WORK-RELATED TRAVEL AND A HEART ATTACK CLAIM: WORKERS COMPENSATION ACT s 9B

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In 2012, the *Workers Compensation Act 1987* was amended to provide that no compensation can be awarded under the Act for heart attack or stroke unless the nature of the worker's employment resulted in a significantly greater risk of the claimed injury (s 9B).

Years later, the case of *Haridra De Silva v Department of Finance & Services* [2015] NSWWCC 279 is the first workers compensation case to satisfy the threshold of 'significantly greater risk' in relation to a claim following a fatal heart attack.

Factual background

Mr Fernando was employed as a principal engineer with the NSW Department of Finance & Services. He and a work colleague were required to attend a two-day site visit at Ballina in August 2014. After completing a day's work, they retired to their respective motel rooms at about 10pm. The following morning, Mr Fernando did not arrive for breakfast. Having failed to obtain a response to telephone calls, the management forced open his door to find him sitting by the bed, with his head on the mattress and with vomitus on the floor. According to expert witness Professor Raftos, this indicated that Mr Fernando had symptoms, most probably chest pain and nausea, before the fatal cardiac arrest. It was determined that Mr Fernando died because of cardiac arrest in ventricular fibrillation, which occurred as a result of acute coronary syndrome caused by occlusion of his left anterior descending coronary artery as a result of atherosclerosis. Mr Fernando was known to have obstructive sleep apnoea, but no other serious illnesses or injuries. He was a non-smoker and there was no family history of heart disease.

Proceedings before the Workers Compensation Commission

Proceedings were brought for death benefits on behalf of the widow in the Workers Compensation Commission. Section 9B, added to the Act in June 2012, states that no compensation is payable for an 'injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a *significantly greater risk* of the worker suffering the injury than had the worker not been employed in employment of that nature' (emphasis added).

The respondent declined liability on the basis that the nature of the deceased's employment did not give rise to a 'significantly greater risk' of him suffering the injury. However, it was argued on behalf of the applicant that the worker's employment did significantly increase his risk of dying from a heart attack because it required him to travel and stay in a motel room by himself.

Snapshot

- *Haridra De Silva v Department of Finance & Services* [2015] NSWWCC 279 is the first decision of the Workers Compensation Commission that deals specifically with the 2012 amendment to the *Workers Compensation Act* under s 9B.
- The Commission found the worker suffered an injury (in this case a fatal heart attack) which may have been avoided had he not been required to travel for his work.
- Furthermore, it was found that the worker's work-related travel created a 'significantly greater risk' of the injury or death occurring. As such, it satisfied the only circumstance in which the amended legislation provides for compensation for heart attack or stroke.

Professor Raftos, who prepared a report at the request of the applicant, expressed the opinion that the deceased 'would have had an 85 per cent chance of survival' if he had the heart attack at home, because his wife would have been alerted to his condition and called an ambulance, which would have been fitted with an electrical defibrillator – the only effective treatment for ventricular fibrillation.

The respondent argued that s 9B referred to 'something which occurs for a duration or with a degree of regularity such that it could be characterised as defining or constituting an integral part of the nature of the employment', and not to a single aspect of employment such as being alone in a motel room.

Decision and orders

Senior arbitrator Snell stated that the phrase 'nature of the employment' in s 9B is 'a reference to the particular employment in which the injury was suffered, rather than to the nature of the class or classification of employment'. He found the risk of the deceased dying from a heart attack 'would have been much less' if he had been at home and received assistance from ambulance officers. He went on to say 'having regard to a comparison of these risks, I am satisfied that the test in section 9B is satisfied,' and that 'the employment concerned gave rise to a significantly greater risk of the relevant injury'.

An order was made that the applicant be paid $510,800, being the lump sum death benefit payable under s 25(1)(a) of the 1987 Act.

Conclusion

The decision in this case has prompted employers to review their work practices and re-evaluate the arrangements for workers who travel frequently in the course of their employment.

Within the context of the 'no fault' system in New South Wales, the decision will be regarded by workers as an important development in safeguarding their rights in an increasingly demanding labour market. **LSJ**