

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

Not Restricted

S ECI 2020 04187

YOUSSEF EL-NAJJAR Plaintiff

v

SWIDRYK INVESTMENTS PTY LTD First Defendant

and

BRIGHTON AUSTRALIA PTY LTD Second Defendant

and

DR CHRIS GRANT Third to Seventh Defendants  
DR PETER MILLINGTON  
ASSOCIATE PROFESSOR DAVID ERNEST  
ASSOCIATE PROFESSOR BRUCE LOVE and  
MR PETER GARD

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<u>JUDGE:</u>	Richards J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	18 November 2021
<u>DATE OF JUDGMENT:</u>	9 December 2021
<u>CASE MAY BE CITED AS:</u>	El-Najjar v Swidryk Investments Pty Ltd
<u>MEDIUM NEUTRAL CITATION:</u>	[2021] VSC 814

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ADMINISTRATIVE LAW – Judicial review – Opinion of a Medical Panel – Panel’s opinion that plaintiff suffering from constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy and constitutional lumbar spondylosis – Panel’s opinion that employment was a significant contributing factor to temporary exacerbation of symptoms that ‘would have resolved over time’ after plaintiff ceased employment – Whether Panel failed to have regard to relevant matters – Whether Panel’s reasons adequate – Error established – Whether questions should be reconsidered by differently constituted Medical Panel – *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), s 313.

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr CE Hangay

Zaparas Lawyers

For the First and Second  
Defendants

Mr MF Fleming QC with  
Mr D Churilov

IDP Lawyers for the First  
Defendant  
Wisewould Mahony for the  
Second Defendant

For the Third to Seventh  
Defendants

No appearance

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HER HONOUR:

- 1 Youssef El-Najjar worked as a plasterer and carpenter for **Swidryk** Investments Pty Ltd for two years between April 2009 and April 2011, for a short period in March 2012, and for a further period between September 2012 and February 2013. He also did plastering and carpentry work for **Brighton** Australia Pty Ltd between May and September 2012.
- 2 During his time with Brighton, Mr El-Najjar worked at heights on tasks that involved extending his neck. In June 2012, he developed pain in his neck, radiating into both arms, along with some tingling in his fingers. Initially his symptoms settled with rest and physiotherapy. Brighton changed his duties and allocated him to work at floor level, but he again experienced symptoms in his fingers and also had difficulty walking. He stopped working for Brighton in September 2012.
- 3 Mr El-Najjar was re-engaged by Swidryk in late September 2012, and his role involved lighter plastering duties. However, his symptoms deteriorated, with ongoing neck pain radiating into his arms, lower back pain radiating into his legs, and weakness in both his arms and legs. He had difficulty doing the work and ceased his employment with Swidryk in February 2013. He was 53 years old when he stopped work, and has not worked since.
- 4 Mr El-Najjar then travelled to Lebanon, where he spent some months following the recent deaths of both of his parents. While overseas, his symptoms became worse. Soon after his return to Australia in June 2013, he was admitted to hospital for treatment of a multilevel disc bulge in his cervical spine and spinal cord compression. He underwent cervical spine surgery, followed by a rehabilitation program.
- 5 In July 2018, Mr El-Najjar made the following claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**WIRC Act**):
  - (a) a claim for weekly payments of compensation and medical and like expenses for neck and back injuries sustained in the course of his employment with Swidryk;

- (b) a claim for impairment benefits for neck and back conditions sustained in the course of his employment with Swidryk;
- (c) a claim for weekly payments of compensation and medical and like expenses for neck and back injuries sustained in the course of his employment with Brighton; and
- (d) a claim for impairment benefits for neck and back conditions sustained in the course of his employment with Brighton.

6 All of these claims were rejected by the employers' respective claims agents.

7 On 30 November 2018, Mr El-Najjar commenced a proceeding in the County Court of Victoria against Swidryk and Brighton. He seeks orders for weekly payments of compensation and payment of medical and like expenses in respect of neck and back injuries suffered in the course of his employment with both employers, and a declaration that he is entitled to benefits under s 98C of the WIRC Act. Swidryk and Brighton both deny that Mr El-Najjar is entitled to the relief claimed, including because they say that his employment with them did not materially contribute to his neck and back injuries.

8 On 21 May 2020, Judge Wischusen referred medical questions to a Medical Panel for an opinion, pursuant to s 274 of the WIRC Act. A Medical **Panel** was convened to consider the referral, comprising Dr Chris Grant, psychiatrist, Dr Peter Millington, psychiatrist, Associate Professor David Ernest, general physician, Associate Professor Bruce Love, orthopaedic surgeon, and Mr Peter Gard, orthopaedic surgeon.

9 The Panel provided its opinion and a written statement of reasons on 7 September 2020. The Panel considered that Mr El-Najjar had constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy and constitutional lumbar spondylosis, as well as mild adjustment disorder with depressed and anxious mood. The Panel was of the opinion that Mr El-Najjar's employment with Brighton and Swidryk between May 2012 and February 2013 had temporarily exacerbated his neck

symptoms, and that his employment with Swidryk from September 2012 to February 2013 had temporarily exacerbated his lower back symptoms. However, the Panel did not consider that these injuries still contributed to Mr El-Najjar's neck and lower back conditions, or had precluded him from undertaking his pre-injury employment or suitable employment at any time from February 2013.

10 The Panel's opinion is to be adopted and applied by the County Court in the workers' compensation proceeding brought by Mr El-Najjar.<sup>1</sup>

11 In this proceeding, Mr El-Najjar seeks judicial review of the Panel's opinion, on the basis that the Panel fell into jurisdictional error and that its reasons were inadequate. He seeks an order in the nature of certiorari quashing the Panel's opinion, and an order in the nature of mandamus remitting the medical questions to a differently constituted Medical Panel.

12 The defendants to the proceeding are Swidryk and Brighton (together, the **Employers**) and the members of the Panel. The Panel members advised that they would abide the decision of the Court, and took no active role in the proceeding.<sup>2</sup>

13 Mr El-Najjar's main complaint about the Panel's opinion was that the Panel did not properly consider the nature of his pre-injury employment, the tasks that he performed during his employment, and the temporal nexus between those tasks and the onset of his symptoms. He also contended that the Panel had not adequately explained its conclusion that the exacerbation of his neck and lower back symptoms was temporary or had resolved, and that his spinal conditions were no longer related to his employment with Swidryk and Brighton.

14 For the reasons that follow, I have concluded that the Panel failed to consider matters that were essential to its function of forming an opinion about whether Mr El-Najjar's employment significantly contributed to his injuries. In addition, its reasons did not disclose its path of reasoning to its conclusions about causation, or why it considered

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<sup>1</sup> *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), s 313(4) (**WIRC Act**).

<sup>2</sup> *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, 35. The Panel sought only to be heard in the event that costs orders were proposed against them.

that the work-related exacerbation of Mr El-Najjar's symptoms was temporary or had resolved. The Panel's opinion will be quashed by an order in the nature of certiorari, and the medical questions will be remitted for the consideration of a differently constituted Medical Panel.

### **The Panel's opinion and reasons**

15 Seven medical questions were referred to the Panel for its opinion. Those questions, and the Panel's opinion in relation to each question, were set out in the Panel's certificate of opinion dated 7 September 2020:

**Question 1. What is the nature of the Plaintiff's medical condition of the -**

- (a) cervical spine;**
- (b) lumbar spine;**
- (c) mind?**

Answer:

- (a) The Panel is of the opinion that the Plaintiff is suffering from constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy.
- (b) The Panel is also of the opinion that the Plaintiff is suffering from constitutional lumbar spondylosis.
- (c) The Panel is also of the opinion that the Plaintiff is suffering from a mild adjustment disorder with depressed and anxious mood.

**Question 2. Was the Plaintiff's employment:**

- (i) with the first Defendant between April 2009 and April 2011;**
- (ii) with the first Defendant in March 2012;**
- (iii) with the second Defendant between 4 May 2012 and 10 September 2012;**
- (iv) with the first Defendant from late September 2012 until February 2013 -**

**a significant contributing factor to -**

- (a) a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease of the Plaintiff's cervical spine?**
- (b) a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease of the**

**Plaintiff's lumbar spine**

**as identified by the Medical Panel in answer to question 1(a) and 1(b)?**

- Answer:
- (i) (a), (b) No.
  - (ii) (a), (b) No.
  - (iii) (a) The Panel is of the opinion that the Plaintiff's employment with the second Defendant between 4 May 2012 and 10 September 2012 was a significant contributing factor to a temporary exacerbation of the Plaintiff's symptoms of constitutional cervical spondylosis.  
  
(b) No.
  - (iv) (a) The Panel is of the opinion that the Plaintiff's employment with the first Defendant from late September 2012 until February 2013 was a significant contributing factor to a temporary exacerbation of the Plaintiff's symptoms of constitutional cervical spondylosis.  
  
(b) The Panel is of the opinion that the Plaintiff's employment with the first Defendant from late September 2012 until February 2013 was a significant contributing factor to a temporary exacerbation of the Plaintiff's symptoms of constitutional lumbar spondylosis.

**Question 3. If yes to any part of question 2(a) and/or 2(b), did any condition of the mind as identified by the Medical Panel in answer to such question 1(c) result from or was it materially contributed to by such condition(s)?**

Answer: The Panel is of the opinion that the Plaintiff's mild adjustment disorder with depressed and anxious mood was materially contributed to by the Plaintiff's cervical spine and lumbar spine conditions.

**Question 4. Does any medical condition of the Plaintiff's -**

- (a) cervical spine;
- (b) lumbar spine;
- (c) mind -

**as identified by the Medical Panel continue to result from or be materially contributed to by injuries suffered in employment with the first Defendant and/or second Defendant?**

Answer: (a) No.

(b) No.

(c) The Panel is of the opinion that the Plaintiff's mild adjustment disorder with depressed and anxious mood continues to be materially contributed to by the Plaintiff's cervical spine and lumbar spine injuries suffered in employment with the first Defendant and/or second Defendant.

**Question 5. In the period:**

(a) from February 2013;

(b) now -

**did/does the Plaintiff have:**

(i) a capacity for pre-injury employment;

(ii) a current work capacity;

(iii) no current work capacity?

Answer: The Panel is of the opinion that from February 2013 that the Plaintiff had, and at present has, no inability arising from an injury that precluded/precludes him from undertaking his pre-injury employment or suitable employment.

**Question 6. If yes to any part of question 5(a)(iii) and question 5(b)(iii), was/is such incapacity likely to continue indefinitely?**

Answer: Not applicable.

**Question 7. If yes to any part of question 5(a)(ii), question 5(a)(iii), and question 5(b)(iii), did/does such incapacity result from or is it materially contributed to by any and if so, which of the conditions identified in answer to question 1?**

Answer: Not applicable.

16 Dr Grant and Dr Millington, the psychiatrists on the Panel, examined Mr El-Najjar on 11 August 2020. The other members of the Panel examined him together on 19 August 2020.

17 The Panel stated that it formed its opinion with regard to the documents and information referred to in Enclosure A, the history provided by Mr El-Najjar, and the examination findings elicited by the Panel. Enclosure A listed a number of documents provided to the Panel with the referral, including written submissions on behalf of Mr El-Najjar, Swidryk and Brighton, the claim documents, the pleadings in the



County Court proceeding, radiological reports, medical reports, hospital records, clinical records, and employment documents. The Panel noted the written submissions made to it on behalf of the respective parties.

18 By way of background, the Panel noted the agreed facts set out in the joint statement provided pursuant to s 304(a) of the WIRC Act, which included the dates of Mr El-Najjar's employment with Swidryk and Brighton, the date he ceased work, and when he underwent cervical spine surgery.

19 Under the heading 'Clinical presentation', the Panel set out the dates of Mr El-Najjar's employment with Swidryk and Brighton. It noted his confirmation that he did not experience any neck, back, arm or leg injuries or experience any symptoms over his first two periods of employment with Swidryk. It also noted that a pre-employment medical examination on 1 May 2012 cleared him for full duties with Brighton. This part of the Panel's reasons contains no description of the tasks performed by Mr El-Najjar during his work for either company.

20 The Panel set out the following history of the symptoms experienced by Mr El-Najjar in 2012 and 2013:

The Plaintiff said that during the course of his employment with Brighton that he experienced sensory disturbance involving the middle, ring, and little fingers of each hand whilst offloading sheets of plaster. He said that he sought medical attention from his local doctor (on 28 June 2012, see details below) and that his initial management included rest and physiotherapy, and that his symptoms settled over the following weeks.

He said that following his return to work with Brighton that he experienced cramping in his fingers and difficulty walking. He said that he was never offered light duties over this period and that his employment was terminated in September 2012.

The Plaintiff said that he was re-employed by Swidryk later in September 2012 and undertook lighter employment duties through to February 2013 when he ceased attending his employment due to progressive symptoms involving his arms and legs. He confirmed that he sought medical attention from a chiropractor and his local doctor and that he underwent medical imaging investigations of his neck and lower back.

The Panel noted from the referral material that the Plaintiff first attended his chiropractor, Dr A Sharma on 24 September 2012 and was reported to have had 20 consultations over the following seven months. Following review with his

treating local doctor for low back pain, leg numbness and neck pain, the Plaintiff underwent a lumbar spine CT scan (7 January 2013) that reported small disc protrusions and a cervical spine CT scan (9 January 2013) that reported features of cervical spondylosis with neural exit foraminae compromise.

The Plaintiff said that after he ceased his employment in February 2013 that he continued to experience symptoms involving his neck, arms, lower back and legs. He said that in early 2013 that both of his parents passed away and that he travelled to Lebanon (on 10 March 2013) to manage some administrative affairs. He said that whilst in Lebanon his symptoms deteriorated, commenting that he was dragging his right leg, and that he underwent an MRI scan and was advised by his doctors to undergo urgent spine surgery. The Plaintiff said that he elected to wait until his return from Lebanon to Australia before undergoing the recommended surgery.

The Plaintiff confirmed that he returned to Australia in June 2013 and attended his local doctor for his ongoing neck pain and arm and leg symptoms, and that he was immediately sent to the emergency department of a local hospital for urgent review. He confirmed that he was admitted to hospital to undergo neck surgery, which relieved some of his neck pain but did not improve his arm or leg symptoms. He said [that] post operatively he undertook physiotherapy and hydrotherapy as part of a rehabilitation program and that his further follow-up included various medical reviews and attendance at a rehabilitation clinic. He said that he also experienced bladder dysfunction and was required to undertake self-catheterisation.

The Panel noted from the referral material that the Plaintiff underwent a C3-7 decompression laminectomy on 19 June 2013, which on follow-up cervical spine MRI scanning (19 July 2013) demonstrated features of the laminectomy with myelomalacia at the C3/4 and C5/6 levels. The Panel noted that the Plaintiff was discharged from his treating rehabilitation clinic in 2016.

21 Mr El-Najjar's description of his current symptoms was recorded as including:

- numbness and cramps in his fingers;
- tingling in the tips of his middle, ring and little fingers of each hand associated with weakness of his hands, more prominent on his non-dominant left side;
- constant neck pain that radiates to his shoulders, which varies in severity and which is exacerbated by turning and bending;
- tightness in his shoulders;
- constant lower back pain [that] radiates to the little toe in each foot;
- a gait disturbance described as "very tight" walking; and
- tingling in his toes.

22 The Panel then noted Mr El-Najjar's activities of daily living, and his assessment of his physical limitations. It recorded that he could not participate in domestic chores or play with his grandchildren due to his symptoms. He told the Panel that he could

drive for up to 25 minutes, stand for up to 20 minutes – limited by shaking in his legs and loss of balance – and walk for up to 2 kilometres at a slow pace using a walking stick. He finds stairs difficult. He told the Panel he had not returned to any employment after February 2013.

23 After setting out its observations on physical examination and summarising the medical imaging investigations provided with the referral, the Panel concluded that Mr El-Najjar 'is suffering from constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy and constitutional lumbar spondylosis'.

24 The next section of the Panel's reasons dealt with Mr El-Najjar's psychiatric history and diagnosis, which are not at issue in this proceeding.

25 In the following section, the Panel noted some information from the referral material:

- Dr H Assaf, treating local doctor dated 28 August 2018 in which he reported that the Plaintiff first attended with neck problems on 28 June 2012 complaining of a two week history of sensory disturbance in both arms and leg weakness, and that these symptoms disappeared with rest (in clinical record entry dated 9 July 2012).

Dr Assaf reported that the Plaintiff represented in January 2013 for lower back pain and leg sensory disturbance for which a CT scan was undertaken, and that the Plaintiff's neck symptoms also flared up for which a CT scan was undertaken. He reported that the Plaintiff travelled to Lebanon on in March 2013 for 10 weeks and on his return in June 2013 the Plaintiff had features of spinal cord compression for which he was referred urgently to the Royal Melbourne Hospital. Dr Assaf concluded that the Plaintiff "had permanent disability and definitely his previous work as plaster [sic] had major fator [sic] of his injury".

- Royal Melbourne Hospital emergency department notes (14 June 2013) that recorded a history of chronic neck pain in the last one year with 2 to 3 months of progressive weakness, stiffness, numbness over upper arms and legs. That report further noted that the Plaintiff had worsening lower limb weakness/stiffness while in Lebanon for which he was admitted to hospital and underwent an MRI scan that showed features of cervical spondylosis with spinal cord compromise and for which surgery was recommended which the patient declined whilst overseas and returned home to Australia. The Plaintiff was reported to have attended his local doctor earlier that day and referred straight to the emergency department.

The Panel also noted the Plaintiff's job application (29 April 2012) for employment with the second Defendant, and the associated report from Dr R Sabetghadam (Kinetic Medical, 1 May 2012) that did not report on any pre-existing neck, back, or spine condition or any physical examination findings to indicate the presence of any clinically significant neck, back or spine condition.

26 The Panel then set out its analysis of the medical conditions it had diagnosed, including its opinions about causation.

27 In relation to Mr El-Najjar's cervical spine condition, the Panel said:

The Panel considers that the worker first experienced symptoms related to cervical spondylosis around June 2012 whilst employed by the second Defendant, and that these symptoms persisted after the Plaintiff returned to work for the first Defendant from September 2012 until February 2013.

The Panel noted the established degenerative changes present in the cervical spine at the time of the X-rays in September 2012 and CT scan in January 2013 and considers that the Plaintiff's symptoms around June 2012 are typical of the natural progression of such constitutional degenerative changes, which become symptomatic over time.

The Panel also noted the progression of the Plaintiff's cervical spine spondylosis symptoms after he ceased work in February 2013, including symptoms related to cervical cord compression and the development of cervical myelopathy requiring surgical decompression. The Panel understands that the progression of these clinical features is entirely consistent with the natural history of cervical spondylosis and the effects of delaying surgical decompression of the cervical spine.

The Panel considers that the Plaintiff's employment duties exacerbated his symptoms of constitutional cervical spondylosis. The Panel considers that any such exacerbation of symptoms however did not affect the underlying bony structure of the cervical spine and that the exacerbation of symptoms had no effect on the natural history of progression of the degenerative changes of cervical spondylosis in any way, which in this Plaintiff culminated in cervical myelopathy.

The Panel further considers that the employment activity related effects of the exacerbation of the symptoms of cervical spondylosis experienced by the Plaintiff would have resolved over time and would not have continued to persist after the Plaintiff ceased his employment as a plasterer and was no longer undertaking his pre-injury employment duties which were of a physical nature.

The Panel considers that the persisting and deteriorating cervical spine condition experienced by the Plaintiff relates to progression of the underlying constitutional condition and does not relate to any employment related recurrence, aggravation, acceleration, permanent exacerbation or deterioration of a pre-existing injury or disease of the Plaintiff's cervical spine, in any way.

The Panel therefore concluded that the Plaintiff suffered a temporary exacerbation of the symptoms of constitutional cervical spondylosis during the course of his employment with the second Defendant between 4 May 2012 and 10 September 2012 and also during the course of his employment with the first Defendant from late September 2012 until February 2013, the effects of which resolved after the Plaintiff ceased his employment duties in February 2013.

The Panel also concluded that the Plaintiff is suffering from constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy, but this condition is not attributable to the alleged cervical spine injury.

As the Panel concluded that the Plaintiff's temporary exacerbation of the symptoms of constitutional cervical spondylosis during the course of his employment with the second Defendant between 4 May 2012 and 10 September 2012 and with the first Defendant from late September 2012 until February 2013 resolved after he ceased his employment, the Panel also concluded that the Plaintiff is not suffering from any cervical spine condition that continues to result from or be materially contributed to by injuries suffered in employment with the first Defendant and/or second Defendant.

28 The Panel then set out its analysis of Mr El-Najjar's lumbar spine condition:

The Panel considers that the worker first experienced symptoms related to lumbar spondylosis around January 2013 whilst employed by the first Defendant, based on the report of Dr Assaf noted above.

The Panel noted the mild degenerative changes present in the lumbar spine CT scan in January 2013 and considers that the Plaintiff's symptoms around that time relate to these constitutional degenerative changes.

The Panel also noted the persistence of the Plaintiff's lumbar spine spondylosis symptoms after he ceased work in February 2013. The Panel understands that the persistence of these clinical features is consistent with the natural history of lumbar spondylosis.

The Panel considers that the Plaintiff's employment duties temporarily exacerbated his symptoms of constitutional lumbar spondylosis due to the physical nature of these employment duties. The Panel considers that any such exacerbation however did not affect the underlying bony structure or the discs of the lumbar spine and that the exacerbation of these symptoms had no effect on the natural history of progression of the degenerative changes of lumbar spondylosis.

The Panel considers that the employment activity related effects of any exacerbation of the symptoms of lumbar spondylosis resolved over time and would not have persisted after the Plaintiff ceased his employment as a plasterer.

The Panel considers that the current lumbar spine condition experienced by the Plaintiff does not relate to any recurrence, aggravation, acceleration, permanent exacerbation or deterioration of a pre-existing injury or disease of the Plaintiff's lumbar spine, in any way.

The Panel therefore concluded that the Plaintiff suffered a temporary exacerbation of the symptoms of constitutional lumbar spondylosis during the course of his employment with the first Defendant from late September 2012 until February 2013, the effects of which resolved after the Plaintiff ceased his employment duties in February 2013.

The Panel also concluded that the Plaintiff is suffering from constitutional lumbar spondylosis, but this condition is not attributable to the alleged lumbar

spine injury.

As the Panel concluded that the Plaintiff's temporary exacerbation of the symptoms of constitutional lumbar spondylosis during the course of his employment resolved, the Panel also concluded that the Plaintiff is not suffering from any lumbar spine condition that continues to result from or be materially contributed to by injuries suffered in employment with the first Defendant and/or second Defendant.

29 After providing its analysis of Mr El-Najjar's psychiatric condition, the Panel turned to the question of work capacity. At this point in its reasons, it set out Mr El-Najjar's description of the range of physical tasks that he performed in his work as a plasterer. It noted that he worked 'in a range of postures and in a variety of positions, including performing his duties whilst on a scaffold or scissor lift and using his hands in an overhead position'. The Panel confirmed with Mr El-Najjar the accuracy of the handwritten descriptions of his pre-injury duties that had accompanied his claim forms.

30 The Panel's conclusion in relation to Mr El-Najjar's work capacity followed from its conclusions that his spinal conditions were not work-related:

As the Panel concluded that the Plaintiff's temporary exacerbations of the symptoms of his constitutional cervical spondylosis and constitutional lumbar spondylosis each resolved after he ceased work, and that his adjustment disorder with depressed and anxious mood is mild in nature and would not have prevented and currently does not prevent the Plaintiff from undertaking his pre-injury employment, the Panel also concluded that the Plaintiff had from February 2013, and currently has, no inability arising from an injury that precluded/precludes him from undertaking his pre-injury employment (or suitable employment).

31 Finally, the Panel noted the opinions and reports of six doctors who had treated or examined Mr El-Najjar, five of whom had expressed an opinion that his employment was a cause of his spinal injuries. The Panel explained that it took a different view:

The Panel considered the range of views expressed above, noting that none of the doctors suggesting a relationship between the Plaintiff's employment and his cervical spine condition reported any specific incident of injury to the Plaintiff's cervical spine to account for a specific disc protrusion in that region, or specified the mechanism whereby a work-related aggravation of cervical spondylosis affects that condition to result in spinal cord compression as occurred in this Plaintiff.

## **Did the Panel fail to consider relevant matters?**

32 Mr El-Najjar contended that, in answering the medical questions referred to it, the Panel was required to have regard to the nature of his pre-injury employment and the tasks performed by him, and did not do so. His amended originating motion provided the following particulars of that ground:

- a) The Panel failed to take, or take into account, or give proper, genuine and realistic consideration to, a history of the Plaintiff's work duties from 2009 onwards, their nature, and the duration of the performance of those tasks performed whilst working for each Defendant.
- aa) The Panel failed in its Reasons to record or reproduce an accurate history of the work duties performed by the Plaintiff for the first and second Defendants.
- ab) There was evidence before the Panel that the Plaintiff was performing heavy and repetitive work involving movements of the arms over the shoulder, and above his head with his head back, and using both arms, for extended periods. In particular such evidence before the Panel was contained in the reports of Mr Awad dated 11 April 2019, Dr Slesenger dated 24 May 2019, Dr Mittal dated 11 June 2019, Dr T Saxby dated 30 July 2018, Professor Marshall dated 8 August 2019, and Mr Roy Carey dated 3 June 2019.
- b) The Medical Panel failed to take into account the absence of symptoms in the Plaintiff prior to the employment and the evidence of pre-employment medical examination performed on 1 May 2012.
- c) Further, the Panel failed to take into account the temporal nexus between the work duties, which on the evidence before the Panel was heavy and repetitive, performed by the Plaintiff for [each] Defendant and the Plaintiff's:
  - i) the onset of symptoms;
  - ii) his seeking of treatment;
  - iii) his seeking of lighter duties; and
  - iv) his cessation of employment.
- d) The Panel failed to give proper consideration to the circumstances of the onset of the plaintiff's symptoms when determining whether the employment could possibly have been a significant contributing factor to any recurrence, aggravation, acceleration, or deterioration of the plaintiff's cervical spondylosis and lumbar spondylosis.

### ***Mr El-Najjar's submissions***

33 Mr El-Najjar submitted that the Panel had made a jurisdictional error by failing to take into account a consideration that it was bound to consider, which materially affected

its decision.<sup>3</sup> He referred to the statutory test for whether a worker's employment is a 'significant contributing factor' to an injury, which requires a number of matters to be taken into account, including the nature of the work performed, the particular tasks of the employment, and the probable development of the injury occurring if that employment had not taken place.<sup>4</sup>

34 He pointed out that the section of the Panel's reasons dealing with causation contained a detailed account of his symptoms, but hardly mentioned the nature of his work duties or the tasks he performed for either Employer. There was substantial material before the Panel about the work that Mr El-Najjar performed during the relevant periods, but this was not referred to by the Panel until it came to deal with his work capacity. The available material included his original claim forms, in which he provided a detailed description of the 'heavy and repetitive work' that he claimed had caused him injury in the course of his employment, as well as the histories recorded in the medical reports provided to the Panel. He submitted that the Panel's failure to refer to any of this material in relation to causation was not merely unhappy phrasing or looseness of language.

35 Mr El-Najjar drew attention to the paragraph at the end of the Panel's reasons, where it explained that it disagreed with the five doctors who considered his cervical and lumbar spine conditions to be work-related because they had not identified any 'specific incident of injury' or 'mechanism'. He submitted that this indicated that the Panel had not properly considered whether employment had been a cause or contributing factor to his injuries. The histories on which the five doctors reached their opinions contained matters that were fundamental to the Panel's task, but were not addressed by the Panel in the relevant part of its reasons.

36 He further submitted that the fact that he had a pre-existing condition or susceptibility was not a proper basis for the conclusion that his work duties did not cause his

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<sup>3</sup> Referring to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40 (Mason J); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82] (McHugh, Gummow and Hayne JJ); *Ryan v The Grange at Wodonga* [2015] VSCA 17, [60]; *Chang v Neill* (2019) 62 VR 174, [73], [92]-[93].

<sup>4</sup> WIRC Act, Sch 1, item 25, set out in full at [45] below.



injuries. He submitted that an employer must take the employee as it finds him or her,<sup>5</sup> and that a work-related hastening, worsening or progression of a condition is compensable.<sup>6</sup> Mr El-Najjar's ultimate submission on this ground was that the Panel's reasons showed that its consideration of the question of causation was affected by its unfounded or *a priori* view that his condition was a result of the progress of a natural condition. This approach involved jurisdictional error of the kind identified by the Court of Appeal in *Chang v Neill*.<sup>7</sup>

### *Employers' submissions*

37 The Employers accepted that jurisdictional error can arise where a decision-maker fails to take into account a consideration it was bound to take into account, and which might have affected the decision.<sup>8</sup> They emphasised that Mr El-Najjar bore the onus of establishing that the Panel failed to take the consideration into account, and that questions of weight were a matter for the Panel and not the Court on judicial review. They also relied on the principle that the Panel's reasons must be read as a whole, and should not be construed 'minutely and finely with an eye keenly attuned to the perception of error'.<sup>9</sup>

38 The Employers directed attention to the Panel's description of Mr El-Najjar's duties in the section of its reasons dealing with work capacity. They said it was clear from that section that the Panel had asked Mr El-Najjar about his work duties and had confirmed with him the duties set out in his handwritten notes submitted with his claim forms. They argued that it was unnecessary for the Panel to set out his duties in detail in circumstances where, reading its reasons as a whole, it plainly understood and had regard to those duties.

39 In any event, the Employers submitted, it was apparent from the 'Analysis' section of

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<sup>5</sup> Relying on *Zlateska v Consolidated Cleaning Services Pty Ltd* [2006] VSCA 141, [11].

<sup>6</sup> Referring to WIRC Act, s 3 – definition of 'injury'; *Federal Broom Company Pty Ltd v Semlitch* (1964) 110 CLR 626, 639-40 (Windeyer J).

<sup>7</sup> *Chang v Neill*, [92]-[93].

<sup>8</sup> Relying on *Peko-Wallsend*, 39-41 (Mason J); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 384 (Toohey and Gaudron JJ); *Craig v South Australia* (1995) 184 CLR 163, 179.

<sup>9</sup> *Gruma Oceania Pty Ltd v Bakar* [2014] VSCA 252, [29], quoting *Collector of Customs v Pozzolanac Enterprises Pty Ltd* (1993) 43 FCR 280, 287.

the Panel's reasons that Mr El-Najjar's duties informed the Panel's conclusion that he had suffered a temporary work-related exacerbation of his constitutional cervical and lumbar spondylosis. The Panel noted that Mr El-Najjar's cervical symptoms came on during his employment with Brighton and continued into his final period of employment with Swidryk, when his lumbar symptoms also commenced. The Employers argued that these references made it clear that the Panel did have regard to Mr El-Najjar's duties when considering causation.

40 The Employers accepted that it is possible for a work-related aggravation or exacerbation of a pre-existing condition to constitute a continuing compensable injury, and that a number of doctors had formed that opinion in Mr El-Najjar's case. They submitted that the Panel's function was to form its own opinion, which was that the work-related exacerbation resolved once Mr El-Najjar ceased performing the relevant work duties. The Employers directed attention to the reasons given by the Panel for disagreeing with the five doctors who considered Mr El-Najjar's spinal conditions to be work-related.

### ***Consideration***

41 Mr El-Najjar claims that the injuries to his cervical spine and lumbar spine were significantly contributed to by heavy and repetitive work duties he performed in the course of his employment with Swidryk, between April 2009 and April 2011, in March 2012, and between September 2012 and February 2013, and with Brighton between May and September 2012. The claim is pleaded against Swidryk in his amended statement of claim in the County Court proceeding as follows:

4. Throughout the course of his employment with Swidryk, the Plaintiff suffered injury arising out of and/or in the course of his employment over a period of time, as a result of heavy and repetitive work duties including *inter alia*, installing plasterboard involving overhead work, transferring heavy plasterboard between floors, pulling and stacking plasterboard, lifting and carrying plasterboard, leaning/balancing plasterboard on his head, screwing plasterboard into ceiling struts, trailing/filling in joints and climbing scaffolding.

#### **Particulars of Injury**

- (a) Injury to the cervical spine including discal injury at the C6/7 level, causing pain and disability in the neck;

- (b) Precipitation, aggravation, exacerbation and acceleration of degeneration in the cervical spine;
- (c) Injury to lumbar spine including disc bulges at the L3/4 and L4/5 levels, causing pain and disability in the lower back and referred pain and numbness in the legs;
- (d) Precipitation, aggravation, exacerbation and acceleration of degeneration in the lumbar spine; and
- (e) Psychological reaction.

5. The Plaintiff's injuries were sustained by way of gradual process due to the heavy and repetitive nature of his employment.

42 The claim against Brighton is pleaded in near identical terms, in paragraphs 7 and 8 of the amended statement of claim. The allegations are denied by the Employers in their respective defences. These claims and denials are the context in which the medical questions in this case were framed and referred for the opinion of a Medical Panel.

43 Medical Panels are established under Pt 6, Div 3 of the WIRC Act, as an integral component of the mechanism for resolving disputes under the Act. Medical questions are referred to a Medical Panel to facilitate the resolution of some dispute that has arisen under the WIRC Act.<sup>10</sup> It follows that an essential feature of a Medical Panel's task under the WIRC Act is to answer referred medical questions in the context of the dispute that gave rise to them.<sup>11</sup>

44 The first medical question referred to the Panel sought its opinion as to the medical conditions suffered by Mr El-Najjar, in the context of his claim that the injuries to his cervical and lumbar spine arose out of or in the course of his employment with the Employers. The second medical question referred to the Panel was whether Mr El-Najjar's employment with the Employers was a significant contributing factor to a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease of his cervical and lumbar spine. The second question was framed in a way that reflects the entitlement to compensation under the WIRC Act in respect

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<sup>10</sup> WIRC Act (Vic), ss 207, 274, 284, 285, 574(11).

<sup>11</sup> *Chang v Neill*, [141]; *Wagstaff Cranbourne Pty Ltd v Hashimi* [2020] VSCA 33, [57]–[58].

of pre-existing conditions that are hastened or made worse by a worker's employment.<sup>12</sup> In the context of the dispute, the Panel's task was to form an opinion about whether the work duties performed by Mr El-Najjar in the course of his employment with both Employers were, by way of a gradual process, a significant contributing factor to the recurrence, aggravation, acceleration, exacerbation or deterioration of pre-existing spinal conditions.

45 The phrase 'significant contributing factor' is defined in Sch 1, item 25 of the WIRC Act, as follows:

In determining whether a worker's employment was a *significant contributing factor* to an injury, the following must be taken into account –

- (a) the duration of the worker's current employment;
- (b) the nature of the work performed;
- (c) the particular tasks of the employment;
- (d) the probable development of the injury occurring if that employment had not taken place;
- (e) the existence of any hereditary risks;
- (f) the life style of the worker;
- (g) the activities of the worker outside the workplace.

These were matters that the Panel was required by the WIRC Act to take into account in forming its opinion in answer to the second question.

46 The Panel's reasons must of course be read fairly and as a whole, making due allowance for the fact that it is a non-legal expert tribunal.<sup>13</sup> Its reasons 'are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed'.<sup>14</sup>

47 While I have been careful not to search for error in the Panel's reasons, I have

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<sup>12</sup> WIRC Act, ss 39(1), 40(3)(c).

<sup>13</sup> *Gruma Oceania*, [29]; *Maimonis v Bourke* [2019] VSCA 302, [51].

<sup>14</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ). Citations omitted.

concluded that it formed its opinion on the key question of causation without considering matters that it was required to take into account, namely the nature of the work performed by Mr El-Najjar and the particular tasks of his employment. There is almost no mention of the tasks he performed for either Employer in the section of the Panel's reasons that records Mr El-Najjar's clinical presentation; the Panel's focus was on his symptoms. The Panel's analysis in relation to both the cervical spine condition and the lumbar spine condition simply did not engage with the central question of whether the heavy and repetitive nature of his work duties for the Employers had significantly contributed to his injuries 'by way of a gradual process'.

48 I have considered whether the Panel's detailed description of Mr El-Najjar's pre-injury employment duties, in its reasons concerning work capacity, indicate that it took those matters into account in reaching its opinion on causation. I was not able to draw that inference. The Panel's reasons were structured so that work capacity was dealt with after causation, and it is not obvious that matters referred to at the end of its reasons were considered in answering the first two questions.<sup>15</sup>

49 Plainly, the Panel was aware of the nature of the work that Mr El-Najjar did as a plasterer, from his description of his duties on examination, and from his claim forms. However, the way in which the Panel explained its conclusions on causation, in particular its focus on symptoms to the exclusion of the work performed by Mr El-Najjar, showed that it had not understood the question it had been asked, and had not considered the matters necessary to answer it.

50 This is confirmed by the reasons given by the Panel for having a different opinion from the five doctors who considered Mr El-Najjar's injuries to be work-related. It noted that none of them had 'reported any specific incident of injury' or 'specified the mechanism' by which his work duties had caused the disc protrusion and spinal cord compression that he ultimately suffered. That explained nothing, given there was no claim that his injuries were the result of any specific incident or mechanism. It rather

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<sup>15</sup> Cf *Sidiqi v Kotsios* [2021] VSCA 187, [106], in which it was unnecessary for the Panel, in explaining its conclusions on work capacity, to repeat in detail the description of pre-injury work duties set out *earlier* in its reasons.

indicated that the Panel had not engaged with the question of whether Mr El-Najjar's neck and lower back injuries were sustained gradually due to the heavy and repetitive nature of his work duties.

51 The first ground of review is established.

**Were the Panel's reasons inadequate?**

52 Mr El-Najjar also contended that the Panel's reasons were inadequate, because they did not explain how the Panel reached several of its conclusions. In particular, he said that the Panel's reasons did not disclose its path of reasoning as to:

- (a) its conclusion that the work-related exacerbation of his cervical spine and lumbar spine conditions was temporary and had resolved; or
- (b) why his heavy and repetitive work duties did not cause or contribute to a recurrence, aggravation, acceleration, permanent exacerbation or deterioration of his pre-existing spine conditions.

53 The Employers submitted that the following path of reasoning could be discerned from the Panel's reasons:<sup>16</sup>

- (a) The worker first experienced neck symptoms in the context of heavy and repetitive work with Brighton in the third period [from 4 May to 10 September 2012], which continued during the worker's employment with Swidryk in the fourth period [from late September 2012 to February 2013]. During the fourth period, he also experienced symptoms in the lumbar spine for the first time.
- (b) The above developments took place in the context of degenerative change evident on imaging in September 2012 (cervical spine) and January 2013 (lumbar spine).
- (c) In those circumstances, and having regard to the nature of his employment duties, the worker suffered a work-related exacerbation of his underlying constitutional condition during the third period (cervical spine) and fourth periods (cervical and lumbar spines).
- (d) While others had reached a different view, the panel was satisfied that those exacerbations were of a temporary nature only and would have resolved once the worker ceased working as a plasterer. In the absence of a specific injury or mechanism, his employment duties had not

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<sup>16</sup> Outline of submissions of the first and second defendants dated 25 August 2021, [19].

affected on the underlying structures of the spine or the natural progression of his constitutional conditions in the cervical and lumbar spines.

- (e) Instead, the persistence of the worker's cervical and lumbar symptoms after he ceased work was consistent with the natural progression of his spondylotic condition. Further, his deteriorating cervical condition was the effect of delayed surgical intervention

54 The Employers submitted that there was no 'missing step' in the Panel's analysis, and that it did not have to explain why the work-related exacerbations were only temporary. These were conclusions reached by the application of medical experience and expertise, and a process of 'evaluative synthesis' that did not call for further explanation.<sup>17</sup>

### **Consideration**

55 Section 313(2) of the WIRC Act requires a Medical Panel to provide a written statement of reasons for its opinion. Those reasons must explain the Medical Panel's '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'.<sup>18</sup> A statement of reasons is not adequate if there is a 'real doubt' whether the Medical Panel correctly performed its statutory functions.<sup>19</sup> A real doubt may exist where a Medical Panel's conclusions are open to more than one interpretation,<sup>20</sup> and in that case the reviewing court should not speculate about a Medical Panel's path of reasoning in order to resolve ambiguity or fill gaps.<sup>21</sup>

56 At the same time, a Medical Panel's reasons, read fairly, as a whole and in context, need only be sufficient to enable a reviewing court to understand that it has performed its function – to form and give its opinion on the medical questions referred to it – lawfully. A Medical Panel's reasons may be able to be understood by combining what is expressly stated with inferences necessarily arising, although any such inferences must have a 'proper evidential foundation disclosed in the reasons'.<sup>22</sup>

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<sup>17</sup> Relying on *McIntyre v Fish* [2015] VSC 82, [121]; *Sidiqi*, [34], [102].

<sup>18</sup> *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, [55].

<sup>19</sup> *Gruma Oceania*, [47].

<sup>20</sup> *Pearce v Lloyd* [2016] VSC 806, [62].

<sup>21</sup> *Denham v Consolidated Herd Improvement Services Co-op Ltd* [2014] VSC 520, [37].

<sup>22</sup> *Tan v Kotzman* [2016] VSC 482, [22].

57 In this case, I have not been able to discern the Panel's path of reasoning on the critical question of causation of Mr El-Najjar's spinal injuries. The reasons express opinions that he is suffering from constitutional cervical spondylosis and constitutional lumbar spondylosis, but do not explain how the Panel reached the conclusion that these conditions were constitutional. In particular, the reader is left to speculate as to why the Panel formed the view that Mr El-Najjar's work duties for Swidryk and Brighton did not significantly contribute to the degeneration of his cervical and lumbar spine. Indeed, the reasons do not reveal that the Panel even considered whether the heavy and repetitive duties that he performed during his employment contributed to his injuries 'by way of a gradual process'.

58 In addition, the Panel's reasons do not explain how it reached the conclusion that the exacerbation of Mr El-Najjar's cervical spondylosis and lumbar spondylosis between May 2012 and February 2013 was only temporary, or had resolved. The history taken by the Panel was that in February 2013 he 'ceased attending his employment due to progressive symptoms involving his arms and legs' and that, after he ceased his employment 'he continued to experience symptoms involving his neck, arms, lower back and legs'. Rather than resolving, the Panel recorded that his symptoms deteriorated while he was in Lebanon, with no indication of any improvement before the surgery in June 2013. In light of this history, I have been unable to understand why the Panel considered that the employment-related exacerbation of Mr El-Najjar's symptoms 'would have resolved over time' and 'would not have continued to persist' after he ceased working as a plasterer.

59 The Panel's reasons do not disclose its path of reasoning to critical conclusions as to the cause of Mr El-Najjar's spinal injuries in enough detail to enable me to see whether the Panel performed its statutory function.

60 The second ground of review is also made out.

### **Disposition**

61 The Panel failed to have regard to matters that it was required to consider, and its



reasons did not meet the standard required by s 313(2) of the WIRC Act. I will therefore make an order in the nature of certiorari, quashing the Panel's opinion.

62 Mr El-Najjar also sought an order in the nature of mandamus, remitting the medical questions to a differently constituted Medical Panel to be reconsidered in accordance with law. He submitted that the Panel had made substantial errors in its consideration of the questions referred to it, beyond giving inadequate reasons for its opinion. In those circumstances, he said that remitting the questions to the same Panel would give at least the appearance of prejudice and unfairness.<sup>23</sup>

63 The Employers submitted that the contended errors in this case were not of the kind that would preclude the same Panel from further considering the medical questions. It said that the questions could be sent back to the same Panel, with a direction that it have regard to the duties performed by Mr El-Najjar in his employment, and provide further and better reasons.

64 I consider that the better course here is to remit the questions for consideration by a differently constituted Medical Panel. The Panel expressed firm conclusions about the cause of Mr El-Najjar's spondylosis, and the duration of a work-related exacerbation of it, without having regard to essential matters and without giving reasons that explained how it reached those conclusions. In those circumstances, there would be an appearance of prejudgment and unfairness to Mr El-Najjar if the same Panel were to consider the medical questions again.

65 I will hear the parties on the question of the costs of the proceeding.

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<sup>23</sup> Relying on *Vegco Pty Ltd v Gibbons* [2008] VSC 363, [33]; *Morrison v Melbourne Pathology Ltd* [2018] VSC 477, [54]-[56].

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**CERTIFICATE**

I certify that this and the 23 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 9 December 2021.

DATED this ninth day of December 2021.



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Associate