WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION

Matter No: **WCC 008050/08**
Applicant: **Bryan Arthur Griffin**
Respondent: **Qantas Airways Limited**
Conference Date: **30 January 2009**

BACKGROUND TO THE APPLICATION

1. On 28 October 2008, Bryan Arthur Griffin ('the Applicant') lodged an 'Application to Resolve a Dispute' ('the Application') in the Workers Compensation Commission ('the Commission'). The Applicant's employer at the relevant time was Qantas Airways Limited ('the Respondent'). It is also the workers compensation insurer at the relevant time, according to the Application.

2. The Applicant claims an entitlement under the workers compensation legislation, the *Workers Compensation Act* 1926 ('the 1926 Act'). The basis of the Applicant's claim is that he suffered an incapacity for work as a result of an injury that arose out of or in the course of his employment with the Respondent on 29 August 1979.

3. Mr Griffin, who appeared in his own behalf, briefly outlined the reason for bringing his claim:

> "*I am hoping to achieve workers compensation for not being able to continue my job in Qantas in some capacity there. But being forced to fly till such stage that my illness got so bad that I haven't been able to work, hold a job, or work ever since. If it was just a normal sickness then I could accept that. But it was documented that Qantas broke the law in clearing me to fly and I feel it's not my fault that my illness got worse*."

ISSUES FOR DETERMINATION

4. The issues that are in dispute between the parties, are:
    a. Whether the Applicant suffered an injury pursuant to s 6 of the 1926 Act

b. The nature and extent of any incapacity for work since the Applicant retired from employment with the Respondent due to ill health, on 17/5/1982.
c. The determination of any entitlement to weekly compensation from that date to the present pursuant to s 9 of the 1926 Act.

EVIDENCE AND FINDINGS

This matter proceeded by way of arbitration hearings on 10:00 AM on Friday, 20 February 2009. Mr Griffin was without legal counsel at his choice and represented himself, Mr John Catsanos counsel of Henry Parkes Chambers appeared for the Respondent.

5. The Applicant's Worker's Injury Claim Form, dated 22/7/2008, was in evidence. In the Claim Form the Applicant identified that the injury/condition in respect of which his claim was made, occurred on 29/8/1979 and that he had reported it to his employer on 31/8/1979. The nature of the injury/condition was described as "OCD [obsessive compulsive disorder] + Depression" and to the question, what happened and how were you injured, the claim indicates "As per Dr Phillips Report".

Incidents and Injury

6. The Applicant prepared and relied upon a variety of different documents, histories, "book" chapters that he had personally authored. These statement covered the various incidents and issues that the Applicant claimed gave rise to his present situation. Not all of the matters addressed in these documents were relevant to the claim for weekly compensation as made on the Respondent.

7. The Applicant described the incident giving rise to his claim in a document entitled, "Chapter 7 – The Start of it All" in the following terms:

> *On our return to Singapore we had left the Australian coast and were flying over the Indian Ocean to our next reporting point, which was about forty minutes away. Having nothing more to relate to the crew of my various exploits or perhaps taking the hint for some quietness, I decided to make good use of this quiet time by going over the phase 1 emergency procedures in my head. Gradually, I went through them one by one, passing the memory test - until I came to the emergency procedure 'loss of all generators' … While I was going over the phase 1 procedure in my mind. I became terrified when my left hand involuntarily moved towards the start levers, four little knobs positioned on the rear or the console between the pilots. The checklist of phase 1 had called for: 1. Start levers off - to turn off the fuel to the engine.*

2. Thrust levers idle - to put them in a closed position ready for when the engine was restarted.

Knowing full well the drama that would result in my involuntary action. I struggled with the uncontrollable limb as though it wasn't mine. Soon, other muscles in my arm began to ache from this fight between them: some were trying to push out involuntarily, while others, with rationality, were trying to pull in. A horrific pain developed in my stomach as tremors were spreading through my body. Beads of perspiration instantly covered my body, and it began to shake uncontrollably as I tried to take control of myself. It was like living a nightmare that I couldn't wake from. Had 1 been taken over by something or someone to want to make me carry out such a bizarre act? In absolute terror, my mind blank with fear and my body still covered with perspiration, I made an excuse to leave the flight deck, indulging in several cigarettes until I felt calm enough to resume my seat. Similar to the unnerving, all-encompassing feeling after a violent thunderstorm, all was quiet and calm - but would the force reappear with a vengeance if I went outside? … Fortunately, my pain and terror dissipated and I made it to Singapore without being tortured again.

8. The Applicant reported his "condition" to Qantas the next day 31 August 1979 to the Qantas doctor by Dr Arthur T(ommy) Thompson, and he was immediately sent to see two psychiatrists, Dr Colin Degotardi and Dr Warren White. Both provided reports within 2 weeks.

9. Dr Colin Degotardi, reported on 5/9/1979 that:

His first sign of problems was about 5 years ago when he was accidentally struck on the head by a hammer. After this experience he says he had suffered severe headaches which needed investigation. Nothing wrong was found but one of the tests was a brain scan. For this he had to be held down still on a table and pinned by sand bags. During this he experienced panicky feelings with palpitations, cold seats and extreme agitation. It was so bad that he had to be removed from the table while screaming. Ever since then he has had panic attacks in dental chairs and also more recently in barber's chairs.

This man has now a neurotic phobic anxiety reaction which has been present in an acute form for 5 years and has become markedly worse for the past 4 or 5 days. It is likely that this disorder will continue without treatment and that he will experience further panic attacks similar to the one he had on the flight last Friday.

10. Dr Warren White reported on 9/9/1979 that:

> *Some 5 years ago on 15 November 1973 according to the records he accidentally struck himself above his left eyebrow with a hammer when he was attempting to pull a nail out of concrete while building his own swimming pool at his home. The diagnosis on this occasion was concussion and he had serious headaches following this which were eventually cured by attendance at a chiropractor. However as a part of these investigations a brain scan was required and he gave a graphic account of this. He said that for the first positioning in the machine he lay on his back and was not happy about it and that his arms turned 'Jelly-like' but he was able to put up with it. He had to return to the machine after having injections of the dye and on this occasion his head was fixed by sand bags. He could not stand it and screamed out "I can't go through with it". He managed to go through with it and was saved only by being able to see the counter going around enabling him to work out how much longer he had before the examination was finished. He described it as having feelings of sheer panic.*
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> *Since that time he had developed a considerable fear about attending the dentist although previously he had never had any fear in the dental chair. The fear was related to lying back with the dentist's surgical gown tucked in around his neck. Similarly he had uncomfortable feelings when he went to the barber but he just managed still to be able to put up with the barber's gown being tucked in and around his neck. He also had fears about the scissors clipping near his ears and fears when the razor was used to clean the hair off the back of his neck.*
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> *…*
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> *He said that he had on this occasion an excessive fear regarding his licence renewal. My feeling was that "once they dam (sic) well get stuck into you, you can be right out". He had been concerned two years ago when he had tried to carry some cargo, glue for his boat in Mauritius, and had been reprimanded for not approaching the project appropriately. The fear of doing something wrong and losing his licence had been the main spur to him getting his various businesses.*
>
> *On one occasion he had been the local agent in Mauritius for "Tic-Tac" sweets, he now had an import business for rubber party masks and his wife was very involved with this and he hoped to make a great deal of money with it. He had built a 52ft boat in Mauritius and had had great trouble because of problems with the keel and 'the boat was now in Singapore waiting to be*

shipped to Sydney. He hoped to make a lot of money this month at the Royal Melbourne Show with the sale of rubber party mask.

In summary we see a 40 year old pilot with some life long features of phobia, a head injury more than 5 years ago with developments of panic feelings during a brain scan injury more compulsive personality in which he is unable ever to relax and a man with an unhappy home life.

11. Following the recommendations of Dr Degotardi and Dr White on 8/10/1979, the Applicant was referred by Dr Thompson for treatment, to Dr Warwick Williams, a psychiatrist in private practice at the Northside Clinic in Sydney. Dr Williams reported on 11/10/1979 that:

> *The relevant problem is that of obsessional thoughts. To explain more clearly, some two years ago, in a setting of stress, when he was in Mauritius, he was seized with the obsessional thought of inappropriately turning the steering wheel of his car hard to the left, with potentially disastrous results. This thought frightened him a great deal, caused him to slow down and head for home. This thought occurred only once. The next occasion that he was troubled by an obsessional thought was recently when he was part of the crew of a 747. He developed an obsessional thought, clearly realised as irrational, of acting out an inappropriate emergency procedure. He was frightened by the thought and the possibility that he might act it out, with the consequences of which you are well aware. The same thought and emotional reaction to it recurred on the return flight shortly afterwards. There has been no recurrence of this or any other obsessional thought since.*

12. Dr Williams proposed to teach the Applicant techniques to relax him and how to stop obsessional thoughts. He was of the opinion that:

> *There is no reason from the psychological point of view why Mr Griffin should not continue his career as an aviator. His known psychological disabilities are not a reason for him to be grounded at this point in time, and I think from a psychological point of view, the sooner he gets back into action as a pilot, the better for him.*

13. However, Dr Williams claimed no expertise "*in the assessment of the suitability of pilots to be re-licensed because of psychological difficulties*" and had therefore discussed the problem of obsessional thoughts in relation to flying with two of his colleagues. He recommended to Qantas that: "*I think that all concerned would be more comfortable were Mr Griffin to see John Ellard for a formal assessment and absolutely expert opinion in this area.*"

14. The Applicant was seen by Dr John Ellard, also a psychiatrist in private practice at the Northside Clinic, as arranged by Dr Williams, one week later on 19/10/1979. Dr Ellard made a formal assessment and provided a report to Qantas, dated 22/10/1979. He was of the opinion that:

> *I think that many senior, multi-engine pilots are rather obsessional people. On balance, this is probably a good thing because some aspects of flying require meticulous attention to detail and they are just the people to give it. As a result, one should not be surprised if from time to time they show the manifestations of the obsessional personality when under stress. I see a fairly constant trickle of dedicated and competent professional aviators who are depressed, phobic or plagued by psychosomatic or tension disorders. I think that First Officer Griffin comes into this category.*

15. On the basis of the recommendations he had received from the four psychiatrists who had seen the Applicant within the space of two months, at the request of the Respondent, Dr Tommy Thompson, wrote to the Director of Aviation Medicine at the Department of Transport on 25/10/1979 and fully reported the history of the Applicant's incident and condition. He noted that: "*Since August he has been very well, although not at work. There has been some relief of the financial problems. He is anxious to return to his normal duties.*" Dr Thompson further advised that:

> *As mentioned to Dr. Lane on 25.10.79, Griffin has seen Dr. John Ellard, and a copy of his report of 22.10.79 is attached. Dr. Ellard also phoned to emphasise his conviction that no contraindication exists to an early return to duty. At the licence examination today therefore I gave a pass assessment, after discussion with Dr Lane.*

16. In a follow up letter dated 17/9/1980 to Dr David Lewis at the Department of Transport, one year later, Dr Thompson related that: "*Since return to duty on 6.11.79 he has operated on a normal pattern without difficulty … Above all there has been no recurrence of the disturbance which caused his removal from duty in August 1979.*"

17. Dr Tym in a report dated 11/12/1981 said:

> *His illness, best described as Traumatic Affective Illness (not a neurotic state or neurosis) dates back to and was engendered by a head injury he received in 1973. Initially the symptoms took the form of "post-concussional syndrome and during that period he had severe headaches and one panic attack (when having a CA T brain scan).*
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> *The illness is totally and permanently curable by an adequate dose of Tricyclic drug given over an adequate time and he can be returned to his*

normal pre 1973 mental state within a month from now. His future abilities to concentrate, memorise and function as a pilot would have been unaffected by this illness:

18. Dr Warren White reported on 11/10/1979 that:

I saw him today and find him normal. He is still on medication but will reduce to 0 over 4 weeks. He should be fit for full normal duties by mid 1982. As he has recovered he has experienced his normal memory concentration and self-confidence etc that has been absent since 1973. He no longer has any compulsive thoughts and there is not reason to suppose that they will appear in the environment in what they appeared previously.

19. Dr Tym reported on 8/3/1982, that:

As far as I can ascertain all the abnormal mental phenomena that persisted since 1973 have cleared and amongst other normal aspects of his disposition his former self-confidence has returned.

All I can say is that when I last saw him I found him to be free of the previous abnormal mental phenoma that were the basis of my diagnosis and treatment.

20. Dr Tym reported on 20/4/1983, that:

The client is now normal in every regard. The abnormal post-traumatic mental state from which he suffered previously will not recur spontaneously.

21. The report of Dr Jonathon Phillips, consultant psychiatrist, dated 20/3/2001 was in evidence. He first assessed the Applicant on 12/2/2001, thirty years after the event took place, for a period of two and three-quarter hours. He reported that the Applicant provided a complex and unusual history of psychiatric problems. In relation to the incident said to give rise to the claim, the doctor recorded that:

He had been assigned to 747 aircraft by early 1979. He had been flying between Singapore and Perth on 29 August 1979. A check captain was in the cockpit and he passed his routine evaluation without incident. On the return trip to Singapore he began to go through an emergency procedure in his head. He explained that procedures or this type need to be known by heart and to be automatic. In the process of this he contemplated an emergency characterised by "loss of all generators". In such a situation all engines are to be shut down. It is necessary as part of the engine restart cycle to close the throttles and move start levers to the off position. Whilst in the process of this personal thought exercise, he felt his left hand wanting to close the start levers. He became terrified that he would act on this compulsion. He had to

sit on his hand in order not to close to the controls. Not certain how to terminate the situation, he asked the captain whether he might leave the cockpit to have a cigarette (smoking was still allowed on aircraft at the time). He felt better after the break from the cockpit and he arrived in Singapore without further incident.

REASONS FOR DECISION

Injury & Causation

22. The Applicant claims to have suffered an injury in the nature of an obsessive compulsive disorder as a result of an incident that occurred aboard a Qantas 747 on 29 August 1979.

23. Section 6 of the 1926 Act provides that "injury" means personal injury arsing out of or in the course of employment, and includes –

    a. *A disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor; and*

    b. *The aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to such a aggravation, acceleration, exacerbation or deterioration.*

24. Deputy President Byron set out the test for causation in *Council of the City of Sydney v Estate of Belinda Jane Griffey and Anor (No.1)* [2008] NSWWCCPD 114 (15 October 2008) as follows:

> The test of causation under the Workers Compensation legislation is whether the incapacity or medical treatment resulted from the work injury sustained. In *Kooragang*, [*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452] Kirby P stated at 462, Sheller and Powell JJA agreeing, in considering the principles of causation in the jurisdiction, that since English authority in 1909:
>
> > "... it has been well recognized in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act."

However, the Court of Appeal stated that the importation of notions of "proximate cause" [alone] by the use of the phrase "results from" are not now, accepted. His Honour continued at 463-464:

> "The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. ... What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury ... is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions."

25. Acting Deputy President Roche (as he then was) noted in *BlueScope Steel (ASI) Pty Ltd v Khourey and Australian Trust for Conservation Volunteers and Co Pty Ltd* [2006] NSWWCCPD 303 (13 November 2006) that the test in *Kooragang* was affirmed by Clarke JA in *Sutherland Shire Council v Baltica* (1996) 39 NSWLR 87 ('*Baltica*'). In obiter comments Clarke JA expressed the view that the test of causation for the workers compensation legislation could be equated with the test at common law. The principal judgment in *Baltica* was delivered by Clark JA, with Priestley JA and Hunter AJA concurring who said at 12 NSWCCR 732 the following:

> *Liability here to pay compensation for death or incapacity is, relevantly, created by ss25 and 33. It arises when incapacity results from an injury or from more than one injury. It is not expressed to arise when incapacity partly results from an injury. Yet s22A(2) speaks of a liability to pay compensation arising from more than one injury and, by virtue of the extended definition, that must include the situation where incapacity results partly from one, and partly from another injury. In this way the terms of s22A(2) may be thought to widen the tests in ss25 and 33. I do not think that they do. No amendment was made to either s25 or s 33. The test of causation "results from" has not been altered in those sections and it is inconceivable that the legislature intended that it be altered. The better view, in my opinion, is that the test of causation remains as it was and s22(1A) is limited in its operation to the widening of the meaning of the expression "results from more than one injury" where it is found in the Act. Where that expression appears in s22A(2), it is to be understood in the wider sense so that apportionment may be carried out in cases of deemed incapacity. The subsection does not, however, qualify the test of causation in ss25 and 33. It follows that I agree with Burke CCJ's conclusion that a trial judge's initial task is to determine*

the liability of an employer or employers to pay compensation to a worker. If the worker satisfies the test in the case where are a number of work injuries and apportionment is sought, the trial judge is then to apply the s22 test and that test will be satisfied if the incapacity resulted partly from one injury (presumably the injury which led to the finding under s 33) and partly from another or other injuries. While, therefore, I disagree with Burke CCJ in his description of the primary test of causation, I do agree with his view that there is a two-stage process when apportionment is sought.

26. In *Flounders v Millar* [2007] NSWCA 238 at [35] Ipp JA said:

> It remains necessary for a plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture. If the court is left to speculate about possibilities as to the cause of the injury, the plaintiff must fail. As I have attempted to demonstrate, there are many cases in this Court that follow and adopt these principles. I would explain *Binks* simply on the basis that the Court in that case was not referred to the relevant authorities. The rules governing causation at common law are those expressed in *Luxton v Vines* and *March v Stramare (E & M H) Pty Limited* [1991] HCA 12; (1991) 171 CLR 506, namely, the test of commonsense, with the onus of proof at all times being on the plaintiff."

27. The standard of proof which the Applicant has to meet in proving his claim, is on the balance of the probabilities. In *Murray v Shillingsworth* [2006] NSWCA 367, Einstein JA, set out the legal requirements of proof on the balance of probabilities by quoting from the decision of Dixon CJ in the case of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 305 where his Honour observed:

> *[T]he law... does not authorise a Court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another with the others.*

28. The Applicant relies on the medical report of Dr Phillips to found his claim. Dr Phillips identifies that the Applicant suffers from a disease and expressed the opinion that:

> *[The Applicant] developed an obsessive compulsive disorder at/around 29 August 1979 whilst flying as co-pilot on a 747 aircraft. He became obsessionally pre-occupied with a particular emergency procedure at that time and had a compulsion to carry out actions likely to cause major problems for the aircraft which was then in normal operating mode.*

29. Dr Phillips is the only doctor relied upon by the Applicant to found his claim that he sustained an injury whilst in the employ of the Respondent which resulted in him developing or aggravating the condition of an "obsessive compulsive disorder". There are three problems with this.

30. The opinion of Dr Phillips does not identify that the Applicant's employment actually caused the Applicant to develop an obsessive compulsive disorder because he was flying as co-pilot on a 747 aircraft, only that the condition developed at around that time. The logicians would deem this to be an error of *post hoc ergo propter hoc*. That since the disease developed after flying the aircraft then that event must have *caused* the disease of obsessive compulsive disorder.

31. The second problem is that even if Dr Phillip's opinion is treated as a definitive statement causation, it is more in the manner of an "oracular pronouncement by an expert" (see *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40) or an *ipse dixit* (see *Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305* at [87]) than a conclusion offered on the basis of evidence which can be tested and proven by the trier of fact. Dr Phillips fails to explain how the Applicant develop the condition and why it happened at that time. The Applicant had joined Qantas as a pilot (Second Officer) on an Electra Aircraft on 9 May 1966 and upgraded to a 747 Officer in March 1979. He had therefore had spent thirteen years as a pilot for the Respondent before he had the thoughts to shut down the engine of the plane. The Applicant points to nothing that was unusual or different about the nature of the flight (there was, for example, no emergency) or his duties (he was not under pressure – in fact he was idle) on 29 August 1997 from any of the hundreds of other flights he must have made for Qantas. The feeling of compulsion apparently spontaneously arose and after a "cigarette break" went away.

32. Thirdly, Dr Phillips himself provides an alternative explanation for the Applicant's condition when he said that:

> *It should be noted that Mr Griffin experienced a number of discreet anxiety problems in the years preceding 1979 and was probably pre-disposed to the development of an obsessive compulsive disorder.*
>
> …
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> *He noted that he first developed obsessional thoughts when 16 years old and added that he had become obsessionally fixated at that time on the woman who was later to become his wife.*

33. Each of the four psychiatrists who examined the Applicant on behalf of the Respondent, identified that the cause of the Applicant's current condition related to a specific event, that

had occurred five years earlier on 15 November 1973 when the Applicant accidentally struck himself above his left eyebrow with a hammer when he was attempting to pull a nail out of concrete while building his own swimming pool at his home. In fact, one of the psychiatrists, took a history of an earlier incident of compulsive behaviour that occurred three years after the accident at home and two years before the Qantas 747 incident. Dr Williams in his medical report dated 11/10/1979 noted that:

> *The relevant problem is that of obsessional thoughts. To explain more clearly, some two years ago, in a setting of stress, when he was in Mauritius, he was seized with the obsessional thought of inappropriately turning the steering wheel of his car hard to the left, with potentially disastrous results.*

34. In my view, looking in detail at the facts of this matter that where extensively reviewed and reported on by five psychiatrists, a number of whom were of particular eminence, it is clear that the Applicant's condition of obsessive compulsive behaviour has a constitutional basis but was made evident after a non-work-related incident in 1973. There was at least one earlier incident which occurred prior to that on 29 August 1979. There is no explanation provided as to why the incident on the flight deck of the Qantas 747 occurred that suggests it was caused by his employment or even to the standard required by s 6 of the 1926 Act, that the employment was a "contributing factor".

The Air Navigation Orders

35. Mr Griffin also makes the claim that he was required to continue flying in breach of the Australian Air Navigation Orders (1980) which specifically provide that:

> *3.3 Mental Fitness:*
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> *(a) The applicant shall have no established medical history or clinical diagnosis of either the following:*
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> *(i) a psychosis*
>
> *(ii) any personality order severe enough to have repeatedly resulted in overt acts.*
>
> *(b) The applicant shall have no established medical history or clinical diagnosis of a mental abnormality, personality disorder, neurosis, alcoholism or drug dependence which makes it likely that within two years of the examination he will be unable to safely exercise the privileges of the licence or the rating applied for or held.*

36. Rather than having ignored the requirements of the Air Navigation Orders as the Applicant suggests, I find that the Qantas doctors were particularly cognisant of their responsibility and were in close contact with the Department of Aviation. They provided them with their reports and updated them about the Applicant's progress. Qantas only approved the

Applicant's licence when it was satisfied on the basis of four psychiatrists reports, one of whom was a leader in this field, that the Applicant was able to resume flying.

37. In fact, so emphatic was the response from Dr Ellard, the person judged an expert in the field of aviation psychology by his peers, that Qantas may well have left themselves open to a claim for compensation if it had **not** allowed the Applicant to return to active flying duty. Dr Ellard after examining the Applicant, gave an unequivocal recommendation that: "*It is extremely unlikely that he would ever perform any of the acts which preoccupy him and I would have no hesitation in certifying him as fit for all flying duties. I would certainly fly with him myself.*"

38. Rather than the Applicant being forced to fly whilst ill. The Applicant appears to have been keen to return to active flying duty. He was at that time living on his boat having moved out of his house because of as disagreement with his wife and had financial problems.

39. On 3/5/1981, Dr Goldfinch, the medical officer at Qantas, wrote to the Director of Aviation Medicine as follows:

> *This pilot has required further treatment for obsessive compulsive symptoms. Previous reports from Drs, White, Ellard and Degotardi are held with your records from a period of assessment in 1979. Subsequent behaviour therapy by Dr. Williams was not successful. On this occasion, he was referred to Dr. Robert Tym in December, 1981, having declared himself unfit while in Honolulu a few days earlier. Copies of Dr. Tym's three reports are enclosed. Mr. Griffin has not yet received Company clearance.*

40. After these reports were provided, Dr T Lane, the Director of Aviation Medicine at the Department of Transport wrote directly to Dr Warren White seeking his advice. In a reply dated 10/5/1982 Dr White explained that he had previously examined the Applicant at the request of Qantas and taken and extensive history and given his findings. In his view, with respect to the matter of the issuance of a commercial pilot's licence to the Applicant: "*I would not be sufficiently pessimistic about his condition to find that it was likely that within two years of the examination he would be unable to safely exercise the privileges of his licence*". He recommended a second opinion be sought from Professor Richard Ball.

41. Professor Richard Ball, of the Department of Psychiatry at the University of Melbourne took a lengthy history and provided a detailed report dated 21/9/1981 to Dr Lane at the Department of Aviation, in which he opined that:

> *So far as I could ascertain he claims to have been well until 1973 when whilst building his swimming pool a hammer fell on his head and he was concussed and was off work for about 3 months. At that time he was*

extensively investigated and it was during the investigations that the first sign of anything untoward came up: ie apart from headaches of which he was complaining when his head was placed into the scanner he became very anxious and this was worse the second time around. He claims that thereafter and especially over the last 5 or 6 years he had a variety of related troubles mainly that he did not go to the dentist at all because he was frightened of being immobilised with things in his mouth and also he had trouble about going to the barber shop and keeping still in the chair and things tightly around his neck. Since being treated by Dr Tym he claims to have been quite well and he now has no trouble with the dentist and has recently been twice within a very short period and had extensive work done and he had no, trouble in going to the hair dresser etc.

… Currently he claims to be quite well all the symptoms are in abeyance but of course he has not had to fly and we have no idea whether they would recur in a flight situation.

… If this man remains well I see no reason why he should not have his licence continued.

42. In his report, Professor Bell referred specifically to the air navigation orders; *3.3 mental fitness*. He was of the opinion that:

> *There was no history whatsoever of a psychotic breakdown. I do not think he can be regarded as having a personality disorder severe enough to have repeatedly resulted in overt acts. I think that he must be considered to have had a neurosis but it in itself would not have led him to do the acts which he feared in the air.*

Incapacity and Weekly Compensation

43. I accept that the definition of incapacity is contained in the following quotation from the decision of Deputy President Bill Roche in *Muir v Ric Developments Pty Ltd trading as Lane Cove Poolmart* [2007] NSWWCCPD 161 (19 July 2007):

> 85. In the text Workers Compensation in New South Wales, second edition, by C P Mills ('Mills'), the following passage provides what I believe to be a fair summary of the law on incapacity and identifies the proper question to be asked. At page 285 the author said:
>
> > "The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity is less than it was before the injury (Williams v Metropolitan Coal Co Ltd [1948] HCA 8; (1948) 76 CLR 431 per Starke J), and it is not limited to the effect on his capacity for his former work (per Dixon J). In Ball v Hunt [1912] AC 496, Lord Loreburn had

said that there is incapacity when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity when such a defect makes his labour saleable for less than it would otherwise fetch: see *Commissioner for Railways v Agalianos* [1955] HCA 27; (1955) 92 CLR 390 per Dixon CJ." (emphasis added by DP Roche)

44. As I have found that the Applicant's employment has not been a contributing factor to the development of the obsessive compulsive condition, it is unnecessary to identify the economic loss suffered by the Applicant since he left the employ of Qantas in 1983. However, if that calculation were necessary to make, although it would be possible to identify with some accuracy the Applicants probable earnings but for injury, there is simply no information provided by the Applicant as to what his actual earnings have been in the relevant 30 year period.

45. From the available evidence, it is clear that the Applicant, even whilst he was employed by the Respondent, was engaged in other remunerative activities. Dr Warren White reported on in 1979 that the Applicant was engaged in a business of importing rubber masks and on his own evidence "hoped to make a lot of money" from sales at the Royal Shows. Professor Ball in 1982 described the Applicant as "now a very successful businessman". He had a yacht built in Mauritius which he had intended to use as a charter vessel in 1988 but it was later financed and sold.

46. The Applicant gave evidence and was cross-examined. He noted that after he left the employ of the Respondent he travelled to England and stayed there on two occasions for a considerable period of time, travelled through Europe on a holiday and returned to New Zealand where he ran a motel business with his partner before travelling back to Australia where he was engaged in the building a house with his partner, that was eventually sold. All of these activities were disclaimed by the Applicant, as providing him with any real income. However, apart from his verbal testimony no corroboration of any sort was provided. There was nothing in the way of tax records, bank statements, or statements from accountants, friends or from his former partner that provided any information. There was nothing that would lead to any basis on which to assess the Applicant's earnings for that thirty year period in order to identify if he had suffered any economic loss as the result to the incident on 29 August 1979.

Failure to make a claim within time

47. There is one further problem for the Applicant in successfully bringing a claim for compensation for the injury he says he sustained on 29 August 1979; he has failed to make the claim for compensation within the time period required.

48. Section 53 of the 1926 Act contained in Part VII, Proceedings Respecting Compensation provides that:

> *53. (1) Proceedings for the recovery, under this Act, of compensation for an injury shall not be maintainable unless notice of the injury has been given to the employer as soon as practicable after the happening thereof, and before the worker has voluntarily left the employment in which he was at the time of injury, and unless the claim for compensation with respect of such injury has been made within six months from the happening of the injury, or in case of death, within six months of death:*
>
> *Provided always that -*
> *(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings that the employer is not or would not if a notice or an amended notice was then given and the hearing postponed be prejudiced in his defence by the want, defect or inaccuracy or that such want, defect or inaccuracy was occasioned by ignorance, mistake, absence from the State or other reasonable cause;*
> *(b) the failure to make a claim within the period above specified shall not be a bar to the proceedings ,if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause.*
> *…*
> *(13) The failure to make a claim within the period required by subsection (7) is not a bar to the recovery of compensation if it is found that the failure was occasioned by ignorance, mistake, absence from the State or other reasonable cause and either:*
> *(a) the claim is made within 3 years after the injury or accident happened or, in the case of death, within 3 years after the date of death, or*
> *(b) the claim is not made within that 3 years but the claim is in respect of an injury resulting in the death or serious and permanent disablement of a worker.*

49. Acting Deputy President Roche (as he then was) considered the meaning of this section in *Albury Real Estate Pty Ltd v Rouse & anor* [2006] NSWWCCPD 139. He said at [29]

> The words used in section 65(13) are virtually identical to those used in section 53(1)(b) of the *Workers Compensation Act* 1926 ('the 1926 Act'). Under that legislation it was accepted that 'mistake' included a mistake of fact, one of law, and a mixed mistake of fact and law (C P Mills *Workers Compensation (New South Wales)* second edition ('C P Mills') page 466 and *Stevenson v Metropolitan Meat Industry Commissioner* [1937] WCR 120 at 124-5). In *G C Singleton & Co Pty Ltd v Lean (Seymour)* [1970] ALR 129

('*Seymour*') it was held that 'ignorance' will include the case where the worker does not know of the need to give the notice within the specified time.

50. And at [30]:

> The phrase 'reasonable cause' was considered in *Garratt v Tooheys Ltd* [1949] WCR 80 ('*Garratt*') at 86-7. In that case Judge Rainbow said at 86:
>
> > "The next question is whether the applicant's failure was occasioned by some reasonable cause. In its context, cause means the grounds which led the workmen to omit to claim. And the mixture of facts, circumstances and motive which constitute the explanation of the failure must be reasonable. It is sometimes argued that the reasonableness of the cause is only to be measured and considered from the viewpoint of the worker and reference is made for example to *King v Port of London Authority* [1920] AC 1 where Lord Atkinson at page 24 said: 'Of course it is reasonable cause having reference to the workman himself'. If this argument means that the inquiry is to be limited to discovering whether the worker believed himself to be acting or thinking reasonably that is not the law: cf *Brown v Aveling and Porter,* (22 BWCC 165 at 169). It is not the worker who is to be reasonable, it is the cause. As Lord Birkenhead said in *King v Port of London Authority*, 'the general atmosphere must always be considered'. The reasonableness is to be measured objectively in the light of every circumstance in the case relevant to showing why the failure to claim occurred: cf *Atherton v Chorley Colliery Co Ltd* (19 BWCC 314)."

51. The Applicant did not bring a claim for compensation until 22 July 2008, which was not a date to which s.53(1) applied being within the period of 6 months after the injury or accident happened. Nor was a claim made within s.53(13) and there is no basis to find that the Applicant's failure to make a claim was occasioned by ignorance, mistake, absence from the State or other reasonable cause. Section 53 is designed to prevent the very claim, such as this one, which is very difficult for a Respondent to meet, when made many years after the event. I find that the Applicant is excluded by the operation of s.53 from bringing this claim, thirty years after the event, in the Commission, due to the prejudice caused to the Respondent in meeting the claim and the failure of the Applicant to offer a reasonable basis for failing to make the claim within time.

SUMMARY

52. I have carefully examined the history of the Applicant's difficulties arising in conjunction with his employment by the Respondent. Based on a chronological analysis of the documentation, it is my view, that the actions of Qantas in dealing with the Applicant, were exemplary.

53. As soon as the Applicant notified the Qantas doctor of his "condition", on 31 August 1979, immediate action was taken. He was suspended from active flying duty at once and sent to see four psychiatrists for their opinion. Drs Degotardi, White, Williams and Ellard all examined the Applicant and provided reports on his condition within two months. Their reports were unequivocal. Not only were the psychiatrists selected, competent and qualified, but especially in the case of Dr Ellard and Professor Bell (who later examined him), appear to be have been regarded as leaders in the field, by their peers. They each identified the cause of the Applicant's difficulties as arising from a non-work related injury when he was constructing a swimming pool for his home. The Applicant's condition was of constitutional origin that had arisen prior to the incident on 29 August 1979. No cause was proposed as to why the Applicant's employment was a contributing factor to his illness.

54. The examination by the doctors occurred not in the context of a worker's compensation claim but by the Respondent seeking to assist the Applicant return to active duty, which he desired to do but also in respect of the Respondent's responsibility to the Department of Aviation under air navigation orders, in force at the time. That decision appears from the documents, to have been carefully and properly considered. The Respondent also initiated appropriate treatment for the applicant with Dr Tym, who at the believed that on the basis of the Applicants reports that his condition was improved. Dr Tym reported on 20/4/1983, that: "*The client is now normal in every regard.*"

DECISION

55. For the reasons set out in this statement, there is an award for the Respondent in respect of the Applicant's claim for weekly benefits.

56. There is no order as to costs.

DEREK M. MINUS
Arbitrator **2 March 2009**

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF DEREK M. MINUS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

This Certificate is issued pursuant to s 294 of the *Workplace Injury Management and Workers Compensation Act* 1998.

Matter No: **WCC 008050/08**
Applicant: **Bryan Arthur Griffin**
Respondent: **Qantas Airways Limited**
Date of Certificate: **2 March 2009**

The determination of the Commission in this matter is as follows:

57. There is an award for the Respondent in respect of the claim for weekly compensation.

58. There is no order as to costs.

A brief statement of reasons for determination, in accordance with Rule 15.6 of the *Workers Compensation Commission Rules 2006*, is attached.

DEREK M. MINUS
Arbitrator

I CERTIFY THAT THIS IS A TRUE AND ACCURATE CERTIFICATE OF DETERMINATION ISSUED BY DEREK M. MINUS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

REGISTRAR