G v South Australian Fire and Emergency Services Commission (Country Fire Service) **[2012] SAWCT 17**

WORKERS COMPENSATION TRIBUNAL (SA)

G

v

SOUTH AUSTRALIAN FIRE AND EMERGENCY SERVICES COMMISSION (COUNTRY FIRE SERVICE)

JURISDICTION: Preliminary Point - Admissibility of Medical Panel Certificate

FILE NO(S): 5080 of 2010 and 104 of 2011

HEARING DATE: 5 April 2012

JUDGMENT OF: His Honour Deputy President Judge P D Hannon

DELIVERED ON: 10 May 2012

CATCHWORDS:

The compensating authority applied under s 98I(1) of the Workers Rehabilitation and Compensation Act 1986 for admission of a certificate of opinion of a Medical Panel in dispute proceedings before the Tribunal - The applicant opposed the admission on the ground that the certificate could not be admitted unless one or more of the authors of the Medical Panel opinion gave evidence which provided a basis for its admission; alternatively, on the ground that fundamental defects in the opinion or its reasons rendered it inadmissible - Held that the Medical Panel certificate was admissible under s 98I(1) of the Act without the need to call evidence from an author of the opinion; further that the proposed challenges based upon alleged fundamental defects in the opinion, if open to be made at all, should be heard after admission of the certificate in the context of further evidence (if any), and went to the weight of the opinion rather than admissibility - Ss 3, 84, 98F, 98G, 98H and 98I of the Workers Rehabilitation and Compensation Act 1986.

Campbell v M & I Samaras Pty Ltd and Employers Mutual Limited; Yaghoubi v BDS People Pty Ltd and Employers Mutual Limited [2011] SASCFC 58
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705
Butto v WorkCover Corporation/Employers Mutual (Spotless Catering Services Ltd) [2012] SAWCT 8
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

WorkCover v Davey [2011] SASCFC 66

REPRESENTATION:

Counsel:
Applicant: Mr J Warren
Respondent: Mr M Hinton QC
Solicitors:
Applicant: Websters Lawyers
Respondent: Gilchrist Connell

Introduction

1 The applicant[1] has been involved with the Country Fire Service ("CFS") as a volunteer since 2004. On 1 April 2009 he injured his back in the course of that work. He asserts that since that time he has suffered a continuing disability as a result of that injury.

2 On 9 September 2010 the South Australian Fire and Emergency Services Commission ("the compensating authority"), as agent for the CFS, obtained a certificate of opinion from a Medical Panel under s 98H of the *Workers Rehabilitation and Compensation Act 1986* ("the Act") to the effect that the CFS disability had resolved by that time.

3 Two determinations which rely upon the Medical Panel opinion were subsequently made by the compensating authority. The applicant disputed each determination and each dispute has been referred for judicial determination by the Tribunal.

4 At the outset of the proceedings the compensating authority requested that the Tribunal admit the certificate of the Medical Panel in evidence in the proceedings in accordance with its power to do so under s 98I(1) of the Act. The applicant objected to the admission of the certificate.

5 This decision relates solely to the challenge to the admissibility of the certificate. In this context there was no dispute that the certificate as to the opinion of the Medical Panel issued under s 98H(2) of the Act should be understood to include the statement required under s 98H(3) of the Act setting out the reasons for the opinion.

Dispute background

6 The disability which occurred on 1 April 2009 was described in the documentation in various ways including as a "lower back strain", as an "L4/5 disc bulge", and as an exacerbation of a pre-existing degenerative disc disease.[2] Whilst the applicant was in receipt of payments of income maintenance in respect of the disability, the compensating authority referred a number of medical questions to a Medical Panel in accordance with ss 98F and 98G of the Act. These included questions as to the nature and extent of the disability sustained by the applicant on 1 April 2009, whether it was sustained in the course of his duties with the CFS, and if so, whether the applicant had ceased to be incapacitated as a result of it.

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[1] The Tribunal granted an application that the applicant's full name not be published on the grounds that publication might adversely impact upon his ability to earn income from self-employment.

[2] The import of these varying descriptions is addressed below.

7 On 9 September 2010 the Medical Panel issued a certificate of opinion with supporting reasons. The certificate stated that the Medical Panel was of the opinion that on 1 April 2009 the applicant sustained a temporary exacerbation of a pre-existing degenerative disc disease of the lumbar spine in the course of CFS duties which exacerbation had since resolved, and that the applicant had ceased to be incapacitated as a result of it.

8 On 21 September 2010 the compensating authority issued a determination which advised the applicant that on the basis of the Medical Panel opinion, the compensating authority was satisfied that he had ceased to be incapacitated for work by reason of the compensable disability, and that he could return to work. He was given notice of discontinuance of weekly payments of income maintenance in accordance with s 36 of the Act. The applicant lodged a notice of dispute with respect to that determination.[3]

9 On 5 January 2011 the applicant submitted a claim for compensation with respect to an alleged aggravation of compensable lumbar spine injuries sustained on 1 April 2009 during the course of an activity carried out at his home. By determination dated 11 January 2011, the compensating authority denied that the aggravation arose in the course of his duties with the CFS in view of the opinion of the Medical Panel that he had ceased to be incapacitated by the compensable disability. That determination was disputed.[4]

The positions of the parties

10 The compensating authority sought to tender the Medical Panel certificate on the basis that it was relevant and probative with respect to the matters in issue between the parties in the dispute proceedings. Whilst it was accepted that the Tribunal was not bound by the opinion, the compensating authority submitted that in the present case, the opinion of the Medical Panel on the medical questions put to it also answered the ultimate legal issue, and that upon admission of the certificate, the Tribunal would have before it evidence sufficient to discharge the onus upon the compensating authority to establish grounds upon which payments of income maintenance should cease, and upon which its rejection of the applicant's further claim should be upheld.

11 The applicant based his objection to the admission of the certificate on two alternative grounds. The first was that, notwithstanding the terms of s 98I(1) of the Act, the certificate could not be admitted into evidence unless one or more of the members of the Medical Panel who formed the

[3] Dispute 5080 of 2010.
[4] Dispute 104 of 2011.

opinion attended before the Tribunal and gave evidence which established a basis for admissibility. The situation was contended to be no different than in the case of any expert opinion, where, absent consent to tender, the opinion was not admissible unless its author gave evidence which satisfied the usual tests for admissibility of expert evidence. Notice was given by the applicant just before the hearing of a request that the Medical Panel members attend the hearing to give evidence for this purpose. They did not attend.

12 The second and alternative ground of objection to admissibility was that, even if the opinion was considered to be admissible without evidence from one or more members of the Medical Panel, it should not be admitted in light of a number of alleged defects in the opinion itself. The matters raised in this context were described as "judicial review-type challenges",[5] including whether the Medical Panel addressed the correct disability in coming to its opinion, whether it provided adequate reasons for its opinion, whether relevant matters that should have been taken into account were taken into account, and whether there had been a denial of procedural fairness.

13 For the purpose of advancing the alternative argument, the applicant sought to tender attachments A and B to the reasons for the Medical Panel opinion. The attachments comprised the material provided to the Medical Panel by the compensating authority upon making the referral under s 98G(2) of the Act. The material included claim documents, radiological and other images, medical reports and notes, and prescribed medical certificates. The proposed tender was for the limited purpose of allowing the Tribunal to have regard to the material in order to analyse the challenges and determine whether they established grounds for declining to admit the opinion.

14 The compensating authority objected to the admission of these documents. For the purpose of allowing all arguments in relation to the admissibility of the opinion to be dealt with, I admitted the documents *de bene esse*.[6]

15 The response of the compensating authority to the first ground of objection was that, given the nature of the dispute resolution scheme established by the Act, the normal common law rules as to admissibility of expert evidence did not apply. Accordingly it was not necessary to call any members of the Medical Panel to establish a basis for admissibility. It contended that the opinion ought to be admitted as long as the Tribunal was satisfied as to the apparent expertise of members of the Medical Panel in relation to the medical questions posed, and as to the relevance

[5] Tr 6, 8.
[6] MFI A1.

of the opinion to the matters in issue between the parties in the proceedings. As to the second ground, the compensating authority submitted that the proposed challenges, if able to be addressed by the Tribunal at any stage (which was not conceded), should be considered at a later time, in the context of determining the weight that ought to be given to the opinion, if admitted.

16 Before addressing these contentions, I set out some general observations in relation to the statutory scheme, and to the extent relevant, judicial interpretations of that scheme to date.

Legislation and judicial interpretation

17 The function of a Medical Panel is to give an opinion on any medical question referred to it under the Act - s 98F(1). Once that opinion has been formed the Act relevantly provides:

> "98H—Opinions
>
> (1) …
>
> (2) The Medical Panel to which a medical question is so referred must give a certificate as to its opinion.
>
> (3) An opinion under subsection (2) must include a statement setting out the reason or reasons for the opinion provided by the Medical Panel.
>
> (4) For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any body or person acting under this Act and must be accepted as final and conclusive irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.
>
> 98I - Admissibility
>
> (1) A certificate given by a Medical Panel is admissible in evidence in any proceedings under this Act.
>
> (2) A member of a Medical Panel is competent to give evidence as to matters in a certificate given by the Medical Panel of which he or she was a member, but the member may not be compelled to give any such evidence."
>
> (3) A consultant engaged to provide expert advice to a Medical Panel is competent to give evidence as to matters relating to that expert advice, but the consultant may not be compelled to give any such evidence."

18 The operation of these provisions is to be considered in light of the relevant objects of the Act, including in particular the efficient and effective administration of the scheme[7] and the reduction of litigation and adversarial contests to the greatest possible extent.[8] Also of general relevance is s 84 of the Act, which provides that the Tribunal is not bound by the rules of evidence, but may inform itself in any way it considers appropriate, although that is not to be taken as suggesting that rules of evidence be ignored as of no account: *Campbell v M & I Samaras Pty Ltd and Employers Mutual Ltd; Yaghoubi v BDS People Pty Ltd and Employers Mutual Limited*, ("the *Campbell* decision").[9]

19 The *Campbell* decision resolved issues concerning the power of a compensating authority or the Tribunal to refer a medical question to a Medical Panel for opinion, and as to when and in what circumstances that power might be exercised. In the course of considering the legislative background, and various submissions as to the use to be made of a Medical Panel opinion, both the majority and the minority members of the Full Court made a number of observations which although not necessarily part of the *ratio* of the decision, are nevertheless of assistance in considering the present question of the admissibility of a Medical Panel opinion.

20 For example, the majority observed that the introduction of Part 6C of the Act represented a marked change to the regime for resolution of some disputes under the Act;[10] that the Medical Panel is a facility which, if utilised, has the effect of minimising the undesirable alternative of "duelling experts", prevents proliferation of reports and provides for a speedy and definitive ruling on medical matters;[11] that the opinion of a Medical Panel is not to be equated to a dispositive order or judgment, even though it might be directed to the ultimate issue in dispute before the Tribunal, but is to be understood as supplementing the process of the primary decision maker;[12] that it remains for the Tribunal to determine whether the opinion is accepted, with the opinion only capable of being accepted as final and binding on the decision-maker (that is, the Tribunal) to the extent that the factual basis of the opinion is agreed or relevant assumptions subsequently proven, the correct questions are

[7] 2(1)(b).
[8] Section 2(1)(f).
[9] [2011] SASCFC 58 at [63] per Gray and Sulan JJ.
[10] [51].
[11] [104].
[12] [59], [86], [92] and [103] - there is a potential for confusion as to what is meant by the phrase "primary decision maker" in [59] and "decision-maker' in [103], and as to whether the phrases refer to the compensating authority determining a claim in light of the receipt of a Medical Panel opinion, or to the Tribunal as the body which ultimately determines the dispute. Having considered the various references in the paragraphs cited in context, including [47], I take the majority to mean the compensating authority in referring to the "primary decision-maker" in [59], and the Tribunal in referring to the "decision maker" in [103] - also see White J at [225].

addressed and questions of law properly applied;[13] and that it remained for the Tribunal to determine if and to what extent the Medical Panel opinion was decisive in a given matter, such that a genuine adjudicative function was to be to undertaken by the Tribunal, including determination of the weight to be given to the opinion, and of the legal question in dispute in which the parties are joined.[14]

21 White J as the minority Judge in *Campbell* also made two observations in relation to the use of a Medical Panel opinion. One was that it had to be adopted and applied by the compensating authority under s 98H(4) of the Act for the purpose of determining any question or matter. The other was that whilst s 98I(1) of the Act made the certificate admissible, it does not specify that it must be admitted, or that it should have any particular status once admitted. Further that:

> "The evidential value of any certificate admitted into evidence is to be assessed in the same way as any other evidence. The Medical Panel's opinion may be of little, if any, value, for example, if it is based on an assumed set of circumstances not proved to the Tribunal's satisfaction."[15]

Consideration

22 Against this legislative background and judicial commentary, I do not accept the applicant's contention that a certified opinion given by a Medical Panel has the same status under the Act as an opinion of an expert who is not a member of a Medical Panel. The fact that a Medical Panel opinion must be certified under s 98H(2), with the certificate thereby becoming admissible under s 98I(1), gives the certificate a different status in terms of admissibility to that of any other expert opinion. If it were otherwise, there would be no need for provisions in the terms of either ss 98H(2) or 98I(1). As with any other opinion, absent these provisions, the Medical Panel opinion, assuming its receipt into evidence was subject to objection, would be admissible only in accordance with the test applied by the Tribunal to admissibility of expert opinions generally. That is, it could be admitted only upon the author or authors of the opinion attending the Tribunal and giving evidence which established their expertise, the relevance of the opinion to the matters in issue before the Tribunal, and which identified the facts and assumptions upon which the opinion was based, and which might be proved through those experts or other evidence if in dispute. But this is not necessary with respect to a Medical Panel certificate given ss 98H(2) and 98I(1) of the Act.

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[13] [103] and [115].
[14] [114], [116] and [117].
[15] [222].

23 The applicant contended that s 98I(2), which provides that Medical Panel members are competent but not compellable witnesses, indicated the contrary. He submitted that if a Medical Panel certificate can be admitted by virtue of s 98I(1) without the need for evidence from an author of the opinion, there was no need for s 98I(2), in that there would be no need for evidence from a member of a Medical Panel in any circumstances. I do not agree for two reasons.

24 First, the fact that the certificate is admissible under s 98I(1), even without the need to call evidence, does not mean that it must be admitted. For example, if on the face of the certificate and the reasons for opinion, the Medical Panel experts did not appear to have the relevant expertise to provide an opinion on the medical questions posed, or if the opinion given was clearly not responsive to the medical questions asked, or was not relevant to the matters in issue for determination, the Tribunal might decline to admit the certificate. So too, if the opinion and accompanying reasons did not set out the material identifying the factual basis upon which the Medical Panel members purported to give the opinion, including the questions posed, the history, the examination, and the documentary material which it could be assumed was considered.

25 The second point relates to s 98I(2) of the Act. Whatever the reason may be for the enactment of a provision which allows Panel members to decline to give evidence, I do not consider that Parliament can have intended that the admissibility of a certificate could stand or fall upon a decision by a member or members of a Medical Panel to exercise their statutory right to decline to give evidence. The failure of a Medical Panel member to give evidence to explain or expand upon an opinion may have consequences in terms of the weight to be given to the opinion, but not for admissibility itself.

26 The approach advocated by the applicant would be contrary to the abovementioned general objects of the Act including the reduction of litigation and adversarial disputes, and the intended effect of the introduction of Medical Panels under Part 6C of the Act, as articulated by the majority in *Campbell.*[16]

27 In this case, the Medical Panel certificate and reasons for opinion set out the qualifications of the Medical Panel members, the medical questions asked and the answers to them, and the information relied upon for that purpose. That information included a history taken from the applicant, observations upon medical examination, and a consideration of other documentary material including medical investigations and reports, these being the contents of attachments A and B to which the opinion referred.

[16] At [104] see para [20] above.

The reference to these matters in the opinion and the reasons provides a satisfactory basis upon which I can conclude that the Medical Panel members appear qualified to give an opinion on the medical questions referred to them, and that the opinion is relevant to the proceedings.

28 Given these conclusions, it follows that I do not consider that the threshold for admissibility under s 98I(1) of the Act should be as stringent as the common law test of admissibility, such as that articulated by Heydon J in *Makita (Australia) Pty Ltd v Sprowles*,[17] particularly given that the admissibility issue may be determined in the absence of oral evidence. In making that observation, I may appear to be taking a different approach to that of another member of the Tribunal in *Butto v WorkCover Corporation/Employers Mutual (Spotless Catering Services Ltd).*[18] I refer to that decision further below.

29 Accordingly I reject the first ground of objection to admissibility based upon the failure of a member of the Medical Panel to give evidence to establish grounds for admissibility.

30 The alternative proposition put by the applicant was that, even if a Medical Panel certificate is admissible in the proceedings without the need for evidence from a Medical Panel member, its admissibility should be subject to determination of the various judicial review-type challenges raised with respect to the opinion.

31 These challenges included the following: first, that the Medical Panel opinion, in determining that incapacity was no longer continuing as a result of the applicant's compensable disability, which it described as a "temporary exacerbation of his pre-existing multi-level degenerative disc disease of the lumbar spine [lumbar spondylosis]", failed to direct its attention to what was contended to be the different injury accepted as compensable, described initially as a "lower back strain",[19] as an "disc bulge at the L4/5 region" in a later determination,[20] and as an "L4/5 disc prolapse" in the Certificate of Referral,[21] and thus erred by considering the wrong disability in coming to its conclusion; second, that it was evident from the Medical Panel's conclusion that it did not accept either the applicant's history as to the ongoing nature of his disability, or assumptions in that regard in the supporting material, and that accordingly, because the Medical Panel's reasons for opinion contained no explanation for not accepting that history, there was either an error of law or a denial of procedural fairness; third, that the same defect arose

[17] (2001) 52 NSWLR 705 at [85].
[18] [2012] SAWCT 8.
[19] Determination 1 December 2009 MFI A1.
[20] Determination 21 September 2010 - Exhibit R1.
[21] MFI A1 - Referral Certificate.

because the logical result of the opinion was that the credit of the applicant was in question, with no reasons or no adequate reasons being given as to why his credit was doubted; fourth, that the Medical Panel erred in its understanding of the law as to what constituted incapacity for work, and in considering whether and when incapacity on account of the compensable disability had ceased; fifth, that inadequate reasons or no reasons were given for not accepting other medical opinions before the Medical Panel which appeared to accept that the compensable disability was ongoing.

32 The applicant expanded upon the above propositions by a detailed analysis of the opinion and cross referencing with the material admitted *de bene esse*. The applicant contended that the reasons of the Medical Panel were inadequate by reference to the approach taken in a series of decisions of the Supreme Court of Victoria in relation to the adequacy of reasons for opinion of Medical Panels established under accident compensation legislation in that State. Those cases were also said to support the proposition that a decision of a Court to decline to rely upon an opinion of a Medical Panel because of inadequacies in its reasons for opinion should be equated to a refusal to admit the Medical Panel opinion into evidence. Further support was drawn by reference to the decision of *Butto*, where it was contended that, having concluded that a Medical Panel opinion failed to address the proper question, the Tribunal declined to admit the opinion into evidence.

33 I do not consider it to be appropriate to address all of the detailed submissions of the applicant as to the alleged defects in the approach taken by the Medical Panel or in its reasoning. The fact that the majority in *Campbell* observed that it was implicit in s 98I of the Act that there remained a genuine adjudicative function to be undertaken by the Tribunal[22] does not necessarily imply, as the applicant contended, that the exercise now urged by the applicant on the Tribunal should be undertaken to determine admissibility. The range of matters which the majority contemplated might be addressed by the Tribunal in considering whether a party otherwise bound by a Medical Panel opinion can seek to impugn that opinion, suggests that the adjudicative function be undertaken after considering all the evidence which might be put before the Tribunal, in which case complaints about the basis for a Medical Panel opinion, admissible on the face of its contents, would more appropriately go to weight. This seems implicit in the comments made in the next paragraph of the decision, where the majority wrote:

> "There remains power vested in the Tribunal to satisfy itself that the opinion is one based on the evidence and within the expertise of

[22] At [115].

> the Medical Panel. It remains open to the Tribunal to receive further evidence or to refer a matter back to the Medical Panel for clarification or elaboration. It remains for the Tribunal to determine what weight shall be given to an opinion."[23]

34 The judicial review-type challenges raised by the applicant are not on their face of such significance that they give rise to grounds for declining to admit the certificate. For present purposes I comment on only two aspects of the applicant's complaints.

35 The first relates to the contention that the Medical Panel erred in considering the wrong disability in coming to its conclusion, such that the position was akin to that in *Butto*, where the Tribunal declined to admit the opinion for this reason. The applicant's contention is not made out on the material upon which he now seeks to rely. Whilst there are differences between the description of the compensable disability in certain determinations of the compensating authority and in the Certificate of Referral, compared with the description in the Medical Panel reasons for opinion, it is evident on a fair reading of the referral and the reasons for opinion that the Medical Panel answered the question posed, namely as to what, in its opinion, was the nature of the disability sustained on 1 April 2009 in the course of CFS duties. The Medical Panel plainly directed itself to that question. The fact that it gave the disability a different description to that given to it by others does not mean it addressed the wrong disability. The differences in description may ultimately go to the weight of the opinion, but on the material relied upon, they cannot support a submission that the opinion should not be admitted because it addresses the wrong disability.

36 The second point concerns the complaints as to the adequacy of the Medical Panel's reasons for the opinion. The reasons set out the history taken from the applicant, observations upon examination and other factual matters apparently drawn from the supporting materials supplied to the Medical Panel. The reasons contain an explanation for the conclusion of the Medical Panel. Upon close analysis there may be gaps in the reasoning of the Medical Panel in the nature alleged by the applicant, but if so, they are not such as to impugn the relevancy of the opinion or its admissibility. Valid complaints as to aspects of the reasoning for an otherwise relevant opinion do not mean it should not be admitted. The complaints raised by the applicant are best assessed in terms of weight once the opinion is admitted if the Tribunal considers it appropriate to entertain such judicial review-type challenges at a later stage of these proceedings.

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[23] At [116]

37 In terms of the level of scrutiny to which the Medical Panel reasons for opinion should be subject, I note that the Victorian Supreme Court cases relied on by the applicant involved opinions of Medical Panels which appear to have the effect of dispositive orders binding on courts before which the relevant compensation proceedings were taking place. In such circumstances there is likely to be a greater obligation with respect to the adequacy and clarity of reasons than in the case of Medical Panels under Part 6C of the Act, where the opinion supplements the dispute resolution process, with the Tribunal at all times retaining the ultimate adjudicative function and the power to determine if, and to what extent, a Medical Panel opinion is decisive in a given matter. There may be some force in the compensating authority's contention that it is not appropriate to adopt the standards required of Medical Panels under the Victorian legislation, and that the lesser level of scrutiny applicable to administrative decisions should apply in accordance with comments in cases such as *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.[24]

38 This leads to the further point that the Victorian decisions relied upon by the applicant were made following applications for judicial review by the Victorian Supreme Court. It is not for this Tribunal to fall into the role of conducting *a de facto* judicial review whether by reference to the adequacy of the Medical Panel reasoning or otherwise. So much is clear from the decision of the Full Supreme Court in *WorkCover Corporation v Davey*.[25] These are not proceedings in the ordinary courts. The role of the Tribunal is to determine the merits of the dispute consistently with the objects of a statutory scheme which has integrated the Tribunal's ultimate dispute resolution powers with a procedure for obtaining Medical Panel opinions which provide for a "speedy and definitive ruling on medical matters."[26]

39 In the circumstances I decline to admit MFI A1 into evidence at this stage. I rule that the Medical Panel certificate of opinion is admissible.

Two further observations

40 The first concerns s 98H(4) of the Act. The applicant contended that the proper interpretation of the scope of that provision was relevant to the question of the admissibility of the Medical Panel opinion. He submitted that what were said to be *obiter dicta* comments of the majority in *Campbell* to the effect that a Medical Panel opinion "might be"[27] binding on the applicant as a party joined in issue, as well as on the compensating authority, were incorrect. He contended that the Tribunal should adopt a

[24] (1996) 185 CLR 259
[25] [2011] SASCFC 66.
[26] *Campbell* at [104].
[27] At [103].

construction consistent with that suggested by White J,[28] to the effect that it is only the compensating authority, as the body involved in determining the claim, which was obliged to adopt and apply a Medical Panel opinion and accept it as final and conclusive. Further that the applicant was not "acting under the Act" for the purposes of s 98H(4) by making a claim for compensation or disputing a rejection of that claim.

41 It was thus submitted that if a Medical Panel opinion was not binding on the applicant by virtue of s 98H(4), it was a consideration relevant to its admissibility, as it supported his submission that the Medical Panel opinion should have the same status as any other expert opinion.

42 The compensating authority contended that the tentative view of the majority was correct. It is not necessary for me to address the issue at this stage. I have already rejected the applicant's submission as to the relative status of Medical Panel opinions as opposed to those of other experts by reference to ss 98H(2) and 98I(1) of the Act. The s 98H(4) issue may have to be resolved as the next stage of the proceedings.

43 The second observation relates to the *Butto* decision. That matter, as here, involved a question as to whether a applicant had ceased to be incapacitated for work as a result of a previously accepted compensable disability. The material put before the Tribunal included an opinion from a Medical Panel on which the compensating authority relied for the disputed determination, and a number of other expert reports. It appears that all of this material was received provisionally subject to admissibility and weight. No preliminary point was taken, as in this matter, as to the admissibility of the Medical Panel opinion under s 98I(1) of the Act before any other evidence was given. In this context the distinction between admissibility and weight was not given the emphasis that it was in these proceedings. The Tribunal in *Butto* ultimately appears to have come to the conclusion that the Medical Panel did not address the right question, and that if it did, it did not satisfy the common law test for admissibility of expert evidence.[29]

44 In regard to that conclusion, I observe as to the first point, that had it been apparent on the face of the opinion in *Butto* that there was a failure to address the right question, then on the approach I have taken, it may quite properly have been concluded that the Medical Panel opinion should not be admitted, rather than that the alleged defect be addressed only in the context of the weight to be given to the opinion. As to the second point, given my interpretation of the effect of ss 98H(2) and 98I(1) of the Act, it follows that I do not agree that a Medical Panel

[28] At [204] and [222].
[29] *Butto* at [88].

opinion must satisfy the common law test for admissibility before it can be admitted in proceedings under s 98I(1) of the Act.

45 Presumably, on account of the different approach to the issue of admissibility of the Medical Panel opinion in the proceedings before me compared with *Butto*, neither party pressed me to form any particular conclusion based upon principles able to be extracted from *Butto*. It is to be expected that, in a complex area of law which is still developing after recent and substantial statutory amendment, there may not always be immediate consistency in first instance decisions, given that varying procedural approaches may be taken to issues which in turn give rise to new arguments before differently constituted Tribunals.

Order

46 The Medical Panel opinion dated 9 September 2010 is admitted in evidence in the dispute proceedings now before me. I will hear further from the parties as to the conduct of the next stage of the proceedings.

NOTE CAREFULLY:

Parties are advised that if a party wishes to appeal against any part of this decision which is appealable pursuant to s 86(1) of the Act such appeal must be filed with the Registrar in accordance with the form titled Notice of Appeal within 14 days of the delivery of this decision and must be served on all parties.

PUBLICATION OF THESE REASONS

It is the practice of this Tribunal to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Tribunal's usual practice.