

WINGFOOT AUSTRALIA PARTNERS PTY LTD & ANOR v KOCAK & ORS
(M52/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2012] VSCA 259

Date of judgment: 23 October 2012

Date special leave granted: 10 May 2013

The first respondent (Kocak) was employed by the appellants as a tyre builder. On 16 October 1996 he suffered a neck injury when pulling a heavy spool of rubber towards him, and he was put onto light duties for about three months. Due to a lower back injury sustained in May 2000, Kocak has not worked since March 2001. In March 2009, he developed more significant symptoms in his neck than he had previously experienced, and his neurosurgeon recommended neck surgery. In May 2009, he submitted a WorkCover claim to the effect that his current neck condition was related to the neck injury which he suffered on 16 October 1996. Liability was denied.

On 2 November 2009, Kocak instituted a proceeding in the County Court, pursuant to s 135A(4)(b) of the *Accident Compensation Act* 1985 (Vic) (“the Act”), for leave to bring proceedings against the employer for common law damages in respect of the neck injury. On 11 November 2009, he issued a further proceeding in that Court for a declaration of entitlement to medical or like expenses under s 99 of the Act in relation to his neck condition. This proceeding was later transferred to the Magistrates’ Court and, on 8 June 2010, that Court referred three medical questions for determination by a Medical Panel pursuant to s 45(1)(b) of the Act. The Medical Panel gave written notice of its opinion and a statement of reasons in August 2010, concluding that Kocak’s current neck condition did not result from, nor was it materially contributed to, by his neck injury of 16 October 1996. Subsequently orders were made by consent in the Magistrates Court, inter alia, “*That the Court adopt and apply the opinion of the Medical Panel*”.

Kocak filed proceedings in the Supreme Court of Victoria, seeking certiorari to quash the Medical Panel opinion on the basis, inter alia, that the Panel had erred in law by failing to give any, or adequate, reasons for their opinion. Cavanough J found that the Medical Panel’s reasons were adequate to meet the requirements of s 68(2) of the Act, and dismissed the proceeding.

Kocak’s appeal to the Court of Appeal (Nettle and Osborn JJA, and Davies AJA) was successful. The Court could see no reason to accept that a Medical Panel’s reasons should not meet the standard required of any other statutory decision-maker exercising a comparable quasi-adjudicative/investigative function. The Panel’s reasons thus should include: a statement of findings on material questions of fact; some sort of identification of the evidence or other material upon which those findings are based; and, an intelligible explanation of the process of reasoning that has led the Panel from the evidence to the findings and from the findings to its ultimate conclusion. In particular, if a party to a dispute relies on expert medical opinion in support of the conclusion for which that party contends, and the Medical Panel forms

an opinion which is inconsistent with that expert opinion, it is not enough for the Medical Panel simply to state that it rejects the expert opinion. The Panel must provide a comprehensible explanation for the rejection of the expert medical opinion or for preferring one or more expert medical opinions over others. In this case the Panel had failed to adequately explain why it had concluded that the injury suffered on 16 October 1996 was merely a soft tissue injury, not a bony injury as Kocak contended; why it did not consider that the injury had had any effect on the progression of degenerative changes and, therefore, why Kocak's employment with the employer on 16 October 1996 could not possibly have been a significant contributing factor to the recurrence of his pre-existing neck condition; and why the Panel rejected the expert opinions of other medical specialists to the contrary. It was therefore not possible to say, as opposed to guess, why the Panel rejected Kocak's claim.

The Court of Appeal held that inadequacy of reasons may constitute an error of law on the face of the record (whether or not it also establishes jurisdictional error) and that such error will, subject to the exercise of the Court's discretion, justify a grant of relief in the nature of certiorari. The Court allowed the appeal and made an order in the nature of certiorari quashing the Medical Panel's opinion and directing that the questions the subject of opinion be referred to a differently constituted Medical Panel for re-determination.

The grounds of appeal include:

- The Court of Appeal erred in holding that medical panel opinions were, by force of s68(4) of the *Accident Compensation Act 1985 (Vic)*, binding on a court hearing an application by a worker for leave to commence a damages proceeding
- The Court of Appeal erred in holding that the reasons given by the medical panel were inadequate
- The Court of Appeal erred in holding that the failure to give adequate reasons constituted an error of law on the face of the record, in consequence of which the opinion of the medical panel should be quashed