though the tribunal did not explicitly address the assessment of any degree of permanent disability arising from the lumbar soft tissue injury, its reasons disclose that that injury was referred to them.

[13] The only conclusion one can draw from the reasons is that, like the doctors who had provided reports, the tribunal members formed the view that the soft tissue injury was irrelevant to the assessment of permanent impairment. As Mr McLeod for the respondent submitted, the tribunal was plainly aware of the injury accepted by WorkCover and the referral to it to determine a DPI. The diagnosis reached by the tribunal does not depart from the injury that was accepted by WorkCover and is consistent with the conclusions expressed, for example, by Dr Coyne. I am not satisfied that the tribunal failed to consider the lumbar soft tissue injury. Rather, its reasons are only consistent with a conclusion that the tribunal's view was that no permanent disability arose from it.

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[5] See *Thompson v WorkCover Queensland* [2002] QSC 119 at [12] per Cullinane J and *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104, 110-11 at [16] per Jerrard JA.

Second ground: failure to comply with GEPI procedures

[14] In this context, Mr Black submitted that paras 1.51 and 1.52 of the GEPI were relevant. They read as follows:

> "1.51 The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of impairment that pre-existed the injury.
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> 1.52 In assessing the degree of permanent impairment resulting from the compensable injury, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as 'the deductible proportion' and should be deducted from the degree of permanent impairment determined by the assessor."

[15] Mr Black's argument was that first, the tribunal must consider whether, on the evidence and on the balance of probabilities, any current degree of impairment was "due to" the pre-existing condition in the sense of being causally related to it. The tribunal, if satisfied that a degree of impairment was due to the pre-existing condition, should then "calculate the degree of impairment that pre-existed the injury and then deduct the degree of impairment calculated for the pre-existing condition from the degree calculated for the injury under consideration".

[16] Here, the tribunal explicitly said that it apportioned the whole of the available permanent impairment (8%) to the previous injury. The tribunal's reasons go on to say "this leaves a value of zero (0) percent whole person permanent impairment to cover the injury diagnosed as an aggravation of pre-existing degenerative changes involving the lumbosacral spine which occurred in June 2014".

[17] Mr Black criticised the reasons as saying that no findings of causation between the previous injury and the current impairment were made. He submitted that the tribunal's calculation of the current degree of impairment was not explicitly one addressing the pre-existing degree of impairment due to the previous injury. The tribunal should have calculated the impairment for the injury referred to it as well as the impairment immediately before that injury using the same process of identifying the relevant

Diagnosis Related Estimate ("DRE") category, identifying, if appropriate, the relevant uplift for activities of daily living and then subtracting the earlier calculation from the current one.

[18] When the reasons are read, keeping in mind the apportionment of the whole of the available permanent impairment to the previous injury, it seems to me that the tribunal did follow the approach required by para 1.52 of indicating the degree of impairment due to any previous injury, pre-existing condition or abnormality. That it did not explicitly identify the relevant DRE category or the percentage uplift does not mean that it ignored the requirements of para 1.52 in particular to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. The conclusion I draw from the reasons is that the tribunal decided that the degree of impairment was 8% and that it was caused by or "due to" the previous injury.

[19] Accordingly, in my view, the tribunal did comply with the procedures required by paras 1.51 and 1.52 of the GEPI. The related question is whether its reasons should have discussed more clearly the relevance of the further symptoms of which he complained after the 2014 injury to its assessment of the final degree of impairment to show why it formed the view that the permanent impairment was all due to the previous injury.

Third ground: inadequate reasons

[20] The decision of the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak*[6] expresses the test for the adequacy of reasons in a case of this type.

> "The standard required of a written statement of reasons given by a Medical Panel under s 68(2) of the Act can therefore be stated as follows. The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. If a statement of reasons meeting that standard discloses an error of law in the way the Medical Panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the

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6 (2013) 252 CLR 480, 501; [2013] HCA 43 at [55].

> face of the record of the opinion. If a statement of reasons fails to meet that standard, that failure is itself an error of law on the face of the record of the opinion, on the basis of which an order in the nature of certiorari can be made removing the legal effect of the opinion."

[21] Mr Black also relied upon the approach of the Full Federal Court in *Comcare v Levett*[7] as follows:

> "Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties."

[22] McMurdo J's reasons in *Ergon Energy Corporation Limited v Rice-McDonald*[8] to the following effect were also said to be relevant:

> "A medical panel is not required to do more than provide sufficient reasons to enable it to be seen by the court and the parties that it has arrived at its decision in accordance with its statutory functions …
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> As I have already pointed out they are required to do no more than to provide a succinct statement of why they came to the conclusions which they did sufficient to enable the parties and the court to see that they have addressed their mind to relevant matters and have not acted unreasonably: see *Iveagh (Earl of) v Minister of Housing and Local Government* [1964] 1 QB 395 at 410.
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> … to show the court and the worker that the question referred to the panel has been properly considered according to law and that the opinion furnished is founded on an appropriate application of the members' medical knowledge and experience."

[23] My attention was also drawn by Mr McLeod to the need to consider the tribunal's reasons in the context of its functions and not to view them from the perspective of a judicial body

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7 (1995) 60 FCR 14, 23-24.

8 [2010] 1 Qd R 516, 520-521 at [15] reproducing passages from the Victorian Court of Appeal's reasons in *Masters v McCubbery* [1996] 1 VR 635, 650-651, 661.

or require that they be delivered "with a degree of exposition and precision suitable for a medical journal".[9]

[24] Mr Black submitted that the uplift applied by the tribunal to its assessment of the degree of basic impairment, derived from the GEPI of 5%, by a further 3% to reflect Mr Griffin's difficulty with home and self-care and the exigencies of daily living was apparently inconsistent with the tribunal's conclusion that Mr Griffin's DPI was wholly referable to the first injury. The evidence before the tribunal was that, after his first injury, he did not have problems, "a few niggles but nothing … significant".[10] He said that when he was doing his bus driving work his back was "okay" but that, after the second incident, he continued to suffer ongoing low back pain and would be struggling after driving about 30 minutes, having problems in reversing, turning and observing what was going across his vision as well as other physical problems associated with daily living.

[25] Mr Black also submitted that the reasons do not refer to the evidence on which the tribunal based its finding that the whole of the 8% impairment should be apportioned to the previous injury, nor did it set out any findings of fact that would support that conclusion or expose the reasoning process by which the conclusion was arrived at. In that context, he submitted that the question whether a legal error had been made by the tribunal was not clear.

[26] The logical conclusion from the tribunal's reasoning process, as Mr McLeod submitted, may be that the incident in 2014 was one that did not have permanent effects from the medical point of view, even if the applicant perceived greater problems after that incident than before. In other words, the tribunal's reasons may lead to the conclusion that his current permanent condition is one that he would have suffered from whether the 2014 incident occurred or not.

[27] The uplift of 3% to reflect difficulty with home and self-care, not apparently a problem after the first incident, is not obviously consistent with such an approach. Nor do the

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[9] See *Di Girolami v Garentone Pty Ltd* [2001] VSC 57 at [20] and *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 482, 484-485.

[10] See the affidavit of Nicole Stewart filed 8 September 2015, ex NS10, p 4.

reasons explain how the tribunal dealt with this apparent problem associated with the conclusion that all the permanent disability was caused by the first incident. Paragraphs 1.29, 1.31 and 1.56 of the GEPI set out some of the tribunal's obligations in providing a report: that it should be "accurate, comprehensive and fair", "provide a rationale consistent with the methodology and content of" the GEPI, include a "comparison of the key findings of the evaluation with the impairment criteria" in the GEPI and "state the matters taken into account, and the weight given to the matters, in deciding the degree of permanent impairment."

[28] I have concluded, therefore, that there has been an omission to deal with evidence apparently significant to the decision.[11] The statement of reasons has not explained the tribunal's actual path of reasoning in sufficient detail to enable me to see whether its opinion does or does not involve any error of law. That is not consistent with the approach required by the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak* discussed earlier.[12] It would have been better if the tribunal had articulated clearly whether the heightened symptoms experienced by the applicant after the second incident evidenced a greater degree of permanent impairment caused by it and, if not, why not.

Conclusion and orders

[29] Accordingly, the application is granted.

[30] I order:

1. that the second respondent's decision be set aside;

2. that the matter be referred to an Orthopaedic Assessment Tribunal differently constituted for further consideration according to law;

3. that the first respondent pay the applicant's costs of the application.

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[11] See *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162, 179 per French J.

[12] (2013) 252 CLR 480, 501; [2013] HCA 43 at [55].