

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 04076

EHAB ROSHDY BASSILY

Plaintiff

v

ACCURATE PROFILE ROLL FORMING  
PTY LTD & ORS (according to the attached  
schedule of parties)

Defendants

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JUDGE: FORBES J  
WHERE HELD: Melbourne  
DATE OF HEARING: 23 November 2021  
DATE OF JUDGMENT: 8 March 2022  
CASE MAY BE CITED AS: Bassily v Accurate Profile Roll Forming Pty Ltd & Ors  
MEDIUM NEUTRAL CITATION: [2022] VSC 112

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ADMINISTRATIVE LAW – Judicial Review – Medical Panel – Challenge to termination of entitlements - Panel opinion that the worker’s condition no longer work related – *Work Injury Rehabilitation and Compensation Act 2013* (Vic) – Whether Panel made jurisdictional error - Certiorari sought – Request for referral to differently constituted Medical Panel – Reasons silent as to nature of compensable injury – Reasons do not show adequate path of reasoning as to why condition no longer compensable – Certiorari granted – Referral to differently constituted panel.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr C. Hangay	Zaparas Lawyers
For the Defendant	Mr M. Fleming QC with Mr R. Kumar	Russell Kennedy
For the Second to Fourth Defendants	No appearances	DLA Piper Australia

HER HONOUR:

- 1 Mr Bassily (the **worker**) had been employed as a machine operator on process lines that manufacture automotive parts. He began this work in May 2010. He ceased work in June 2017. In September 2017, when his sick leave ran out, his doctor advised him to lodge a WorkCover claim. His claim, for injury to his back, neck and right shoulder, was accepted. There was no specific incident of injury.
- 2 The worker returned to work on 11 December 2017 on reduced hours doing lighter duties. By April 2018, those hours had gradually increased to full time. By notice dated 7 May 2018, the insurer, Gallagher Basset, terminated weekly payments and medical expenses on the basis that he was no longer incapacitated for work and/or his incapacity and the need for treatment was not materially contributed to by a compensable injury and therefore:
  - (a) from 25 May 2018, the worker was no longer entitled to weekly payments of compensation; and
  - (b) from 8 June 2018, the worker was no longer entitled to medical and like expenses.
- 3 The worker continued working until April 2019, when he suffered an episode of severe low back pain and attended a hospital emergency department. He then needed ten days off work. He subsequently resumed full time work. He was told his claim had been 'closed' and his employer was no longer accepting medical certificates. In March 2020, he ceased work again. He told the medical panel that at the time he ceased work in 2020 his pre-injury duties had not been available for some time and he had been undertaking other duties. The joint statement to the medical panel described the worker as continuing 'to work full time hours performing light processing duties'. It appears from the material available to the medical panel that from August 2017, work had changed for everyone and had

become lighter.<sup>1</sup>

4 Mr Bassily commenced proceedings in the Magistrates' Court on 31 January 2019, disputing the decision to terminate his entitlements. The Magistrates' Court referred eight questions to the medical panel (the **Panel**) pursuant to s 274(b) of the *Workplace Injury Rehabilitation and Compensation Act 2013 (WIRC Act)*. The Panel provided its Certificate of Opinion (the **Opinion**) and accompanying reasons (the **Reasons**) on 29 August 2020. The Panel's answers, which are set out below, concluded that the worker had lumbar and cervical spondylosis of constitutional origin, no intrinsic condition of the right shoulder and an adjustment disorder that arose as a consequence of his constitutional physical conditions. Subsequent questions as to employment being a significant contributing factor to the medical conditions, and material contribution of employment to injury were answered adversely to the worker. As a result, the final questions of incapacity for work and a need for medical services were therefore given an answer of 'not applicable'.

5 The worker seeks certiorari, quashing the Panel's Opinion, as well mandamus to remit the referred medical questions to a differently constituted panel. In summary, the worker relies on four grounds. Three are inter-related: that the Panel erroneously determined whether there had been any compensable condition when the existence of a compensable condition was not in issue; that it failed to have regard relevant considerations; and that it asked itself the wrong question as to causation. Fourthly, the worker submits that the Reasons of the Panel are inadequate.

6 The Panel was constituted by Dr David Kotzman, Mr Peter Dohrmann, Dr Jennifer Harmer and Dr Steven Adlard. They are the second to fifth defendants in this proceeding, and took no part in the proceeding in accordance with a *Hardiman* letter dated 5 November 2021.<sup>2</sup>

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<sup>1</sup> The history is recorded in Dr Nadira Grindy's report dated 31 August 2017; see also First Defendant, 'Outline of Submissions', Submission in *Bassily v Accurate Profile Roll Forming Pty Ltd*, S ECI 2020 04076, 30 July 2021, [28].

<sup>2</sup> In accordance with *R v The Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13.

7 For the reasons that follow, I will grant an order in the nature of certiorari, and quash the Opinion. I will also make an order in the nature of mandamus and refer the medical questions to a differently constituted panel.

### **The Panel's conclusions**

8 The Panel's Reasons begin with an overview setting out the joint statement details and confirming that the dispute was one concerning the termination of entitlements. It then set out under a heading 'Past History', the history of complaints of pain and investigations into those complaints between 2011 and 2016. Under the heading 'Sequence of Events' it detailed the attendance on the general practitioner in July 2017, the cessation of work and the investigations that followed this. It observed the resumption of work in December 2017 and again in April 2019. It then detailed 'Current Physical Symptoms'. There followed a section dealing with 'Psychiatric History and Symptoms' before a 'Physical Examination', and a section detailing 'Medical Imaging'. Finally, the Panel set out its conclusions under a heading titled 'Physical Diagnosis' concluding:

Mr Bassily is suffering from cervical spondylosis, of constitutional origin, with referred symptoms to the right side of the neck and the right shoulder girdle, but without radiculopathy, and lumbar spondylosis, also of constitutional origin, with referred symptoms to the left buttock and left groin, but without a radiculopathy.<sup>3</sup>

9 Thereafter, the Panel conducted a 'Mental State Examination' before setting out its Psychiatric Diagnosis and Material Contribution. It concluded that:

Mr Bassily is suffering from a chronic adjustment disorder with depressed mood, which has arisen secondary to his physical symptoms developing...

The Panel concluded that as Mr Bassily's physical conditions are constitutional in origin, that his adjustment disorder with depressed mood has not arisen in the course of employment and as such it was not materially contributed to by any injury to the back, neck or right shoulder.

The Panel therefore concluded that the adjustment disorder with depressed mood, which arose as a consequence of his constitutional physical conditions, does not result from and is not materially contributed to by any alleged injury

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<sup>3</sup> Medical Panel, *Certificate of Opinion* (Medical Panel Ref No. M120/1278, 29 August 2020), 9 ('Panel Reasons').

to the back, neck, or right shoulder.<sup>4</sup>

- 10 Finally, the Panel dealt again with the physical injuries under a heading ‘Significant Contributing Factor and Material Contribution,’. The questions were worded so that in this section the Panel considered the period from 8 June 2018. In full that section reads:

**Significant Contributing Factor and Material Contribution**

The Panel noted that Mr Bassily returned to work on 11 December 2017 and gradually increased his hours of work during 2018, reaching full-time hours. He said that “*they wanted me to leave*” and he was given difficult work to do, but did not return to his pre-injury duties, as those duties were no longer available. The Panel noted that he continued working in this capacity until suffering a further injury to the low back on 20 April 2019 resulting in further time off work, after which he again returned to work full-time. The Panel also noted findings on physical examination and on medical imaging, which demonstrated the presence of widespread pre-existing multi-level degenerative changes in the cervical and lumbar spine.

- 11 The Panel then set out its conclusion:

Based on this information, the Panel concluded that in the period 8 June 2018 to date, Mr Bassily’s employment was not, and is not, a significant contributing factor to any medical condition of the back, neck or right shoulder or to any alleged recurrence, aggravation, acceleration, exacerbation, or deterioration of any pre-existing injury or disease of the right shoulder, back or neck, in any way. For the same reasons the Panel also concluded that any medical condition of Mr Bassily’s back, neck or right shoulder, does not continue to result from, or be materially contributed to by any injury to the back, neck, or right shoulder, suffered in employment with the Defendant.<sup>5</sup>

- 12 The Panel went on to explain its finding regarding work capacity, noting that as the worker’s neck and back conditions are of constitutional origin, as there is no intrinsic condition of the right shoulder and as the psychiatric condition does not affect work capacity, Mr Bassily has no incapacity for pre-injury employment. Similarly, because it found the neck and back conditions to be of constitutional origin, the Panel expresses no opinion as to treatment.

**The Panel’s Opinion**

- 13 Consistent with these conclusions set out in its Reasons, the Panel provided its

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<sup>4</sup> Ibid 10.

<sup>5</sup> Panel Reasons (n 3), 11.

answers to the following questions:

**Question 1** What is the nature of the Plaintiff's medical condition relevant to the injuries alleged in paragraph 5 of the Statement of Claim and, in particular:

- (a) back;
- (b) neck;
- (c) right shoulder; and
- (d) consequential psychological condition?

**Answer:** In the Panel's opinion, Mr Bassily, is suffering from cervical spondylosis, of constitutional origin, with referred symptoms to the right side of the neck and the right shoulder girdle, but without radiculopathy, and lumbar spondylosis, also of constitutional origin, with referred symptoms to the left buttock and the left groin, but without radiculopathy, and from an adjustment disorder with depressed mood, which arose as a consequence of his constitutional physical conditions, and is not attributable to any alleged injury.

The Panel is also of the opinion that Mr Bassily is not suffering from any intrinsic medical condition of the right shoulder.

**Question 2** Does any medical condition identified by the Medical Panel in answer to question 1(d) result from, or is it materially contributed to, by any and if so which, of the Plaintiff's claimed injuries to the:

- (a) back;
- (b) neck; and
- (c) right shoulder.

**Answer:** The Panel is of the opinion that the adjustment disorder with depressed mood, which arose as a consequence of his constitutional physical conditions, does not result from and is not materially contributed to by any alleged injury to the back, neck or right shoulder.

**Question 3** In the period 8 June 2018 to date, was/is employment a significant contributing factor to any, and if so what, medical condition of the Plaintiff's:

- (a) back;
- (b) neck;
- (c) right shoulder,

**as identified by the Medical Panel?**

**Answer:** In the Panel's opinion, in the period of 8 June 2018 to date, Mr Bassily's employment was not, and is not, a significant contributing factor to any medical condition of the back, neck, or right shoulder or to any alleged

recurrence, aggravation, acceleration, exacerbation, or deterioration of any pre-existing injury or disease of the right shoulder, back, or neck in any way.

**Question 4** In the period 8 June 2018 to date, did/does any medical condition of the Plaintiff's:

- (a) back;
- (b) neck;
- (c) right shoulder,

**as identified by the Medical Panel continue to result from or be materially contributed to by injury suffered in employment with the Defendant?**

**Answer:** The Panel's [sic] is of the opinion that, in the period 8 June 2018 to date, any medical condition of Mr Bassily's back, neck, or right shoulder, does not continue to result from, or be materially contributed to by any injury to the back, neck, or right shoulder, suffered in employment with the Defendant.

**Question 5** In the period 25 May 2018 to the date of the Medical Panel examination, and as at the date of the Medical Panel examination, was/is the Plaintiff incapacitated to pre-injury work as a Machine Operator?

**Answer:** In the Panel's opinion, Mr Bassily has no present inability arising from an injury, such that he is not able to return to work in his pre-injury employment as a Machine Operator.

**Question 6** If 'yes' to Question 4, did/does such incapacity result from or is it materially contributed to by any, and if so which, of the injuries identified in your answer to Question 1?

**Answer:** Not applicable.

**Question 7** From 8 June 2018 was/is it (and if so with what frequency) adequate and appropriate for the Plaintiff to:

- (a) attend a general practitioner;
- (b) attend a physiotherapist;
- (c) attend a psychiatrist;
- (d) attend an orthopaedic surgeon -

**for any and, if do which, of the injuries identified in your answer to Question 1?**

**Answer:** Not applicable.

### **Jurisdictional error - 3 grounds of review**

- 14 The worker raises three distinct grounds upon which he says the Panel is in error. They overlap and all are substantially addressing the concept that the Panel

overlooked the period of employment between 2010 and Jun 2017 (the **earlier period of employment**) and the acceptance of a compensable injury to the back and neck arising during that period.<sup>6</sup> I will separately set out the parties' submissions on each ground, but given the overlapping nature of the grounds, will consider all three together.

### **Ground 1 - the wrong question**

15 The worker submitted that the dispute before the Panel was whether his entitlement to compensation continued beyond 25 May 2018 (for weekly payments) and 8 June 2018 (for medical and like expenses). The disputed entitlement arose in the context of an accepted injury of the kind described in subparagraph (c) of the definition of injury; that is 'a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease' (the **extended definition of injury**). For the Panel in Question 1 to simply determine a physical condition of the neck and back 'of constitutional origin' that is not attributable to any injury, meant it had wrongly asked itself whether any compensable injury had occurred, rather than correctly asking whether a compensable injury persisted. The answer to Question 1 was said to necessarily exclude the 'possibility of a previously existing work related condition in the worker's back, neck or shoulder'.<sup>7</sup> The Reasons failed to address the competing contentions of a temporary exacerbation or series of temporary exacerbations as posed by the employer or the onset of symptoms which continued and which remained related to the earlier period of employment which had been heavy. Instead, wrongly, the Panel's answers identified no compensable condition and the Reasons do not make any reference to the nature of compensable injury arising from work duties in the earlier period of employment.

16 Moving on to Questions 2 and 4, the worker submitted that the Panel was required to consider whether or not the accepted work related condition continued to make a

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<sup>6</sup> In the its defence and its submissions to the Panel, the defendant contested that any shoulder injury had been accepted but the Panel's Opinion in relation to there being no intrinsic shoulder condition is not challenged and can be put to one side.

<sup>7</sup> Plaintiff, 'Outline of Submissions of the Plaintiff', Submissions in *Bassily v Accurate Profile Roll Forming Pty Ltd*, S ECI 2020 04076, 14 June 2021, [22].



material contribution beyond 25 May 2018 to incapacity or the need for treatment. Instead, in answer to the questions the Panel effectively determined that a 'work related condition had never existed'.<sup>8</sup>

17 The defendant submitted that the questions were directed only to the period after May 2018 and the Panel answered those questions that it was asked. Notwithstanding agreement between the parties as to an accepted claim the Panel is not bound by agreement but is required to form its own opinion. In any event, the Panel explicitly stated that it understood the questions related to the termination of an accepted claim. It could and did answer the referred questions without forming an opinion one way or the other about the nature of the compensable injury prior to the termination of entitlements.

18 The Reasons take as their first step, the identification of the underlying or pre-existing condition and next consider whether presently (and relevantly, since 25 May 2018) that condition is relevant to a work injury, concluding that it is not. The defendant submitted that in answering Question 1 it is not necessary that a Panel identify a past compensable injury that existed prior to May 2018. While medical panels may and frequently do express an intermediate step to identify the nature of a past but resolved condition, it is not compelled to do so by the questions asked here. This issue was said by the defendant to be more accurately described as an attack on the adequacy of the Reasons.

## **Ground 2 - Relevant considerations**

19 The worker submitted that the Panel has ignored relevant material in a way that has affected its exercise of power. He argued that the material that demonstrated injury to the back and neck in the earlier period of employment was a relevant matter which the Panel has ignored. It was said that the way that the Reasons are structured, recording the earlier employment period and the complaints made up to 2017 as matters under Past History, demonstrate that the Panel did not have regard

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<sup>8</sup> Plaintiff, 'Outline of Submissions of the Plaintiff', Submissions in *Bassily v Accurate Profile Roll Forming Pty Ltd*, S ECI 2020 04076, 14 June 2021, [25].

to that period but rather focused on employment between 2018 and 2020 in answering all the questions. Further, it was contended that a list of ten identified matters including statements of work duties, clinical notes and various medical reports, (none of which are mentioned in the Reasons) demonstrate that the Panel did not have regard to the earlier period of employment which gave rise to a compensable injury.

20 The worker contended that the section of the Reasons headed ‘Significant Contributing Factor’ and ‘Material Contribution’ (which are set out above at [10] and [11]) demonstrates an exhaustive statement of what is considered by the Panel in reaching its conclusions as to continuing compensable injury. This was limited to consideration only of the employment period after December 2017.

21 The defendant submitted that the Panel was clearly aware of the earlier period of employment and the complaints of pain during that time. The worker’s complaint focuses on the particular section of the Reasons dealing with causation and the absence in this section of reference to the earlier period of employment. Such complaint disregards the need to look at the Reasons as a whole. Read fairly, the defendant says the earlier period of employment and the complaints from that period informed the Panel’s conclusion that the worker’s conditions ‘were wholly constitutional’.<sup>9</sup>

22 Finally, the defendant contends that the Panel was not required to address each listed piece of evidence before it. The relevant consideration was the existence of a persisting compensable injury. The listed material does not identify an overlooked and relevant consideration but is evidence that was before the Panel and which addressed that matter.<sup>10</sup>

### **Ground 3 – error in applying the statutory test of causation**

23 The worker submitted that the presence of a constitutional degenerative condition

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<sup>9</sup> First Defendant, ‘Outline of Submissions’, Submission in *Bassily v Accurate Profile Roll Forming Pty Ltd*, S ECI 2020 04076, 30 July 2021, [23].

<sup>10</sup> A distinction drawn in *Chang v Neill* [2019] VSCA 151 (*Chang v Neill*).

begs the real question that the Panel had to determine: whether the impact of the earlier period of employment continued to have an effect on that condition. Again, the worker focussed on the conclusions as to significant contributing factor and material contribution set out above at [10] and [11]. He submitted that the Panel did not consider whether or not the earlier period of employment continued to be a cause of the worker's ongoing symptoms and to explain its reasoning for that conclusion.

24 There were three relevant considerations as to causation. The first was simply that identifying the present condition involved a consideration of causation. The second, because the parties were agreed that the compensable injury was one encompassed by the extended definition of injury, was whether employment continued to affect that constitutional condition, altering it in one of the ways contemplated by that definition. To that end, the Panel failed to grapple with the seven statutory factors that the WIRC Act mandated for consideration when addressing the question of significant contributing factor: duration of employment, nature of work and the particular tasks, hereditary risks, lifestyle activities outside the workplace and the probable development if the employment had not taken place.<sup>11</sup>

25 The third, because the grounds of termination put it in issue, was whether any persisting injury made a material contribution to incapacity or the need for treatment. Questions 2, 3 and 4 were addressed to these matters.

26 The first way that causation was raised was by Question 1. The worker submitted this is because the Panel is not opining about conditions in a vacuum or at large,<sup>12</sup> but relevantly to an injury. In reliance on *Ventrice v Riva Plaster Pty Ltd*<sup>13</sup> and recent decisions that have applied it (such as *Kakae v Wetspot Consolidated Pty Ltd*<sup>14</sup> and *Emmelmann v Thompson Geer Services Pty Ltd*<sup>15</sup>), the plaintiff submitted that a bare

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<sup>11</sup> As they are set out in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), sch 1 cl 25.

<sup>12</sup> *Kakae v Wetspot Consolidated Pty Ltd* [2016] VSC 271, [53] ('*Kakae*').

<sup>13</sup> [2008] VSC 415 ('*Ventrice*').

<sup>14</sup> *Kakae* (n 12).

<sup>15</sup> [2020] VSC 801.

assertion of a condition of ‘constitutional origin’ in the neck and back did not properly respond to a question that asks about a condition relevant to an injury, or in other words about cause and effect. Therefore, the worker submitted, the Panel has failed to properly exercise its jurisdiction.

27 The defendant submitted that the Reasons are explicit that the Panel understood the acceptance of compensable injury and that the dispute related to whether incapacity and the accepted injury continued to make a material contribution after 25 May 2018. The questions are predicated on the earlier period of employment being the relevant employment and the Panel’s answers can be readily understood as answering the questions of causation as it relates to the situation after termination of entitlements.

28 The defendant further submits the Reasons demonstrate that the Panel did consider those aspects of the criteria relevant to applying ‘significant contributing factor’ as were relevant here, particularly what may have occurred in the absence of employment, and the onset and progress of symptoms including work and other activities. It would be wrong to confine consideration of the Panel’s approach to the particular paragraphs under the causation heading, and read as a whole, the Panel did consider both causation questions and answer each one separately. There was nothing, it was said, that suggested the Panel misunderstood that it was being asked two different questions on causation. Both tests apply the same factual reference.

### **Principles and Analysis**

29 The applicable principles may be briefly and uncontroversially set out. When a medical panel applies itself to or asks itself the wrong question, or where it misunderstands the task at hand, it exceeds its jurisdiction.<sup>16</sup> A medical panel is bound to consider relevant matters and not to consider irrelevant matters.<sup>17</sup> A failure to do so may amount to a jurisdictional error where that failure is material to the decision of a medical panel.<sup>18</sup> Where the information provided by a worker or the

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<sup>16</sup> *Craig v State of South Australia* (1995) 184 CLR 163, 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

<sup>17</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299.

<sup>18</sup> *Ryan v Grange at Wodonga Pty Ltd* [2015] VSCA 17, [58].

material provided by the parties to a medical panel raise an issue which is not addressed in the reasons, then a relevant consideration has not been taken into account.<sup>19</sup> Identifying relevant considerations is approached by regard to the issues raised and the parameters of the dispute before a panel, rather than the evidence that addresses those issues.<sup>20</sup> Finally, a medical panel asked to opine on the nature of a medical condition relevant to an injury or alleged injury may require a medical panel to grapple with matters of causation.<sup>21</sup>

30 I accept that question 1 is capable of raising cause and effect and so has to identify the present medical condition and if it has relevance to an injury accepted as compensable in the past. Although the Panel used the phrase 'alleged injury', thereby in the worker's submission demonstrating it impermissibly looked at whether there had ever been compensable injury, in my view the Panel did no more than reflect the wording of the question that the parties had referred. In the context of the Panel explicitly noting the accepted injury and the grounds of termination, I do not accept that the reference to 'alleged injury' is of any significance.

31 The first question asks only about the present situation and says nothing one way or the other about the nature of a compensable injury in the past. The answer does not preclude the existence of a past compensable injury. I accept the defendant's submission that the Panel has answered precisely the question asked of them, albeit in narrower terms than might often be seen in the context of referrals over the termination of entitlements. Further, question 4 and its answer that any medical condition '...does not continue to result from or be materially contributed to by any injury' does countenance a previous compensable injury. The adequacy of reasons however, explaining why the present condition is no longer relevant to the compensable injury, is a different matter as discussed below.

32 Nor do I accept that the manner in which the Panel structured its Reasons reveals

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<sup>19</sup> Ibid.

<sup>20</sup> *Chang v Neill* (n 10).

<sup>21</sup> *Smith v Mann* (1932) 47 CLR 426; also *Kakae* (n 12).

that it effectively and erroneously disregarded the earlier period of employment. The Panel explicitly noted pre-injury employment as described in a detailed Statement of Work Duties and Addendum that commenced in 2010 and continued until 25 June 2017. It observed the claim was one for an injury occurring throughout the course of employment without specific incident and that it was accepted. It noted a history of complaints of spinal pain from 2011, repeated in 2013 and 2014 which was investigated. The Panel referred to Mr Bassily's difficulty recalling past events and his agreement that the clinical notes were probably right. The Panel then dealt with the events that occurred once the claim was lodged and accepted; documenting subsequent investigations, the certification and resumption of work on light duties until ceasing work in March 2020. The Panel have clearly had regard to the content of the clinical notes and thereby to the complaints of pain and other symptoms recorded there.

33 Having referred earlier in its Reasons to radiology including in 2013, 2014, 2017, the Panel made reference under a separate sub-heading to the most recent radiology. It described a lumbar spine CT scan taken 23 April 2019, in the context of an episode of severe pain in the low back at that time when the worker bent to pick up a shoe from the floor (an episode not said to have occurred at work and which resulted in a 10 day absence and subsequent resumption of work). A cervical CT scan was dated 21 November 2019.

34 Again under the section 'Psychiatric History/Symptoms', the Panel recorded a gradual onset of pain and tiredness at work over time from 2010. It noted that he went on and off work and was later placed on lighter duties until stopping work in March 2020.

35 Read fairly and as a whole it could not be said that the Panel failed to have regard to the earlier period of employment that gave rise to the accepted claim, or to ask itself wrongly whether that earlier period of employment did or did not give rise to an injury so as to have made an error in the exercise of its jurisdiction.

36 As to whether question 1 is answered in a vacuum because it did not address causation, the plaintiff relied on *Ventrice* and *Kakae*. Those cases stand for the proposition that a Panel does not fall into error if it does address causation in answering a question broadly in the form of Question 1. If causation is in issue, either because a decision to terminate or a reject a claim puts it in issue, a Panel will not be in error by introducing matters of cause and effect into its answer. The reverse is not true. As her Honour Justice Incerti (then Zammit) said:

The Panel's response to the first medical question addressed the issue of whether there was any medical condition relevant to the injury of 16 August 2013. It did so by identifying the nature of the plaintiff's medical condition which in its opinion was not attributable to any claimed injury. The Panel could have quite simply said that there was no medical condition that was relevant to the claimed injuries. However, for the reasons set out below, I do not consider the Panel's more fulsome response to the first medical question to have constituted an error of law.

37 A failure to give that more fulsome response or to address causation does not of itself bespeak error. As the analysis in those cases makes clear, consideration has to be given to the issues raised by all questions and not to look at any one question in isolation. Questions of causation or contribution are raised in subsequent questions. The short answer to this aspect of the worker's submission is that the less fulsome answer to question 1 is not itself indicative of error in light of subsequent answers, particularly question 4.

38 Whether the Panel has asked itself the right question is less clear cut in respect to the answers regarding the contribution of the compensable injury to the ongoing condition; whether that be the questions dealing with significant contributing factor or those dealing with material contribution. In part this arises because of the way in which those questions are worded. They are somewhat ambiguous. They might be read as inquiring about the contribution made by employment in the period after 25 May 2018 or 8 June 2018, bearing in mind that the plaintiff had returned to full time lighter duties by that time and continued to undertake that work until March 2020. But there must be an inquiry about the continuing contribution of the earlier period of employment. I accept that a medical panel would understand the

employment as it is used particularly in questions 3 and 4 as being a reference to the earlier period of employment and not be misled by any ambiguity. There was no claim or allegation that work after June 2017 led to any injury.

39 However, as can be seen from the matters referred to under the subheading dealing with the contribution of employment, the Panel's focus was solely on the factual matrix arising after December 2017. Even allowing that the conclusions are expressed 'Based on this information...', should not be read as based solely on this information but in the wider context, it is unclear as to how the Panel reached its conclusion as to the absence of a relevant contribution from the earlier period of employment. This is principally because the Reasons are silent as to the impact of the earlier period of employment both in this section specifically and more broadly in its reasoning process. Fundamental to the conclusions that the compensable injury is no longer incapacitating or requiring treatment is an understanding of what conclusion the Panel reached as to the nature of that compensable injury. The Reasons provide no indication of that in my opinion. They do not permit the reader or a Court to understand the process of arriving at those conclusions.

#### **Adequacy of Reasons**

40 Pursuant to section 313(2) of the WIRC Act, a medical panel has an obligation to provide reasons. The reasons of a medical panel must be sufficient to explain its path of reasoning. They must be sufficiently detailed to enable a reviewing Court to see whether or not there has been an error of law. They are not of a standard required of judicial reasons. As a body that is neither adjudicative nor arbitral, the reasons will involve the application of its own collective medical experience and expertise.<sup>22</sup>

41 As can be seen, I have concluded that the Reasons do not permit the Court to ascertain whether or not the Panel has asked itself the wrong question or failed to have regard to a relevant consideration, at least in respect of its consideration of the

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<sup>22</sup> *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 840; see also the principles summarised in *Gamble v Emerald Hill Electrical Pty Ltd* (2012) 38 VR 45, *Gruma Oceania Pty Ltd v Bakar* [2014] VSCA 252, and *Dundar v Bas* [2019] VSCA 315.



contribution of the earlier period of employment to the worker's condition or incapacity or need for treatment.

42 During the course of oral submissions, I raised with the defendant that the Panel identifies the first step in its conclusion by identifying the underlying condition. It takes the last step – that only the underlying condition is presently contributing to symptoms. It fails to take a middle step and identify the way in which the condition is relevant to an injury. The defendant described a fulsome answer that mentions the nature of a past resolved injury as something that might assist the parties, but by the terms of question 1 it is not bound to do so. As set out above I accept that in answering the questions that provide the binding Opinion, a medical panel is not bound to do more than answer those questions that are asked.

43 However when it comes to following a path of reasoning, the explanation as to why compensable injury is no longer relevant to a current condition would generally require some consideration of the nature of the compensable injury in order to explain why a medical panel has reached either a conclusion of continuing effect or one of no continuing effect. Particularly where the binding answers do not expressly make such a link, one looks to the reasons for that explanation. The defendant submitted that the Reasons were not completely silent on the fact of a work injury. Clearly, that is correct insofar as it recognised an accepted claim.

44 The Reasons are nevertheless inadequate in my view.

45 First, what the Reasons fail to do is in any way describe the impact of the earlier period of employment on a degenerative condition of constitutional origin. Reference is made in the Reasons to the imaging demonstrating 'widespread pre-existing multi-level degenerative changes in the cervical and lumbar spine', no doubt informing the origin of the condition, but nowhere in the Reasons is there any link made with the impact on that condition caused by the earlier period of employment. There is therefore considerable doubt and speculation as to what the Panel concluded about an impact.

46 Second, that doubt grows in the context of its findings about a consequential psychiatric injury. In that regard, the Panel concluded that:

...Mr Bassily is suffering from a chronic adjustment disorder with depressed mood, which has arisen secondary to physical symptoms developing, and in the context of a breakdown of his marriage. The Panel considered this condition to be at the milder end of the spectrum and of insufficient severity in and of itself to preclude Mr Bassily working, and noted that he was working despite having symptoms of that condition, until March 2020.

The Panel concluded that as Mr Bassily's physical conditions are constitutional in origin, that his adjustment disorder with depressed mood has not arisen in the course of his employment and as such it was not materially contributed to by any injury to the back, neck or right shoulder.

The Panel therefore concluded that the adjustment disorder with depressed mood, which arose as a consequence of his constitutional physical conditions, does not result from and is not materially contributed to by any alleged injury to the back, neck or right shoulder.

On causation the Panel has linked the onset of the psychological condition in part at least to the development of his physical symptoms. The conclusion is inconsistent with a compensable injury in the extended sense having occurred with the onset of symptoms. If in some way the psychological condition was consequential to physical symptoms including pain, and those physical symptoms commenced to be incapacitating in 2017 after some years of employment, but were physical symptoms unrelated to the incapacitating compensable injury, then some explanation was necessary to understand the distinction.

47 Third, although the joint statement of the parties referred to the worker resuming lighter duties from December 2017, the Panel's Reasons made little or no differentiation between the tasks undertaken in the earlier period of employment and work undertaken after acceptance of the claim. It observed only that:

He said he returned to work on 11 December 2017 and gradually increased his hours of work during 2018, reaching fulltime hours. He said that "they wanted me to leave" and he was "given difficult work to do".

He said that on 20 April 2019, he suffered from an episode of severe pain in the low back when he bent down to pick up a shoe from the floor....He said he was certified off work for ten days, but subsequently returned to full time work.

...

He said that at the time he ceased work, his pre injury duties were no longer available, and he had been undertaking other duties.

- 48 There is in my view, force in the submission that the Reasons do not make clear whether the Panel, in addressing material contribution and therefore incapacity for employment, were in fact doing so by reference to the correct period of employment. Even attempting to give the Reasons a beneficial interpretation, a reader has difficulty in following a path or reasoning that does not take account of or explain the impact of the accepted injury.
- 49 I will grant the relief sought and quash the Opinion. Although the applicant has succeeded on the adequacy of Reasons ground, the quality of the Reasons has not permitted me to ascertain whether a jurisdictional error was also made. In those circumstances, it is appropriate in my view that the matter be considered by a differently constituted Panel.
- 50 I will hear from the parties on the appropriate orders.

**SCHEDULE OF PARTIES**

S ECI 2020 04076

**EHAB ROSHDY BASSILY**

Plaintiff

v

**ACCURATE PROFILE ROLL FORMING PTY LTD**

First Defendant

and

**DR DAVID KOTZMAN**

Second Defendant

and

**MR PETER DOHRMANN**

Third Defendant

and

**DR JENNIFER HARMER**

Fourth Defendant

and

**DR STEVEN ADLARD**

Fifth Defendant