

Insurance law update

May 2015



CASE NOTE

Medical Panel Determinations made more than 30 days after examination of the claimant will be invalid

In *Holloway v Department of Human Services and Ors* [2015] VSC 184, his Honour McDonald J found that a determination of a medical panel convened pursuant to the *Wrongs Act 1958* ("**Act**") is invalid if the determination is given outside the 30 day period prescribed by s28LZG(3)(a) of the Act.

BACKGROUND

In this case the plaintiff alleged that she suffered psychiatric injury in reaction to the suicide of her daughter. At the time of her death, the plaintiff's daughter was in the care of the Department of Human Services ("**DHS**"). The plaintiff alleges that her daughter's death was caused by the negligence of DHS in its care, monitoring and supervision of her daughter.

On or around 30 July 2012 in accordance with s28LWE of the Act, DHS referred for assessment by a medical panel the question: *Does the degree of impairment resulting from the injury to the claimant alleged in the claim satisfy the threshold level?* On 1 October 2012 the medical panel examined the plaintiff. The medical panel was required by s28LZG(3)(a)(i) to give a determination or certificate within 30 days; in this instance, by 31 October 2012.

On 14 November 2012, the medical panel provided to the plaintiff's solicitors documents titled 'Medical Panel Certificate of Determination' and 'Reasons for Determination', in which they determined that the degree of psychiatric impairment resulting from the psychiatric injury to the plaintiff did not satisfy the threshold level under the Act. This date was outside the prescribed 30 day period.

The plaintiff sought to have the medical panel determination quashed on the basis that the medical panel fell into jurisdictional error by issuing the Certificate of Determination and Reasons for Determination outside of the 30 day period prescribed by s28LZG(3)(a) of the Act.

KEY FINDINGS

McDonald J applied the decision made by Kaye J in *Mikhman v Royal Victorian Aero Club* [2012] VSC 42 which cited with approval the principles considered by the High Court in *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355. The High Court found in that case that the test is whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard *must be had to 'the language of the relevant provision and the scope and object of the whole statute'*.

When looking at the 30 day time period prescribed by s28LZG(3)(a) of the Act, McDonald J upheld the following conclusions from *Mikhman* which lead to the finding that non-compliance by a medical panel of the time limit has the consequence that the panel's determination is invalid. The Court of Appeal in *Ryan v Grange at Wodonga Pty Ltd* [2015] VSCA 17 expressly endorsed the below reasoning of Kaye J in *Mikham*:

- » The time limit specified in s28LZG(3)(a) is expressed in mandatory terms, i.e. 'must';
- » The verb 'must' is used repeatedly in Divisions 4 and 5 of Part VBA of the Act. In each instance the verb 'must' is used in its normal, mandatory, sense;
- » Sections 28LZG(1) and (2) each use the verb 'must' to prescribe a procedure to be complied with by a panel;
- » s28LZK (which provides that any act or decision of a panel is not invalid 'by reason only' of any defect or irregularity in connection with the appointment of a panel member) does not preserve the validity of a decision if a panel fails to comply with other mandatory provisions, including s28LZG(3)(a);
- » The existence of provisions expressly providing for the consequences of a failure of a party to comply with a time limit indicate a 'statutory intention that the time limits, prescribed for each of the steps to be taken leading to the assessment of impairment by a medical panel, must be strictly complied with;
- » The intention of the Act is to provide for a speedy resolution of the threshold question as to whether a claimant, in a particular case, has sustained a 'significant injury'; and

- » No public inconvenience is caused by the invalidation of a medical panel decision by reason of failure to comply with the prescribed time period.

DHS argued that the Convenor of medical panels has no power to reconstitute a medical panel once a question has been referred under s28LWE of the Act nor the power to ask a registered health practitioner who has examined the claimant to meet with the Panel and answer questions under s28 LZE of the Act as the time limits would have expired. McDonald J did not accept this, stating that a failure to comply with the time prescribed by s28LZG(3)(a) does not invalidate the steps taken by the parties leading to the referral of the relevant medical question to a panel. Nor would it affect the validity of the referral by a respondent under s28LWE of the Act of a medical question to a panel.

THE SUPREME COURT'S DECISION

McDonald J ordered that the Certificate of Determination and Reasons for Determination of the medical panel be quashed and that the medical question be referred back to the Convenor of the medical panel for determination by a differently constituted medical panel.

IMPACT OF THE DECISION FOR INSURERS

If an Insurer receives a medical panel determination outside the time limit, on applying to the Court they are likely to receive a declaration that the determination is invalid. However the Court will probably proceed to order the matter to be determined by a differently constituted medical panel which could well to come to the same conclusion as the original panel. As such, the further referral may be a futile exercise which results in increased costs unless the defendant is able to unearth useful evidence that was not presented to the original panel.

Medical Panels are likely to heed the Court's warning that determinations issued outside of time limits will be invalid and are unlikely to repeat this mistake very often.

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