WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHARLIE BIBBY, *Applicant*

vs.

NEW JERSEY NETS; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; PHILADELPHIA 76ers, permissibly self-insured; LANCASTER LIGHTNING; LOS ANGELES CLIPPERS formerly known as SAN DIEGO CLIPPERS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for FREMONT INSURANCE, in liquidation, *Defendants*

Adjudication Number: ADJ8809936
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant New Jersey Manufacturers Insurance Company (NJMIC), on behalf of the New Jersey Nets, seeks reconsideration of the Findings and Award and Order (F&A), issued on April 3, 2024, by the workers' compensation administrative law judge (WCJ). Therein, the WCJ determined that applicant sustained injury from July 1, 1972 to April 7, 1982 to his lumbar spine, cervical spine, bilateral fingers, bilateral wrists, bilateral shoulders, bilateral hips, bilateral knees, and bilateral feet/ankles, internal, and psyche. The WCJ also determined in relevant part that the Workers' Compensation Appeals Board (WCAB) had subject matter jurisdiction over the claimed injury, as well as personal jurisdiction over NJMIC; that applicant's claim was not barred by Labor Code section 5405; that applicant's date of injury pursuant to section 5412 was March 13, 2013; that liability pursuant to section 5500.5 rests with the San Diego Clippers and the New Jersey Nets; that pursuant to Insurance Code section 1063.1, NJMIC constituted "other insurance" such that the California Insurance Guarantee Association (CIGA) was relieved of all liability; that applicant became permanent and stationary as of August 7, 1982; that applicant sustained 92 percent permanent disability; that the issues of applicant's wages, and the related issues of the amount of permanent disability indemnity payable and attorney fees were deferred; and that applicant was entitled to future medical care to cure or relieve from the effects of his injuries.

Defendant NJMIC contends it has been denied due process by being forced to adjudicate issues other than jurisdiction; that the court lacks personal jurisdiction over NJMIC and subject matter jurisdiction over the claimed injury; that neither section 5500.5 nor Insurance Code section 1063.1(c)(9) confer liability on NJMIC or on the New Jersey Nets; that the medical reporting relied upon by the WCJ was not substantial evidence; that impairment for applicant's alleged psychiatric injury is barred by section 4660.1; and that the claimed cumulative trauma injury should extend to include applicant's coaching career.

We have received Answers from codefendants Philadelphia 76ers, and from CIGA on behalf of Fremont Indemnity Company, in liquidation. The WCJ has prepared a Report and Recommendation on Petition for Reconsideration recommending we deny NJMIC's petition.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following facts and legal principles that may be relevant to our review of this matter:

The Workers' Compensation Appeals Board has subject matter jurisdiction over a claim when industrial injury occurs in California. (Cal. Const., Article XIV, § 4; Lab. Code, §§ 3202, 5300, 5301; *Daily v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 726 [61 Cal.Comp.Cases 216] "[T]he California Workers' Compensation Act applies to a worker employed in another state who is injured while working in California"]; *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 27 (Appeals Board en banc) [the WCAB can exercise jurisdiction "over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurred within the state"].)

The legislature has further provided that a hiring in California within the meaning of Labor Code sections 3600.5(a) and 5305 provides this state with sufficient connection to the employment to support adjudication of a claim of industrial injury before the WCAB. (*Alaska Packers Assn. v. Industrial Acc. Com. (Palma)* (1934) 1 Cal.2d 250, affd. (1935) 294 U.S. 532 (*Palma*); *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 27 [64 Cal.Comp.Cases 745] ["an employee who is a professional athlete residing in California, such as Bowen, who signs a player's contract in California furnished to the athlete here by an out-of-state team, is entitled to benefits under the act for injuries received while playing out of state under the contract"]; *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (2013) 221 Cal.App.4th 1116, 1126 [78 Cal.Comp.Cases 1257] (*Johnson*) ["[T]he creation of the employment relationship in California, which came about when [Mr. Palma] signed the contract in San Francisco, was a sufficient contact with California to warrant the application of California workers' compensation law"].)

Labor Code section 3600.5, subd. (a), provides:

> If an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state.
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> (Lab. Code, § 3600.5(a).)

Labor Code section 5305 provides:

> The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state. Any employee described by this section, or his or her dependents, shall be entitled to the compensation or death benefits provided by this division.
>
> (Lab. Code, § 5305.)

Accordingly, the formation of a contract for hire, standing alone, is sufficient to confer California jurisdiction over an industrial injury that occurs outside the state. "[T]he creation of the [employer-employee] status under the laws of this state is a sufficient jurisdictional basis for the regulation of that relationship within this state and the creation of incidents thereto which will be recognized within this state, even though the relation was entered into for purposes connected

solely with the rendition of services in another state." (*Palma, supra*, 1 Cal.2d 250; *Benguet Consol. Mining Co. v. Industrial Acci. Com.* (1939) 36 Cal.App.2d 158, 159 [1939 Cal.App. LEXIS 28]; *McKinley, supra,* 78 Cal.Comp.Cases 23; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].) Here, we must consider whether the applicant has established he was hired in California, such that the WCAB has jurisdiction over "all controversies arising out of injuries suffered outside the territorial limits of this state." (Lab. Code, § 5305.)

In addition, we must further consider the applicability of section 4660.1. The date of injury under section 5412 is an integral consideration with respect to various workers' compensation benefits. (Lab. Code, §§ 4658, 4660 et seq.) In *Argonaut Mining Co. v. Ind. Acc. Com. (Gonzalez)* (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118], the court held that in addition to identifying the date of injury for purposes of the operation of the statute of limitations, section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right." (See also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) 268 Cal. Rptr. 699 [55 Cal.Comp.Cases 107].)

Section 4660.1 provides in relevant part:

> This section applies to injuries occurring on or after January 1, 2013.
>
> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
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> (b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.
>
> (c)
>
> > (1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

> (2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:
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> (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.
>
> (B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(Lab. Code, § 4660.1)

Moreover, and with respect to the issue of direct versus compensable consequence injury, applicant's evaluating psychologist Dr. Greenzang has opined that applicant's "emotional reaction to his having become physically symptomatic referable to multiple areas during the course of his professional basketball career and his emotional reaction to his having felt pressured to attempt to continue to play and perform despite his physical symptoms and limitations in function combined to play an active, significant and predominant role of greater than fifty percent as to all causes in compromising his adaptive capacities and precipitating dysphoric symptoms and symptoms of anxiety in Mr. Bibby." (Ex. 5, Report of Ted Greenzang, M.D., dated May 7, 2018, at pp. 22-23.)

Thus, in addition to the issue of the applicability of section 4660.1, we must further determine whether the evidentiary record adequately addresses the extent to which applicant's claimed psychiatric injury arose out of a compensable physical injury.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Additionally, the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.) Here, based on our preliminary review, it appears that further development of the record may be appropriate.

II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d

374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant defendant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by a workers' compensation administrative law judge on April 3, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2024

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

CHARLIE BIBBY
GLENN, STUCKEY & PARTNERS
MALQUIST, FIELDS & CAMASTRA
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK
GUILFORD, SARVAS & CARBONARA
BINDER AND KALIOUNDJI

SAR/abs

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