

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0084

WAGSTAFF CRANBOURNE PTY LTD

Applicant

v

ALI HASHIMI

First Respondent

and

DR DOMINIC YONG

Second Respondent

and

KEITH ELSNER

Third Respondent

and

DR EDMOND VAN AMMERS

Fourth Respondent

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<u>JUDGES:</u>	BEACH, KYROU and KAYE JJA
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	18 February 2020
<u>DATE OF JUDGMENT:</u>	27 February 2020
<u>MEDIUM NEUTRAL CITATION:</u>	[2020] VSCA 33
<u>JUDGMENT APPEALED FROM:</u>	[2019] VSC 496 (Quigley J)

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JUDICIAL REVIEW – Procedural fairness – Medical panel – Workplace injury to first respondent’s lumbar spine – Adjustment disorder – Medical panel concluded adjustment disorder caused by first respondent’s traumatic experiences as refugee – Such conclusion not advocated in parties’ submissions to medical panel or expressed in any medical report – Whether medical panel’s conclusion could be reasonably anticipated by first respondent – Whether medical panel denied first respondent procedural fairness – Judge’s decision correct – Leave to appeal refused.

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APPEARANCES:

Counsel

Solicitors

For the Applicant

Mr M F Fleming QC  
with Ms S Gold

IDP Lawyers

For the First Respondent

Mr A G Uren QC  
with Mr C Hangay

Zaparas Lawyers

For the Second to Fourth  
Respondents

No appearance

Victorian Government  
Solicitor

*Introduction and summary*

1           Between 29 March 2005 and 2 August 2012, the first respondent, Ali Hashimi,  
was employed by the applicant, Wagstaff Cranbourne Pty Ltd ('Wagstaff'), as a full  
time slaughterman and process worker.

2           On 18 June 2015, Mr Hashimi made a claim for a lump sum permanent  
impairment benefit pursuant to s 98C of the *Accident Compensation Act 1985*  
(‘AC Act’) in respect of an injury to his lumbar spine which was said to have been  
caused by a fall at work on 22 June 2012. On 5 July 2016, he made a claim for  
compensation under that Act in the form of weekly payments in relation to an injury  
to his back which was said to have occurred throughout the course of his  
employment with Wagstaff between 29 March 2005 and 22 June 2012.

3           The Victorian WorkCover Authority ('VWA') rejected both claims. Mr Hashimi  
commenced a proceeding in the Magistrates' Court against Wagstaff in respect of  
VWA's rejection of the claims. He alleged injury to his lumbar spine, aggravation of  
pre-existing injury to the lumbar spine and psychological injury secondary to the  
physical injuries.

4           At the request of Wagstaff, the magistrate referred certain questions to a medical  
panel pursuant to s 274(l)(b) of the *Workplace Injury Rehabilitation and Compensation  
Act 2013* ('WIRC Act'). A medical panel comprising the second to fourth  
respondents was convened ('Panel'). The questions and the answers that the Panel  
gave to those questions in its opinion dated 25 July 2018, insofar as they are presently  
relevant, are set out at [26] below.

5           On 20 September 2018, Mr Hashimi commenced a proceeding in the Trial  
Division seeking to quash the Panel's opinion on the basis that the Panel had  
committed jurisdictional error. He alleged that, in concluding that he suffered an

adjustment disorder which was caused by his traumatic experiences as a refugee, the Panel denied him procedural fairness. In essence, he claimed that, as neither the medical reports nor the parties' submissions that were provided to the Panel asserted that his experiences as a refugee were causally connected to his medical condition, the Panel was obliged – but failed – to give him notice that it was contemplating reaching this conclusion and afford him an opportunity to address it.

6 The judge found that the Panel had failed to afford Mr Hashimi procedural fairness. She made an order setting aside the Panel's opinion and remitting the medical questions for determination by a differently constituted medical panel.<sup>1</sup>

7 Wagstaff has sought leave to appeal against the judge's order on the ground that she 'erred in finding that the Panel failed to afford procedural fairness'.

8 For the reasons that follow, the application for leave to appeal will be refused.

### *Facts*

9 Mr Hashimi was born in Afghanistan on 25 April 1979. He worked as a shoemaker there for 10 years before seeking refugee status in Australia. He was detained on Christmas Island for a period of time before coming to mainland Australia in 2001.

10 In 2003, Mr Hashimi suffered injury to his head and lower back when working as a labourer for another employer. He was compensated by a lump sum permanent impairment benefit pursuant to s 98C of the AC Act and weekly payments in relation to the back injury.

11 Mr Hashimi suffers from chronic ulcerative colitis for which he has been prescribed the steroid prednisolone. In 2003, he was diagnosed with osteoporosis.

12 Mr Hashimi alleged that on 22 June 2012, during the course of his work with

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<sup>1</sup> *Hashimi v Yong* [2019] VSC 496 ('Reasons').

Wagstaff, he slipped and suffered an injury described as ‘sacro-iliac [and] lower lumbar pain’ and ‘severe osteoporosis’. On 2 August 2012, he ceased work with Wagstaff due to the injury. On 10 August 2012, he made a claim against Wagstaff for compensation in the form of weekly payments under the AC Act in relation to the injury. The claim was initially rejected by VWA but later resolved at conciliation. Mr Hashimi received a limited period of payments and Wagstaff denied liability.

13 As we have already stated, on 18 June 2015, Mr Hashimi made a claim for a lump sum permanent impairment benefit pursuant to s 98C of the AC Act (‘impairment benefit claim’) in respect of the injury to his back that was said to have occurred on 22 June 2012. On 21 July 2015, VWA rejected the impairment benefit claim for reasons including that Mr Hashimi had not suffered an injury arising out of his employment with Wagstaff.

14 On 5 July 2016, Mr Hashimi made a further claim for compensation in the form of weekly payments pursuant to the AC Act against Wagstaff in relation to the injury to his back which was said to have occurred throughout the course of his employment from 29 March 2005 until 22 June 2012 (‘course of employment claim’). He alleged that this injury was sustained by way of ‘heavy and repetitive work on the kill floor including frequent bending, lifting heavy carcasses, hooking up carcasses, cutting and skinning animals and physically “necking” the animals’. On 11 August 2016, VWA rejected the course of employment claim for reasons including that Mr Hashimi had not suffered an injury arising out of his employment with Wagstaff.

15 Mr Hashimi commenced a proceeding in the Magistrates’ Court which disputed the decisions to reject the impairment benefit claim and the course of employment claim, and claimed compensation in the form of weekly payments and medical expenses. In his statement of claim, he alleged that he had suffered injuries as a result of his work duties over time, as well as in particular on 22 June 2012, which were particularised as follows:

- (a) Injury to lumbar spine including disc damage at the L4/5 level with referred pain and symptoms;

- (b) Precipitation, acceleration, exacerbation and/or aggravation of pre-existing degenerative change and pre-existing injury in the lumbar spine;
- (c) Emotional/psychological secondary reaction to the physical injuries.

16 In its notice of defence, Wagstaff denied that Mr Hashimi sustained any injury that was causally related to his employment with the company.

17 As we have already stated, the magistrate referred to the Panel certain questions which are relevantly set out at [26] below.

*Documents and submissions provided to Panel and opinion reached by it*

18 The Panel was provided with 64 documents including court documents, claims and notices, seven radiological reports, four clinical notes, 27 medical reports from Mr Hashimi and six medical reports from Wagstaff.

19 As to the court documents, the Panel relevantly had before it the statement of claim and notice of defence, to which we have already referred. In those documents neither party made reference to Mr Hashimi's experiences as a refugee as causative factors in relation to his alleged injuries.

20 Many of the medical reports referred to Mr Hashimi's past medical issues and some referred to his experiences as a refugee as part of the overall context of the report. Only two of the medical reports on which Mr Hashimi relied stated that he suffered from an adjustment disorder. They were a report of psychiatrist Dr Gregor Schutz dated 14 April 2016 and a report of psychiatrist Dr David Weissman dated 29 November 2016. Only one of the medical reports on which Wagstaff relied considered whether Mr Hashimi suffered from a psychiatric condition, and concluded that he did not. That was a report of psychiatrist, Dr Natalie Krapivensky, dated 4 September 2017.

21 In his report, Dr Weissman set out in detail Mr Hashimi's personal history, including his experiences as a refugee. He was of the opinion that Mr Hashimi did

not suffer from any pre-injury psychiatric condition. However, he said that 'there may be a small degree/amount of premorbid psychological and emotional vulnerability in this case based upon [Mr Hashimi's] experiences [as a refugee] in 2001'. Dr Weissman's ultimate prognosis was that Mr Hashimi was 'suffering from a moderate group of work-related psychiatric conditions and mental injuries characterised by a chronic Adjustment Disorder with Depressed and Anxious Mood and some symptoms and features of a Chronic Pain Disorder/Somatic Symptom Disorder with predominant pain'.

22 In his report, Dr Schutz stated that Mr Hashimi was suffering from moderate chronic adjustment disorder with mixed depression and anxiety, the onset of which occurred at the time of his reported injuries in 2012. Dr Schutz also stated that the disorder was substantially secondary to his chronic back condition and that if that condition was work related then the disorder was secondary to the workplace injury.

23 In his written submissions to the Panel, Mr Hashimi contended that all factors pointed to the conclusion that he had sustained a lumbar disc injury as a result of his employment with Wagstaff. He did not specifically contend that he suffered from any psychiatric injury.

24 In its written submissions to the Panel, Wagstaff contended that any back condition from which Mr Hashimi may suffer was not causally related to his work with the company. Rather, so it was said, it was related to longstanding osteoporosis and other conditions which pre-dated his employment with the company. Whilst Wagstaff's submissions referred to the fact that Mr Hashimi had consulted a psychologist in 2003 'in relation to psychological issues around pain management', it did not address the existence of any current psychiatric injury.

25 Neither Wagstaff nor Mr Hashimi raised in their submissions to the Panel the possibility that any psychiatric injury that he suffered was caused by his experiences as a refugee.

26 The Panel examined Mr Hashimi on 18 June 2018 and, as stated above, on 25 July

2018 it delivered its opinion and reasons for its opinion on the questions that had been referred to it. Those questions and the Panel's answers were relevantly as follows:

Question 1 What is the nature of [Mr Hashimi's] medical condition relevant to:

- a. the alleged injury to his lumbar spine?
- b. the alleged psychiatric injury ('the alleged injuries')

Answer: The Panel is of the opinion that [Mr Hashimi]:

- a. Suffered a soft tissue injury to the lumbar spine, now resolved and;
- b. An Adjustment Disorder

Question 2 Was either of:

- a. [Mr Hashimi's] employment as an abattoir worker with [Wagstaff] from 29 March 2005 [to] 22 June 2012;
- b. the alleged incident of 22 June 2012;

in fact, or could possibly have been, a significant contributing factor to any (and if so which) medical condition identified in answer to question 1?

Answer: The Panel is of the opinion that [Mr Hashimi's] employment as an abattoir worker with [Wagstaff] from 29 March 2005 to 22 June 2012; was not in fact, or could not possibly have been, a significant contributing factor to the lumbar spine, now resolved or to the Adjustment Disorder.

The Panel is of the opinion that the incident of 22 June 2012 was in fact a significant contributing factor to the soft tissue injury to the lumbar spine, now resolved, however was not in fact, or could not possibly have been, a significant contributing factor to the Adjustment Disorder.

27 In its reasons for opinion, the Panel gave the following reasons for its conclusions regarding Mr Hashimi's physical injury:

The Panel noted pain symptoms described by [Mr Hashimi] that have persisted over time, which the Panel considers disproportionate to the history of injury, and unrelated to any objective physical findings or radiological imaging. The Panel considers that [Mr Hashimi] experienced a soft tissue injury of the lumbar spine at the time of the incident [on 22 June 2012], but that the effects of any such soft tissue injuries have resolved over time.

The Panel concluded that [Mr Hashimi] suffered a soft tissue injury to the lumbar spine, now resolved and does not now have an intrinsic symptomatic medical condition of the lumbar spine.

28 The Panel gave the following reasons for its conclusions regarding Mr Hashimi's psychiatric injury:

The Panel found that [Mr Hashimi] has an Adjustment Disorder in the mild range. Noting the clinical character and possible aetiologies to his back pain, the Panel did not find there was a Pain Disorder. The Panel was of the opinion that there were features of traumatisation related to [Mr Hashimi's] refugee experiences.

The Panel concluded that [Mr Hashimi] has an Adjustment Disorder.

From a psychiatric perspective, the Panel was of the opinion that [Mr Hashimi] has longstanding physical health issues which have an impact on his psychological wellbeing. Underlying vulnerabilities were noted in context of [Mr Hashimi's] trauma history and prior history of steroid related medical problems. The Panel noted preoccupation with his subjective somatic symptoms and with worry about finances and the future. The nature of his psychological presentation is however not that unusual or abnormal that it would be considered a Pain Disorder, and is best described as an Adjustment Disorder, which in [Mr Hashimi's] case is of a mild nature. The Panel concluded that [Mr Hashimi's] Adjustment Disorder was not the result of the soft tissue injury to the lumbar spine, now resolved and therefore was not significantly contributed to by [Mr Hashimi's] employment as an abattoir worker with [Wagstaff] from 29 March 2005 to 22 June 2012, or the alleged incident of 22 June 2012.

### *Proceeding in the Trial Division*

29 On 20 September 2018, Mr Hashimi commenced a proceeding in the Trial Division alleging that the Panel had denied him procedural fairness and had therefore committed jurisdictional error. He sought an order in the nature of certiorari to quash the Panel's opinion. In particular he alleged that the Panel reached its conclusion – that the cause of his pain was a psychological reaction to pre-existing physical health issues and traumatic experiences as a refugee – without affording him procedural fairness. This was said to be because, as that conclusion had not been advanced in the parties' cases or in any medical report, he could not have reasonably anticipated it.

30 On 18 June 2019, the proceeding was heard before Quigley J. On 24 July 2019, her

Honour delivered judgment finding in favour of Mr Hashimi. She concluded that the Panel had found that the adjustment disorder was not causally connected to the lumbar spine injury but was a consequence of Mr Hashimi's traumatic personal history and pre-existing health issues. She found that procedural fairness required that Mr Hashimi be given the opportunity to address these non-work related causal factors and that, by failing to comply with this requirement, the Panel had not afforded Mr Hashimi procedural fairness. Accordingly, she ordered that the Panel's opinion be set aside.

31 Before considering the judge's reasons and the parties' submissions, we will first outline the nature and role of a medical panel and the principles of procedural fairness that are relevant in the present case.

#### *Nature and role of a medical panel*

32 Section 82(1) of the AC Act provides that a worker is entitled to compensation if he or she sustains an injury 'arising out of or in the course of any employment'.<sup>2</sup> 'Injury' means any physical or mental injury.<sup>3</sup>

33 A worker is entitled to compensation in the form of weekly payments where he or she has an incapacity for work which results from, or is materially contributed to by, a compensable injury.<sup>4</sup>

34 A worker is entitled to compensation in the form of a lump sum payment where he or she suffers compensable injury resulting in permanent impairment.<sup>5</sup>

35 Medical panels are constituted by medical practitioners who are selected from a list of members appointed by the Governor in Council.<sup>6</sup> Under the WIRC Act, the

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<sup>2</sup> In these reasons, references to provisions of the AC Act are to those in force at the time of Mr Hashimi's injuries.

<sup>3</sup> AC Act s 5 (definition of 'injury').

<sup>4</sup> AC Act s 93.

<sup>5</sup> AC Act ss 98C, 98D.

<sup>6</sup> WIRC Act s 537(2).

function of a medical panel is to give its opinion on medical questions concerning employment related injuries that are referred to it.<sup>7</sup> Medical questions may be referred to a medical panel by various bodies, including a conciliation officer, the Magistrates' Court and the County Court.<sup>8</sup>

36 A 'medical question' relevantly includes questions as to 'the nature of a worker's medical condition relevant to an injury', the 'existence, extent or permanency of any incapacity of a worker for work' and 'whether a worker's incapacity for work ... resulted from ... or was materially contributed to by an injury'.<sup>9</sup>

37 A medical panel is not bound by the rules of evidence and must act informally and expeditiously.<sup>10</sup> It may inform itself of any matter relating to a referral of a medical question in any manner it sees fit.<sup>11</sup>

38 The nature and scope of a medical panel's functions were described by the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak* 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 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

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<sup>7</sup> WIRC Act s 302(1).

<sup>8</sup> WIRC Act ss 284, 274. See *Chang v Neill* [2019] VSCA 151, [12] ('*Chang*').

<sup>9</sup> WIRC Act s 3 (definition of 'medical question' paras (a)–(b), (m)). See *Chang* [2019] VSCA 151, [13].

<sup>10</sup> WIRC Act s 303(1), (2).

<sup>11</sup> WIRC Act s 303(1). See *Chang* [2019] VSCA 151, [14].

referred to it by applying its own medical experience and its own medical expertise.<sup>12</sup>

### *Relevant principles of procedural fairness*

39 As stated by the High Court in *Wingfoot* in the passage set out at [38] above, a medical panel must observe procedural fairness. Relevantly, the principles of procedural fairness require a medical panel to afford a party a reasonable opportunity to be heard on issues that the medical panel proposes to take into account as a reason for reaching an opinion that is adverse to the party.

40 A medical panel does not afford a party a reasonable opportunity to be heard where it reaches an adverse opinion on a matter which the party did not address because it could not reasonably have been anticipated that the medical panel might reach that opinion.<sup>13</sup> For the purposes of the present proceeding, it is not necessary for us to canvas all the circumstances in which it may be found that an opinion of a medical panel could not reasonably have been anticipated. It suffices to say that, depending on the facts, those circumstances may include a situation where, without prior notice, a medical panel treats as determinative a fact or evidence that is known to be before the medical panel but upon which the parties placed no reliance.<sup>14</sup>

41 The principles of procedural fairness are directed at the fairness of a decision-maker's procedures in reaching a decision rather than at the merits of the decision. Ordinarily, the Court will make an order setting aside a decision reached in breach of the requirements of procedural fairness and remit the matter for rehearing, irrespective of whether it was the correct decision. However, such an order will not be made if it would be futile, such as where the same decision would have been made even if there had been compliance with the requirements of procedural

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<sup>12</sup> (2013) 252 CLR 480, 498–9 [47] (citations omitted); [2013] HCA 43 (*Wingfoot*).

<sup>13</sup> *Barrett Burston Malting Co Pty Ltd v Kotzman* [2013] VSC 248, [48] (*Barrett*). See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 163 [35], 164 [38], 165 [42]–[44]; [2006] HCA 63; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 589–9 [9]; [2011] HCA 1.

<sup>14</sup> *H&G MacDonald Carriers Pty Ltd v Carson* [2014] VSC 586, [19]–[22]; *Toyota Motor Corporation Australia Ltd v Bendrups* [2016] VSC 718 [39]–[43].

fairness.<sup>15</sup> For example, if the issue that a party was not given an opportunity to address was not material to the decision, it would be futile to set aside the decision in order to give the party an opportunity to address that issue.<sup>16</sup>

### *Judge's reasons*

42 The judge held that it was open to the Panel to find that Mr Hashimi had a soft tissue injury to the lumbar spine, which had resolved, and that the parties' submissions and the medical evidence supported such a finding. She also found that it was open to the Panel to conclude that Mr Hashimi suffered from an adjustment disorder.<sup>17</sup>

43 The judge construed the Panel's reasons as containing a finding that there was a causal relationship between Mr Hashimi's chronic lumbar pain and his adjustment disorder. She gave the following reasons for that conclusion:

The Reasons provided by the Panel did not identify a cause or physical connection between the otherwise unexplained chronic pain. In its Reasons, the Panel discards the diagnosis of a pain disorder and goes on to conclude that the psychiatric injury is one of an adjustment disorder un-associated with Mr Hashimi's lumbar spine workplace related injury. By necessary implication the words used, if implication is needed, draw a link between the chronic lumbar pain complained of and the diagnosis of an adjustment disorder.<sup>18</sup>

44 The judge held that the Panel's finding that the adjustment disorder was not causally connected to the lumbar spine injury of 22 June 2012 but was a consequence of Mr Hashimi's traumatic personal history and pre-existing health issues was a finding which, on the material before the Panel, was tangential and unexpected and ought to be set aside.<sup>19</sup>

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<sup>15</sup> *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145-6; [1986] HCA 54.

<sup>16</sup> *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134-5 [30], 147-8 [72]; [2018] HCA 34; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [45]; [2019] HCA 3.

<sup>17</sup> Reasons [46]-[47].

<sup>18</sup> Reasons [45] (citations omitted).

<sup>19</sup> Reasons [48].

45 The judge considered that the key issue was whether Mr Hashimi should have reasonably anticipated that the Panel would rely to a material extent on his history of traumatisation related to his experiences as a refugee, his long-standing physical health issues and prior history of steroid related medical problems in reaching its finding that he did not have a work-related medical condition.<sup>20</sup> Her Honour found that Mr Hashimi was not given an opportunity to address the non-work related causal factors in what she described as the ‘determinative’ issue of causation, and that this constituted a breach of the requirement to afford procedural fairness.<sup>21</sup> She was satisfied that this error affected the Panel’s determination such that a different opinion may have been reached if the error had not occurred.<sup>22</sup>

46 The judge stated that the fact that neither of the parties identified in their submissions the particular diagnostic cause on which the Panel relied in forming its opinion raised doubt as to the process Mr Hashimi was afforded.<sup>23</sup> She held that by not inviting the parties to explore the potential diagnosis, the Panel deprived Mr Hashimi of a fair opportunity to address the potentially adverse outcome.<sup>24</sup>

47 The judge ultimately concluded as follows:

In this case, the boundaries of the dispute were identified by the pleadings in the Magistrates’ Court claim, the referred medical questions, the submissions of the parties and the medical evidence before the Panel. There were two key questions to be answered. The first requiring the Panel to determine the medical condition of Mr Hashimi. The second determinative question was causation. As noted, the Reasons provided by the Panel did not identify a causal connection between the physical injury and the otherwise unexplained chronic pain. In relation to the psychiatric injury, the Panel finds an adjustment disorder but un-associated with Mr Hashimi’s lumbar spine workplace related injury. In my view, by necessary implication one must draw a link between the chronic lumbar pain complained of and the diagnosis of an adjustment disorder. The causal connection between the adjustment disorder as drawn by the Panel, in this context, is not one which was obvious. Taking into account the pleadings, the medical reports, the parties’ submissions and the referred questions which collectively set the

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<sup>20</sup> Reasons [49].

<sup>21</sup> Reasons [58]–[59].

<sup>22</sup> Reasons [58].

<sup>23</sup> Reasons [60].

<sup>24</sup> Reasons [61].

expected ambit of the dispute, the findings of the Panel are unexpected, tangential and unforeseen.

Not having an opportunity to address the alternative cause of the adjustment disorder demonstrates reviewable error.<sup>25</sup>

48 As we have already stated, Wagstaff has sought leave to appeal on the ground that the judge erred in finding that the Panel failed to afford Mr Hashimi procedural fairness.

### *Parties' submissions*

49 Wagstaff submitted that the findings of the Panel were not beyond the reasonable anticipation of the parties and therefore Mr Hashimi had not been denied procedural fairness. It argued that the judge's conclusion that the Panel's finding that Mr Hashimi's psychiatric condition arose from his traumatic personal history and pre-existing health issues was 'tangential and unexpected' cannot be supported. This was said to be so as the underlying facts relating to Mr Hashimi's personal and medical history were known to the parties.

50 Wagstaff noted that both Dr Schutz and Dr Weissman incorporated details of Mr Hashimi's refugee experiences and medical history into their opinions regarding his psychiatric injury. According to Wagstaff, Dr Weissman in particular contemplated the possibility that those non-work related matters may be relevant to Mr Hashimi's psychiatric diagnosis. Wagstaff contended that there was no critical issue which was not apparent from the material before the Panel or any adverse conclusion that was not recognisably open. It submitted that psychiatric causation was a matter fairly 'in the ring'. It argued that the fact that the Panel came to a different view to other medical practitioners did not mean that Mr Hashimi was denied procedural fairness.

51 Wagstaff submitted that Mr Hashimi had an opportunity to address non-work related causal factors and by way of the psychiatric medical evidence he did so. Accordingly, so it was said, there was no breach of the requirements of procedural

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<sup>25</sup> Reasons [62]-[63].

fairness. Wagstaff contended that it was not procedurally unfair for the Panel to come to a finding that was not actively contended for by either party.

52 As to the judge's statement that Mr Hashimi was required to show that a denial of procedural fairness deprived him of the possibility of a successful outcome, Wagstaff argued that he already provided two psychiatric opinions which commented on the cause of an adjustment disorder and these opinions also referred to his non-work related personal history. Therefore, so it was said, it was not apparent that a different outcome would have resulted if he had the opportunity to address the Panel further regarding non-work related matters.

53 Wagstaff submitted that the judge misconceived the Panel's findings by inferring that it drew a link between Mr Hashimi's chronic back pain and the diagnosis of an adjustment disorder. Wagstaff contended that the Panel rejected Mr Hashimi's contention that his pain was caused by a workplace injury and also directly considered, and rejected, a diagnosis of a pain disorder which might provide a psychogenic cause for his symptoms. Wagstaff argued that the Panel did not comment any further on possible causes for Mr Hashimi's pain. According to Wagstaff, as the Panel did not find a causative link between Mr Hashimi's pain and his adjustment disorder, failure to give him notice of a possible finding of such a link could not amount to a denial of procedural fairness.

54 Mr Hashimi argued that the judge was correct in finding that the Panel had not afforded him procedural fairness as he could not have reasonably anticipated that the Panel might opine, based on the parties' submissions and the medical opinions – including those of Dr Schutz and Dr Weissman – that his pain was caused by his mental reaction to his traumatic experiences.

55 Mr Hashimi submitted that the judge did not misconceive the Panel's findings. He argued that it was clear that the Panel considered his pain to be somatic and that it attributed the cause to his past trauma and not the work-related injury.

## *Decision*

56 In our opinion, the judge correctly found that the Panel failed to afford Mr Hashimi procedural fairness.

57 The questions that were referred to the Panel required it to decide the nature of any injury suffered by Mr Hashimi and whether the requisite causal relationship existed between the injury and his employment with Wagstaff. The Panel was required to reach its own decision on these issues and was not bound by the opinions in the medical reports that were provided to it. However, the Panel was not free of all constraints in performing its task. Rather, it had to perform its task in accordance with the provisions of the WIRC Act and applicable legal principles. In particular, the Panel had to take into account the material provided to it, including the parties' pleadings, submissions and medical reports.

58 The parties' pleadings, submissions and medical reports established the parameters of their dispute. Procedural fairness required that the Panel form its opinion within those parameters and that, if it intended to treat as determinative a matter falling outside those parameters, it had to give the parties notice of its intention to do so and an opportunity to address the Panel on that matter.

59 As appears from our summary of the parties' pleadings and submissions and the medical reports that were provided to the Panel, no party or medical practitioner suggested that there was a causal relationship between any injury that Mr Hashimi suffered and his traumatic experiences as a refugee.

60 Wagstaff had submitted to the Panel that Mr Hashimi did not have any subsisting injury to his lumbar spine and that, to the extent that he had any incapacity for work, it was caused by his longstanding osteoporosis and other conditions which predated his employment with the company. Mr Hashimi had submitted that his ongoing pain and incapacity was caused by an injury to his lumbar spine (or an aggravation of an existing injury) that he suffered during the course of his employment with Wagstaff and a psychiatric injury that was secondary

to his physical injury.

61 The medical reports that were provided to the Panel focused predominantly on whether Mr Hashimi had suffered a physical injury in the course of his work with Wagstaff. The only reports that discussed whether Mr Hashimi suffered from a psychiatric injury were those of Dr Schutz and Dr Weissman – both of whom concluded that the applicant suffered from an adjustment disorder – and Dr Krapivensky, who concluded that he did not suffer from any psychiatric injury. Dr Schutz concluded that the adjustment disorder was secondary to Mr Hashimi’s chronic back condition. Dr Weissman concluded that the adjustment disorder was work related but he allowed for the possibility that Mr Hashimi had a small degree of ‘psychological and emotional vulnerability’ prior to his workplace injury due to his experiences as a refugee.

62 It can be seen that it was not part of Wagstaff’s case before the Panel that Mr Hashimi suffered from an adjustment disorder which was causally related to his experiences as a refugee and that no medical report suggested such a causal relationship. In these circumstances, there was no issue before the Panel as to whether there was such a causal relationship. Accordingly, there was no basis on which Mr Hashimi could have reasonably anticipated that the Panel might find such a causal relationship and thus there was no reason for him to address the issue.

63 We accept that some of the medical reports made reference to Mr Hashimi’s experiences as a refugee and that Dr Weissman considered the impact of those experiences on Mr Hashimi’s mental health. However, we reject Wagstaff’s submission that this meant that Mr Hashimi was on notice that the Panel might express an opinion on the existence of a causative relationship between those experiences and any psychological injury from which he suffered. The fact that a doctor raises a hypothesis and rejects it is not necessarily sufficient to give notice to a worker that a medical panel might adopt that hypothesis.

64 In the present case, there was an absence of any medical opinion that accepted

the hypothesis that there was a causative relationship between Mr Hashimi's experiences as a refugee and his adjustment disorder, as well as a lack of reliance on such a hypothesis in Wagstaff's submissions to the Panel. This meant that Mr Hashimi could not have reasonably anticipated the adoption of such a hypothesis by the Panel.

65 It is not necessary for us to determine whether, on the evidence before the Panel, it was open to it to conclude that there was a causal relationship between Mr Hashimi's experiences as a refugee and his adjustment disorder. Even if such a conclusion were open to the Panel, that is no answer to Mr Hashimi's complaint that, in reaching that conclusion, the Panel denied him procedural fairness. That is because, as we have explained at [41] above, the principles of procedural fairness are directed to the fairness of a medical panel's procedures in reaching its opinion rather than the merits of the opinion.

66 We now turn to the judge's conclusion that the Panel may have reached a different opinion if it had afforded Mr Hashimi procedural fairness on the issue of the cause of his adjustment disorder. In our view, it cannot be said that the Panel would necessarily have reached the opinion that Mr Hashimi's adjustment disorder was caused by his pre-existing health issues and experiences as a refugee even if he had been given notice of the possibility that such an opinion might be reached and an opportunity to address the issue. It is quite plausible that the Panel might have reached a different opinion if Mr Hashimi had been given an opportunity to obtain further medical reports directly addressing the causation hypothesis, to elaborate further on his personal history during his examination by the Panel and to make detailed written submissions on the causation hypothesis.

67 Finally, we will briefly dispose of the question whether the judge erred in finding that it can be inferred from the Panel's reasons that it had decided that Mr Hashimi's back pain was caused by an adjustment disorder which was causally linked to his experiences as a refugee.

68 After concluding that Mr Hashimi suffered a soft tissue injury which had resolved and was therefore not a cause of his lumbar spine pain, the Panel considered whether there was a psychological explanation for the pain. In the passage of its reasons set out at [28] above, the Panel concluded that Mr Hashimi had an adjustment disorder in the mild range, that his back pain was not caused by a pain disorder and that there were features of traumatisation related to his refugee experiences. The sequence in which these conclusions are expressed by the Panel clearly indicate that it was seeking to determine the cause of Mr Hashimi's back pain. Having excluded a pain disorder as the cause, the combination of the Panel's findings that Mr Hashimi had an adjustment disorder and that his experiences as a refugee were traumatic can only mean that the Panel was of the opinion that the back pain was causally related to the adjustment disorder and that the disorder was, in turn, causally related to those experiences.

*Conclusion*

69 For the above reasons, the application for leave to appeal will be refused.

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