Turks LEGAL

INSURANCE ▪ COMMERCIAL ▪ BANKING

LEGISLATIVE DEVELOPMENTS

The *Civil Liability (Third Party Claims Against Insurers) Act 2017* commenced on 1 June 2017 and allows claimants to recover directly from insurers in court proceedings in certain circumstances. **Read more**

RECENT DECISIONS

- **Riding rodeo for reward**
  Gajkowski v The Camden Show Society Inc and Australian Bushman's Campdraft & Rodeo Association Ltd [2017] NSWWCC 124 (31 May 2017)
- **Perception versus reality: workplace bullying**
  Bailey v The Workers Compensation Nominal Insurer [2017] NSWDC 57 (22 March 2017)
- **Section 151Z: Watch your step! Negligence not proven against occupier**
  Kalolane Pty Limited v Hungry Jack's Pty Limited [2015] NSWDC 82 (22 May 2015)

LEGISLATIVE DEVELOPMENTS

The *Civil Liability (Third Party Claims Against Insurers) Act 2017* ('the Act') commenced on 1 June 2017. The Act allows claimants to recover directly from insurers in court proceedings in certain circumstances.

The Act repeals section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* and replaces it with a new mechanism that enables a third party to bring proceedings directly against an insurer if it can be shown that the insurer was on risk under the relevant liability policy.

The right to proceed against the insurer requires leave of the court irrespective of whether the insured is being wound up. The insurer will then stand in the shoes of the insured and any liability of the insurer will be limited to the amount that it would have been required to pay under the policy of insurance.

back to top

RECENT DECISIONS

Riding rodeo for reward

Gajkowski v The Camden Show Society Inc and Australian Bushman's Campdraft & Rodeo Association Ltd [2017] NSWWCC 124 (31 May 2017)

Link to decision

Summary

On 31 May 2017, an Arbitrator of the Workers Compensation Commission ('WCC') found that a young rodeo rider was a 'deemed worker' for the purposes of the workers compensation legislation allowing him to receive compensation for severe injuries. The Arbitrator also found that both respondents were equally liable for the claim.

Background

The applicant was an 18 year old rodeo rider who was also undertaking a butchers apprenticeship. He was an established rodeo rider from a young age and had ambitions of moving to the USA after completing his apprenticeship to progress his career on the Professional Bull Riders circuit.

On 4 April 2014, the applicant fell from a bull that he was riding during a rodeo at the Camden Show and suffered a severe brain injury. The applicant made a claim for workers compensation that was denied on the basis that he was not a 'worker' for the purposes of the Acts at the time of the injury.

An Application to Resolve a Dispute was filed on 9 February 2017 claiming weekly compensation payments and medical expenses. The parties agreed the issues in dispute before the WCC were:

1. Whether the applicant was a 'deemed worker' pursuant to Schedule 1, Clause 15 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act);
2. If so, whether either of the first or second respondent is liable for the claim; or whether both respondents are liable; and if so, to what extent; and
3. The applicant's entitlement, if any, to weekly compensation and medical expenses.

Decision

Issue 1 (deemed worker)

Section 4 of the 1998 Act defines 'worker' as a person who has entered into or works under a contract of service or training contract with an employer. Schedule 1 of the 1998 Act provides a wide variety of definitions for 'deemed workers' that do not otherwise fall under the definition contained in section 4.

The applicant argued that he was an entertainer engaged for fee or reward in a contest or public performance that charged an admission fee such that Schedule 1, Clause 15 applied. He also argued that he received substantial remuneration from the rodeo circuit.

The first respondent, The Camden Show Society, argued that the entry fee to the show was not a fee or reward, and that the potential for prize money fell short

back to top

of satisfying Clause 15. The second respondent, the Australian Bushman's Campdraft & Rodeo Association Limited (ABCRA), argued that the 'fee or reward' must be guaranteed and not just represent a mere possibility.

The Arbitrator looked at Schedule 1 of Clause 15 to determine the first issue. Clause 15 provides that:

> "15 Boxers, wrestlers, referees and entertainers (cf former Sch 1 cl 15)
>
> (1) A person engaged for fee or reward to take part:
> …
> (c) as an entertainer in any public performance in a place of public entertainment to which the public is admitted on payment of a fee or charge,
> …
>
> is, for the purposes of this Act, taken to be a worker employed by the person conducting or holding the contest or public or other performance.
> …
>
> (4) If 2 or more persons conduct or hold a contest or public or other performance, those persons are liable to contribute to any compensation payable under this Act for the injury in such proportion as, in default of agreement, the Commission determines."

When considering 'engaged for fee or reward' the Arbitrator considered that the opportunities for the applicant to win substantial prize money and to further his career by exposure at the rodeo, gave substance to the argument that he was seeking 'reward'. Although there was no guarantee of receiving such rewards, the evidence was that the applicant earned substantial amounts from the rodeo circuit. The Arbitrator found that there was a 'well-established' agreement between the applicant and the organisers of the event to perform his rodeo skills for the entertainment of the crowd and in return he was afforded the opportunity to win prize money and progress towards his goal of making a career on the lucrative US circuit.

The Arbitrator also considered the applicant's status 'as an entertainer'. He accepted that the rodeo was a 'public performance in a place of public entertainment to which the public was admitted on payment of a fee or charge'. The Camden Show Society and the ABCRA had engaged the applicant to ride bulls 'affording diversion or amusement' for the show crowds in a public performance and in return, he was given the opportunity to accumulate prize money and advance his career in Australia and work towards his goal to progress to the professional US circuit.

The Arbitrator ultimately found that the applicant was a 'deemed worker' under Schedule 1 Clause 15, of the 1998 Act.

Issue 2 (respondents' liability)

The applicant submitted that both respondents were liable under Clause 15 relying on the authorities of *Murphy v North Sydney Leagues Club Ltd* [1969] WCR 59 and *Bushby v Morris* [1980] 1 NSWLR 81 in which it was held there were two entities co-operating to put on the event; in the present case, one entity (Camden Show) was "holding" the event; while another (ABCRA) was "conducting" it. The respondents argued that each other was liable.

The Arbitrator considered extensive evidence from both respondents, as well as additional parties before ultimately finding that both respondents were involved in holding and conducting the rodeo and that 'it was an integrated joint process developed over many years. While it was not a clear-cut case of one "holding" the event, and the other "conducting" it', he believed that both respondents were significantly involved in conducting or holding the event and as such were liable for any compensation payable. The highly organised mutual contributions by the respondents indicated that they should be equally liable with each respondent paying half.

Issue 3 (compensation entitlement)

The Arbitrator accepted that the applicant was totally incapacitated for any employment and by satisfying his status as a 'worker' was entitled to an award of weekly compensation.

Outcome

The decision exemplifies the process required when considering the definition of 'entertainer' and the circumstances where a person who competes for fee or reward will be a 'deemed worker' under Schedule 1 Clause 15 of the 1998 Act.

The interpretation of 'fee or reward' may be seen to be relatively broad, indicating that when an entertainer competes for prize money at an event where members of the public pay for admission, they are likely to be a 'deemed worker'.

back to top

In this case, the applicant was a young successful bull rider who was able to give evidence of his consistent career winnings and desire to extend this career to the professional circuit in the USA that assisted the Arbitrator in finding this constituted a 'reward'. In circumstances involving more casual participation by a rider without any aspirations of pursuing a rodeo career or a history of earnings from such activities, this may have led to a different outcome.

Event organisers, and participants who compete for prize money on a public stage, should be aware of the possible ramifications of this decision.

For more information, please contact:

Graham White
Special Counsel
T: 02 8257 5712
M: 0417 205 683
graham.white@turkslegal.com.au

Robbie Elder
Senior Associate
T: 02 8257 5766
M: 0418 970 181
robbie.elder@turkslegal.com.au

Jock Spence
Lawyer

back to top

RECENT DECISIONS

Perception versus reality: workplace bullying

Bailey v The Workers Compensation Nominal Insurer [2017] NSWDC 57 (22 March 2017)

Link to decision

Summary

In this case, a worker failed to establish that his psychological injury was a result of bullying and harassment by his supervisor.

Background

The worker commenced working for the employer in early 2009. He reported to a supervisor, Mr G. It was common ground that the worker initially got on well with Mr G.

The worker injured his back on 6 October 2009. His injury occurred as a result of a faulty seat in a truck which he had been working in that day. It was alleged that the faulty seat had previously been brought to the attention of Mr G.

The worker submitted his time sheet containing his account of the seat problem prior to going to a toolbox meeting on 7 October 2009. At the meeting, Mr G. expressed concern about employees smoking in the workplace. After the meeting, the worker and another employee were summoned to Mr G's office. The worker alleged that Mr G. gave him a 'thorough berating' about smoking in the office and told him his back injury was 'a crock'. The allegations were denied by Mr G. However, Mr G. did admit that there had been 'yelling and unpleasantness' when the worker attempted to justify smoking in the workplace.

Decision

The matter was heard by Judge Gibson in the District Court. Judge Gibson observed that the evidence of the worker and Mr G. was 'starkly different.'

In considering the reliability of the witnesses' evidence, Judge Gibson found that the worker was 'less than frank concerning his medical history' and prior workers compensation claims. In addition, Judge Gibson considered that the worker's accounts of his workplace difficulties to medical practitioners varied not only from his oral evidence but between each other. Conversely, Judge Gibson considered that Mr G. 'answered questions directly and without evasion.' In those circumstances, Judge Gibson preferred Mr G's evidence over the worker's evidence.

When considering liability, Judge Gibson noted that there was only generalised evidence of prior incidents from the worker about the asserted bullying by Mr G. There was no evidence from other employees of the worker being singled out for abuse or bullying. On balance, Judge Gibson was satisfied that the worker's perception of Mr G's treatment of him was not based on real events.

Overall, Judge Gibson concluded that work arguments, where the worker's own conduct was part of the problem, 'falls far short of amounting to evidence of sustained bullying in the workplace'. The Judge was satisfied that there was no evidence of sustained bullying, and that the worker's injury was not foreseeable given his employer was not given any notice of a psychological disturbance.

Accordingly, the worker's proceedings were dismissed.

back to top

For more information, please contact:

Adele Fletcher
Partner
T: 02 8257 5708
M: 0408 862 995
adele.fletcher@turkslegal.com.au

Eliza Hannon
Senior Associate
T: 02 8257 5730
M: 0418 613 090
eliza.hannon@turkslegal.com.au

back to top

RECENT DECISIONS

Section 151Z: Watch your step! Negligence not proven against occupier

Kalolane Pty Limited v Hungry Jack's Pty Limited [2015] NSWDC 82 (22 May 2015)

Link to decision

Summary

The employer failed on a claim against Hungry Jack's seeking to recover compensation paid to and on behalf of a delivery driver for injuries suffered as the result of a slip and fall at their premises. The employer was unable to satisfy the court that any negligence on the part of Hungry Jack's was proven or causative of the worker's injuries.

Background

The worker had driven to the Hungry Jack's store at Muswellbrook on 5 April 2013 arriving at about 9am and commenced unloading goods from the rear of his truck.

After placing a number of boxes onto a trolley, he then attempted to alight from the rear of the truck when he slipped and fell to the ground sustaining injury.

The employer contended that the worker had walked through some grease at the store at a point during the delivery and that was what caused him to fall from the back of the truck.

The Proceedings

The worker gave evidence that the floor inside the main doorway of the Hungry Jack's store including a ramp leading up to that area, was greasy and had water on it. The grease had then tracked onto the soles of his shoes that had caused him to slip and fall.

In cross examination, the worker could not recall precisely what had occurred when he attempted to alight from the back of the truck and the Court was not persuaded that he had slipped because of grease on his boots noting that the worker's evidence was 'just as consistent with a misstep beyond the rear of the truck as it is with a slip.'

Hungry Jack's tendered evidence about the system of cleaning, to show that the floor of the store was cleaned with hot water and degreaser every night while the surrounding concrete area was high pressure cleaned early every second morning. It was conceded that a grate area, where the grease and water was directed during cleaning, was greasy; however the worker did not traverse this area. As this evidence was not directly challenged by the employer, the Court was not satisfied that the ramp from the doorway had grease on it.

The Court held that the evidence failed to establish that Hungry Jack's had breached any duty of care that it owed to the worker.

Implications

While civil liability claims including actions against occupiers, remain a viable avenue for recoveries, careful consideration must be given to the evidence of the worker as well as any systems or processes that may have been put in place by the occupier. Obtaining as much information as possible about the systems and processes as well as any contemporaneous evidence of the mechanism of injury will often be vital to the outcome of the recovery action.

back to top

For more information, please contact:

Dominic Maait
Partner
T: 02 8257 5726
M: 0417 021 026
dominic.maait@turkslegal.com.au

Shawn Finnerty
Lawyer

back to top