

FOLEY'S | LIST

THE HIGH GROUND - Judicial Review of Medical Panel Determinations

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The High Ground- Judicial Review of Medical Panel Determinations**Sharon Keeling**

Judicial review of Medical Panel Determinations

Usually brought pursuant to the operation of Order 56(1) of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*.

- 56 Judgment or order instead of writ
- (1) Subject to any Act, the jurisdiction of the Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with these Rules.

Bringing an application for judicial review in the Supreme Court of Victoria:

1. Originating Motion Form 5G, including stating grounds.
2. Summons on the Originating Motion.
3. Affidavit in support exhibiting:
 - (i) Documents provided to the Medical Panel, including submissions to the Medical Panel.
 - (ii) Determination of the Medical Panel.

Orders requested

1. That the determination of a medical panel constituted by the Second Defendant and the Third Defendant dated THIS DATE (Medical Panel Reference No: M.....) regarding the assessment of the whole person impairment of the First Defendant for the purposes of s.28LH(1)(a) of the *Wrongs Act 1958 (Vic)* be quashed (*certiorari*).
2. That the medical questions before the medical panel constituted by the Second Defendant and the Third Defendant regarding the whole person impairment of the Third Defendant for the purposes of s.28LH(1)(a) of the *Wrongs Act 1958 (Vic)* be remitted for determination to a differently constituted medical panel (*mandamus*).
3. Such further or other order as the Court thinks fit.

Judicial review - available only on the basis of an error of law. Administrative law grounds. Not a merits (conclusion) review.

Any ground of judicial review can succeed.**In the Supreme Court of Victoria handed down between July 2016 and September 2018**

- 33 published decisions of applications for judicial review of Medical Panel determinations.
- 20 applications were successful, with usual outcome of being remitted for assessment by a differently-constituted Panel.
- 13 applications were unsuccessful.

Table 1. Grounds of judicial review of a Determination by a Medical Panel sought between 2016 and 2018.

Ground of appeal	Upheld	Dismissed
Procedural unfairness	8	5
Failing to take a relevant consideration into account	13	14
WIRC Act claims only: Failure to provide adequate reasons	10	13
Panel asked itself the wrong question	1	1
Took irrelevant consideration into account	1	8
Failed to provide an opinion on a referred question	1	1
No evidence	2	0
Made a finding of fact not open to the Panel	1	4

Jurisdictional error

Craig v South Australia (1995) 184 CLR 163 at 179:

‘an administrative tribunal (such as a medical panel) falls into an error of law, which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.’

Relevant and irrelevant considerations

Relevant and irrelevant considerations are identified by reference to the statute which empowers the decision-maker to act: *Minister for Aboriginal Affairs v Peko-Wallsend* (1985-86) 162 CLR 25 Mason J at 39-41.

Failing to take into account a relevant consideration.

Failing to undertake the assessment of the claimant's impairment in accordance with the AMA Guides is a common ground for judicial review [and *The Guide to the Evaluation of Psychiatric Impairment for Clinicians* (GEPIC)], as required by:

- (a) 28LH(1)(a) of the *Wrongs Act 1958* (Vic);
- (b) s54(1)(a)(i) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

HJ Heinz Company Australia Ltd v Kotzman [2009] VSC 311 at [45]:

‘... (a Panel) must apply the methodologies, processes and criteria set out in the Guides for the relevant condition, body part or system and adhere to any minimum or maximum values set out in the Guides for that condition, body part or system.’

Where the Guides contains a table that is applicable to a condition, body part or system, an assessment based on that table will not be in accordance with the Guides unless the categories, descriptions, criteria, ranges, adjustments and other elements of the table that are relevant to the condition, body part or system are adhered to and complied with.'

Failing to take into account an opinion of an independent medical examiner. The Panel stated that the doctor's opinion was '*not a relevant consideration*', when it was.

Ryan v The Grange at Wodonga Pty Ltd [2015] VSCA 17 at [29]: It is a mandatory consideration for a Panel to consider if a worker can fully and safely return to work duties where those work duties resulted in the workplace injury.

Adams v Wadesley [2018] VSC 304

Consideration of aggravation of left hip osteoarthritis arising from left inguinal hernia repair is a mandatory consideration as:

- (a) s 28LB of the *Wrongs Act* defines 'injury' as including 'aggravation, acceleration or recurrence of an injury or disease';
- (b) the Panel can go beyond the Certificate of Referral;
- (c) the hip pain was worse after the inguinal hernia repair; and
- (d) the Panel found that there was no evidence of any unrelated impairment that was playing a part in the claimant's current impairment.

Factual error by a Panel

Facts found by a Panel are generally not reviewable.

Relevant evidence on affidavit can be put before the Court for judicial review.

The Court may infer findings of the Panel that it considers to be implicit but not stated by the Panel.

If a fact has been stated in the Panel's reasons, the Court is likely to hold that the matter was taken into consideration.

'*The mere occurrence of (a factual) error is not sufficient.*' A factual error **must have been material** to the determination: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 (Mason CJ) and 384 (Toohey and Gaudron JJ).

Failing to disregard impairment arising from an unrelated injury

Lingenberg v Gallichio (2013) 40 VR 60.

Alcoa Holdings Ltd v Lowthian [2011] VSC 245 (J Forrest J) [66]–[70].

In *Chua v Lowthian* [2011] VSC 468 Osborn J stated principles relevant to the operation of s 28LL(3) of the *Wrongs Act 1958* (Vic) concerning the identification of the impairment resulting from the injury claimed and the identification of any pre-existing permanent impairment from an unrelated injury:

- (a) The Panel must identify an injury potentially caused in the manner alleged in the claim.
- (b) Pre-existing impairment can be established and assessed in accordance with the Guides on the basis of historical evidence. ...
- (c) The Panel must undertake a 'before and after' inquiry in the context of a medical negligence claim, but is not required to undertake a comparison between the hypothetical and actual after situations. A 'before and after' inquiry will bear on the threshold question of whether potentially compensable injury has occurred. Once that question has been answered in the affirmative, however, the Panel's statutory task is not to inquire further;
- (d) there must be evidence before the Panel in order for a pre-existing injury to be made out.

Inadequate reasons by a Panel

Pursuant to s 313(2) of the WIRC Act inadequate reasons are a valid ground of judicial review.

In *Colquhoun v Capitol Radiology Pty Ltd* (2013) 39 VR 296 Maxwell P, Weinberg JA and Ferguson AJA held that a medical panel had no obligation at common law to give reasons for its decisions. Inadequate reasons are not a ground of judicial review (in *Wrongs Act* claims) but can be applied in supporting an allegation that an error of law was made.

The Reasons must disclose a path of reasoning sufficient to identify reviewable error: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 501 [55].

The Court ought not to be required to speculate in order to fill gaps in the Panel's reasoning.

For example, in *Stankoski v Flickers Australia Pty Ltd* [2016] VSC 648 Ginnane J held that the Panel failed to link the jobs in question to the worker's capacity, whether as to his language, training, physical or psychological in order to explain how it considered that he could undertake some jobs but not others.

Procedural unfairness

Toyota v Bendrups [2016] VSC 718 at [26] – [32] per J Forrest J, citing Mason J in *Kioa v West* (1985) 159 CLR 550 who said, regarding procedural fairness and the 'hearing rule':

'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.'

Examples of procedural unfairness by Medical Panels:

Discovering a new important fact that is not within the parties' knowledge and relying on it, without giving the parties notice and seeking submissions, such as transdermal opioid use resulting in an incapacity for work.

Informing itself as to the surgical procedure undertaken without asking the defendant surgeon.

An interpreter misinterpreting during the Panel examination on an issue impacting on the determination.

A party not anticipating a finding of a Panel, where the party was aware of the underlying facts, has been variably interpreted as procedural unfairness.

A Panel made a finding outside the boundaries of the dispute between the parties, for example a new diagnosis **not** open on the materials before the Panel and not anticipated.

A Panel taking into account medical history provided to the Panel, but not to the Defendant, without seeking the Defendant's submissions.

A Panel informing itself of a medical fact (details of surgery undertaken) without seeking the Defendant's submissions.

A worker not given opportunity to explain inconsistencies or delay in seeking medical treatment reported by Panel leading to rejection of her account of symptoms.

Irrationality/illogicality ground

In *O'Brien v Brand* [2017] VSC 596 AsJ Daly held that a Panel had made a determination that was irrational or illogical as the determination was not consistent with the findings made by the Panel.

Wednesbury-type unreasonableness.

No evidence ground

Morrison v Melbourne Pathology Pty Ltd [2018] VSC 477 (27 August 2018) at [43]:

'... no evidence that she had suffered right arm lymphoedema before 2016, that she suffered an exacerbation of right arm lymphoedema in 2016, or that the condition in her right arm was temporary or had resolved.'

Tan v Gibbons [2016] VSC 652: No evidence before the Panel that the surgeon had removed the bony endplates of vertebrae.

Analysing a Panel's reasons:

1. Did the Panel seek submissions from the parties on new facts or a conclusion that would take a party by surprise (procedural unfairness)?
2. Did the Panel consider all relevant considerations? Did the Panel properly apply the AMA Guides?
3. Did the Panel draw a conclusion not reasonably open to it on the materials before it?
4. WIRC Act claims only: Are the Panel's reasons adequate?

The most frequently successful grounds for judicial review of a Determination by a Medical Panel are procedural unfairness and failing to take into account a relevant consideration