

**SUPREME COURT OF VICTORIA
COURT OF APPEAL**

S EAPCI 2022 0017

SWIDRYK INVESTMENTS PTY LTD AND ANOR
(ACCORDING TO THE ATTACHED SCHEDULE)

Applicants

v

YOUSSEF EL-NAJJAR AND ORS (ACCORDING TO THE
ATTACHED SCHEDULE)

Respondents

JUDGES:	BEACH, MACAULAY JJA and J FORREST AJA
WHERE HELD:	Melbourne
DATE OF HEARING:	16 November 2022
DATE OF JUDGMENT:	10 February 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 11
JUDGMENT APPEALED FROM:	[2021] VSC 814 (Richards J)

ADMINISTRATIVE LAW – Judicial review – Medical panel – Workplace injury – Significant contributing factor – Whether work was a cause of injury to the respondent’s cervical and lumbar spine – Whether Panel failed to consider nature of first respondent’s work in determining answers to questions posed by County Court judge — Whether Panel’s Reasons adequate – Leave to appeal granted and appeal allowed.

WORDS AND PHRASES – ‘Workplace injury’ – ‘Medical Panel’.

Workplace Injury Rehabilitation and Compensation Act 2013 ss 274, 313.

Sidiqi v Kotsios [2021] VSCA 187, *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, *Minister for Immigration and Ethnic Affairs v Wu Sian Liang* (1996) 185 CLR 259 referred to.

Counsel

First and Second Applicants: Ms F Spencer and Ms E Golshtein

First Respondent: Mr C Hangay and Ms S Fernando

Second to Sixth Respondents: No appearance

Solicitors

First Applicant: IDP Lawyers

Second Applicant: Wisewould Mahony

First Respondent: Zaparas Lawyers Pty Ltd

Second to Sixth Respondents: DLA Piper

- 1 Youssef El-Najjar is a 63-year-old plasterer and carpenter. He worked for Swidryk Investments Pty Ltd (the First Applicant, ‘**Swidryk**’) and Brighton Australia Pty Ltd (the Second Applicant, ‘**Brighton**’ and together, ‘the **Applicants**’) at various times between 2009 and 2013.
- 2 Mr El-Najjar lodged claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (‘the **Act**’) in respect of pain and disability in his cervical and lumbar spine which he asserted were caused by his work for the Applicants.
- 3 He sought payments of weekly compensation, medical and like expenses and impairment benefits under the Act. These were rejected by the WorkCover insurer of both companies.
- 4 Mr El-Najjar then instituted a proceeding in the County Court in November 2018 seeking the payments rejected by the WorkCover Insurer.
- 5 On 21 May 2020, a judge of the County Court referred seven questions for determination by a Medical Panel — comprised of the second to sixth respondents (‘the **Panel**’)¹ — pursuant to s 274 of the Act.
- 6 The primary issue to be determined by the Panel was whether Mr El-Najjar’s employment with Swidryk and/or Brighton was a significant contributing factor to his cervical and lumbar spine conditions.
- 7 On 7 September 2020, the Panel delivered a ‘Certificate of Opinion’ in respect of the referred medical questions (‘**Opinion**’), accompanied by its written Reasons for Opinion (‘**Panel’s Reasons**’).
- 8 The Panel concluded that his work with each of Swidryk and Brighton only temporarily exacerbated his symptoms, and that his cervical and lumbar conditions did not continue to result from, or be materially contributed to, any injury he sustained in his work with the Applicants.
- 9 Subsequently, Mr El-Najjar sought judicial review of the decision contained in the opinion, alleging that the Panel fell into jurisdictional error and failed to give adequate reasons for its conclusion.
- 10 This complaint was upheld by a judge of this Court on 9 November 2021² on both grounds and this application for leave to appeal seeks to challenge the correctness of that decision.

¹ The second to sixth respondents are identified, along with their respective specialities, at [20].

² *El-Najjar v Swidryk Investments Pty Ltd* [2021] VSC 814 (‘**Reasons**’).

Factual background

- 11 Mr El-Najjar was born on 21 November 1959. He had worked for more than 30 years as a plasterer.
- 12 The following account of Mr El-Najjar's work for the Applicants is not in issue and is taken from the judge's summary (with abridgement where necessary):³

Youssef El-Najjar worked as a plasterer and carpenter for [Swidryk] 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] between May and September 2012.

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.

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.

... While overseas [later in 2013], [Mr El-Najjar's] 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.

- 13 In July 2018, Mr El-Najjar made the following claims under the Act:
- (a) ... 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) ... for impairment benefits for neck and back conditions sustained in the course of his employment with Swidryk;
 - (c) ... 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) ... for impairment benefits for neck and back conditions sustained in the course of his employment with Brighton.

³ Reasons, [1]–[4].

The County Court proceeding

- 14 On 30 November 2018, Mr El-Najjar filed a writ and statement of claim against the Applicants in the County Court (which was amended on 20 February 2020). Mr El-Najjar sought orders for weekly payments of compensation and medical and like expenses from February 2013 in respect of neck and back injuries which he alleged were sustained in the course of his employment with the Applicants. He also sought a declaration that he was entitled to impairment benefits pursuant to s 98C of the Act.
- 15 On 5 September 2019 and 8 October 2019, Swidryk and Brighton each filed amended Notices of Defence respectively, denying that Mr El-Najjar was entitled to the relief he claimed.

The referral by the County Court judge

- 16 On 21 May 2020, a County Court Judge referred seven medical questions to a Medical Panel for an opinion, pursuant to s 274 of the Act ('the **Referral**'). These are set out at [22].
- 17 As well as the questions, a large number of documents described in a 'schedule of attachments' ('the **Attachments**') were referred to the Panel by the lawyers for Mr El-Najjar, Swidryk and Brighton.
- 18 These documents were bundled into groups: Court documents; claims and notices; radiology and hospital reports; medical reports obtained by Mr El Najjar; medical reports obtained by Swidryk and Brighton; employment documents; and the clinical notes of the Moonee Ponds Medical Centre.⁴
- 19 Accompanying the Attachments were submissions to the Panel ('the **Panel submissions**') made by the lawyers for each of the parties as well as a notice of request pursuant to s 274 of the Act.
- 20 The Panel considering the referral comprised 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.
- 21 Drs Grant and Millington, the psychiatrists on the Panel, jointly examined Mr El-Najjar on 11 August 2020. The other members of the Panel jointly examined Mr El-Najjar on 19 August 2020.

The opinion of the Panel and its reasons

- 22 The seven medical questions, and the Panel's answers in relation to each question, were set out in the Opinion which reads as follows:

⁴ Schedule of attachments signed by the lawyers for the parties and dated 19 May 2020 as being present and correct for the Medical Panel referral.

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.

23 In the Panel's Reasons, it said:

(3) The Panel formed its Opinion with regard to –

(a) the documents and information referred to in Enclosure A; and

(b) the history provided by the plaintiff and the examination findings elicited by the Panel at the abovementioned examinations of the Plaintiff [being the psychiatric examinations on 11 August 2020 and the physical examinations on 19 August 2020].

24 Enclosure A contained the Attachments set out at [18] above.

25 In the Panel's Reasons, under the heading '*Clinical presentation*', it set out the dates of Mr El-Najjar's employment with the Applicants. 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.

26 The Panel then set out the history of Mr El-Najjar's symptoms 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.

27 The Panel then described Mr El-Najjar’s ongoing symptoms, activities and medication.

28 The next part of the Panel’s Reasons dealt with the physical examination and the medical imaging investigations available to the Panel.

29 The Panel concluded:

... that the Plaintiff is suffering from constitutional cervical spondylosis (surgically treated) associated with cervical myelopathy and constitutional lumbar spondylosis.

30 The Panel then set out the psychiatric history of Mr El-Najjar, the mental state examination and the conclusion of the psychiatrists — irrelevant to this application.

31 In the following section, headed ‘*Information from the referral material*’, the Panel noted the following reports:

- Dr H Assaf, treating local doctor dated 28 August 2018 ...
- Royal Melbourne Hospital emergency department notes (14 June 2013) ...

The Panel also noted [Mr El-Najjar’s] job application for employment with [Brighton] and the associated report from Dr R Sabetghadam (Kinetic Medical, 1 May 2012) that did not identify 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.

32 The Panel under the heading ‘*Analysis*’ dealt separately with the alleged cervical and lumbar spine injuries.

33 In relation to Mr El-Najjar’s cervical spine condition, the Panel concluded:

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.

34 The Panel then assessed 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.

- 35 After providing its evaluation of Mr El-Najjar's psychiatric condition, the Panel examined the question of his work capacity:

The Plaintiff confirmed to the Panel the nature of his pre-injury employment duties as a plasterer. He described being involved with a range of physical tasks related to trowelling, sanding, inserting tracks and studs and using various power tools including a nail gun and drill. He said 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 noted the handwritten description of the Plaintiff's pre-injury

employment duties with the first Defendant in his claim form dated 2 July 2018, and the handwritten description of his preinjury employment with the second Defendant in his claim form also dated 2 July 2018. The Panel read these descriptions to the Plaintiff who agreed they were an accurate account of his employment duties with each respective employer.

and 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).

- 36 Finally, the Panel noted the opinions and reports of six medical practitioners who had treated or examined Mr El-Najjar, and then said:

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.

The judge's decision

- 37 The relevant parts of the judge's decision in relation to the Panel's asserted failure to consider relevant matters are contained in the following paragraphs of her Honour's reasons:

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

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.

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.

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 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.

The first ground of review is established.⁵

38 In relation to the adequacy of the Panel's Reasons, her Honour concluded as follows:

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".

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.

⁵ Reasons, [47]–[51].

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.⁶

Consideration

The First Ground of Appeal – The Panel's failure to consider the nature of Mr El-Najjar's work

39 The first proposed ground of appeal reads as follows:

The primary judge erred in concluding that the Medical Panel, in forming its opinion in answer to question 2 of the referred medical questions, failed to have regard to the nature of the work performed by the first respondent and whether his neck and lower back injuries were sustained gradually due to the nature of his work duties.

40 The judge's impugned conclusion is set out at [37] above. Her Honour did not accept that the Panel took into account 'the nature of the work performed by Mr El-Najjar and the particular tasks of his employment'. This was referred to by her Honour later in the following terms:

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".⁷

41 It was not in dispute that the Panel was obliged to consider the question identified by her Honour.⁸ The question is whether it had done so.

42 In any review of the decision of a medical panel the starting point is a consideration of its statutory function under the Act.

43 The phrase 'significant contributing factor' is defined in sch 1, item 25 of the 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;

⁶ Reasons, [57]–[59].

⁷ Reasons, [47].

⁸ Ibid.

- (e) the existence of any hereditary risks;
- (f) the life style of the worker;
- (g) the activities of the worker outside the workplace.

44 In the context of Mr El-Najjar’s claim, the relevant parts of the definition obliged the Panel to consider paras (a), (b), (c) and (d).

45 In carrying out its task, the Panel was also required to consider, pursuant to s 3 of the Act, whether Mr El-Najjar’s employment duties with the Applicants constituted a ‘recurrence, aggravation, acceleration, exacerbation or deterioration’ of Mr El-Najjar’s cervical and lumbar conditions.⁹

46 A medical panel commits jurisdictional error if it fails to give genuine consideration to matters which it is required by the Act to consider (such as those set out at [43]), provided such consideration could materially affect its decision or goes to fundamental issues raised by the facts of the case.¹⁰

47 In recent years decisions of the High Court and this Court have considered the role and function of medical panels appointed under the Act and its predecessor.¹¹

48 The primary function of the Panel was to form its own opinion with respect to the questions referred to it. It was to do so by applying its expertise to the questions posed, giving the appropriate relevance and weight to the evidence before it.¹²

49 And, as this Court pointed out in *Sidiqi*:

The character of the Panel’s function means that opinions on medical questions of fact raised by the questions asked of it will necessarily be informed by expertise which the Court does not possess and which will potentially govern the relevance and weight which is to be accorded to any particular aspect of the circumstantial evidence.

The nature of the Panel’s functions means that this Court cannot approach judicial review in the same way which it would with respect to the decision of a body exercising an adjudicative function and it cannot approach judicial review in the way in which it would if the Panel did not possess expertise which the Court does not.

It will be difficult to conclude that an opinion was not open to a medical Panel if that opinion was materially informed by the expertise of that medical Panel. In this case, the Panel was not only an expert Panel in the sense that it possessed relevant general medical expertise, but it included specialist medical practitioners holding particular expertise with respect to the matters in issue in

⁹ The Act, s 3, definition of ‘injury’.

¹⁰ *Sidiqi v Kotsios* [2021] VSCA 187, [61] (*‘Sidiqi’*).

¹¹ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 (*‘Wingfoot’*); *Sidiqi* [2021] VSCA 187.

¹² *Wingfoot* (2013) 252 CLR 480, [47].

this case.¹³

50 The thrust of the Applicants' case in respect of her Honour's conclusion is as follows:

The expert Medical Panel ... having interviewed and examined the worker for itself, formed the opinion that his employment duties over the course of certain periods of his employment with the applicants had exacerbated his symptoms of constitutional cervical and lumbar spondylosis, but that this exacerbation of symptoms did not affect the underlying bony structure of his cervical or lumbar spine, or the discs of the lumbar spine, and had no effect on the natural history of progression of the degenerative changes of his cervical and lumbar spondylosis. This opinion was not only well open to the Panel, but it also shows that the Panel well understood that its task was to form and give its own opinion, applying its medical experience and medical expertise, as to whether the worker had suffered any, and if so what, injury in the extended sense in his employment with the applicants to which his employment duties over the specified periods of time were a significant contributing factor.

51 Mr El-Najjar responded that her Honour's analysis was patently correct, and that the judge's Reasons made it clear that the Panel had misdirected itself. Mr El-Najjar asserted that the Panel's Reasons failed to have regard to or set out the factors contained in the 'significant contributing factor' test of the Act, in particular, cl 25 sch 1, para (b) which related to the nature of the work performed; para (c) which related to the particular tasks of the employment; and para (d) which related to the probable development of the injury occurring if that employment had not taken place respectively.

52 On the question of causation, Mr El-Najjar asserted that the Panel's inquiry was incomplete, and should have been directed towards the nature of the work tasks performed in the lead up to, and at the onset of, his symptoms:

The Panel recorded a temporal relationship between the Plaintiff's employment and the onset of symptoms, and his seeking of treatment. Further, the Panel noted the seeking of lighter duties, and the cessation of employment by the worker (both which the Panel noted was due to the presence of symptoms related to his cervical and lumbar spine condition). After having noted the history and progress of the worker's symptoms the Panel's line of inquiry on the question of causation stopped there.

The worker's case before the Medical Panel was that he had sustained injuries to his lumbar and cervical spine throughout the course of that employment by way of gradual process as a result of the performance of heavy and repetitive work. The Medical Panel's Reasons show that it did not have regard to the course of employment issue.

The Panel also had before it various histories recorded by the other medical experts ...

Mr Awad, Dr Slesenger, Dr Mittal, Professor Marshall, and Mr Roy Carey all

¹³ *Sidiqi* [2021] VSCA 187, [34], [36]–[37].

concluded that the worker’s work duties caused an injury in the worker’s cervical and lumbar spines in the form of an aggravation of spondylosis in the cervical and lumbar spines. Each of those experts had recorded a history of the heavy and repetitive nature of employment duties which the worker had been required to perform and the performance of which coincided with the timing of the onset of symptoms in the worker’s neck and low back. These were the sort of histories which the Panel ought to have recorded and taken into account in its analysis on causation and failed to do so.

...

The Panel should have inquired further of the worker as to what work tasks he had been performing in leading up to, and at the time of, the onset of his symptoms ...

...

This was not a matter of ‘loose language’ or ‘unhappy phrasing’ in the Panel’s Reasons. Rather the language used by the Panel was careful and comprehensive in its discussion of its analysis. Yet a plain reading of the Reasons as a whole, shows the inquiry by the Panel as to causation was incomplete.

53 Finally, Mr El-Najjar contended that this was a case properly contrasted with *Sidiqi*,¹⁴ as ‘the [Panel’s] failure to refer to the work duties is a proper foundation for an inference that the Panel did not properly consider those matters’, and that the judge’s finding in relation to jurisdictional error was consistent with authority.¹⁵

54 The submissions of Mr El-Najjar focused almost exclusively on the content of the Panel’s Reasons which he endeavoured to pick apart.

55 It may be observed at the outset that in determining whether the Panel genuinely considered the role and nature of Mr El-Najjar’s work for the Applicants and its contribution to his cervical and lumbar conditions and symptoms, the examination by the Court is not that of a minute and forensic analysis of the Panel’s Reasons. Rather, in determining whether its consideration of an issue was genuine or realistic, attention needs to be directed to all of the material provided to the Panel and inferences to be drawn from that material as well as the content of the reasons. It is then for Mr El-Najjar to demonstrate that, on the basis of that analysis, it is likely that the Panel did not give appropriate consideration to the relevant issue or issues — in this case the role of the work tasks undertaken by Mr El-Najjar in relation to any injury to his cervical and/or lumbar spine.

56 In our opinion (and contrary to that of the judge) it has not been demonstrated that the Panel failed to give genuine consideration to the nature of the work performed by

¹⁴ Ibid, [106].

¹⁵ *Chang v Neill* [2019] VSCA 151; 62 VR 174, [92]–[93]. See also: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–42; [1986] HCA 40; *Abebe v Commonwealth* (1999) 187 CLR 510, 579–580 [196]; [1999] HCA 14; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 348 [74]; [2001] HCA 30.

Mr El-Najjar (including the fact that it was continuous), the particular tasks of his employment (including those which can be described as heavy) and their relationship to his alleged injuries. This is for the following reasons.

57 First, the very exercise that the Panel undertook in answering several of the questions posed by the County Court judge mandated consideration of the role of his continuous work duties. Question 2 (set out at [22] above) directed the Panel's attention specifically to the ongoing nature of Mr El-Najjar's work as opposed to a specific incident or incidents, or indeed anything else.

58 And, equally as importantly, the fact that this question was clearly answered by the Panel in relation to the particular periods of employment demonstrates that it considered the nature of the ongoing work and its effect on Mr El-Najjar's spine. For instance, the answer to question 2(iii)(a) was as follows:

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.

59 Second, the claim forms (and attachments) completed by Mr El-Najjar and provided to the Panel made it apparent that this was a gradual process claim based on an allegation of continuous manual work by Mr El-Najjar for the Applicants.

60 Third, and this is particularly significant, the Panel also stated in its reasons that it had interviewed Mr El-Najjar and confirmed with him the descriptions of his job duties with the Applicants as described in his handwritten statements.

61 The relevant parts of the Swidryk claim form completed by hand by Mr El-Najjar read as follows:

What is your injury/condition, and which parts of your body are affected?

Neck. Back.

What happened and how were you injured?

See attached.

What task/s were you doing when you were injured?

Plastering Duties ...

What was the date and time the injury/condition occurred?

Course of employment – 2011 to May 2012 and September 2012 to February 2013 ...

62 The handwritten statement of Mr El-Najjar accompanying this claim, reads as follows:

I sustained injury throughout the course of my employment as a plasterer and carpenter. My work involved heavy and repetitive work duties including:

- Installing plasterboard involving over head work.
- Transferring heavy plasterboard between floors.
- Pulling and stacking plasterboard.
- Lifting plasterboard.
- Carrying plasterboard.
- Leaning / balancing plasterboard on my head.
- Screwing plasterboard into ceiling struts.
- Trailing / filling in joints.
- Climbing scaffold.
- Carpentry duties.
- Sanding.
- Sanding.
- Trowelling.

63 The relevant parts of the Brighton claim form completed by hand by Mr El-Najjar read as follows:

What is your injury/condition, and which parts of your body are affected?

Neck. Back.

What happened and how were you injured?

See attached.

What task/s were you doing when you were injured?

Plastering Duties.

...

What was the date and time the injury/condition occurred?

Course of employment – 4 May 2012 to 10 Sept 2012.

... Have you previously had another injury/condition or personal injury claim that relates to this injury/condition?

Yes. Claim against Adanac Plastering which is currently pending.

64 The statement of Mr El-Najjar accompanying this claim, which was again handwritten, is as follows:

I sustained injury throughout the course of my employment as a plasterer and carpenter. My work involved heavy and repetitive work duties including:

- All aspects of plastering work.
- Installing plasterboard involving overhead work
- Pulling and stacking plasterboard.
- Installing heavy gauge metal track framing.
- Lifting and holding in place ceiling metal track.
- Using concrete nail gun.
- Screwing plasterboard into metal framing.
- Corking/crouching to fill taps between cement floor and plasterboard.

65 In the Panel's Reasons it 'noted the handwritten description' in the claim forms completed by Mr El-Najjar. And, as we have already mentioned, in its report of its interview with him it noted that it asked him to confirm that these were the duties he performed.

66 Fourth, the amended statement of claim filed by Mr El-Najjar and set out below identified his continuous work (including heavy lifting) as a plasterer resulting in injury to the cervical and lumbar spine:

- (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.

67 The claim against Brighton is pleaded in similar terms — although alleging different periods of employment.

68 The Panel was provided with the pleadings as part of the material within the Attachments. It expressly said that it formed its opinion ‘with regard to the information’ in it.

69 Fifth, there were several medical reports which described Mr El-Najjar’s continuous work and its relationship to his neck and back symptoms.

70 In the report of Professor Vernon Marshall of 8 August 2018, Mr El-Najjar described his work with Brighton as being ‘in regard to ceiling work at very high levels and very demanding and heavy work. His subsequent work with Adanac Plastering was of much lighter duties of plastering work at St Vincent’s Hospital’.

71 In the report of Dr Joseph Schlesinger of 24 May 2019, the following job tasks of Mr El-Najjar were noted:

- Work at heights (often on a scissor lift).
- Over shoulder reach.
- Forward reach.
- Repeatedly bend and twist.
- Lift weights of over 50kg (e.g., plaster board).
- Use power tools and hand tools.
- Work in restricted or confined spaces.

There followed a comprehensive description of the tasks Mr El-Najjar was performing in 2011 and 2012 in jobs which would be described as moderate to heavy with repetitive lifting of weights up to 15 kg.

72 The report of Mr Roy Carey, in June 2019, set out the following history:

His work with Brighton (apparently a Sydney based company) commenced in May 2002, and he told me that after he left Adanac (Swidryk), Mr El-Najjar confirmed that he “... underwent a pre-employment medical assessment on 1 May 2012 which noted no restrictions in his cervical, thoracic or lumbar spine at that time” (quote from the Circumstance Investigation Report, 30 July 2018 (your end 2).

Initially his work for Brighton involved working with a colleague installing partitioning onto a ceiling.

He had to lay 3 meter lengths of “heavy track” weighing perhaps up to 15 kg onto the ceiling. He told me that he was standing on a scissor lift 10 meters off the floor, with another worker. Each of them would hold an end of the

heavy track onto the ceiling, whilst he lined up the track with a point on the floor using a laser. He would then use a firing gun which he told me was heavy, and produced a significant jerk as the fixer was propelled from the gun.

He told me that he did this with another worker for about 3 weeks, and everything was “fine”.

He told me that thereafter the other worker was taken away such that he had to undertake exactly the same task by himself. He told me that within a short period of doing that, he noticed tingling in the 3rd, 4th and 5th digits of both hands doing this task, complained about it to his supervisor, but was told to get on with it.

This story is in accord with records in the notes of Dr Assaf (your end 3) which indicated at a visit 28 June 2012 that he had “tingling,,numbness (sic) both hands and like electricity for 2 weeks feels sometimes weakness in both legs”.

Mr El-Najjar told me that as management was resistant to his complaints, he got the Union involved, and was then given another task, and this required caulking the 10mm gap between the partitions and the floor. He was required to kneel or squat for this and place the caulking material in the space between the panel and the floor. He told me that he did three levels of the building block on his own over 2 ½ months or so and that “finished me off”, not just with the upper limb symptoms, but now with significant low back pain.

He told me that coincidentally his mother died and then his father died (in Australia) and that he took time off for that reason.

He was by that time seeing a chiropractor for the neck and low back and was told that x-rays “didn't show much”.

He told me that he left Brighton and went back to his previous employer Swidryk/Adanac in September 2012 and continued to work with that company on “much lighter duties” (nevertheless full-time hours/normal duties for the job description) until he needed to travel to Lebanon to obtain information for the death certificates for his parents.

73 In its reasons the Panel referred specifically to the opinions of these three doctors.

74 Sixth, in their submissions to the Panel, the lawyers for Mr El-Najjar spelt out how his claim was put and, more relevantly, set out in detail the nature of his work with each of the Applicants.

75 The following appeared in his submissions:

16. Accordingly, the Medical Panel is required to ask whether, the Plaintiff's condition affecting his spine had its origin in either of his periods of employment.

...

31. Between April 2009 and April 2011 and in March 2012, the Plaintiff worked for Swidryk which traded as Adanac plastering. The company

specialised in commercial and domestic plastering. The Plaintiff generally worked alone though when working on a larger job he was allocated other staff to assist.

32. His normal job involved such tasks as working at heights (often on a scissor lift), over shoulder reaching, forward reaching, repetitive bending and twisting, lifting weights of over 50 kg (e.g. plasterboard), using power tools and hand tools, and working in restricted or confined spaces. The job tasks were usually paste and he was required to complete them within a set time (i.e. in order to keep pace with the renovation timeframe).

33. He did not have a second job. He normally worked between 7 am and 4 pm, Monday to Friday and sometimes worked overtime on Saturdays. In addition, he would be required to travel interstate 2 to 3 times a year.

34. The Panel's attention is drawn to the very detailed history recorded by Dr Slesenger in his report dated 24 May 2019 under heading "History of Presenting Complaint" where Dr Slesenger recorded:

"In 2011, he was working in a residential property in Kew. He was required to manoeuvre 2.5 tons of plasterboard up to the second level by hand. He advised that each plaster board weighed an estimated 50 kg and he worked with one another [sic] staff member. He advised that he had difficulty pulling the sheets upstairs by hand. He advised that he began to develop tingling in the ulnar 3 fingers of both hands. He attended his GP. He was referred physiotherapy. He advised that he engaged in physiotherapy for about 7 months. During which time, his symptoms settled. He was able to remain at work performing normal duties and had no time off work.

He advised that during this time, there was a gradual resolution of the tingling. During his recovery, this time there was no development of neck or shoulder pain."

...

36. On 4 May 2012 he changed employment commenced working with Brighton as a plasterer.

37. Prior to commencing that employment, the Plaintiff was required to undergo a pre-employment medical assessment which was performed by Dr Reza Sabetghadam of the Kinetic Health Clinic on 1 May 2012. In that assessment the Plaintiff was cleared for work with Brighton. Unless that assessment is incorrect then the logical inference is that the Plaintiff was not symptomatic in either his arms, neck or back at that time.

38. The Plaintiff was put to work renovating the National Australia Bank on Bourke Street in the Melbourne CBD. The tasks required installation of framework and in particular installation of overhead steel track. Each track weighed up to 15 kg and had to be manoeuvred into position (using a scissor lift and a laser guided location system). The tracks were then secured into position using a concrete fascinate.

39. The tasks required him to constantly work at heights, reach over the shoulder, and repetitively lift weights of up to 15 kg with his left arm forcefully securing the track while his right arm used the fastener.

40. During this process his neck was constantly extended. Initially he was working with another member of staff who assisted him, but after three weeks, that person was taken away and put two different duties and he was required to perform the work alone. Yet at the same time he was required to keep pace with production. This meant he was effectively doing the work of two men, at the pace of two men, on his own.

41. He described working on the scissor lift as being at a level 8 m high. He described working for long periods with his neck constantly extended and using both arms above shoulder level.

42. After about a couple of months working on the scissor lift the Plaintiff started getting neck pain which radiated into both his arms as well as weakness in the arms and tingling. He said he felt back pain as well whilst working on the scissor lift. He reported the injury. He told me he reported the injury to the foreman, named Michael.

43. The Plaintiff was then put to work on that employer's version of light duties which wasn't very light. That is, he was put to work installing cork flooring. This required him to repetitively bend, crawl and lift light weights. He performed these duties alone without assistance or support. His neck pain persisted during this time and his back pain increased. He said he did that for about two months. Then the work dried up and on about 10 September 2012 he was made redundant.

Swidryk

44. After that the Plaintiff returned to work with Swidryk in about late September 2012. The precise date is not clear but it seems it was not long after the Plaintiff was made redundant at Brighton that he started back at Swidryk.

45. This time he was put to work on a renovation project at St Vincent's Hospital. He was given a plastering role. The role was lighter, as the majority of the job tasks required patching up of existing plaster. He was required to lift buckets of plaster and was required to stand, to perform repetitive bending and twisting and forward reaching. There were no scissor lift duties.

46. During this time he struggled with ongoing neck and lower back pain and regularly took time off work. In addition, both his parents passed away and he took periodic extended compassionate leave. He also travelled to Lebanon to obtain a birth certificate of his parents which required him to be out of Australia for 2 to 3 weeks.

47. When working he experienced increasing difficulty performing the job demands and his symptoms deteriorated. In February 2013 he ceased employment because he was having difficulty performing his duties due to ongoing neck pain with upper limbs radiating symptoms, lower back pain with lower limbs radiating symptoms, weakness in both his upper and lower limbs and difficulty maintaining awkward postures.

76 The Panel noted that it had read and considered the submissions of the parties.

- 77 When all this material is considered, it is plain that the Panel must have given genuine consideration to the role of Mr El-Najjar’s continuous work tasks for the Applicants (and their heavy and repetitive nature) as a potential cause of injury to his cervical and lumbar spine and any ongoing sequelae.
- 78 We also observe that there are no references in the extensive material considered by the Panel to a specific incident contributing to Mr El-Najjar’s spinal condition. To the contrary all the material, without exception, points to continuous moderate to heavy work as an alleged cause of Mr El-Najjar’s cervical and lumbar conditions.
- 79 Subject to one matter, there is no reason to conclude that the Panel failed to have proper regard to this substantial body of evidence setting out the continuous work duties of Mr El-Najjar for the Applicants — much of which it expressly noted in its reasons.
- 80 The qualification is this: her Honour, in reaching her conclusion, focused on the absence of any specific reference to the nature of the continuous work of Mr El-Najjar in those parts of the Panel’s Reasons dealing with his employment as being a cause of his injuries. Her Honour regarded this omission, when combined with the Panel’s reference to the lack of any mention of a specific incident in any of the medical reports tendered to it as demonstrating that the Panel misdirected itself in its consideration of the nature of Mr El-Najjar’s work. We respectfully disagree.
- 81 The question here, as already touched upon, is whether the Panel failed to engage appropriately (i.e. genuinely or realistically) with the issues it was required to determine.
- 82 We repeat that, in determining whether this argument is made out, it is important to firstly to identify the statutory task of the Panel in answering the questions posed by the Judge and secondly, to determine what appropriate inferences can be drawn by a court from the content of the Panel’s Reasons in the context of the material it was required to consider. This was emphasised recently by this Court in *A & L Windows Pty Ltd v Yildirim*:

In considering the issues raised in this proceeding, it is important to remember that the function of a medical panel is to form and give its own opinion on the medical questions referred to it. Its function is to do this by applying its own medical experience and its own medical expertise — rather than having some function of choosing between competing arguments, or opining on the correctness of competing medical opinions.

The primary judge was critical of the medical panel’s reasons for not containing any analysis of a number of topics identified by her. It is now well settled that a medical panel’s statement of reasons must explain the actual path of reasoning by which the medical panel in fact arrived at its opinion, in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. A medical panel is, however, under no obligation to explain why it did not reach an opinion it did not form, even if that opinion is shown by material before it to have been formed by someone else. Moreover, the standard of reasons required of a medical panel is not to be equated with the standard of reasons that would be required of a judge giving reasons for a

final judgment after the trial of an action in the Court. It follows that the mere identification of matters not contained in a medical panel's reasons does not necessarily say anything about the adequacy of those reasons.¹⁶

83 Bearing in mind these statements of principle, we are forced to disagree with her Honour's assessment of the Panel's Reasons and the likelihood that it did not give genuine consideration to the nature of Mr El-Najjar's work. This is for five reasons.

84 First, we repeat that the Panel's Reasons cannot be read in isolation when considering what material it did or did not have regard to. They need to be read in the context of the large amount of material provided to it (and referred to in the Reasons). As we have just seen, there was a large amount of documentation which the Panel considered and referred to in the context of answering the questions, one of which was specifically directed to the nature of the continuous work and went directly to the issue of the form of work being productive of injury.

85 Second, in any event, the Panel's Reasons do not ignore the question of the role of the work process over a period of time in contributing to Mr El-Najjar's condition.

86 The Panel referred to Mr El-Najjar returning to work and being offered and undertaking light duties with the Applicants. It described Mr El-Najjar as experiencing symptoms when offloading plaster (set out at [26] above).

87 In its conclusion (set out at [33] above), the Panel referred to the role of his employment duties in exacerbating Mr El-Najjar's symptoms of constitutional cervical spondylosis which it concluded would have resolved over time. It referred to the temporary exacerbation of symptoms due to the physical nature of the employment duties.

88 Third, in the Panel's Reasons it specifically and correctly described Mr El-Najjar's work duties under the heading 'work capacity' set out at [35] above. The judge's criticism set out at [37] above was that it appeared in an odd part of the Panel's Reasons.

89 But the question here is whether the Panel genuinely considered the issue, not how its reasons were structured. As was said by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002*:

Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole.¹⁷

90 Given the material considered by the Panel and its explicit references to multiple documents that referred to Mr El-Najjar's continuous work for the Applicants, we

¹⁶ [2022] VSCA 46, [29]–[30] ('*A & L Windows*').

¹⁷ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [14]; [2003] HCA 30.

place no weight on the fact that the Panel's description of Mr El-Najjar's work duties appear in a later part of its reasons.

91 Fourth, the judge considered the Panel's specific reference to the lack of any report by Mr El-Najjar to the doctors concerning a specific injury or mechanism as being of significance. Her Honour treated this as being confirmatory of the Panel's failure to consider or understand the issues.

92 We cannot agree. This was simply an observation by the Panel as to whether a frank incident could have produced a prolapse or spinal cord compression. It was part of the Panel's complete evaluation of the role of Mr El-Najjar's work as a cause of his lumbar and cervical conditions and symptoms. In the context of the material with which it was provided and its own description of the work tasks, we cannot accept that in some way the Panel focused solely or overwhelmingly on the lack of a specific incident to the exclusion of considering the effect of the continuous work tasks. As the judge noted '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'.¹⁸ To then conclude that it ignored or misunderstood its role is, we think, a bridge too far.

93 Finally, we do not accept her Honour's observation that the Panel's explanations in its conclusion on causation amounted to a 'focus on symptoms to the exclusion of the work performed by Mr El-Najjar', and thus demonstrated that it had 'not understood the question it had been asked, and had not considered the matters necessary to answer it'.¹⁹ To the contrary, we consider that the Panel's Reasons, when considered as a whole and in the context of the material supplied to it, demonstrate that it gave genuine consideration to the questions posed by the County Court Judge and particularly those related to the work undertaken by Mr El-Najjar in his employment with the Applicants.

94 For the reasons we have just set out, we consider that it is highly unlikely that the Panel misunderstood its task. To focus on selected parts of the text of the Panel's Reasons without examining 'the big picture' can lead to error. We develop this aspect further in our assessment of the Panel's Reasons.

95 So, in summary we respectfully disagree with the conclusion of the judge on this issue. We are unable to see how the Panel's assessment of Mr El-Najjar's employment duties could relate to anything other than those tasks that he described to it in the interview with him and which were confirmed and elaborated upon in the documentation read by the Panel and discussed above.

96 On a fair reading of the Panel's Reasons and the content of the material accompanying the questions posed by the judge, we are not persuaded that the Panel failed to genuinely consider the nature of Mr El-Najjar's work duties as a cause of his incapacity.

¹⁸ Reasons, [49].

¹⁹ Ibid.

97 There are two remaining points to mention.

98 First, in his written case, Mr El-Najjar also asserted that the Panel ‘misdirected’ its inquiry in its reasons as to the deterioration in his symptoms:

Similarly, the Panel’s focus on the worker’s ‘deterioration’ in his symptoms which it recorded as occurring whilst the worker was in Lebanon showed that it misdirected itself. The Panel’s inquiry should have been directed towards such matters as the timing of the onset of symptoms, the nature of the work duties, the work tasks performed, and the probability of the condition developing had the employment not taken place ...

Despite that, in the face of all the evidence available, the Panel limited its findings on causation to a finding that employment temporarily exacerbated the worker’s symptoms.

99 For the reasons we have set out, we reject this contention. Merely because the Panel noted that the deterioration occurred in Lebanon does not (and could not) mean that it did not take into account the work duties carried out by Mr El-Najjar in Australia for the Applicants.

100 Second, Mr El-Najjar’s case is, in truth, an attack upon the Panel’s assessment of the evidence and particularly its different conclusion on causation to that of a number of other medical practitioners. But, and this is particularly so in the context of the statutory regime in this case, such an attack is not the basis for establishing jurisdictional error.

101 Proposed ground 1 is made out.

The Second Ground of Appeal — Adequacy of the Panel’s Reasons

102 The second proposed ground of appeal reads as follows:

*The primary judge erred in concluding that the statement of reasons of the Medical Panel did not comply with its statutory obligation pursuant to s 313(2) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).²⁰*

103 Section 313(2) of the Act requires that a ‘Medical Panel to whom a medical question is so referred must give a certificate as to its opinion and a written statement of reasons for that opinion’.

104 The Applicants’ written case on the application for leave to appeal and the appeal states:

Further, the Panel provided detailed reasons that set out its path of reasoning in sufficient detail to show how the Panel reached its conclusion and that it did not fail to take into account mandatory considerations. It was not a necessary step in the Panel’s reasons that it explain why the worker’s

²⁰ The Act, s 313(2).

constitutional spondylosis was constitutional. Nor was the Panel obliged to give reasons for why it did not determine that the worker had suffered a different injury to the one it had found he had sustained. Lastly, the Panel's conclusion that the exacerbation was temporary followed from its conclusion that the exacerbation caused by the worker's employment duties was an exacerbation of the symptoms emanating from his underlying constitutional condition, which would not have continued to persist after he ceased his employment as a plasterer and was no longer undertaking his pre-injury employment duties which were of a physical nature. The Panel expressly found that the worker's duties had not caused any worsening of the underlying degenerative condition itself or a hastening of its natural progression. Again, these were conclusions formed by the Panel in the application of its professional medical experience and expertise which clearly explained why it formed the opinion it formed. It was not to the point that different doctors may have reached different conclusions. The task of answering the referred medical questions was entrusted to the Panel, and no error was shown in the way that the Panel went about that task.

105 Mr El-Najjar submitted:

Further, at [58] the primary judge considered that the Panel's reasons did not explain how it reached the conclusion that the exacerbation of the worker's cervical spondylosis and lumbar spondylosis between May 2012 and February 2013 was only temporary or had resolved. It is submitted there is no error in the primary judge's approach to the Panel's reasons.

It is submitted the primary judge's approach to the Panel's Reasons was consistent with the Court of Appeal's statement of the principles relating to Medical Panel Reasons in *Sidiqi v Kotsios* [2021] VSCA 187 at [99] and in *A&L Windows Pty Ltd v Yildirim* [2022] VSCA 46 at [29]–[31].

106 We have already referred to this Court's decision in *A & L Windows* at [82]. We also adopt her Honour's statement of principle set out at [55]–[56] of the Reasons which reads as follows:

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'. A statement of reasons is not adequate if there is a 'real doubt' whether the Medical Panel correctly performed its statutory functions. A real doubt may exist where a Medical Panel's conclusions are open to more than one interpretation, 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.

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’.²¹

- 107 In our opinion, the Panel’s Reasons explain why the condition of Mr El-Najjar’s cervical and lumbar spine and the consequential symptoms were not causally related (as prescribed by the provisions of the Act) to the performance of his work duties. In addition, they clearly explain the basis for the Panel’s conclusion as to the cause of persisting and deteriorating symptoms after he ceased his employment.
- 108 It must be remembered that the Panel’s Reasons are those of an expert medical panel (and not a court) and caution is to be exercised in avoiding an overzealous examination of its reasoning in seeking to discern inadequacy. The Panel’s Reasons should not be construed ‘minutely and finely with an eye keenly attuned to error’.²²
- 109 We disagree with her Honour’s criticism of the adequacy of the Panel’s path of reasoning as set out at [38] above.
- 110 First, the Panel was not required to explain the nature of the underlying conditions of cervical and lumbar spondylosis. It was more than sufficient for the Panel to identify as it did (see [33] and [34] above) that these were constitutional degenerative conditions that became symptomatic over time consistent with their natural progression.
- 111 Second, the Panel explained that the work duties of Mr El-Najjar only produced a temporary aggravation. It was not required to use terms of art such as ‘gradual process’.²³ Its description of those duties set out at [35] above demonstrates that it understood the work tasks he performed and, as set out at [33] and [34] above regarded those as only producing a temporary aggravation.
- 112 Third, it is clear from the Panel’s Reasons that it regarded the cause of Mr El-Najjar’s symptoms as being the underlying degenerative condition of the cervical and lumbar spines. The Panel at [33] and [34] above made it clear that it did not accept that the performance of Mr El-Najjar’s work tasks effected the overall progression of the underlying degenerative condition of his cervical and lumbar spines. Nor did it effect the bony structures of either spine. The Panel’s Reasons for rejecting the opinions of the doctors with whom it disagreed (as set out above at [36]) supply, inferentially but nonetheless clearly, its answer as to why gradual process alone could not account for the recurrence, aggravation, acceleration, exacerbation or deterioration of the congenital condition affecting the bony structures which, as the Panel found, was the relevant ‘medical condition’ of the Applicant’s cervical and lumbar spine. This explained why the work duties only produced a temporary exacerbation of symptoms.
- 113 Her Honour’s final criticism is that of the lack of detail in the Panel’s Reasons which it is said precludes a determination as to whether the Panel performed its statutory

²¹ *A & L Windows* [2022] VSCA 46, [55]–[56].

²² *Minister for Immigration and Ethnic Affairs v Wu Sian Liang* (1996) 185 CLR 259, 272; [1996] HCA 6.

²³ Reasons, [47].

function. Its function was, using its expertise, to answer the questions posed by the County Court Judge and to provide a sufficient explanation in its reasons of the basis of reaching those conclusions.

114 In our opinion, the Panel's path of reasoning is clear:

- (a) Mr El-Najjar had established degenerative changes in both his cervical and lumbar spine as disclosed by medical imaging in 2012 and 2013.
- (b) The continuous work tasks performed for the Applicants by Mr El-Najjar (which were set out in his handwritten statements and confirmed by him), produced a temporary exacerbation of the underlying degenerative conditions of his cervical and lumbar spine.
- (c) Mr El-Najjar's work for the Applicants did not alter the progress of the underlying degenerative conditions of his cervical and lumbar spine and did not produce any ongoing symptoms which persist to the present time.
- (d) The current symptomatology of both Mr El-Najjar's cervical and lumbar spine was due to the underlying degenerative condition and not to his employment with the Applicants.
- (e) That its opinion differed to that of a number of the other medical opinions considered by it.

115 We are satisfied that the Panel performed its statutory function in answering the questions and particularly those related to the role of Mr El-Najjar's work for the Applicants and its relationship to his cervical and lumbar conditions and any consequential symptoms. No 'real doubt' as to the Panel's reasoning and conclusion has been demonstrated.

116 Proposed ground 2 is made out.

Conclusion

117 Leave to appeal should be granted and the appeal allowed.

118 Subject to any application by the parties the following orders should be made:

- (1) Leave to appeal is granted.
- (2) The appeal is allowed.
- (3) The orders of Richards J dated 20 December 2021 are set aside and in their place it is ordered as follows:
 - (a) The proceeding be dismissed.
 - (b) The plaintiff pay the first and second defendant's costs of the proceeding, including reserved costs, on the standard basis, to be taxed in default of agreement.

- (4) The first respondent pay the appellants' costs of the application for leave to appeal and the appeal on the standard basis, to be taxed in default of agreement.

SCHEDULE OF PARTIES

SWIRDYK INVESTMENTS PTY LTD	First Applicant
BRIGHTON AUSTRALIA PTY LTD	Second Applicant
and	
YOUSSEF EL-NAJJAR	First Respondent
DR CHRIS GRANT	Second Respondent
DR PETER MILLINGTON	Third Respondent
ASSOCIATE PROFESSOR DAVID ERNEST	Fourth Respondent
ASSOCIATE PROFESSOR BRUCE LOVE	Fifth Respondent
MR PETER GARD	Sixth Respondent