CITATION: *Q-COMP AND John Kennerley and Qantas Airways Limited (C/2012/16)*
John Kennerley AND Q-COMP and Qantas Airways Limited (C/2012/18) - Decision
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INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial commission

Q-COMP AND John Kennerley and Qantas Airways Limited (C/2012/16)

John Kennerley AND Q-COMP and Qantas Airways Limited (C/2012/18)

PRESIDENT HALL 18 October 2012

DECISION

[1] On 3 May 2011, Qantas Airways Limited (Qantas) initiated an appeal in the Queensland Industrial Relations Commission (the Commission) against a decision of Q-COMP, which had been released on 7 April 2011. By that decision, Q-COMP had set aside a decision of the self-insurer to reject an Application for Compensation by Mr John Kennerley under the *Workers' Compensation and Rehabilitation Act 2003* (the Act). In lieu thereof, Q-COMP ruled that the claim was one for acceptance. Mr Kennerley, who had sought the Statutory Review by Q-COMP, was the Second Respondent to the appeal to the Commission.

[2] The appeal to the Commission was successful. Q-COMP now Appeals to this Court (Matter C/2012/16) naming each of Mr Kennerley and Qantas as Respondents. Mr Kennerley also Appeals to the Court (Matter C/2012/18). The Respondents to that Appeal are Q-COMP and Qantas. Mr Kennerley has filed the same outline of submissions in both Appeals. Each of Q-COMP and Qantas has filed one outline of submissions and relies upon that outline in each of the Appeals. The Appeals were heard together. These reasons for decision deal with both Appeals.

[3] The claim arose out of a traffic incident at about 2.30 p.m. on 10 March 2010, which occurred about 500 metres from Mr Kennerley's residence. In attempting to turn right at an intersection with traffic lights, Mr Kennerley, who was riding a motorbike and who did not have the advantage of a right-turn arrow, came into collision with a motor vehicle. The Commission summarised Mr Kennerley's injuries as follows:

> "[30] The injuries suffered on the day were identified as follows:
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> - dislocated left hip;
> - acetabular fracture to the left-hand pelvis;
> - several fractures to the right femur;
> - spiral [sic] fracture; and
> - broken wrist.".

[4] It is common ground that Mr Kennerley's injuries were "personal injuries" for the purposes of s. 32(1) of the Act, that Mr Kennerley was a "worker" for the purposes of the Act and that Qantas was his employer for the purposes of the Act. (He had been employed by Qantas since 1988.) It is also common ground that the journey provisions of the Act have no application. The critical issues are whether the injuries "arose out of, or in the course of Mr Kennerley's employment" and whether Mr Kennerley's employment was a "significant contributing factor" to the injuries.

[5] At the time of the collision on 10 March 2010, Mr Kennerley was employed by Qantas as a long-haul flight attendant. (His actual work was as a Cabin Supervisor.) He had been so employed for 15 years. Whilst his residence was located at Varsity Lakes, his "home port" was Brisbane Airport. The Gold Coast Airport is a Jetstar destination/embarkation port; not a Qantas destination/embarkation port.

[6] To operate into the USA Airport, cabin crew are required to hold a current Passport and Visa authorising entry into the USA. It was a condition of Mr Kennerley's employment with Qantas that he hold a valid Passport and valid Visa allowing entry into the USA. Qantas provided staff, such as Mr Kennerley, with assistance in renewing such documentation. To begin with, Qantas tracked his documentation and advised Mr Kennerley of the imminence of the five year renewal date for his Visa. Additionally, Qantas provided Mr Kennerley and all such employees with a "US Visa Application Information Pack" (Exhibit 3). Counsel for Mr Kennerley helpfully summarises the pack as follows:

> "The information pack provides crew members with a detailed step by step process that crew are required to follow in order to renew their visa. The information provided includes the following:

- how to schedule an appointment online via the US consulate website;

- payment of a booking fee and how to see [sic] reimbursement of same from Qantas via a PCV (petty cash voucher);

- how to notify the Qantas Brisbane Base Operational Support Desk of their appointment time;

- details of the location of the US consulate in Sydney, the preliminary security check and the documents to be taken to the interview at the US consulate.".

The documents to be taken to the interview included a current Passport and US Visa (emphasising the importance of Qantas' monitoring of renewal dates), a letter of introduction from Qantas and a Qantas Staff ID card. When answering the question "address where you will stay in USA" in the Visa Application Form, Qantas staff (on instructions from Qantas), enter the Qantas hotel address in Los Angeles or Honolulu.

[7] Notwithstanding that Qantas has and displays business interest in its long-haul cabin crew successfully renewing their Visa's, Qantas is adamant that crew renew their Visa's in their own time. As a matter of fact, the proposition is correct. Mr Kennerley could not work as a long-haul flight attendant whilst travelling to Sydney. Neither could he work as a long-haul flight attendant whilst attending at the Consulate. Neither could he work as a long-haul flight attendant for some time thereafter, because the Consulate temporarily retained his Passport. In short, Mr Kennerley had to pursue the Visa in his time off. However, for crew whose "home port" is Brisbane and who have to attend the US Consulate in Sydney, Qantas provides a "duty travel ticket" and bears the costs of the return flight, carries the cost of expenses (other than overnight accommodation) and pays the crew member an amount equivalent to six hours' wages to compensate the crew member for taking the trip in his own time. It is also useful to note that, Australians travelling on business or tourism for fewer than 90 days do not require a US Visa. It was Mr Kennerley's employment which made the Visa necessary.

[8] The Commission summarised Mr Kennerley's evidence about how he came to be riding his motorcycle at or about 2.30 p.m. on 10 March 2010 at paragraphs [31] to [37] of the Commission's decision:

> "[31] Evidence from Kennerley went to a Traffic Infringement Notice issued on 19 May 2010 emanating from the accident of 10 March 2010. The Infringement Notice [Exhibit 9] had been issued for the offence of "Failing to give way to oncoming vehicle while turning right at intersection with traffic lights without a green right turn traffic arrow" with Kennerley informing the Commission that he paid the fine of $300 on 23 June 2010.
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> [32] The purpose of the journey on 10 March 2010 was because he had made an arrangement to stay at Foster's residence so as to make it easier to catch the 5.00 a.m. flight on 11 March 2010 to Sydney to renew his US Visa. A photocopy of Kennerley's US Visa was tendered [Exhibit 10] which identified the expiration date as 18 April 2010. Evidence was given on the processes undertaken by both Kennerley and Qantas in making the relevant arrangements to renew the US Visa. An appointment was made by Kennerley on 10 February 2010 to attend the US Consulate at 8.45 a.m. (daylight savings time) in Sydney. An e-ticket had been issued by Qantas (prior to 10 March 2010) and was required to be presented at the standby counter at Brisbane Airport so as to be issued with a boarding pass. He understood that he was guaranteed a seat on the flight in question.
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> [33] The time frames he had allowed himself for the proposed travel on 11 March 2010 had been structured to facilitate him being at the US Consulate at 8.15 a.m. (local time) in line with requirements to attend 30 minutes prior to the appointment to enable a security check to be completed.
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> [34] He had chosen to break the journey by staying at Foster's residence on 10 March 2010, and indicated that he had a unreliable vehicle and would need to travel by motorcycle, raising concerns about using the Pacific Highway (due to inadequate lighting) at 2.00 a.m. in the morning. Of further concern was the enormous amount of road works being undertaken at the time. The other mode of transport that could have been considered was rail, however at the time there was not an early train in operation that would get him to Brisbane in time to catch the 5.00 a.m. flight to Sydney. Also as part of his consideration was that to leave from the Gold Coast, he would have awoken at about 1.00 a.m. whilst departing from Foster's residence where the trip to Brisbane Airport was around 20 minutes would have allowed him additional sleep.
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> [35] The primary purpose of staying overnight at Foster's residence was not for social reasons and despite having known Foster for around 22 years, he had only ever stayed at Foster's residence one time previously, about 15 years ago.

[36] Under cross-examination, Kennerley's evidence was that on 10 March 2010 he performed no work for Qantas and the only task he would have undertaken on 11 March 2010 was to renew his US Visa. The cost of travel from his home to Brisbane Airport would have been his responsibility. The arrangement to stay overnight at Foster's residence had been pre-organised and he did not accept that the nature of the visit to Foster's residence was for social purposes [Transcript p. 2-73]. In terms of the traffic accident, he accepted that he was "totally at fault" [Transcript p. 2-74].

[37] In re-examination, Kennerley reaffirmed that he would not have been travelling to Foster's residence if he had not been required to travel to the US Consulate the following day.".

[9] Mr Foster, who at the time of the hearing in the Commission was a (short-haul) Customer Service Manager for Qantas based in Adelaide, gave evidence that he had known Mr Kennerley since the 1980's when both gentlemen had worked for Qantas out of Sydney. His evidence was that he had invited Mr Kennerley to stay overnight at his Brisbane residence after Mr Kennerley had advised him of his travel arrangements to renew his US Visa. Mr Kennerley had not stayed at Mr Foster's residence for ten to eleven years. The only social arrangements were for dinner and "a couple of drinks". Mr Foster confirmed that Mr Kennerley had expressed concern about riding his motorbike through a "fairly unsafe" stretch of highway at 2.00 a.m.

[10] Some further materials are deserving of mention:

(a) The times at which long-haul crew might renew their US Visa's had been negotiated by Qantas and the US Consulate. The times were limited and were all on the Thursday of each week.

(b) The collision between Mr Kennerley's motorbike and the motor vehicle occurred about 500 metres from Mr Kennerley's residence, not about 500 metres from Mr Foster's residence.

(c) Not only did Mr Kennerley pursue the Visa on "his own time", he was on annual leave from 15 February 2010 to 14 March 2010.

(d) Mr Kennerley normally travelled from his residence to Brisbane Airport by train. On 11 March 2010, that option was not available. The earliest Air Train was scheduled to arrive at the Brisbane Domestic Airport at 6.21 a.m., well after the 5.00 a.m. flight to Sydney had departed.

[11] I have the misfortune not to share the Commission's view that Mr Kennerley's injuries did not arise out of or in the course of his employment. The starting point is the decision of the High Court in *Humphrey Earl Ltd v Speechley*[1] (itself a motorcycle case) and in particular the well known passage in the decision of Dixon J at 133, *viz*:

> "The acts of a workman which form part of his service to his employer are done, needless to say, in the course of his employment. The service is not confined to the actual performance of the work which the workman is employed to do. Whatever is incidental to the performance of the work is covered by the course of the employment. When an accident occurs in intervals between work the question whether it occurs in the course of the employment must depend upon the answer to the question whether the workman was doing something which he was reasonably required, expected or authorised to do in order to carry out his duties.".

[12] That passage may not be reconciled with paragraphs [104], [108], [109] and [110] of the Commission's decision:

> "[104] Any reasonable consideration of Kennerley's evidence under cross-examination on the point of whether he had undertaken work on 10 March 2010 would conclude that he did not perform any task of work for Qantas on that day and as for what would have occurred the following day (barring the motorcycle accident), the travel to Sydney would have occurred on an annual leave day and he would not have performed any task of work on that day.
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> [108] All of the authorities to which the Commission was drawn tended to indicate that some causal connection existed between the accident (injury) and the employment, albeit in an array of differing circumstances, however in this matter the connection between the accident (injury) of 10 March 2010 is more likely that of a 'casual' rather than 'causal' connection.
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> [109] In this particular matter, there was an agreed requirement to hold and maintain a valid US Visa with the process funded by Qantas in terms of the cost of air travel and other incidental expenses associated with the renewal. There was no agreement that the renewal would occur on a usual day of work with the custom and practice being that a non work day (duty day) was utilised for

[1] *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126

renewal purposes and a payment equivalent to six hours pay given as a form of compensation to the employee.

[110] Therefore, it is difficult to accept that, on consideration of the evidence, material and submissions before the proceedings, the relationship of the US Visa renewal process undertaken by Kennerley is more than that of a 'casual' relationship to his employment. It certainly, on the evidence before the proceedings, did not have the status of a 'causal' connection to the employment and unlike in *Hook, ibid,* at the time was not undertaking professional work associated with his employment. The matter of *Blanch* is not of assistance to Kennerley in that Blanch's circumstances were that she was injured during the course of her work duties whilst in Los Angeles on a work-related visit.".

[13] With respect, it is not the point that Mr Kennerley did not perform any task for Qantas on 10 March 2010 and, even if not injured, would not have performed any task for Qantas on either 10 or 11 March 2010. The question is "whether the workman was doing something which he was reasonably required, expected or authorised to do in order to carry out his duties". Here, Mr Kennerley could not perform his duties without a current US Visa. The terms of his engagement required him to maintain a current US Visa. Qantas monitored the currency of his US Visa. Qantas made his booking at the Consulate and organised his flight. But for the fact that the amount equal to six hours' wages was called "compensation" rather than wages, the journey to and from the Consulate would have been in Qantas' time.

[14] In *Humphrey Earl Ltd v Speechley*[2] the workman failed because he travelled too far in search of a hot fish lunch. He was held to have stepped outside the course of his employment. Had Mr Kennerley reached Mr Foster's residence, and had Mr Kennerley been injured whilst partying with Mr Foster, he would not have had a claim. However, Mr Kennerley did not complete his trip. There were no festivities. What Messrs Kennerley and Foster had planned was no more than social interaction which was a courteous concomitant of Mr Foster's offer of hospitality. In any event, the employment purpose of renewing the US Visa was operative in the arrangement to stay at Mr Foster's residence and in Mr Kennerley's presence on the road. (The particular route upon which he was riding when injured was chosen to avoid after school traffic on roundabouts.) That seems to me to be sufficient, compare *Whiting v Brambles Industries Ltd*[3] at 220 per Glass JA.

[15] *Humphrey Earl Ltd v Speechley, op. cit,.* was criticised in *Hatzimanolis v ANI Corporation Limited*[4]. However, in this case, Qantas did not merely encourage and authorise Mr Kennerley to utilise his annual leave to renew his US Visa, Qantas required and facilitated the exercise. If one looks at "the general nature, terms and circumstances of the employment", *Hatzimanolis v ANI Corporation Limited, ibid,* at 484 per Mason CJ, Deane, Dawson and McHugh JJ, the conclusion that the injury occurred in the course of Mr Kennerley's employment is quite unexceptional.

[16] Having concluded that Mr Kennerley's injuries did not "arise out of, or in the course of his employment", the Commission explicitly declined to consider whether the employment was "a significant contributing factor" to his injuries. At the hearing of the Appeal to the Court, there was some discussion about whether the matter could and should be remitted. Given the concession of Counsel for Qantas that all necessary findings of fact have been made and that only matters of inference and conclusion remain, I consider that I should act on the submission of Counsel for Mr Kennerley and determine the matter of "significant contribution".

[17] In *Favelle Mart Limited v Murray*[5] at 584 to 585, Barwick CJ accepted that a worker who was sent to a foreign country by his employer and contracted a virus whilst there, was a worker whose injury was one to which his employment was a contributing factor. The problem under the current Act is the qualifying adjective "significant". I am not persuaded to depart from the view which I propounded in *Qantas Airways Limited v Q-COMP and Michelle Blanch*[6]. It is unnecessary to (again) reproduce the Second Reading Speech of the Minister, the Explanatory Notes and the analysis of the decided cases. It is sufficient to reproduce the conclusion at 118 to 119, *viz*:

> "Here the context is quite enlightening. It is useful to set out s. 32(1) of the Act in full. Section 32(1) provides:
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> > 'An injury is a personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.'. (emphasis added)

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[2] *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126
[3] *Whiting v Brambles Industries Ltd* [1976] WCR (NSW) 213
[4] *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473
[5] *Favelle Mart Limited v Murray* (1975) 133 CLR 580
[6] *Qantas Airways Limited v Q-COMP and Michelle Blanch* (2009) 191 QGIG 115

> On the face of the section each of the words emphasised has work to do. If 'significant' bears the meaning of 'large', 'great', 'weighty' or 'substantial' it requires some ingenuity to conceive of cases in which an injury to which the employment was a significant contributing factor would not also be an injury arising out of the employment. It is equally difficult to conceive of situations in which a worker who failed to show that an injury arose out of the employment, but who succeeded on the alternative argument that the injury arose in the course of the employment, would be able to satisfy the requirement that the employment was a significant contributing factor to the injury. Yet s. 32(1) seems to contemplate that such a case might be made out. All of that suggests that the appropriate meaning of 'significant' is to be found at the lower end of the spectrum. It is important to bear in mind also that the adjective 'significant' qualifies the expression 'contributing factor'. The notion of 'contribution' in itself requires some linkage between the employment and the injury; compare *Favelle Mort Limited v Murray* (1975-1976) 133 CLR 580. In those circumstances, it seems to me that it would be wrong to place the meaning of 'significant contributing factor' so far towards the lower end of the spectrum that it carried the meaning of 'more than ephemeral or nominal'. Without treating s. 14B of the *Acts Interpretation Act 1954* as a directive to construe a Minister's Second Reading Speech rather than of the statute, I take the liberty of observing that 'strong' is not an inappropriate word to use to indicate the positioning of the phrase 'significant contributing factor' within the spectrum of meaning. With hindsight, the words adopted in *Q-COMP v Green* (2008) 189 QGIG 747, *viz.*, 'important' and 'of consequence', seem to me to be equally apposite. I should say also that I also doubt that if 'significant' carries the meaning of 'large', 'great', 'weighty' or 'substantial', the amendment would have achieved the objective referred to by the Minister of ameliorating the difficulties which the expression 'the major significant contributing factor' had caused in cases about the aggravation of pre-existing conditions.
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> On the balance, I am not prepared to accept the submission that 'significant' bears the meaning of 'large', 'great', 'weighty' or 'substantial'. I regret that I am unable to be more precise than fixing the meaning of 'significant' as towards the lower end but not at the base of the spectrum, and (to the extent that adjectives may be used without supplanting the statutory language) using words such as 'strong', 'important' or 'of consequence'. However, the task is to apply a statutory test. The task is not to conceptualise an idea.
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> …
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> I accept that the decision in this matter does not sit well with the outcome of the appeal in *Da Ros v Qantas Airways Limited* [2009] NSW WCCPD 58 delivered on 27 May 2009. However, the difference of outcome seems to me to flow inexorably from the differences between s. 32(1) of the Act and s. 9A of the *Workers' Compensation Act 1987* (NSW) averted to in *Q-COMP v Green* (2008) 189 QGIG 747. It is not simply a matter of the Queensland Act using the adjective 'significant' while the New South Wales Act uses the adjective 'substantial'. Section 9A of the *Workers' Compensation Act 1987* (NSW) gives 'substantial' a context and casts considerable light upon its own scope.".

Here, it was the nature and terms of his employment together with decisions and initiatives of Qantas, which caused Mr Kennerley to be riding his motorbike where and when he was injured. Whilst repudiating any suggestion that a "but for" test must be satisfied, in this case "but for" his employment, Mr Kennerley would not have been injured.

[18] The Commission also expressly declined to determine whether s. 130 of the Act operated to deny Mr Kennerley compensation for his injury. In relation to that matter, the necessary findings of fact have not been made. There is a précis of the evidence. However, the précis is subject to the caveat that "all the material" was "considered in its entirety". It would be unsafe for the Court to attempt to make findings of fact on the record and the video of the intersection which was taken on another occasion.

[19] I set aside the decision of the Commission. In lieu thereof, I declare that Mr Kennerley's injuries were suffered in the course of his employment and that his employment was a significant contributing factor to his injuries. The substituted decision being incomplete, I remit to the Commission as previously constituted the question whether s. 130 of the Act operates to defeat Mr Kennerley's claim for compensation. I reserve all questions as to costs.

Dated 18 October 2012.

D.R. HALL, President.

Appearances:
Mr S.P. Gray, directly instructed for Q-COMP.
Mr J.S. Miles, instructed by Turner Freeman Lawyers for Mr Kennerley.
Mr M.T. O'Sullivan instructed by HWL Ebsworth Lawyers for Qantas Airways Limited.

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