WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRIAN LAPIN, *Applicant*

vs.

COLORADO ROCKIES and ACE AMERICAN INSURANCE COMPANY administered by SEDGWICK RIVERSIDE; THE TRAVERSE CITY BEACH BUMS; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10874015
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration[1] in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant Liberty Mutual Insurance Corporation (LMIC) seeks reconsideration of the Findings of Facts issued by a workers' compensation arbitrator (WCA) on December 2, 2020, wherein the WCA found that Liberty Mutual Insurance Policy No. W-C5-34S-516001-019 provides workers' compensation insurance coverage for the Traverse City Beach Bums before the Workers' Compensation Appeals Board in the State of California. Defendant contends that the WCA erred in his findings, as the plain terms of the insurance policy that LMIC issued to Traverse City Beach Bums LLC provides no coverage for the applicant's California claim.

We received an Answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA, which recommends that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated in the Opinion on Decision and the WCA's Report, both of which we adopt and incorporate, and for the reasons stated below, we will affirm the Findings of Fact.

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[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) To be timely, however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(a).) Petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].)

This time limit is jurisdictional and therefore, the Appeals Board has no authority to act upon or consider an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Here, the WCA issued the decision on December 2, 2020, and defendant filed the Petition for Reconsideration on December 23, 2020 at the Van Nuys district office. Thus, the Petition was timely filed within 20 days of the decision.

WCAB Rule 10995 provides that if the arbitrator does not rescind the order, decision or award within 15 days of receiving the petition for reconsideration, the arbitrator is required to forward an electronic copy of their report and the complete arbitration file within 15 days after receiving the petition for reconsideration pursuant to WCAB Rule 10995(c)(3). (Cal. Code Regs., tit. 8, § 10995(c)(1)-(3).) WCAB Rule 10914 requires the arbitrator to make and maintain the record of the arbitration proceeding, which must include the following:

(1) Order Appointing Arbitrator;

(2) Notices of appearance of the parties involved in the arbitration;

(3) Minutes of the arbitration proceedings, identifying those present, the date of the proceeding, the disposition and those served with the minutes or the identification of the party designated to serve the minutes;

(4) Pleadings, petitions, objections, briefs and responses filed by the parties with the arbitrator;

(5) Exhibits filed by the parties;

(6) Stipulations and issues entered into by the parties;

(7) Arbitrator's Summary of Evidence containing evidentiary rulings, a description of exhibits admitted into evidence, the identification of witnesses who testified and summary of witness testimony;

(8) Verbatim transcripts of witness testimony if witness testimony was taken under oath.

(9) Findings, orders, awards, decisions and opinions on decision made by the arbitrator; and

(10) Arbitrator's report on petition for reconsideration, removal or disqualification.

(Cal. Code Regs., tit. 8, § 10914(c).)

The WCA issued the Report on January 11, 2021, however, filing of the arbitration file in EAMS was not completed as required by WCAB Rule 10995 until May 2, 2022.

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co.*

v. Workers' Comp. Appeals Bd. (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (*Von Ritzhoff*) (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Von Ritzhoff*, *supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Meaningful review of an arbitrator's decision requires that the "decision be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission*." (*Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original.) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*; see also *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration].)

Therefore, until the record of proceedings was complete, we were unable to complete our review.

Labor Code section 5909 provides that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed. Timely petitions for reconsideration filed and *received by* the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition.

Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See Lab. Code, § 5901.)

An exception occurs when a petition is *not received by* the Appeals Board within 60 days due to irregularities outside the petitioner's control. In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on June 4, 2021. Thus, the first notice to the Appeals Board of the Petition was on June 4, 2021. Due to this lack of notice by the district office, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on the Petition was equitably tolled until 60 days after June 4, 2021.

Accordingly, we affirm the Findings of Facts.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Facts issued by the WCA on December 2, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

BRIAN LAPIN
ROSE KLEIN & MARIAS LLP, ATTN: G. RONALD FEENBERG (ARB.)
LAW OFFICES OF KIRK & MYERS
BOBER PETERSON & KOBY
ALTMAN BLITSTEIN
MADANS LAW

LAS/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

OPINION ON DECISION

The purpose of this letter is to share with each of you my thought process in arriving at the decision referenced by the accompanying "Findings of Facts." Kindly consider this letter as akin to an Appeals Board trial judge's "Opinion on Decision." Under Labor Code §5313, the decision of the arbitrator must be accompanied by a Summary of Evidence, "... relied upon and the reasons or grounds upon which the determination was made." Board Rule § 10782 requires that this arbitrator's Opinion on Decision set forth "... clearly and concisely the reasons for the decision made."

I was the Arbitrator in the above-referenced matter. Arbitration was held before me on October 13 and 30,2020. A court reporter was present. A transcript of the proceedings is available, if necessary, to the Workers' Compensation Appeals Board. Exhibits were presented and one witness, Neil Johnson, testified.

Pursuant to the Appeals Board Panel Decision in the case of Cabezas v. Kragen Auto Parts, 30 CWCR 102 (2002), in order for the record to be adequate for a meaningful review of a decision, the Appeals Board requires the arbitrator to conduct proceedings and maintain the record in the same manner as required of Workers' Compensation Administrative Law Judges. All evidence must be identified and be in compliance with requirements set forth in Hamilton v. Wausau Insurance Co. 66 CCC 473 (2001). Kindly note that at pages 10 and 11 of the arbitration transcript are the exhibits received by the Appeals Board on behalf of employer, the Colorado Rockies, and at pages 12 and 13 are the exhibits of Liberty Mutual Insurance Company.

This case comes before me on the issue of insurance coverage. The primary question was whether or not the Liberty Mutual insurance policy for the Traverse City Beach Bums provided coverage for that employer in the State of California, if there was jurisdiction over Traverse City. Brian Lapin, Applicant, is a former professional athlete - baseball player. He was a professional minor league baseball player in the Colorado Rockies organization from June 10, 2007 through September 1,2008. (See, Colorado Rockies and Wuerfel Family, Exhibit 2). Applicant Lapin was employed by the Traverse City Beach Bums from March 19, 2009 through approximately January 1, 2010. (See, Liberty Mutual, Exhibit B).

The Deposition Transcript of Applicant Brian Lapin is Colorado Rockies, Exhibit 3 and Liberty Mutual, Exhibit C. Lapin signed his initial contract to play with the Colorado Rockies, after being drafted by the Colorado Rockies, in California. (Applicant's Deposition page 25, line 2) . The Applicant signed his contract to play professional baseball with the Traverse City Beach Bums in Fresno, California. (See, Applicant's Deposition Transcript page 35, line 8). After signing his contract with Traverse City, Lapin continued to work out at Fresno State College, where he attended college prior to being drafted by the Colorado Rockies. He took batting practice, weight lifted, and ran. (See, Applicant's Deposition pages 35 and 36). While playing for Traverse City, his home games were in the State of Michigan and he played with the Traverse City Beach Bums on road or away games in multiple other states, but not California. Lapin's last year of employment as a professional athlete and baseball player appears to have been during the period he was solely employed by the Traverse City Beach Bums who are determined to be insured for workers' compensation liability indemnity by Liberty Mutual. Liberty Mutual had denied coverage for

Traverse City prior to the arbitration hearing and had denied that their insurance policy required them to either defend or cover Traverse City in this case.

Traverse City possessed a valid Workers' Compensation insurance policy through Liberty Mutual Insurance Group. The policy covered June 27,2009 through June 27,2010. (See, Colorado Rockies, Exhibit 1). The Liberty Mutual policy provided coverage to Traverse City in the State of Michigan and additionally included a "Residual Market Limited Other States Insurance" endorsement. (See Policy).

California Labor Code §§ 5305 and 3600.5(a) convey jurisdiction to the California Workers' Compensation Appeals Board when one is regularly employed in California or *has been hired in California.* In the seminal case of Bowan vs. WCAB, 64 CCC 745 (1999), a very similar case to this, the California District Court of Appeal confirm jurisdiction to the California WCAB as jurisdiction will be present in California over injuries which occurred outside of California where a *contract-for-hire* is made in this state. In the Lapin case, there is unrebutted testimony that Applicant signed both his Colorado Rockies's contract and his Traverse City Beach Bums's contract within the borders of the State of California. Applicant negotiated, with the assistance of a California-based agent, and agreed to all terms in California. (See, Lapin's Deposition, page 24 and page 33 and 34). Based on these undisputed facts, California Labor Code §5305 and California §3600.5(a) are applicable and provide subject matter jurisdiction to the WCAB over this case. Additionally, there is personal jurisdiction over both the Colorado Rockies and the Traverse City Beach Bums because they hired Applicant in California and Applicant performed some type of work in California for these teams, as will be described hereinafter, after entering into a contract with each of those teams. (See, Applicant's Deposition Transcript, page 31, line 25 and at page 35, lines 21-23).

I find that there is both subject matter and personal jurisdiction over Liberty Mutual in this case. At Section (H) and (4) of Part I of the Liberty Mutual Insurance policy issued to Traverse City, it reads, "jurisdiction over you is jurisdiction over us [Liberty Mutual] for the purpose of the workers' compensation law. We are bound by decisions against you under the law, subject to the provisions of this policy that are not in conflict with that law. (See, Exhibit 1 and Exhibit C, Liberty Mutual Insurance Policy). Because there is statutory jurisdiction over Traverse City, the terms of the Liberty Mutual policy issued to the Beach Bums provide subject matter jurisdiction over Liberty Mutual in California and Liberty Mutual is bound by the contractual agreement in the policy that issued to cover injuries if Applicant suffered those injuries while working within the State of Michigan and those states outside of Michigan under the terms of their policy.

Let me make it clear in this decision that I do not know if Lapin has sustained injury arising out of and occurring in the course of his employment with either Traverse City Beach Bums or the Colorado Rockies, both or either or neither. I do not know what body parts Lapin is alleging that he injured.

The only witness presented in the arbitration was Neil Johnson of Boston, Massachusetts. He is the Vice President and Manager of the Commercial Premium Fraud, Special Investigation Unit for Liberty Mutual. In that position, as reflected at page 15 of the transcript, Johnson is an individual who has knowledge and expertise regarding insurance coverage. In his professional capacity, he reviews insurance policies and provides opinions to Liberty Mutual about whether a

policy does or does not provide coverage. He has been doing this type of work for 44 years. He has particular experience in dealing with assigned risk market policies in multiple states, including Michigan, which is the state of the Traverse City Beach Bums in this matter.

Attached to the Liberty Mutual policy for Traverse City is the "Residual Market Limited Other States Insurance" endorsement. The policy clearly identifies the State of Michigan as the state of coverage for the employer, Traverse City. Then, how does this Liberty Mutual policy have its coverage extended outside of Michigan. The answer is in the endorsement. All of the following conditions must be met.

> 1. The employee was principally employed in a state listed in Item 3 A of the information page [this policy and the State of Michigan]; 2. the employee claiming benefits is not claiming benefits in a state where at the time of injury the employer has other insurance coverage in place; 3. the duration of work being performed by the employee claiming benefits in the state for which the employee is claiming benefits is temporary.

Throughout his testimony, witness Johnson continued to emphasize that Lapin had to be an individual "working under the direction and control of the Traverse City Beach Bums." At page 75 of the transcript, Johnson continued to emphasize the words "employer operation, which he defined as the employer having some direct control where that operation occurs. Johnson was emphatic in stating that the Beach Bums did not have any operations within the state of California. I disagree. Where at page 90, lines 23-25 of the transcript and at page 91, lines 1 -3 of the transcript, Johnson is asked to explain or define the word "operations" and what he means by "begins operations" he stated an employer begins performing functions that they normally do; functions that are related to their work and their business.

A very key piece of evidence in this case is Liberty Mutual Exhibit E, correspondence, forms and a Uniform Player Contract utilized by the Traverse City Beach Bums involving Brian Lapin. At page 3 of Exhibit E, clause or Paragraph No. 5 is identified as the "Loyalty" clause. As part of the contract between the Beach Bums and Lapin, the player agreed

> "To serve the club diligently and faithfully, to report at the time and place fixed by the club in good physical condition, to keep himself in the first-class condition, to observe and comply with all rules and regulations of the league and the club and to conform to the highest standards of personal conduct and good sportsmanship at all times, and not to do anything which is a detriment to the best interest of the club or league...."

In his deposition, Lapin indicated that he was motivated to be in as good a shape as possible for his own purposes. Traverse City is an independent league team and is not part of either the recognized major or minor leagues of baseball. Lapin wanted to be recognized by major league teams and get back into organized professional baseball. That was his personal motivation. Concurrently, Traverse City was equally motivated to put onto the baseball diamond as representative a team as possible. The better the player performed, clearly the better Traverse City would be. They each had a mutual desire to be successful.

Lapin testified in his deposition that he attended college at Fresno State. He continued to live in Fresno after he was released by the Colorado Rockies. After he signed his Traverse City contract, he continued working out with his old college team, the Fresno State Bulldogs. Clearly, Lapin was doing the workouts, the batting practice, the weightlifting and the running for his own personal good. But, he was also complying with the "loyalty" clause of the Traverse City contract and recognized that he was supposed to be "in good physical condition, to keep himself in first class condition...".

Lapin's activities, in keeping himself in good shape and working out constitute "a reasonable expectance of or were expressly or impliedly required by a contract of employment." See. IBM Corporation vs. WCAB (Korpela) 43 CCC 161 (1978). Where at the time of an injury, the employee is combining his employer's business with that of his own, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could have been serving the employer. See, Lockheed Aircraft Corporation vs. IAC (Janda) 11 CCC 209 (1946). Lapin admits that he was engaging in work activities for his own betterment. But, the "loyalty" clause directs Lapin to be in good shape. It would not inure to the benefit of the Beach Bums if Lapin showed up for their baseball season overweight, out of shape, and not in baseball playing condition. In fact, the Beach Bums so-directed Lapin to be in First Class condition and in good shape by the directives, expressed, in their own contract. Also, See, CIGA/Stanford University vs. WCAB (Schneider/Willick) 67 CCC 1160 (Writ Denied 2002). The endorsement to the Liberty Mutual policy for Traverse City establishes that there is Liberty Mutual coverage for the Beach Bums outside of Michigan. All of the necessary conditions are met. Lapin was principally employed in Michigan, where Traverse City played their home games, as identified in Item 3 A of the Information Page of the Policy. Lapin was claiming benefits in a state where, at the time, the employer did not have other insurance coverage in place. And, Lapin was performing work in the State of California where Lapin was temporarily employed by Traverse City. Even by witness Johnson's definitions, Liberty Mutual's Policy should activate for coverage of the Wuerfel Family and the Traverse City Beach Bums for reasons including the *"Mixed Purpose" Doctrine.*

Because of Liberty Mutual's representation of other professional athletic teams in the State of California, an effort was made by the Colorado Rockies and by the Wuerfel family to establish waiver. However, I am not that persuaded that the Waiver Doctrine is applicable to the facts of this case, especially where I recognize that the Liberty Mutual Policy, with endorsement, is in of itself one which ensures, in California, the Traverse City Beach Bums. The cases identified by the Colorado Rockies, primarily, are not precedent establishing cases. They all involve the Detroit Lions of the National Football League and there is a distinction made by Liberty Mutual and Witness Johnson which is notable as to their facts and the Lapin case. That distinction is that the Detroit Lions do, with some regularity, come into the State of California to perform as a professional football team in the National Football League. I do not really have to reach a determination as to the persuasiveness of the Waiver Argument because under the applicable Liberty Mutual Policy, I find it insured Traverse City before the California Workers' Compensation Appeals Board. I am only determining the issue of coverage and I am not determining whether or not Lapin had sustained injury arising out of and occurring in the course of his employment nor am I determining whether that alleged cumulative trauma injury occurred during the last year of injurious exposure of Lapin's professional baseball career or not. I am not dismissing the Colorado Rockies from this case. All I am determining is that Liberty Mutual is a Co-Defendant with them

and that the Wuerfel Family and the Traverse City Beach Bums are not uninsured in the State of California.

It has been a pleasure to have served the parties as arbitrator in this matter. Should any of the parties have any questions concerning the nature of this "Opinion on Decision" or the accompanying "Findings of Facts," I instruct you to write to me, with copy to opposing counsel. There shall be no unilateral communication no communication by telephone. If an aggrieved party decides to file a Petition for Reconsideration, the original must be filed with the appropriate appeals Board venue, with courtesy copy concurrently served upon me, so that I might timely file a "Report and Recommendation on Reconsideration."

Very truly yours,

ROSE, KLEIN & MARIAS LLP

G. Ronald Feenberg
Arbitrator

REPORT AND RECOMMENDATIONS OF ARBITRATOR
RE PETITION FOR RECONSIDERATION

I am the Arbitrator in the above-identified matter. Arbitration was held before me on October 13 and October 30, 2020. A Findings of Fact" issued on December 1, 2020. Aggrieved by that "Findings of Fact," Liberty Mutual Insurance Company (hereinafter "LMIC") has filed a timely "Petition for Reconsideration. An "Answer to Petition for Reconsideration" was filed by the Colorado Rockies, insured by Ace American Insurance and administered by Sedgwick Riverside on or about December 31,2020. This is the Arbitrator's "Report and Recommendation on Reconsideration." For ease of reference by the Appeals Board, during these uncertain times and this Arbitrator's uncertainty as to whether or not all the pleadings and decisions have been received by the Appeals Board, a copy of my "Findings of Fact" and my "Opinion on Decision" accompany this letter.

The sole issue before me in arbitration focused on insurance coverage of LMIC for alleged employer, the Traverse City Beach Bums (hereinafter "Beach Bums"). As I indicated in my "Opinion on Decision," and it is worth repeating, I know nothing about whether or not Applicant Brian Lapin has suffered an industrial injury arising out of and occurring in the course of his Beach Bums' employment nor do I know the mechanism by which he is alleged to have suffered a work-related injury nor do I know the body parts even involved in that injury, if it was industrial in nature. Only insurance coverage was at-issue before me.

The sole question was whether or not LMIC's insurance policy for the Beach Bums provided coverage for that employer in the state of California, if there was jurisdiction over the Traverse City Beach Bums. Lapin, a former professional athlete-baseball player, initially played in the Colorado Rockies minor league organization from June 10, 2007 through September 1, 2008. Applicant Lapin was employed by the Beach Bums, a franchise in an independent league, located in the State of Michigan. As Liberty Mutual insured the Traverse City Beach Bums in Michigan. LMIC denied coverage for Traverse City in this case, denying that their policy requires them to either defend or cover that employer in California.

Applicant signed his initial baseball contract with the Colorado Rockies in California. He had been drafted by the Rockies. Applicant also signed his contract to play professional baseball with Traverse City in California. The Applicant's contract with Traverse City states,

> The Club hereby employees player to render, and the player agrees to render, skilled services as a baseball player for all games of the club in the league during the 2009 season *from and after the date of this contract,* including regular season games and any championship or playoff series games.. . . This agreement shall commence on March 19 2009 .... "

After signing his baseball contract with the Beach Bums, Lapin continued to work out at Fresno State. His workouts included batting practice, fielding practice, lifting and running.

The Beach Bums contract, at page 3 of Exhibit E, clause or paragraph No. 5, identified as the "Loyalty" clause provided in part,

> "[Lapin] to serve the club diligently and faithfully, to report at the time and place fixed by the club in good physical condition, to keep himself in the first-class condition, to observe and comply with all rules and regulations of the league and the club and to conform to the highest standards of personal conduct and good sportsmanship at all times, and not to do anything which is a detriment to the best interest of the club or league .... "

Traverse City had a valid insurance policy for workers compensation through LMIC. The policy covered the time involved in the Lapin cause of action. The policy provided coverage in the State of Michigan and additionally included a "Residual Market Limited Other States Insurance" endorsement. LMIC's coverage for this claim issued to Traverse City in June 2017. LMIC indicated in their denial that had the case been filed in Michigan, LMIC would have covered it. However, since the case was filed in California, LMIC was denying coverage.

I relied on California Labor Code§ 3600.S(a) to determine that the WCAB has jurisdiction over this claim in California because the contract of hire occurred in California. It was without dispute that Applicant was hired in California by the Beach Bums by virtue of his executing his contract of employment in California. With jurisdiction clearly established, the critical issue for review was whether or not there was coverage for Traverse City under the LMIC policy.

LMIC's policy for the Beach Bums issued under, and was pursuant to, the rules applicable to the to the Michigan Assigned Risk Plan. In Part One, paragraph B, the policy provided that LMIC would "pay promptly when due the benefits required of you [the Beach Bums] by the Workers' Compensation Law. In General Section, part CC, the policy stated that "Workers' Compensation means the workers' ...law of each state or territory named in item 3 .A. of the Information page." The only state named in item 3 .A of the information page was Michigan.

Under Part 3 of the policy - other states insurance OSI (as modified by the Residual Market Limited Other States Insurance Endorsement offers, the LMIC policy provides for payment of benefits required of the Beach Bums under the law of any state other than Michigan, but only where three conditions were met: (a) the employee was principally employed by the Beach Bums in Michigan and (b) the employee is not claiming benefits in a state where that Beach Bums have other workers' compensation coverage, or are required to have other workers' compensation coverage; and (c) the duration of the work being performed by the employee claiming benefits in the state for which the employee is claiming benefits is temporary.

My decision comes down to about three basic key determinations in this case. In the LMIC policy, in Part one, at Section H(4) the policy issued by LMIC to Traverse City states, "jurisdiction over you is jurisdiction over us for purposes of workers' compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with the law." As indicated before, there is both personal jurisdiction over Traverse City in California and subject matter jurisdiction at the WCAB in California. Thus, this case, including arbitration, is properly before the WCAB and me.

As reflected by the California Rockies in their answer, the basic rules of interpreting a contract are that any ambiguity in the contract is to be construed against the draftee. *See,* Lamps Plus vs. Varela, 139 S.CT. 1407 (2019). Insurance coverage is to be interpreted broadly, so as to afford the greatest possible protection to the insured. *See,* MacKinnon vs. Truck Insurance Exchange, 31 Cal. 4th 635 (2003) . As such, LMIC must appear and defend cases where the employer named in the LMIC policy is subject to jurisdiction.

The terms of the contract of employment are very persuasive. Applicant Lapin alleges that he performed work in California, albeit temporarily, during his employment with the Traverse City Beach Bums and, therefore, the Residual Market Others States Endorsement is applicable to this claim. Lapin complied with the terms imposed upon him by the Beach Bums contract. In Lapin's deposition testimony, he expressly said that playing for the Beach Bums was for his own improvement so he could return to affiliated baseball. But Lapin's improved baseball skills would obviously be a benefit to his team and his employer. The contractual terms of the contract are what I viewed on the coverage issue. I am not expressing an opinion as to whether Lapin's activities in California can be considered as being "in the course of employment." My finding is not a finding as to injury arising out of or occurring in the course of employment; it was simply a finding that since injury was alleged to have occurred in California, in some fashion, unknown to me, and allegedly pursuant to the contractual terms imposed on Lapin and by the Beach Bums, Lapin would then be temporarily performing work in California for his employer which would activate the policy provisions mandating LMIC to appear and defend.

The insurance policy terms make it clear that LMIC will defend any claims for benefits payable by the policy. Witness Johnson, confirmed in his testimony that if an employee was doing work in California for his employer on a temporary basis, the policy provides coverage. Applicant did not file his cause of action in Michigan; he filed his cause of action in California. Was Lapin performing activities in California which give rise to industrial injury? I have no idea. However, injury arising out of and occurring in the course of employment is not a prerequisite for imposing insurance coverage upon LMIC to appear and defend Traverse City. Lapin's allegations fall within the LMIC coverage as provided. The duty to defend is broader than the duty to indemnify. See, Horace Mann Insurance Company vs. Barbara B, 4 Cal. 4th 1076 (1993).

LMIC asserts in their "Petition for Reconsideration," that Lapin's employment began on May 7, 2009. That argument is incorrect. There is a signed contract dated April 1, 2009, which in Section 20 thereof contains an integration clause indicating that the written contract controls the relationship between Lapin and the Beach Bums. The signed contract, upon which I rely, says employment began to March 19, 2009.

Liberty Mutual takes position that the Residual Markets Other States Endorsement is not effective in this case despite Lapin's allegations that he was performing work in California. LMIC asserts that for the endorsement to activate, Traverse City had to have "operations" in California. Witness Johnson, at the arbitration, testified he defined operations as "functions that normally do relate to the business operations." It seems to me, that hiring an employee is a dramatic and significant essential factor in an employer's business operations. The act of hiring and the act of firing employees is about as integral part of a business's normal functions as business operations could possibly be defined. Lapin was hired in California. Lapin was sent a contract to his Fresno residents. That contract was signed in California. The fact that Traverse City is hiring California

residents in California is evidence in and of itself that the Beach Bums have some limited operations in California. As such, if work is temporarily being performed in California, coverage is afforded under the Residual Market Other States Endorsement when those conditions are satisfied. Lapin and Traverse City seem to have satisfied the conditions whereby LMIC should appear and defend Traverse City in this case.

Again, I am expressing no opinion whatsoever on any issue other than coverage. Let LMIC appear and defend and let LMIC raise what ever and substantive issues it wishes to assert to Lapin's cause of action.

It is my opinion that the LMIC policy requires Liberty Mutual to provide both coverage and defense of Traverse City in this case. The policy indicates that where there is jurisdiction over Traverse City, there is jurisdiction over Liberty Mutual. The policy further indicates that Liberty Mutual will be bound by the applicable Workers' Compensation laws in those situations. Further, the facts of this case implicate the Residual Market Others States Endorsement and its conditions for coverage pursuant to said endorsement. The three requirements are all presented and met in this case. The facts of this case support the Finding of Fact that LMIC has coverage. There is a duty to defend. As to any other issues which may arise in this case, they are not the subject matter of this arbitration or my "Findings of Fact." I recommend that the "Petition for Reconsideration" of Liberty Mutual Insurance Company be denied.

Respectfully submitted,

ROSE, KLEIN & MARIAS LLP

G. Ronald Feenberg
Arbitrator