SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0088

WAHID SIDIQI — Applicant

v

DR CHRISTINE KOTSIOS & ORS — Respondents
(according to the attached Schedule)

JUDGES:	BEACH, KAYE and OSBORN JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4 June 2021
DATE OF JUDGMENT:	25 June 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 187
JUDGMENT APPEALED FROM:	[2020] VSC 446 (Richards J)

ADMINISTRATIVE LAW – Judicial review – Medical panel – Applicant sought judicial review of medical panel decision with respect to physical and mental injuries suffered after workplace injury – Diagnosis of chronic pain syndrome following soft-tissue injury which had since resolved – Panel's opinion that applicant could perform pre-injury duties and had 'current work capacity' – Whether judge erred in construction of Panel's reasons – Whether open to Panel on the evidence to form opinion – Whether Panel's conclusions illogical, irrational or otherwise unreasonable – Whether Panel failed to have regard to relevant matters – Whether Panel's reasons were adequate and explained the actual path of reasoning by which it arrived at its opinions – Leave to appeal refused – *Wingfoot Australia Pty Ltd v Kocak* (2013) 252 CLR 480, *S v Crimes Compensation Tribunal* [1998] 1 VR 83, *Amaba Ltd (under New South Wales administered winding up) v Booth* (2010) 9 DDCR 488, *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, *Ryan v The Grange at Wodonga Pty Ltd* [2015] VSCA 17 considered; *Dundar v Bas* [2019] VSCA 315, *Chang v Neill* [2019] VSCA 151, *Richter v Driscoll* (2016) 51 VR 95 applied – *Workplace Injury Rehabilitation and Compensation Act 2013* ss 3, 274, 313, 325.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr A G Uren QC with Mr C Hangay	Zaparas Lawyers

For the First to Fourth Respondents	No appearance	DLA Piper
For the Fifth Respondent	Mr M F Fleming QC with Ms F Spencer	Russell Kennedy Lawyers

BEACH JA
KAYE JA
OSBORN JA:

1 The applicant seeks leave to appeal against a decision of Richards J dismissing an application for judicial review of the opinion of a medical panel ('the Panel') with respect to questions referred to it pursuant to s 274 of the *Workplace Injury Rehabilitation and Compensation Act 2013* ('the WIRC Act').[1]

2 The Panel accepted that as the result of a workplace injury the applicant suffered from a chronic pain syndrome affecting his lower back coupled with a mild chronic adjustment disorder with mixed anxiety and depressed mood, and that his conditions were, in the relevant sense, permanent.

3 Nonetheless, the Panel found that neither his physical nor mental condition resulted in the applicant having an incapacity for his pre-injury work and that he had 'current work capacity' and did not have 'no current work capacity' for the purposes of the WIRC Act.

4 By an originating motion, the applicant contended that the Panel fell into jurisdictional error and that its reasons were inadequate. As the trial judge noted, the applicant's central complaint is that the Panel's findings of fact in respect of pain symptoms were inconsistent with its conclusions about his capacity to work.

5 It was further submitted to the trial judge that the Panel had not properly considered the extent to which the applicant's continuing pain affected his capacity to work and had not, by its reasons, adequately explained its conclusion that he could work.

6 The trial judge dismissed the originating motion, holding with respect to the applicant's central contentions that:

(a) the Panel had not failed to consider relevant matters including, in particular,

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1 *Sidiqi v Kostsios* [2020] VSC 446 ('Reasons').

his ongoing experience of pain and his personal circumstances;

(b) the Panel's decision was open to it and was not irrational or otherwise legally unreasonable; and

(c) the Panel's reasons adequately explained its actual path of reasoning.

7 The applicant now seeks leave to appeal on the following grounds:

1. The trial judge erred in finding that the Reasons of the Medical Panel explained the actual path of reasoning by which it arrived at its opinions on the questions referred to it in Questions 4 to 13.

2. The trial judge erred in finding that the Medical Panel had given proper, genuine and realistic consideration to the applicant's pain and its consequences in forming its opinions on the questions referred to it in Questions 4 to 13.

3. The trial judge erred in not finding that in reaching its opinions on the questions referred to it in Questions 4 to 13 the Medical Panel had failed to take into account, or to give any or any proper genuine or realistic consideration to, the actual demands of the tasks involved in the applicant's pre-injury employment or in each of the other employment options, or alternatively erred in finding to the contrary.

4. The trial judge erred in not finding that in in [sic] forming its opinions on the questions referred to it in Questions 4 to 13 the Medical Panel did not take into account, or give any or any proper genuine or realistic consideration to, whether the applicant had an injury caused inability to return to work in employment, ie as a settled or established member of the wage-earning work force, and in doing so to consider more than a physical and psychiatric capacity to engage in the particular task or tasks that constitute such employment.

5. The trial judge erred in finding that in forming its opinions on the questions referred to it in Questions 4 to 13 the Medical Panel had taken into account, or had given any or any proper genuine or realistic consideration to the entirety of the applicant's personal circumstances such as age, transferable skills and experience, prior work experience, and other matters which would affect the attractiveness of the applicant to a potential employer (the ability to find employment with his pain and disabilities).

6. The trial judge erred in finding that the opinions of the Medical Panel on the questions referred to it in Questions 4 to 13 were not unreasonable.

7. The trial judge erred in finding that it was open in the circumstances for the Medical Panel to be of its opinions on the questions referred to it in Questions 4 to 13, or alternatively erred in not finding to the contrary.

8 In summary, we are satisfied that:

(a) it was open to the Panel on the evidence to form the opinion which it did and that its conclusions were not unreasonable (grounds 6 and 7);

(b) the Panel did not fail to give genuine and realistic consideration to:

- the applicant's pain and its consequences (ground 2);
- the actual demands of the tasks involved in the applicant's pre-injury employment or each of the other employment options it considered (ground 3);
- whether the applicant had an injury caused inability to return to work in employment and whether the applicant had more than a physical and psychiatric capacity to engage in the particular task or tasks involved in a return to work (ground 4);
- the entirety of the applicant's personal circumstances and other matters which would affect the attractiveness of the applicant to a potential employer (ground 5); and

(c) the Panel's reasons were adequate (ground 1).

9 For the reasons which follow, we would refuse leave to appeal.

Background facts

10 In April 2016, the applicant, who was then 35 years of age, commenced working as a storeman and forklift driver in a timber yard. On 26 August 2016, he suffered injury at work when he bent over to pick up a piece of timber and felt acute pain in his lower back ('the incident').

11 The pain in his lower back prevented him from finishing his shift and he sought medical attention.

12 In September 2016, he made a claim for workers compensation for injury to his lower back, described as 'two bulging discs'. The claim was accepted.

13 In early 2017, the applicant made a graduated return to work on modified duties involving stocktaking and printing. He ceased performing these duties in order to undertake a pain management program in mid-September 2017.

14 In October 2017, his employer terminated his employment.

15 In October 2018, the applicant sought leave pursuant to s 335 of the WIRC Act to commence proceedings against his employer for the recovery of damages in respect of a claimed serious impairment or loss of body function of the back and/or a claimed severe mental and/or behavioural disturbance or disorder arising out of the incident.

16 On 20 June 2019, Judge Wischusen referred medical questions to a medical panel pursuant to s 274 of the WIRC Act.

17 The Panel comprised of a psychiatrist (Dr Christine Kotsios), an occupational and environmental physician (Dr Susanne Homolka), a neurosurgeon (Mr Kevin Siu), and a rheumatologist (Dr Daniel Lewis), was convened to form and give an opinion on the referred medical questions.

18 The applicant was examined by Dr Kotsios on 16 September 2019 and jointly by the other members of the Panel on 20 September 2019.

19 On 30 September 2019, in accordance with s 313(2) of the WIRC Act, the Panel rendered a 'Certificate of Opinion' in respect of the referred medical questions. The questions and opinions in response were as follows:

> **Question 1:** **What is the nature of the medical condition of the Plaintiff's:**
> **1.1 lumbar spine;**
> **1.2 mind?**
>
> Answer: 1.1 In the Panel's opinion the Plaintiff is currently suffering from chronic pain syndrome following a soft tissue injury on a background of pre-existing, constitutional degenerative changes of the lumbar spine commensurate with his age, the effects of which have otherwise resolved,
>
> 1.2 In the Panel's opinion the Plaintiff is currently suffering from a mild chronic adjustment disorder with mixed anxiety

depressed mood.

Question 2: **Do any, and if so which, of the medical condition [sic] identified in response to Question 1 currently result from, or are they materially contributed to by, the back injury suffered by the Plaintiff in the course of his employment on 26 August 2016?**

Answer: The Panel is of the opinion that the Plaintiff' [sic] current physical and psychiatric medical conditions of chronic pain syndrome following a soft tissue injury on a background of pre-existing, constitutional degenerative changes of the lumbar spine commensurate with his age, the effects of which have otherwise resolved and mild chronic adjustment disorder with mixed anxiety depressed mood result from and are materially contributed to by the back injury suffered by the plaintiff in the course of his employment on 26 August 2016.

Question 3: **Is any medical condition of the Plaintiff's:**
3.1 lumbar spine;
3.2 mind;
which results from, or is materially contributed to by, the injuries 'permanent', meaning 'likely to last for, during or through the foreseeable future'?

Answer: 3.1 and 3.2 The Panel is of the opinion that the Plaintiff's current physical and psychiatric medical conditions of chronic pain syndrome following a soft tissue injury on a background of pre-existing, constitutional degenerative changes of the lumbar spine commensurate with his age, the effects of which have otherwise resolved and mild chronic adjustment disorder with mixed anxiety depressed mood are permanent.

Question 4: **Does any medical condition of the Plaintiff's lumbar spine which results from, or is materially contributed to by, the injuries (excluding any psychological or psychiatric consequences of those conditions) result in him having an incapacity for work as a store person and a forklift driver?**

Answer: No.

Question 5: **If any incapacity is identified in response to question [4], is such incapacity 'permanent', meaning 'likely to last for, during or through the foreseeable future'?**

Answer: Not applicable.

Question 6: **Does any medical condition of the Plaintiff's mind which results from, or is materially contributed to by, the injuries (excluding any physical consequences of these conditions) result in him having an incapacity for work as a store person and a forklift driver?**

Answer: No.

Question 7: **If any incapacity is identified in response to question [6], is such incapacity 'permanent', meaning 'likely to last for, during or through the foreseeable future'?**

Answer: Not applicable.

Question 8: **Does any medical condition of the Plaintiff's lumbar spine which results from, or is materially contributed to by, the injuries (excluding any psychological or psychiatric consequences of those conditions) result in him having:**
8.1 a 'current work capacity' within the meaning of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('the Act'); or
8.2 'no current work capacity' within the meaning of the Act?

Answer: 8.1 Yes.
8.2 No.

Question 9: **If 'yes' to question [8.1], would employment as a:**
9.1 Process Worker (Light);
9.2 Machine Operator (Light);
9.3 Cashier;
9.4 Sales Assistant;
9.5 Stock Clerk;
constitute suitable employment within the meaning of the Act and, if so, for how many hours and days per week?

Answer: 9.1 – 9.5 The Panel is of the opinion that full-time employment as a process worker (light), machine operator (light), cashier, sales assistant, and stock clerk, working for eight hours per day and five days per week, would constitute suitable employment within the meaning of the Act.

Question 10: **If any incapacity is identified in response to Question 9, is such incapacity 'permanent', meaning 'likely to last for, during or through the foreseeable future'?**

Answer: Not applicable.

Question 11: **Does any medical condition of the Plaintiff's mind which results from, or is materially contributed to by, the injuries (excluding the physical consequences of those conditions) result in him having:**
11.1 a 'current work capacity' within the meaning of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('the Act'); or
11.2 'no current work capacity' within the meaning of the Act?

Answer: 11.1 Yes
11.2 No.

Question 12: **If 'yes' to question [11.1], would employment as a:**
12.1 Process Worker (Light);
12.2 Machine Operator (Light);

12.3 Cashier;
12.4 Sales Assistant;
12.5 Stock Clerk;
constitute suitable employment within the meaning of the Act and, if so, for how many hours and days per week?

Answer: 12.1 – 12.5 The Panel is of the opinion that full-time employment as a process worker (light), machine operator (light), cashier, sales assistant, and stock clerk, working for eight hours per day and five days per week, would constitute suitable employment within the meaning of the Act.

Question 13: If any incapacity is identified in response to question 12, is such incapacity 'permanent', meaning 'likely to last for, during or through the foreseeable future?

Answer: Not applicable.

20 The Panel's opinion falls to be adopted and applied by the County Court in the applicant's serious injury application pursuant to s 313(4) of the WIRC Act.

21 The applicant's contentions on the application for leave to appeal accept the Panel's answers to questions 1, 2 and 3 and are directed to the answers to questions 4 to 13.

The Panel's reasons

22 In accordance with s 313(2) of the WIRC Act, the Panel also gave a written statement of its reasons for these opinions.

23 The trial judge carefully summarised the Panel's reasons and we shall adopt that summary.

> Dr Kotsios, the psychiatrist on the Panel, conducted an examination of Mr Sidiqi on 16 September 2019. The other members of the Panel jointly examined Mr Sidiqi on 20 September 2019. The Panel commenced its reasons by referring to these examinations.
>
> 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 Sidiqi, and the examination findings elicited by the Panel. Enclosure A listed a large number of documents provided to the Panel with the referral, including written submissions of Mr Sidiqi and WorkCover, Mr Sidiqi's affidavits in support of his serious injury application, certificates of capacity, surveillance material, radiological reports, medical reports, clinical records, and rehabilitation documents. The Panel expressly noted written submissions

made to it on behalf of Mr Sidiqi dated 22 May 2019.

The Panel set out Mr Sidiqi's occupational history and his pre-injury employment. It described the history of the incident on 26 August 2016, Mr Sidiqi's medical and like treatment following the incident, and his graduated return to work in 2017, before he stopped work due to ongoing lower back pain. It noted Mr Sidiqi's efforts to retrain and find alternative employment, following the termination of his employment by Dindas in October 2017.

The following sections of the Panel's reasons summarised Mr Sidiqi's current physical status and activities of daily living. His main complaint was 'constant lower back pain of variable severity which is worse in cold weather and which is increased by walking or standing for longer than about 10–15 minutes, and by sitting for longer than 20–30 minutes'. He also suffered intermittent associated pain in his left leg, which at times felt numb and weak, although he told the Panel that his left leg symptoms were 'not really a problem for him'. His lower back pain disturbed his sleep, and he always woke up feeling stiff and tired. He was independent in his personal care, and able to drive his car, shop with his wife, and make sandwiches for his children. He did little else around the house because his doctor had advised him not to bend, and he was 'too scared to do anything' for fear of another lower back injury. For that reason, he had not returned to playing soccer.

The Panel noted that Mr Sidiqi's current treatment was limited to seeing his general practitioner two or three times a month for prescriptions. He had not seen his pain specialist since the pain management program concluded. His medications included opioid analgesics, an antidepressant, and an anxiolytic, all of which he tried to avoid taking as much as possible. He also used paracetamol as a simple analgesic. He had ceased physiotherapy, hydrotherapy, and acupuncture when funding was withdrawn, and had also stopped his self-directed gym/swim program for financial reasons. He was last reviewed by his neurosurgeon in early 2018, and had opted to avoid surgery.

The findings of the Panel's clinical examination on 20 September 2019 were then set out:

> The Panel conducted a physical examination and noted that the Plaintiff walked with a normal gait, and was able to heel and toe walk and to weight bear fully on each leg individually without difficulty. He demonstrated a normal standing posture, with equal body weight distribution to both lower limbs and a level pelvis. Examination of the thoracolumbar spine revealed a slight thoracic scoliosis convex to the left but otherwise normal spinal contours, with a retained lumbar lordotic curve and without any evidence of paraspinal muscle spasm. Range of active motion of the lumbar spine was full and symmetrical, and neurological examination of the lower limbs was normal. Specifically, there was no evidence of any muscle wasting or atrophy of either the thighs or the calves, and no loss of power was demonstrated. Deep tendon reflexes were present and symmetrical, the plantar response was down going bilaterally, and sensory testing did not reveal any abnormalities.

The Panel noted that an MRI scan of Mr Sidiqi's lumbar spine demonstrated 'mild degenerative changes' at the two lower lumbar levels, and a small

annular tear at L4/5. There was no radiological evidence of any neural compromise. No further imaging or investigations were required by the Panel. It had viewed surveillance footage of Mr Sidiqi captured on 25 August 2018, and considered that the footage was consistent with its clinical examination findings and did not provide additional information that would assist it in forming an opinion about his medical condition, or about any functional limitations or restrictions he may be experiencing.

In a section headed 'Analysis and Discussion', the Panel referred to the onset and progression of Mr Sidiqi's symptoms, its clinical examination findings, available radiological evidence, surveillance material, and the opinions of medical practitioners who had examined and/or treated Mr Sidiqi and whose reports were included in the referral material. Having considered those matters:

> The Panel considered that the Plaintiff had suffered a soft tissue injury on a background of pre-existing, constitutional degenerative changes of the lumbar spine commensurate with his age, as a consequence of the incident. The Panel noted, and accepted, the Plaintiff's description of persistent pain symptoms and of the restrictions to his activities, which he practises due to his fear of further injury. The Panel considered that the nature, extent and severity of the Plaintiff's symptoms of pain, when considered in the context of a normal clinical examination of his lumbar spine, do not correlate with, and cannot be accounted for, by the minor degenerative changes of his lumbar spine, and the Panel formed the view that the Plaintiff has developed a chronic pain syndrome as a consequence of the soft tissue injury, the effects of which have now otherwise resolved.

The Panel then set out its diagnosis and conclusions:

> The Panel therefore concluded that the Plaintiff is currently suffering from a chronic pain syndrome following a soft tissue injury on a background of pre-existing, constitutional degenerative changes of the lumbar spine commensurate with his age, the effects of which have otherwise resolved, and the Panel also concluded that his current medical condition of chronic pain syndrome results from and is materially contributed to by the back injury suffered by the Plaintiff in the course of his employment with the Defendant on 26 August 2016.

Noting the nature and duration of Mr Sidiqi's symptoms, the Panel considered that his chronic pain syndrome was likely to persist in the foreseeable future.

As to Mr Sidiqi's physical work capacity:

> The Panel considered that notwithstanding his persistent pain symptoms, the Plaintiff's current medical condition of chronic pain syndrome would not preclude him from undertaking the full duties and hours of work of his pre-injury role as a storeman/forklift driver for a supplier of timber with the Defendant. The Panel also considered that the nature of his pre-injury duties would not exacerbate or aggravate his current medical condition of chronic pain syndrome in any way.
>
> The Panel therefore concluded that the Plaintiff' current medical condition of chronic pain syndrome does not, when excluding any psychological or psychiatric consequences of this condition, result in him having an incapacity for work as a store person and forklift driver.

> The Panel turned to the **five employment options** identified in the Vocational Assessment report dated 5 February 2019 — namely, process worker (light), machine operator (light), cashier, sales assistant, and stock clerk. It considered that Mr Sidiqi's chronic pain syndrome 'would not preclude him from being able to consistently and reliably perform the duties of any/all of these five job options on a full-time basis as a settled or established member of the wage-earning workforce, without the need for retraining'. It did not consider that the physical functional requirements of these suitable employment options would exacerbate or aggravate Mr Sidiqi's medical condition in any way. As a result:
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> > The Panel therefore concluded that when disregarding any psychological or psychiatric consequences of his current medical condition of chronic pain syndrome, the Plaintiff has a current work capacity within the meaning of the Act, and the Panel also concluded that the duties of a process worker (light), machine operator (light), cashier, sales assistant, and stock clerk, working for eight hours per day on five days per week, would constitute suitable employment for him within the meaning of the Act.
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> The contrary opinions of Mr Craig Timms, Mr Sidiqi's treating neurosurgeon, Dr Meena Mittal, pain physician, and Dr Joseph Slesenger, occupational physician were noted. The Panel said that it had formed a different opinion, based on its own clinical examination of Mr Sidiqi and 'for the reasons above'.
>
> The Panel next provided an extensive account of its psychiatric assessment of Mr Sidiqi. It concluded that Mr Sidiqi has 'a mild chronic adjustment disorder with mixed anxiety and depressed mood' resulting from and materially contributed to by his lower back injury. It considered that this psychiatric condition was likely to persist through the foreseeable future and was therefore permanent.
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> However, in the Panel's opinion, Mr Sidiqi's psychiatric condition did not result in an incapacity for work in his pre-injury employment as a store person and forklift driver, or more generally. The five employment options were considered by the Panel to be 'suitable employment' for Mr Sidiqi, which he could perform full-time. The Panel's view was that the psychological and emotional functional requirements of those job options would not exacerbate or aggravate his psychiatric condition in any way.[2]

Chronic pain syndrome

24 As the trial judge observed,[3] a diagnosis of chronic pain syndrome is used by doctors to refer to chronic pain which does not have an obvious organic cause. Because there are no generally agreed criteria for the diagnosis and it is applied to a variety of both physical and psychiatric conditions, it is an ongoing source of

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2 Ibid [9]–[22].

3 Ibid [23]–[25].

difficulty for judges.[4]

25 In the present case, however, it is clear from the Panel's answers to questions 1, 2 and 3 that the Panel's diagnosis of chronic pain syndrome designated a physical condition of the lumbar spine.

26 This diagnosis was complicated by the additional diagnosis of a mild chronic adjustment disorder with mixed anxiety and depressed mood which was materially contributed to by the back injury.[5] Thus, in terms of the whole person, the applicant's ongoing condition is a combination of both physical and psychological components.

27 The Panel's answers to questions 1 and 2 left open the assessment of the consequences of the respective medical conditions of the applicant's lumbar spine and mind, if each was considered separately as the subsequent questions required the Panel to do.[6]

28 Insofar as the applicant's anxiety state modified his perception of, and reaction to, pain, this had to be disregarded in answering questions which required the Panel to address the consequences of injury to his lumbar spine, stripping out psychological consequences.

Legal principles

29 There are a series of interrelated legal principles which must be borne in mind in addressing the matters which the applicant contends justify setting aside the Panel's opinion by way of judicial review.

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4 Ibid [23] citing *Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis* (2007) 15 VR 649, 650–1 [2]–[4] (Maxwell P).

5 See the answer to question 2.

6 The stripping out of aspects of the applicant's overall medical condition for the purpose of these questions was directed to separate consideration respectively of the applicant's physical and mental conditions, and was the consequence of the combination of the definition of serious injury in s 325(1) by reference to different categories of injury, the different tests for different kinds of serious injury pursuant to ss 325(2)(c) and (d), and the supplementary provisions of ss 325(2)(h) and (i) of the WIRC Act.

30 First, judicial review proceedings are not concerned with merits review. It is not open to argue, as it is on an appeal by way of rehearing, that the decision reached by the primary decision-maker was contrary to compelling inferences to be drawn from the evidence as a whole.[7]

31 Although the applicant seeks to accommodate this case within notions of judicial review, this basic limitation gives rise to a fundamental problem with his case because at its heart it seeks to agitate precisely this kind of proposition. In particular, the applicant wishes to contend that the Panel's opinion as to inferences to be drawn from the evidence was contrary to compelling inferences to be drawn from what are said to be conflicting aspects of the facts.

32 Secondly, the starting point for judicial review must be a consideration of the Panel's statutory function. The primary function of a medical panel is to form an opinion with respect to questions referred to it. The secondary function is to certify answers to those questions and state reasons for them.

33 Insofar as the Panel's primary task was to answer the medical questions asked of it, it was required first to form a medical opinion as to the nature, cause and permanency of the applicant's injuries, and secondly, to assess the consequences of his medical conditions in terms of the applicant's ongoing capacity to work. In *Wingfoot Australia Partners Pty Ltd v Kocak*,[8] the High Court described the functions of a medical panel as follows:

> The function of a Medical Panel is to form and to give its own opinion on the medical question referred for its opinion. In performing that function, the Medical Panel is doubtless obliged to observe procedural fairness, so as to give an opportunity for parties to the underlying question or matter who will be affected by the opinion to supply the Medical Panel with material which may be relevant to the formation of the opinion and to make submissions to the Medical Panel on the basis of that material. The material supplied may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a

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7 *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679, 686–7 [43] (French CJ, Bell, Keane, Nettle and Gordon JJ).

8 (2013) 252 CLR 480 ('*Wingfoot*').

> particular case to place weight on a medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the function of the Panel as being either to decide a dispute or to make up its mind by reference to competing contentions or competing medical opinions. The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. *The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise*.[9]

34 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.

35 Section 3 of WIRC Act defines medical questions with an extended meaning and the questions which the Panel was required to address with respect to the applicant's capacity to work travel beyond matters of strictly medical opinion. Nonetheless, the starting point for each opinion which is now in issue, was an evaluation of the nature, extent and severity of the applicant's chronic pain syndrome. In this sense, the exercise of medical expertise was fundamental to each of the opinions which the Panel expressed.

36 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.

37 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

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[9] Ibid 498–9 [47] (French CJ, Crennan, Bell, Gageler and Keane JJ) (emphasis added) (citation omitted).

holding particular expertise with respect to the matters in issue in this case.

38 Thirdly, a medical panel is not bound by the rules of evidence and may inform itself on any matter relating to the issue referred to it, in any manner it sees fit.[10]

39 It follows that the Panel is possessed of a broad discretion as to the manner in which it evaluates the facts in a particular case.

40 In consequence, establishing a ground of review based on 'no evidence' may be very problematic. It has been fairly said that in such a case the 'no evidence bar is set very high'.[11]

41 In a fundamental sense, it is for the Panel itself to determine what information is sufficient to found an opinion with respect to a medical question.

42 Fourthly, the Panel's decision will be subject to judicial review if it reached a conclusion of fact that was not open to it. Such a conclusion may be a specific finding of fact purportedly based on direct evidence or an inference purportedly drawn from evidence concerning a number of primary facts.[12]

43 The present case is fundamentally concerned with opinions as to the inferences which should be drawn from a body of circumstantial evidence. As Phillips JA explained in *S v Crimes Compensation Tribunal*,[13] such an inference will not be open if the finding of the primary facts forming the basis of the inference was not itself open. Alternatively, an inference may be said not to be open if, accepting the facts as found, the inference itself was not open.

It may question whether there were the primary facts from which an

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10 WIRC Act s 303(1).

11 *North v Homolka* [2014] VSC 478, [63] (Ashley JA); *Vellios Electrical Contractors Pty Ltd v Barton* [2014] VSC 664, [89] (Cavanough J). See also *Moore v Barton* [2014] VSC 78, [65]–[66] (Dixon J) and cases there cited.

12 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 90 (Phillips JA); *Amaba Pty Ltd (under New South Wales administered winding up) v Booth* (2010) 9 DDCR 488, 498 [22]–[25].

13 [1998] 1 VR 83, 90.

> inference might be drawn or, there being no doubt about the primary facts, it may question whether the inference could be drawn from those facts.[14]

44 The applicant's case raises the latter kind of contention.

45 In *S v Crimes Compensation Tribunal*, Phillips JA doubted whether the relevant test is whether an inference can be 'reasonably' drawn as distinct from simply whether the inference is open.[15] In relation to the drawing of inferences, Phillips JA adopted what was said by Mildren J in *Tracy Villages Sports and Social Club v Walker*, including the following:

> In the context of this discussion, if an inference cannot reasonably be drawn, it will be because the inference cannot be drawn from the primary facts. However, if the inference is one about which minds might differ, it being a question of judgment or degree, the inference not only can be drawn but it would not be unreasonable to draw it.[16]

46 As this passage indicates, the question of whether an inference is open raises an issue which may be regarded in an underlying conceptual sense as one of legal unreasonableness.

47 The rationale for the requirement that a finding be open to a statutory decision-maker was explained by Phillips JA as follows:

> To perceive an error of law in the ultimate conclusion by reason of a totally unsubstantiated finding which is critical to it can rest, I think, on the recognition of an unstated premise in the legislation that the tribunal will proceed only according to the evidence and not arbitrarily, according to some frolic of its own … Again I say 'evidence' only for the sake of simplicity; in a case where the tribunal is authorised to obtain information otherwise or to act upon its own expertise, it may be more difficult to show that the finding was not open, in view of the possibly uncertain nature of the material upon which the finding could be based, but the principle is unchanged.[17]

48 An inference may be drawn from a combination of facts none of which would

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14 Ibid.

15 Ibid 91.

16 (1992) 111 FLR 32, 37–8, cited in *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 91 (Phillips JA).

17 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 90 (Phillips JA). See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356 (Mason CJ).

individually demonstrate that it should be drawn.[18]

49 When an inference is to be drawn by way of the opinion of a medical panel as to the nature, extent and severity of a medical condition, it follows from what we have said concerning the panel's function that it will be for the panel to identify the relevant facts and evaluate the weight to be given to particular circumstances in the light of its medical knowledge and experience.

50 In some cases, different facts or combinations of facts may support opposing inferences. The medical panel is not required to arrive at scientific certainty but to arrive at an opinion on the balance of probabilities. In some cases, such an opinion may be one on which rational minds might differ.

51 This said, an inference will not be open if there was no evidence which could rationally support a finding of the conclusion in issue. In *Amaba Ltd (under New South Wales administered winding up) v Booth*,[19] Basten JA observed:

> Implicit in the statement that there is no evidence to 'support' a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of 'relevance', on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.[20] As explained by Gleeson CJ, Heydon and Crennan JJ in *Washer v Western Australia*:
>
> > The word 'rationally' is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.[21]
>
> Whether an inference is reasonably open, in the sense of being logically available, involves an evaluative judgment, which is to be assessed by the court exercising appellate or supervisory jurisdiction.[22]

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18 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 535 (Gibbs CJ and Mason J). These principles as stated are as much applicable to civil as criminal cases: *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 129.

19 (2010) 9 DDCR 488.

20 *Evidence Act 1995* (NSW) s 55(1).

21 (2007) 234 CLR 492, 497 [5].

22 *Amaba Pty Ltd (under New South Wales administered winding up) v Booth* (2010) 9 DDCR 488, 498

52 Fifthly, the applicant contends that the Panel's opinions as to his capacity to work should be set aside on the basis that they are demonstrably illogical or irrational and are subject to judicial review as such for legal unreasonableness independently of the specific rules which govern the question whether inferences drawn by the Panel were open to it. The general principle that a decision made in the exercise of statutory power is unreasonable in a legal sense when it lacks an evident and intelligible justification is derived from decisions of the High Court involving consideration of decisions of the Minister for Immigration, and the administrative decisions of tribunals with respect to matters relating to immigration and refugees.[23]

53 The conceptual basis of the relevant principles of legal unreasonableness was explained by Nettle and Gordon JJ in *Minister for Immigration and Border Protection v SZVFW* as follows:

> The task of the court, where it has been alleged that a decision is legally unreasonable, is to ask whether the exercise of power by the decision-maker was beyond power because it was legally unreasonable.[24]
>
> That task requires the court to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power.[25]
>
> Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker.[26] The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker or, put in different terms, the decision is beyond power.[27] That question is critical to an understanding of the task for a court on review.

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[23]–[24] (citations in original).

23 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 620–1 [23]–[24] (Gummow ACJ and Kiefel J), 636 [96] (Crennan and Bell JJ) ('*SZMDS*'); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ) ('*Li*'); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 550–1 [10] (Kiefel CJ), 572–4 [78]–[83] (Nettle and Gordon JJ) ('*SZVFW*').

24 *Li* (2013) 249 CLR 332, 351–2 [30], 367–9 [77]–[85], 378–80 [114]–[124].

25 Ibid 363–4 [67], 370–1 [90], 376 [109] citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473; see also at 473–4.

26 Ibid 350 [26], 351 [29], 362 [63], 370 [88].

27 Ibid 363–4 [67]; see also at 370–1 [90], 371 [92], 375 [105].

> How that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome. The abuse of statutory power is not limited to a decision affected by specific errors which bring about an improper exercise of power because, for example, the decision-maker took into account an irrelevant consideration or failed to take into account a relevant consideration; or exercised the power in bad faith, or for a purpose other than a purpose for which it was conferred; or exercised the power in such a way that the result of the exercise of power is uncertain.[28]
>
> Nor is the abuse of statutory power limited to a decision which may be described as 'manifestly unreasonable',[29] or to what might be described as an irrational, if not bizarre, decision that is so unreasonable that no reasonable person could have arrived at it.[30] A conclusion of legal unreasonableness may be outcome focused — where, for instance, there is no 'evident and intelligible justification' for the decision.[31] As Gageler J explained in *Minister for Immigration and Citizenship v Li*, '[r]eview by a court of the reasonableness of a decision made by another repository of power "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" but also with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"'.[32]
>
> Indeed, grievous error may result if a court on review had to identify a particular error to found its conclusion of unreasonableness. If the court approached the assessment in this way, at least one important part of the lens for assessing legal unreasonableness would be removed: namely, error identified by observing that the *result* is so unreasonable that it could not have been reached if proper reasoning had been applied in the exercise of the statutory power in the particular circumstances. In that situation, the court is not undertaking merits review of an exercise of a discretionary power by a decision-maker.[33] Rather, the court is asking whether the decision-maker's purported exercise of power was beyond power because it was legally unreasonable.[34]

54 Because the principle may extend to justification within the decision-making process, it may be necessary to go beyond considering whether the opinion of a medical panel as to the inferences which should be drawn in a particular case was open (in the sense that we have explained) and to examine whether the process of

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28 Ibid 365–6 [72].

29 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.

30 See *Li* (2013) 249 CLR 332, 364 [68], 375 [105].

31 Ibid 367 [76]; see also at 373 [98], 375 [105].

32 Ibid 375 [105] quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–1 [47].

33 See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6.

34 (2018) 264 CLR 541, 572–4 [78]–[83] (citations in original) (emphasis in original). See also 564–5 [53]–[54] (Gageler J); 583–6 [131]–[135] (Edelman J).

reasoning which the panel did in fact adopt in order to make the findings which it did was rational.

> [T]he correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the judgment it did make on the material before it.[35]

55 This approach differs from that explained by Mason CJ in the oft cited passage in *Australian Broadcasting Tribunal v Bond*:

> Thus at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[36]

56 There remains some uncertainty as to whether and how the principles of irrationality and illogicality should be applied to opinions of a medical panel as a distinct ground of judicial review essentially for the reasons explained by Neave JA (with whom Santamaria JA and Ginnane AJA agreed) in *Ryan v The Grange at Wodonga Pty Ltd*.[37]

57 The trial judge in the present case adopted the view that she has previously articulated in *Total Transport Pty Ltd v Tasiopoulos*:[38]

> Illogicality and irrationality are subsets of the legal unreasonableness ground of review, where the focus is on the decision-maker's reasoning process rather than on the outcome.[39] Hesitation about the availability of illogicality, irrationality or unreasonableness as a ground of review of a Medical Panel opinion is not easy to reconcile with other authority to the effect that legal reasonableness is a condition of the lawful exercise of statutory power.[40] As a

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35 *SZMDS* (2010) 240 CLR 611, 648 [133] (Crennan and Bell JJ).

36 (1990) 170 CLR 321, 356 (emphasis in original).

37 [2015] VSCA 17.

38 [2019] VSC 266, [22] (citations in original) adopted at Reasons [35] fn 9; see also *Mailton Holdings Pty Ltd v Jussy* [2019] VSC 421, [40].

39 *SZMDS* (2010) 240 CLR 611, 645–8 [124]–[131] (Crennan and Bell JJ); *Li* (2013) 249 CLR 332, 365–6 [72] (Hayne, Kiefel and Bell JJ), 375 [105] (Gageler J); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 445–7 [43]–[48]; *SZVFW* (2018) 264 CLR 541, 573 [82] (Nettle and Gordon JJ).

40 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J); *Li* (2013) 249 CLR 332, 350–1 [26]–[29] (French CJ), 362–4 [63]–[67] (Hayne, Kiefel and Bell JJ), 370–1 [88]–[90] (Gageler J);

> matter of principle, it is difficult to see why the standard of legal reasonableness should not apply to the formation of an opinion by a Medical Panel, as much as to the exercise of a discretion[41] or satisfaction as to the existence of a jurisdictional fact.[42] Indeed, the standard has been applied in decisions of this Court concerning Medical Panels.[43]

58 There is, with respect, much to be said for this view. Given that the WIRC Act vests in medical panels the power to form a binding opinion, it may be implied that it is intended that such an opinion will be reached by a rationally defensible path of reasoning. It is not sufficient simply that a panel arrives at an opinion which is open. In this regard, there may be many cases where differing and perhaps opposing medical opinions will be open.

59 Moreover, it should be emphasised that acceptance of this basis of judicial review does not open the door to a merits review of the applicant's case. As the trial judge recorded in the present case:

> That said, the test for legal unreasonableness is stringent,[44] and the ground is not a vehicle for challenging the merits of a Medical Panel's opinion.[45] An opinion on a medical question is a matter on which logical or rational or reasonable minds might follow different routes and reach different conclusions.[46] The standard of legal reasonableness allows room for reasonable minds to differ.[47]

60 As Nettle and Gordon JJ further observed in *SZVFW*, legal unreasonableness is invariably fact-dependent.[48] In the present case, as will become apparent below, the application of the concepts of illogicality and irrationality to the Panel's reasoning appear to us to raise essentially the same issues as we have identified by

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SZVFW (2018) 264 CLR 541, 564–5 [51]–[53] (Gageler J), 572–3 [80] (Nettle and Gordon JJ), 583–6 [131]–[135] (Edelman J).

41 Eg *Li* (2013) 249 CLR 332.

42 Eg *SZMDS* (2010) 240 CLR 611.

43 Eg *Moore v Barton* [2014] VSC 78, [67]–[70], [78]; *City of Melbourne v Neppessen* [2019] VSC 84, [64]–[68], [87], [148]–[154].

44 *Li* (2013) 249 CLR 332, 376–8 [108]–[113] (Gageler J).

45 Ibid 351–2 [30] (French CJ), 363 [66] (Hayne, Kiefel and Bell JJ).

46 *SZMDS* (2010) 240 CLR 611, 647–8 [130]–[131] (Crennan and Bell JJ).

47 Reasons [36] (citations in original).

48 (2018) 264 CLR 541, 574 [84].

reference to the question whether the inferences drawn by the Panel were open on the evidence. In any event, assuming that illogicality and irrationality do provide distinct grounds for judicial review, for the reasons set out below, we are not persuaded that the Panel's decision was irrational or illogical.

61 Sixthly, a medical panel will commit jurisdictional error if it fails to give genuine consideration to matters which it is required by statute to consider and that consideration could have materially affected its decision,[49] or to fundamental issues raised by the facts of the case.[50]

62 In the present case, the applicant contends both that the Panel failed to consider matters stipulated by the WIRC Act as relevant to assessment of his capacity to find employment, and failed to give genuine consideration to his ongoing experience of pain which the trial judge accepted was a consideration essential to the valid performance of its statutory function.[51]

63 Seventhly, a failure by a medical panel to give reasons for its opinion in accordance with the statutory requirement will constitute an error of law on the face of the record.

64 In *Wingfoot*, the High Court held that consistently with the nature of its function, a medical panel must explain the path of reasoning by which it arrives at its own opinion. The reasons must enable a court to assess whether the panel's opinion involved an error of law. A panel is not required to give reasons of the kind which would be required by a tribunal carrying out an adjudicative function. In *Dundar v Bas*,[52] this Court summarised the following principles governing the assessment of the adequacy of a medical panel's reasons:

> It is worthwhile stating principles to do with a Panel's reasons.

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49 In the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

50 *Chang v Neill* [2019] VSCA 151, [74]–[100] and the authorities there discussed.

51 Reasons [27].

52 [2019] VSCA 315.

> First, the standard is that required by *Wingfoot*. A statement of reasons must be sufficient to explain the Panel's path of reasoning, and to enable a court to see whether the Panel's opinion involved any error of law.
>
> Second, the standard of reasons required of a medical panel is not to be equated with the standards of reasons that would be required of a judge giving reasons for a final judgment after the trial of an action in a court.
>
> Third, as a corollary —
>
> > a Medical Panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.
>
> Fourth, the function of a medical panel is neither arbitral nor adjudicative. Its function in every case is to form and give its own opinion on the medical questions referred to it by applying its own medical experience and its own medical expertise.
>
> Fifth, a panel's reasons must be read fairly, as a whole and in context, and should not be subjected to overly zealous judicial review. …[53]

Was the Panel's opinion open to it and logically justified?

65 It is convenient next to address the factual framework forming the basis of the Panel's conclusions. If there was no logically probative factual basis for the Panel's conclusions then that is the end of the matter, whatever the quality of its reasons.

66 The applicant submitted that the evidence referred to in the Panel's reasons was not logically probative of its conclusions. Alternatively, the applicant submitted that the Panel's findings that the applicant suffered continuing symptoms due to a chronic pain syndrome was necessarily inconsistent with its ultimate conclusions concerning his capacity to work. Thus, the opinion had no logical justification.

67 Conversely, the respondent submitted that, on the facts as the Panel found them, the Panel was entirely justified in forming the opinion which it did.

68 As we have noted, the applicant does not seek to impugn the Panel's

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[53] Ibid [46]–[51] (Beach, McLeish and Ashley JJA) (citations omitted). See also *Gamble v Emerald Hill Electrical Pty Ltd* (2012) 38 VR 45 (Maxwell P and Cavanough AJA); *Gruma Oceania Pty Ltd v Bakar* [2014] VSCA 252 (Neave, Santamaria and Kyrou JJA); *Maimonis v Bourke* [2019] VSCA 302, [51] (Ferguson CJ, Beach and Ashley JJA).

diagnosis of his physical condition but disputes its opinion and prognosis with respect to the effects of his chronic pain syndrome upon his capacity to work.

69 In reaching its conclusions the Panel had before it, amongst other things:

(a) detailed information describing the nature of the applicant's pre-injury duties;

(b) detailed information as to the physical demands of alternative duties which the applicant may be able to engage in;

(c) a history obtained from the applicant as to the variable nature and progress of his symptoms and the activities which aggravated them;

(d) a history of the applicant's self-imposed limitation and avoidance of activity due to fear of pain;

(e) information of the decreased and modest level of medication at the time of the Panel's examination of the applicant;

(f) detailed findings upon clinical examination demonstrating no objective evidence of spinal injury;

(g) medical imagery demonstrating no structural damage or other objective evidence of spinal injury;

(h) video surveillance footage showing the applicant carrying shopping and driving a car in an apparently normal fashion; and

(i) medical opinions which supported the view that the applicant's physical injuries did not prevent him from working, including the following:

Dr Majid Rahgozar, a consultant occupational physician, expressed the opinion on 30 November 2016:

> In my opinion, the initial musculoligamentous injury of the lower back has resolved; however, Mr Sidiqi's pain has become chronic in the context of a number of factors such as inappropriate pain management with high-dose opioids in combination with

> benzodiazepines, fear avoidance of further injury and being highly pain focussed. There was a degree of illness behaviour.

Dr Timothy Wood, sport and exercise medicine physician, expressed the opinion on 10 September 2018:

> A contemporary diagnosis for Mr Sidiqi would be a maladaptive neurobiological pain response to his low back pain injury which occurred over two years ago. Typically such episodes of back pain settle within six weeks without any major residual deficit. Mr Sidiqi was given nocebo comments by the physiotherapist within a few days of his injury who stated that it looked 'bad' and that he needed an MRI scan. The MRI scan revealed non-specific changes at L4/5 and L5/S1 which Mr Sidiqi was told were responsible for his symptoms. It is highly likely that his MRI scan would have looked similar the day before he injured his back.
>
> Nevertheless, the majority of simple episodes of mechanical low back pain that Mr Sidiqi experienced should settle within six weeks. The fact that Mr Sidiqi is still symptomatic over two years later is indicative of a maladaptive neurobiological pain response in which numerous biopsychosocial factors can be implicated. This can include comments from treating practitioners and management via a biomedical model that Mr Sidiqi has been managed by.

70 The Panel was both entitled and required to use its own experience and expertise in assessing this information.

71 In our view, it was plainly open on the material before the Panel (including its examination of the applicant) to reach the conclusions which it did in the sense that there was a logically probative basis for the opinion which it reached in an expert capacity. Conversely, a rational evaluation of that material as a whole could not be said to compel a contrary conclusion to the opinion reached in the exercise of its expertise.

72 In particular, the Panel's findings on clinical examination, the medical imaging, and aspects of the historical opinion evidence before it might rationally be thought to support the Panel's opinion.

73 In addition, that opinion was consistent with a series of incidental circumstantial matters which the trial judge identified:

(a) Mr Sidiqi told the Panel that he could care for himself, including

cutting his own toenails, drive, shop, and prepare sandwiches for his children. He avoided other housework because his doctor had told him not to bend and had not returned to playing soccer because he feared causing another injury.

(b) He had opted to avoid surgery.

(c) Strategies he had learned during a pain management program in 2017 had helped him to cope better with his pain, and he had benefitted from regular exercise and acupuncture.

(d) Although he was no longer receiving physiotherapy and acupuncture treatment and had reduced his exercise program, he was able to limit his use of opioid analgesics.

(e) The MRI scan of his lumbar spine showed no radiological evidence of any neural compromise.

(f) The surveillance footage of Mr Sidiqi carrying a bag of shopping to his car, getting in and driving away demonstrated a level of activity consistent with the Panel's clinical examination of him. It did not provide further information 'about any functional limitations or restrictions which he may be experiencing'.

(g) In explaining its diagnosis of chronic pain syndrome, the Panel noted that Mr Sidiqi restricted his activities due to his fear of further injury. It did not suggest that he avoided these activities because they caused him pain, or that his avoidance behaviour was pathological.[54]

74 As the matter was argued, the applicant's essential complaint is that the following specific finding by the Panel was inconsistent with the Panel's ultimate conclusions:

> The Panel noted, and accepted, the plaintiff's description of persistent pain symptoms and of the restrictions to his activities, which he practises due to his fear of further injury.

75 In our view, the acceptance of the fact that the applicant suffered from persistent pain symptoms was not inconsistent with a balanced positive conclusion as to the applicant's work capacity. As a matter of logic it was open to the Panel to conclude that the symptoms caused by the applicant's chronic pain syndrome either were or were not of such a nature, severity and extent as to permit him to resume employment in the capacities which the Panel identified. Indeed, it was logically open to conclude that increased exercise associated with a return to work may assist

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[54] Reasons [46].

with, and decrease, his pain symptoms.

76 The conclusions that the applicant's symptoms would persist through the foreseeable future but would not prevent him from returning to his pre-injury work or alternative work involved an evaluative judgment by way of expert opinion as to the nature, extent and severity of the applicant's medical condition. The applicant has not demonstrated that the opinion at which the Panel arrived was not open to it.

77 In the course of argument it was put that a return to pre-injury duties would require a return to the work in which the incident occurred and the applicant suffered the injury which precipitated his chronic pain syndrome preventing a full return to work. This fact does not logically preclude the conclusion that at the point in time at which the Panel saw the applicant he was capable of employment. As the respondent submitted, the applicant's injury was the product of a specific incident and the Panel was required to assess his condition at a subsequent point in time. The Panel formed the view that the initial injury (the soft tissue injury) had by then resolved.

78 It follows from the above that it cannot be said that the Panel's opinion was irrational or illogical. In this regard, we respectfully agree with the observations of the trial judge.

> I accept the submission made for WorkCover that there is nothing inherently illogical or irrational about a finding that a person with chronic pain could, notwithstanding their pain, work in suitable employment. Everything would depend on the severity of the pain. The Panel's reasons disclose that it paid careful attention to the 'nature, extent and severity' of Mr Sidiqi's pain symptoms and the effect of those symptoms on his activities. It also noted that he avoided many activities due to his fear of further injury, although it did not find that this avoidant behaviour was an aspect of either his physical or psychiatric injuries. Its conclusions about his capacity for work were, in my view, open to it.[55]

Did the Panel fail to consider relevant matters?

79 The applicant submits that the Panel's reasons demonstrate that it failed to

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[55] Ibid [39].

give proper consideration to matters identified in its proposed grounds of appeal.

80 It is first submitted that the Panel failed to give genuine consideration to the nature, extent and severity of the applicant's ongoing pain. We reject that submission. As the respondent submits, it is plain from the very terms of its conclusions with respect to the applicant's physical work capacity, that the Panel's conclusions were reached 'notwithstanding his persistent pain symptoms'.

81 Further, as the trial judge held,[56] when the Panel's reasons are read as a whole, it is plain that the Panel carefully considered the evidence bearing on the nature, severity and extent of the applicant's chronic pain syndrome.

82 Next, it is submitted that the Panel's reasons do not show that appropriate consideration was given to the actual demands of the tasks involved in the applicant's pre-injury employment or in each of the alternative employment options. As the respondent submits, the Panel's reasons are replete with a consideration of the applicant's pre-injury duties both by reference to evidence from a workplace assessment report of 9 November 2016 and evidence from the applicant himself. Moreover, the Panel stated that it had considered two vocational assessment reports describing alternative employment options. The most recent of these dated 5 February 2019 set out in detail the physical and psychological demands of each of the employment options which were identified as suitable.

83 Next, it was submitted that the Panel had failed to properly consider the applicant's inability to return to his pre-injury employment or alternative work in accordance with the WIRC Act.

84 The relevant definitions of 'current work capacity', 'no current work capacity' and 'suitable employment' are as follows:

> ***current work capacity***, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment;

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[56] Ibid [28].

> ***no current work capacity***, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre injury employment or in suitable employment;
>
> ***suitable employment***, in relation to a worker, means employment in work for which the worker is currently suited—
>
> (a) having regard to the following—
>
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, the certificate of capacity supplied by the worker;
>
> (ii) the nature of the worker's pre-injury employment;
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> (iii) the worker's age, education, skills and work experience;
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> (iv) the worker's place of residence;
>
> (v) any plan or document prepared as part of the return to work planning process;
>
> (vi) any occupational rehabilitation services that are being, or have been, provided to or for the worker;
>
> (b) regardless of whether—
>
> (i) the work or the employment is available; or
>
> (ii) the work or the employment is of a type or nature that is generally available in the employment market; … [57]

85 As this Court held in *Richter v Driscoll*,[58] the concept of return to work conveys an intention that the mere fact that a worker is able to physically perform work duties does not necessarily mean that the worker has the ability to undertake work in employment. The relevant definitions require consideration of the entirety of the worker's personal circumstances.[59]

86 The applicant submitted that the Panel focussed solely upon the question whether the applicant was physically capable of performing his pre-injury work and alternative duties. Attention was drawn to the expressions of opinion that the applicant's current medical condition 'would not preclude him from undertaking the

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57 WIRC Act s 3.

58 (2016) 51 VR 95, 114–21 [73]–[98] (Ashley and Kaye JJA), 135 [143]–[145] (Osborn JA).

59 The background to these provisions is described by Ashley and Kaye JJA in *Richter v Driscoll* (2016) 51 VR 95, 119–20 [88]–[93].

full duties and hours of work of his pre-injury role …'; and 'would not preclude him from being able to consistently and reliably perform the duties of any/all of these five job options on a full-time basis as a settled or established member of the wage-earning workforce, without need for retraining.'

87 In many cases, however, the capacity to undertake physical work will demonstrate a capacity to return to work. In this regard we adopt the observations of Gorton J in *Bainbridge v Westside Meats Pty Ltd*:

> However, a capacity to perform work duties will, in many circumstances, correspond with a capacity to return to work in employment. There would have to be some feature of the individual worker arising from the relevant injury that justifies the distinction being drawn. One example is a worker being disfigured, such that they are not able to sell their labour in certain areas of work where disfigurement is in reality a disqualification from employment, notwithstanding an ability to perform the actual work duties. Another example would be a worker who has a variable medical condition, such as a worker with a back injury, who would be able to perform work duties for the most part, but who suffers from periodic exacerbations that would prevent him or her from attending work with sufficient regularity to be able to obtain or maintain employment. Another might be a person who has developed a psychiatric reaction that, for practical purposes, would make that person unable to attend job interviews, or cause that person to present so badly that their labour is not, in fact, merchantable, despite their ability to perform the work if given the chance. Yet another might be someone who can perform the work duties, but those duties would unacceptably aggravate his or her injury, or involve an unacceptable level of pain or discomfort in their performance. However, these cases would be the exception, rather than the rule. It is only when features of this type are present that the distinction between a capacity to perform work duties and a capacity to return to work in employment would matter.[60]

88 In the present case, the critical question confronting the Panel was whether the applicant's pain symptoms would prevent him from returning to work. As we have explained, the Panel made clear that they considered this issue and expressed their conclusions by reference to, and despite, that factor.

89 No other factor was identified in argument which might be said to have relevantly affected the applicant's ability to return to work.

90 Lastly, in respect of alleged failures by the Panel to have regard to relevant

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[60] [2021] VSC 320, [25] (citation omitted).

considerations, we note that before the trial judge it was also submitted that the Panel did not properly consider the effects of the applicant's personal circumstances.[61] This argument was not pursued in oral argument on the application for leave to appeal but, for completeness, we note that the Panel comprehensively noted the applicant's personal circumstances in the course of its reasons (save for his place of residence). In turn, the vocational assessment report material to which it had regard addressed the applicant's personal circumstances including his current ability to complete tasks, his employment history, his education and qualifications, his interests, employment preferences and attitude to work and his transferrable skills/abilities. The assessment of employment options had regard to the duties involved in each job, the physical and psychological demands of those duties, a labour market analysis of the availability of such jobs within the region of Melbourne in which the applicant lives,[62] and the applicant's capacity to perform each option and interest in each role discussed.

91 In turn, the terms of the Panel's decision addressed the broader concept of the applicant's employability by reference to his capacity to consistently and reliably perform full-time duties as a settled or established member of the wage-earning workforce, without the need for retraining.

92 There is nothing in this point.

Were the Panel's reasons adequate?

93 In the present case, the applicant submits that the Panel's reasons are not sufficient to explain its path of reasoning. In particular, it is submitted that the Panel does not explain how, having found as a matter of fact that it accepted the applicant's description of persistent pain symptoms, it moved on to find that the applicant has a capacity for his pre-injury employment or alternative employment of the kinds referred to in its reasons.

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61 Reasons [30].

62 The applicant lives in Cranbourne North.

94 In support of this submission, the applicant submits that, on the face of it, it is illogical that the very type of pain that caused the applicant to cease his pre-injury employment would not preclude him from resuming it.

95 Next, it is submitted that the Panel's reasoning does not disclose a close consideration of the pain consequences of the physical activity the applicant would be required to undertake either in his pre-injury employment or alternative employment. A necessary step in the Panel's reasons was to reconcile the finding it made with respect to the applicant's continuing pain including the difficulties he described in sitting and standing for extended periods, with the requirements of potential suitable employment. Thus, it is submitted the Panel failed to include a necessary step in its reasons.[63]

96 The trial judge addressed this issue as follows:

> Mr Sidiqi submitted that the Panel's reasons did not explain the actual path of reasoning by which it arrived at its opinion that Mr Sidiqi had capacity to work as a store person or forklift driver, despite the accepted diagnosis of chronic pain syndrome. He argued that the 'missed step' in the reasoning of the Panel was a failure to explain why it considered he could perform the requirements of his former role despite the pain that had caused him to stop working in that role.
>
> He made a similar submission in relation to the Panel's opinion, in answer to Questions 8 and 9, that the five employment options were suitable for him. He submitted that the only basis on which the Panel concluded that Mr Sidiqi's work capacity was not affected by his chronic pain syndrome was the Panel's own examination of him. He argued that this was a 'sweeping generalisation' that did not adequately disclose the Panel's path of reasoning, or explain why the Panel considered that he had a current work capacity despite his chronic pain.[64]
>
> These submissions were all premised on the Panel having overlooked the disabling effects of Mr Sidiqi's chronic pain, without explaining why it considered he could work despite the pain. I do not accept that premise. Reading the Panel's reasons as a whole, it is clear that the Panel accepted that Mr Sidiqi suffered ongoing pain, although his original injury had otherwise resolved. The inference that necessarily arises is that the Panel did not consider his chronic pain to be disabling. The Panel said that it considered he could do his pre-injury duties 'notwithstanding his persistent pain

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63 *Denham v Consolidated Herd Improvement* [2014] VSC 520, [37] (T Forrest J).

64 Citing *Gruma Oceania Pty Ltd v Bakar* [2014] VSCA 252, [39], [49]; and *Combined Enterprises Pty Ltd v Brister* [2016] VSC 807, [31].

symptoms'.[65]

97 In oral submission on the application for appeal, the applicant characterised reasoning by necessary inference as 'bootstrap' reasoning. We do not agree. The decision in *Wingfoot* itself demonstrates that in the particular circumstances of a case, it may be plain that a necessary step in the panel's reasoning is to be implied.

98 In *Wingfoot*, the High Court held that, in order to exclude alternative possible diagnoses of the worker's injury, it was sufficient for the medical panel to make an implied finding that the worker suffered no further injury beyond the soft tissue injury to the worker's back which it expressly stated had been suffered.

> The answer to the Worker's complaint lies in the implicit finding of the Medical Panel that the Worker on 16 October 1996 sustained only a soft tissue injury, and not an injury to his spine. That finding was one of fact. Whether or not that finding of fact was open to the Medical Panel is a question of law. But no further explanation of the reasoning process adopted by the Medical Panel is necessary to enable a court to address that question.[66]

99 In *Woolworths Ltd v Warfe*,[67] this Court observed with respect to judicial reasons given in respect of a serious injury application to the County Court:

> The adequacy of the reasons must depend upon the issues, and nature of the proceeding, in any individual case. In an appropriate case, reasons can be adequate by a combination of what is expressly stated and the inferences that necessarily arise from what is expressly stated.[68]

100 The same must be true a fortiori of reasons which simply state the path of reasoning to a medical panel's opinion.

101 In the present case, the trial judge was correct to describe the inference in issue as a necessary inference. When the Panel's reasons are read as a whole it is inescapable that the Panel reached the conclusion that it did having regard to its

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65 Reasons [43]–[45] (citation in original).

66 *Wingfoot* (2013) 252 CLR 480, 504–5 [63] (French CJ, Crennan, Bell, Gageler and Keane JJ). Similar reasoning was applied by analogy by this Court in the case of *Karabinis v Bendrups* [2018] VSCA 124, [37]–[42] (Osborn, Santamaria and Beach JJA).

67 [2013] VSCA 22 (Tate and Whelan JJA and Kaye AJA).

68 Ibid [131], citing *ACN 005 565 926 Pty Ltd v Snibson* [2012] VSCA 31, [81]; *Murray Goulburn Coop Co Ltd v Filliponi* [2012] VSCA 230, [28].

assessment of the nature, extent and severity of the applicant's chronic pain syndrome. So much appears from the critical passage in its reasons to which the trial judge referred in part in her summary[69] but which it is convenient to repeat in full:

> The Panel considered the nature, extent and severity of the Plaintiff's current medical condition of chronic pain syndrome in relation to his pre-injury duties as a storeman/forklift driver, which involved heavy manual handling and sustained weight-bearing activity, and which he performed on a full-time basis, with some overtime. The Panel also considered its clinical examination findings, the radiological evidence, and the opinions of those medical practitioners who have examined and/or treated the Plaintiff's [sic], as expressed in the reports included with the Referral material. The Panel considered that notwithstanding his persistent pain symptoms, the Plaintiff's current medical condition of chronic pain syndrome would not preclude him from undertaking the full duties and hours of work of his pre-injury role as a storeman/forklift driver for a supplier of timber with the Defendant. The Panel also considered that the nature of his pre-injury duties would not exacerbate of aggravate his current medical condition of chronic pain syndrome in any way.

102 The Panel's opinion was squarely based on its assessment of the effects of the applicant's chronic pain syndrome having regard to the evidence as a whole, and in particular, its view of the nature, extent and severity of the applicant's then current chronic pain syndrome, the nature of his pre-injury duties, its clinical examination of him, the evidence of medical imaging and the history and range of medical opinions before it.[70] As we read the Panel's reasons, its conclusions explain that it arrived at its opinion after an evaluative synthesis of these matters. In our view, the reasons do not leave any gap requiring speculation as to the basis of the Panel's opinion.

103 The same path of reasoning underpinned the Panel's conclusion with respect to the applicant's capacity to engage in alternative employment.

104 For completeness we note that the trial judge observed[71] that the Panel explained its conclusion by reference to the normal clinical examination of the applicant's lumbar spine. In our view, a fair reading of the Panel's reasons

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69 At Reasons [18].

70 The Panel had earlier stated that it essentially agreed with the opinions of Drs Rahgozar and Wood.

71 At Reasons [46].

demonstrates that although this was a critical matter, its conclusion also rested on the other matters to which we have referred. Insofar as the trial judge's Reasons may reflect an oversimplification of the Panel's reasons however, this does not assist the applicant.

105 We respectfully agree with the trial judge's ultimate conclusion that the Panel's reasons enable its path of reasoning to be followed and do not cause doubt that it has failed in performing its statutory functions. In truth, the applicant's real complaint is not about the legibility of the Panel's path of reasoning but about its outcome.

106 Lastly, we should make clear that it was in our view unnecessary for the Panel in explaining its conclusions to repeat in detail the description of the applicant's pre-injury work duties set out earlier in its opinion and further detailed in the work assessment report of 9 November 2016. The passage we have quoted above makes clear that the Panel understood that these duties involved heavy manual handling and sustained weight-bearing activity performed on a full-time basis with some overtime. Likewise, it was unnecessary to set out seriatim the description of duties detailed in the ultimate vocational assessment report to which it referred.

Conclusion

107 We would refuse the application for leave to appeal. No reasonably arguable material error has been demonstrated in the trial judge's decision.

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S C H E D U L E O F P A R T I E S

S EAPCI 2020 0088

BETWEEN:

SIDIQI	Applicant
- and -	
DR CHRISTINE KOTSIOS	First Respondent
DR SUSANNE HOMOLKA	Second Respondent
MR KEVIN SIU	Third Respondent
DR DANIEL LEWIS	Fourth Respondent
VICTORIAN WORKCOVER AUTHORITY	Fifth Respondent