WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FREDDY KEIAHO, ***Applicant***

vs.

INDIANAPOLIS COLTS; GREAT DIVIDE INSURANCE COMPANY, care of BERKLEY ENTERTAINMENT; JACKSONVILLE JAGUARS; ACE AMERICAN INSURANCE COMPANY, care of QUAL-LYNX, INC., formerly SCIBAL ASSOCIATES, ***Defendants***

Adjudication Number: ADJ8124831
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) issued on November 18, 2019, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from April 15, 2005 to December 1, 2010, claims to have sustained industrial injury to his head, brain, jaw, neck, teeth, back, psyche, bilateral shoulders, bilateral hips, bilateral legs, bilateral arms, bilateral knees, bilateral ankles, bilateral feet, bilateral wrists, bilateral elbows, bilateral hands, fingers, toes, and sleep disturbance. The WCJ found that the court lacked subject matter jurisdiction over applicant's claimed injury.

Applicant contends that his oral acceptance of an offer of employment by both the Indianapolis Colts and the Jacksonville Jaguars while physically located in California was sufficient to create an oral contract of hire, and to confer subject matter jurisdiction pursuant to Labor Code[2] section 5305 and 3600.5(a).

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

[2] All further references are to the Labor Code unless otherwise noted.

We have received Answers from the Jacksonville Jaguars and the Indianapolis Colts. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answers, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the November 18, 2019 F&O and substitute new findings that the Workers' Compensation Appeals Board has subject matter jurisdiction over the claimed injury and that all other issues are deferred. We will then return this matter to the trial level for further proceedings and decision by the WCJ.

FACTS

Applicant claimed injury to his head, brain, jaw, neck, teeth, back, psych, bilateral shoulders, bilateral hips, bilateral legs, bilateral arms, bilateral knees, bilateral ankles, bilateral feet, bilateral wrists, bilateral elbows, bilateral hands, fingers, toes, and in the form of sleep disturbance, while employed as a professional athlete by defendants Indianapolis Colts and Jacksonville Jaguars from April 15, 2006 to December 1, 2010. Defendants contend there is no California subject matter jurisdiction over the claimed injury and deny that applicant sustained injury arising out of and in the course of employment.

On September 16, 2019, the parties proceeded to trial, framing issues in relevant part of whether the court has subject matter jurisdiction over applicant's claimed injury pursuant to sections 3600.5 and 5305. The applicant testified and the parties submitted the matter for decision the same day.

On November 18, 2019, the WCJ issued her F&O, finding that the court lacked subject matter jurisdiction over the claimed injury. (Finding of Fact No. 4.) The WCJ's accompanying Opinion on Decision discussed *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175] (*Tripplett*), in which the court of appeal determined that California lacked subject matter jurisdiction over the injury claimed therein because applicant signed no contracts in California, and the written employment contracts later signed by applicant outside of California contained integration clauses obviating any prior agreements. The WCJ noted that in the present case, applicant signed all relevant employment contracts outside California. Further applicant could still reject the contract after it was negotiated by the agent, applicant's written

agreement with the Indianapolis Colts specified it was effective only when executed, and applicant's written contract with the Indianapolis Colts included an integration clause specifying that it superseded any prior oral agreement. (Report, at pp. 5-6.) In the absence of a valid California contract of hire, the WCJ determined the court lacked subject matter jurisdiction over the claimed injury. (*Ibid*.) The WCJ further determined that the written contracts signed by applicant had valid and enforceable forum selection clauses, and that California lacked a legitimate and substantial interest in adjudicating applicant's claim. (*Id.* at p. 8.)

Applicant's Petition avers applicant entered into an oral contract of hire with both the Indianapolis Colts and the Jacksonville Jaguars when he accepted their offers while physically located in California, and that the signing of the contracts was a condition subsequent to contract formation. (Petition, at p. 3:28.) Applicant further distinguishes *Tripplett, supra,* 25 Cal.App.5th 556 on a factual basis because applicant's assertion of a California contract of hire did not depend on his agent's power to bind him to a contract. (*Id.* at p. 8:19.) Applicant further contends that the terms of applicant's 2006 "mini-camp" agreement with the Indianapolis Colts specifies that applicant "shall be deemed an employee of the Club," and that applicant's status as an employee was thus established prior to any ensuing written contract. (*Id.* at p. 8:9.) Applicant further asserts that defendant failed to raise the issue of forum selection, thus waiving the issue, and that in any event, the holdings in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 [2013 Cal. Wrk. Comp. LEXIS 2] (Appeals Board en banc) (*McKinley*), are inapposite because applicant entered into a valid California contract of hire. (Petition, at p. 10:1.)

Defendant Indianapolis Colts filed an Answer (Colts' Answer), averring the National Football League Players Association (NFLPA) requires that every contract advisor agreement contain language specifying the contract advisor has no authority to "bind or commit Player to enter into any contract without actual execution thereof by Player." (Colts' Answer, at p. 4:17.) Thus, applicant's agents were not empowered to bind him to a California contract, obviating any assertion of the formation of an oral contract as the basis for subject matter jurisdiction. (*Id.* at p. 4:21; 11:20.) The Colts' Answer further asserts that "[m]ere negotiations by a player or a sports agent in California of the potential terms to be included in an NFL Player Contract are not sufficient to constitute the making of a contract of hire in California." (*Id.* at p. 10:16.) The Colts also contend that the forum selection clause in the written contract should be enforced because

applicant has not established any of the criteria for unreasonableness set forth in *McKinley, supra,* 78 Cal.Comp.Cases 23.

Defendant Jacksonville Jaguars' Answer (Jaguars' Answer) similarly contends that applicant cannot establish a California contract of hire, and that the parties did not enter into a binding contract of hire until applicant signed the written agreement outside of California. (Jaguars' Answer, at p. 8.) The Jaguars acknowledge that while "an employee who is otherwise eligible for California benefits cannot be deemed to have contractually waived those benefits," applicant in the present matter did not establish an underlying right to California workers' compensation benefits. (Jaguars' Answer, at p. 9, citing *Matthews v. National Football League Management Council* (2012) 688 F.3d 1107 [77 Cal.Comp.Cases 711].)

The WCJ's Report notes that applicant's agents were precluded from binding him to a contract under the terms of the standard representation agreement. (Report, at p. 3.) The WCJ also observes, "[a]s determined in *Tripplett*, applicant's claim of the mere fact his agent negotiated the contract terms in California establishes he was 'hired' in this state is not enough," and that "as there has been no communication directly between applicant and either team he played for, there cannot be a meeting of the minds, and there is no oral contract." (Report, at p. 5.) The WCJ observes that with respect to the issue of contract formation, "there are two schools of thought ... [o]ne in which the arguments are that the utterance of acceptance binds the parties at that moment … [t]he second takes the approach that unless and until the contract is signed, the contract has not been formed." (Report, at pp. 6-7.) Here, however, the WCJ found the reasoning in *Tripplett* to be persuasive, and based thereon, recommends we deny reconsideration.

DISCUSSION

Section 3600.5(a) provides that, "[i]f 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." (Lab. Code, § 3600.5.)

Section 5305 further 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.)

The burden of establishing that a contract of hire was made in California rests with applicant, who has the affirmative of the issue. (Cal. Lab. Code §§ 5705, 3202.5.) A contract of employment is governed by the same rules applicable to other types of contracts, including the requirements of offer and acceptance. (*Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd. (Egan)* (1966) 65 Cal.2d 429 [31 Cal.Comp.Cases 415].) The salient question in determining whether Labor Code section 5305 applies to a contract of hire is whether the acceptance took place in California. (*Aetna Casualty and Surety Co. v. Workers' Comp. Appeals Bd. (Salvaggio)* (1984) 156 Cal.App.3d 1097, 1103 [49 Cal.Comp.Cases 447]. Where parties have agreed in writing upon the essential terms of a contract, there is a binding contract even though a formal one is to be prepared and signed later. (*Commercial Casualty Insurance Company of Newark, New Jersey v. Indus. Acc. Comm. (Porter)* (1952) 110 Cal.App.2d 83 [17 Cal.Comp.Cases 84].)

The formation of a contract of 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." (*Alaska Packers Asso. v. Industrial Acci. Com. (Palma)* (1934) 1 Cal.2d 250, 256 [1934 Cal. LEXIS 358], affd. (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L. Ed. 1044, 20 I.A.C. 326] *(Palma)*; *Benguet Consol. Mining Co. v. Industrial Acci. Com.* (1939) 36 Cal.App.2d 158, 159 [1939 Cal.App. LEXIS 28]; *McKinley v. Arizona Cardinals (*2013) 78 Cal.Comp.Cases 23, 32-33 [2013 Cal. Wrk. Comp. LEXIS 2]; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].)

California courts have also held that the formation of an oral contract in California is sufficient to confer jurisdiction under section 5305. Under California law, "an oral contract consummated over the telephone is deemed made where the offeree utters the words of acceptance." (*Janzen v. Workers' Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109, 114 [71

Cal.Rptr.2d 260] (*Janzen*), citing *Travelers Ins. Co. v. Workmens' Comp. Appeals Bd. (Coakley)* (1967) 68 Cal.2d 7, 14 [32 Cal.Comp.Cases 527] (*Coakley*).) Pursuant to Civil Code section 1583, "[c]onsent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section." (Civ. Code, § 1583.) Thus, in *Paula Insurance Co. v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 426 [2000 Cal. Wrk. Comp. LEXIS 6264] (writ denied), the telephonic offer of employment by an Oregon employer, as accepted by the father of a California farm laborer, was sufficient to form a contract of hire.

Here, applicant testified to accepting three offers of employment while physically located in California. Applicant was drafted by the Indianapolis Colts while attending San Diego State University. (Transcript of Proceedings, at p. 14:18.) On the night of the draft, applicant was physically located in Ventura, California. (*Id.* at p. 15:4.) Applicant was subsequently contacted by his agent who presented applicant with the terms of the contract that applicant eventually signed. Applicant's agent presented the terms of the offer, including the length of the contract, applicant's salary, the signing bonus, the "splits in the contract," various incentives, and the options available to the applicant in the fourth year of the contract. (*Id.* at p. 15:22-16:17.) Applicant was physically located in San Diego, California, when he instructed his agent to accept the offer on his behalf. (*Id.* at p. 16:23.) Applicant later signed a written contract with the Colts outside of California. The written contract reflected the previous terms reached in the oral agreement. (*Id.* at p. 17:2.)

Three years later, the Colts declined to exercise their option to retain applicant for a fourth year, and applicant returned to San Diego, California. However, following additional negotiations, the Colts extended an offer for a second employment contract. Applicant testified that while he was in San Diego, California, his agent conveyed the terms of the second contract, including "all the years and numbers and terms" that had been discussed in connection with applicant's first contract. (Transcript of Proceedings, at p. 19:22.) Applicant then instructed his agent to convey his acceptance of the offer to the Colts. Thereafter, applicant signed the written contract outside California. The written contract contained no changes to the terms verbally conveyed by applicant's agent. (*Id.* at p. 20:8.)

Following the expiration of the second contract with the Colts, applicant returned to California. (Transcript of Proceedings, at p. 21:25.) In April, 2010, applicant was physically

located in Temecula, California when his agent contacted him with an employment offer from the Jacksonville Jaguars. Applicant's agent discussed the terms of the contract including salary and bonus issues. (*Id.* at p. 22:12.) Applicant then instructed his agent to convey applicant's acceptance of the offer to the Jaguars. Thereafter, applicant signed the written contract outside California. The written contract was "the exact manifestation of the negotiations and [applicant's] acceptance." (*Id.* at p. 23:11.)

Thus, applicant entered into two contracts with the Indianapolis Colts, and another contract with the Jacksonville Jaguars. In each instance, applicant was physically located in California when his agent contacted him and conveyed an offer of employment made by the Colts or the Jaguars. In each instance, applicant's agent discussed the relevant terms of the offer with the applicant, and after discussion, applicant accepted the offer and directed his agent to communicate his acceptance back to the offeror. In all three instances, applicant accepted an offer of employment while physically located in California.

In *Ledbetter Erection Corp. v. Workers' Comp. Appeals Bd. (Salvaggio)* (1984) 156 Cal.App.3d 1097 [49 Cal.Comp.Cases 447] (*Salvaggio*), the Court of Appeal held that the time and place of the acceptance of an offer of employment was dispositive, and that applicant's oral contract for hire was formed in Nevada, when the applicant uttered his acceptance of an offer of employment over the telephone while physically located in Nevada. (*Id*. at 1105.) Similarly, in *Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd. (Egan)* (1966) 65 Cal.2d 429 [31 Cal.Comp.Cases 415] (*Egan*), the California Supreme Court determined that applicant's contract of hire was formed in California when he physically went to the union local to pick up a referral slip and immediately departed for the jobsite. (*Id*. at 433-434.)

Here, the undisputed evidence establishes that applicant was physically located in California at the time each of the three offers to form a contract of hire were communicated to him. Applicant accepted each offer, and in each instance, instructed his agent to communicate his acceptance to the offering team, thus putting his acceptance "in the course of transmission to the proposer." (Civ. Code, § 1583; *Janzen, supra,* 61 Cal.App.4th 109; *Coakley, supra*, 68 Cal.2d 7, 14.)

Accordingly, a contract of hire was formed at the time and place of applicant's acceptance of the offer in California. (*Salvaggio, supra,* 156 Cal.App.3d 1097; *Egan, supra,* 65 Cal.2d 429; see also *Royster v. NFL Europe* (ADJ7597520, September 9, 2014) [2014 Cal. Wrk. Comp. P.D.

LEXIS 445] [acceptance of employment by applicant and agent while in California is hiring in this state]; *Stephens v. Nashville Kats* (ADJ4213301, April 1, 2015) [2015 Cal. Wrk. Comp. P.D. LEXIS 207] [applicant hired in California when he accepted employment by telephone in this state]; *Pierce v. Washington Redskins* (May 23, 2017, ADJ8937991) [2017 Cal. Wrk. Comp. P.D. LEXIS 244] [agent and applicant both in California when applicant accepted terms of contract sufficient for jurisdiction, notwithstanding applicant traveled out of state to sign the contract]; *Withrow v. St. Louis Rams* (May 23, 2017, ADJ6970905) [2017 Cal. Wrk. Comp. P.D. LEXIS 249] [applicant's acceptance of offer of employment in California sufficient for California jurisdiction]; *Paddio v. Cleveland Cavaliers* (May 26, 2017, ADJ7041227) [2017 Cal. Wrk. Comp. P.D. LEXIS 242] [applicant accepted offers of employment through his agent while in California and finalization of written contract and other employment documents after hiring in California are conditions subsequent to hiring and are not determinative of place of hiring].)

Applicant testified that the terms conveyed to him by his agent were reflected in the final written contracts. (Transcript of Proceedings, at pp. 17:9; 20:11; 23:11.) With respect to applicant's first contract with the Colts, the terms conveyed over the telephone by applicant's agent included the length of the contract, the annual salary applicant would receive, the amount applicant would receive as a signing bonus, the "splits" in the contract, various contractual performance incentives, and the relevant options available to the team and the applicant in the fourth year of the contract. (*Id.* at p. 15:22.) With respect to applicant's second contract with the Colts, applicant testified that his agent discussed "all the years and numbers and terms" discussed in relation to the first contract. (*Id.* at p. 19:22.) With respect to applicant's contract with the Jacksonville Jaguars, applicant's agent similarly conveyed the terms of the contract telephonically. (*Id.* at p. 22:10.) Thus, applicant testified that in all three instances his agent conveyed material terms of each offer, and in each instance, applicant accepted those terms. Moreover, in each instance, those terms were reflected in the final written contract without change. (*Id.* at p. 16:9; 20:14; 23:11.) In addition, there is no evidence in the record of changes to the terms conveyed to applicant telephonically in connection with his 2009 contract with the Colts, or the subsequent 2010 contract with the Jaguars.

The Colts aver "the evidence suggests that the team and the agent were negotiating additional terms including the split, the signing bonus and the incentive bonus up until August 1, 2006 - the day before the contract was signed … [t]his lack of an agreement caused Keiaho to miss the first few days of 2006 training camp." (Colts' Answer, at p. 12:20.) However, applicant

testified that he discussed that the terms of the salary "splits" as well as signing and incentive bonuses with his agent telephonically prior to accepting the offer of employment. (Transcript of Proceedings, at p. 15:22.) Moreover, the Colts do not identify with specificity what additional terms caused the purported delay, or how those terms differed from what applicant's agent discussed with him following the draft. The Colts' Answer further contends that with respect to the 2009 contract, applicant was not aware of the entirety of the terms of the contract, including the public appearance clauses and the reporting bonuses. (*Id.* at p. 12:23.) However, applicant's testimony was that he could not recall whether he had discussed the publicity and public appearance clauses of the contract with his agent. (*Id.* at p. 51:20.) Applicant was clear in his recollection and testimony that he discussed the signing bonus with his agent. (*Id.* at p. 52:1.)

We also observe that the issue presented is whether there is California subject matter jurisdiction as to applicant's claimed *injury.* Here, applicant alleges a cumulative injury from April 15, 2006 to December 1, 2010. (Transcript of Proceedings, at p. 4:2.) There is no dispute that applicant entered three separate contracts as relevant to the claimed cumulative injury. Pursuant to section 5305, subject matter jurisdiction extends to any controversy arising out of the claimed injury where a contract of hire was formed within the state. Thus, *any* of applicant's three contracts, all of which were formed in California at the time of applicant's acceptance, would be sufficient to confer subject matter jurisdiction over the injury claimed to have arisen in connection thereto. (See, e.g., *New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Macklin*) (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] [jurisdictional analysis extends to entire cumulative injury, rather than one teams' contacts with forum state].)

Moreover, California courts have held that a contract for hire is formed for purposes of California jurisdiction even when not every term has been negotiated, so long as the essential terms of engagement have been agreed upon. Decided more than 100 years ago, the case of *Globe Cotton Oil Mills v. Industrial Acc. Com.* (1923) 64 Cal.App. 307, 309-310 [1923 Cal. App. LEXIS 130], involved a contract for hire made in Calexico, California for work to be performed outside the state. The parties to the agreement did not reach an accord regarding applicant's wages until applicant had been working for several days. The court of appeal observed that "[t]he place of the contract is the place at which the last act was done by either of the parties essential to a meeting of the minds." (*Id*. at 309-310.) Thus, "[t]he substance of the negotiations was that at Calexico, within the state of California, [applicant] asked the superintendent for a job; the superintendent

said he would see about it and later told [applicant] that he could go to work." (*Id*. at 309.) Accordingly, a contract was formed in California when the parties reached a meeting of the minds regarding the employment, despite issues such as a rate of pay having not yet been negotiated. *(Ibid.)*

In *Egan, supra,* 65 Cal.2d 429, the employee accepted an offer of Nevada employment, conveyed by a representative of his union, while physically located at a union hiring hall in California. The Supreme Court held that the contract for hire was made in California even when certain out-of-state contingencies were to be satisfied at a date subsequent to the date of agreement, including the completion of a lengthy questionnaire in Nevada, applicant obtaining a security clearance once in Nevada before he could commence work, and where the employer could reject applicant when he appeared at job site in Nevada. (*Egan, supra,* 65 Cal.2d 429, 431-432.)

One year after the decision in *Egan*, the Supreme Court confirmed in *Coakley, supra*, 68 Cal.2d 7, that a contract for hire in California was established even where all of the conditions of employment were not yet finalized. In *Coakley*, applicant in California accepted an offer for work in Wyoming. Notwithstanding this oral contract for hire, the employer required the completion of additional documents and conditions, including, inter alia, documents specifying applicant's work, addressing patent rights, requiring four weeks' notice of termination, completion of a W-2 form, and completion of both a medical examination and a driver's test. Moreover, applicant's job title was changed following the initial agreement from Geological Aid/Technician to Assistant Engineer - Mud Logging. The Supreme Court held:

> [T]he oral California agreement included the essential terms of the contract: the parties, time and place of employment, salary, and the general category of employment (geologist). An employment contract need not detail every condition of employment (*Gordon v. Wasserman* (1957) 153 Cal.App.2d 328, 329 [314 P.2d 759]). That particular terms remain undesignated does not render the original contract invalid for uncertainty. Later agreement on the unspecified terms does not rescind the original contract (*Wilson v. Wilson* (1950) 96 Cal.App.2d 589, 594 [216 P.2d 104]), especially if the parties' performance indicates that they intended to be bound by the prime agreement. (*Bohman v. Berg* (1960) 54 Cal.2d 787, 794-795 [8 Cal.Rptr. 441, 356 P.2d 185].) Second, an alteration of details of the contract which leaves undisturbed its general purpose constitutes a modification rather than a rescission of the contract (*Grant v. Aerodraulics Co.* (1949) 91 Cal.App.2d 68, 74-75 [204 P.2d 683]); it does "not affect the original contract, which still remains in force." [Citations.]
> (*Coakley, supra*, 68 Cal.2d 7, 17.)

Accordingly, the Supreme Court concluded that a valid contract for hire was established in California, conferring California jurisdiction over the subsequent workers' compensation claim.

Here, applicant has testified that his agent conveyed the salient terms of the offers extended by the Colts and the Jaguars, and that in each instance, applicant accepted the offers and instructed his agent to convey his acceptance to the respective teams. We are persuaded that in each instance, applicant was apprised of the material terms of the offer made by each team. While it is true that the contracts contained various additional terms ranging from the injury grievance process (Ex. 104, NFL Player Contract, Para. 13) to a prohibition from accepting bribes to throw or fix a game (*Id.* at p. 15), "later agreement on unspecified terms does not invalidate the agreement." (*Coakley, supra*, 68 Cal.2d 7, 17.) Accordingly, and on the record before us, we conclude that applicant was apprised of the *material* terms of the offers made by the Colts and the Jaguars, and that in each instance, applicant accepted those offers, notwithstanding the need to finalize undesignated later terms.

The WCJ's Opinion on Decision also applied the analysis found in *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175] to the issues at bar. *Tripplett* involved a professional football player and California resident who asserted a contract for hire was formed when he signed a contract together with his agent at the agent's office in Newport Beach, California. (*Id.* at p. 559.) However, the actual signature pages to the contract appeared to demonstrate applicant's agent signed the document separately from applicant and that the agent faxed the signature page from a telephone number in Buffalo, New York. When presented with this evidence at trial, applicant admitted he did not remember where he signed the agreement. (*Id.* at p. 1177.) The WCJ nonetheless found that applicant's agent had negotiated the contract in California, thus conferring California jurisdiction over the dispute.

In a split panel decision, the WCAB reversed, finding that the evidence demonstrated "neither [Tripplett] nor his agent were in California when the employment was accepted and the contract was signed." (*Tripplett, supra,* 25 Cal.App.5th 556, at 561.) On applicant's petition for writ of review, the court of appeal affirmed the panel majority's determination of no jurisdiction, noting the factual discrepancies in the record did not support a finding that either applicant or his agent were present in California at time of the making of the contract of hire. However, the court went on to hold that because Tripplett retained the ability to reject any contract his agent negotiated, the agent could not bind applicant to a contract, and because the agent's negotiations

in California were the only contract-related activities in the state, there was no basis for California jurisdiction. (*Id.* at 567.) The opinion in *Tripplett* further rejected applicant's contentions that an oral agreement was reached in California because, "Tripplett's employment agreement was in writing and specified that it became effective only after execution," and because "there was no evidence any party believed a binding agreement had been formed before the parties executed the written document." (*Id.* at 563.) In addition to these determinations, the court in *Tripplett* opined:

> Additionally, the outcome here remains the same even if we assume that Tripplett's agent had some authority to bind him to an oral employment agreement at the conclusion of the agent's negotiation with Indianapolis. Tripplett's written employment agreement includes an integration clause that specifies it supersedes any prior oral agreement between the parties. Thus, the written agreement Tripplett signed while attending the team's minicamp in Indianapolis was the only agreement governing his employment relationship with the team.
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> (*Id.* at 567.)

We find *Tripplett* distinguishable on a factual basis, however, because *Tripplett* presented the question of whether applicant had met the burden of proof of establishing a contract of hire made in California. The jurisdictional question was decided adversely to applicant because he *did not meet that burden of proof*.

Here, the applicant does not contend that his agent had the authority to bind him to a contract. (Petition, at p. 8:21.) In addition, the applicant testified that he signed the Standard Representation Agreement (SRA) required by the NFL Players Association. (Transcript of Proceedings, at p. 57:5.) As is observed in both the Indianapolis Colts' and the Jacksonville Jaguars' Answers, the SRA provides that the agent "shall not have the authority to bind or commit Player to enter into any contract without actual execution thereof by Player." (Ex. 106, Records of Athletes First, p. 1, para. 3; Colts' Answer at p. 4:3; Jaguars' Answer at p. 7.) Thus, the pivotal issue decided in *Tripplett* – the location of both applicant and his agent at the time of acceptance – is not at issue in the present matter. Here, applicant's agent conveyed an offer to the applicant while applicant was in California. When applicant accepted that offer, a California contract of hire was formed. (*Palma, supra*, 1 Cal.2d 250; *Benguet Consol. Mining Co., supra,* 36 Cal.App.2d 158, 159; *Egan, supra,* 65 Cal.2d 429; *Coakley, supra,* 68 Cal.2d 7.)

The Colts' and Jaguars' Answers also observe that the standardized NFL Player Contract signed by applicant in each instance contains an "integration clause," that confirms the written contract to be the entire agreement, obviating any prior agreement, oral or written, except as attached to or specifically incorporated in the written contract. (Colts' Answer at p. 6:22; 7:23; Jaguars' Answer, at p. 10.) Defendants aver that pursuant to *Tripplett*, *supra*, 25 Cal.App.5th 556, the integration clause in each of applicant's written contracts with the various teams invalidates any prior agreements, including an oral contract of hire.

However, the discussion in *Tripplett* of the interaction between an oral contract of hire reached in California and a subsequent contract containing an integration clause is *obiter dictum*, and therefore not binding. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 945, pp. 986–987.) Although dictum may be persuasive authority if made by a court after careful consideration or in the course of an elaborate review of the authorities, it is axiomatic that cases are not authority for propositions they did not consider or address. (*Id. at* § 947, pp. 989–991, *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153 [29 Cal. Rptr. 3d 352]; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [119 Cal. Rptr. 2d 903]; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1195 [64 Cal.Comp.Cases 1].) The issue of whether an integration clause can invalidate a prior oral agreement for contract for hire in California was neither raised nor discussed at the trial level in *Tripplett*, nor was it raised or discussed in subsequent WCAB proceedings. (See *Tripplet [sic] v. Indianapolis Colts* (March 1, 2017, ADJ6943108) [2017 Cal. Wrk. Comp. P.D. LEXIS 123] (WCAB panel decision).)

Of course, the question of whether the dictum expressed in *Tripplett* should be followed warrants careful consideration in each case, and we note the California Supreme Court's subsequent denial of petition for review in *Tripplett*. (*Tripplett v. Workers' Compensation Appeals Bd.*, 2018 Cal. LEXIS 8421.) "To say that dicta are not controlling…does not mean that they are to be ignored, on the contrary, dicta are often followed. A statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 785, p. 756.)

The interplay between California's public policy-driven decision to extend jurisdiction based on a "contract of hire" and traditional principles of contract formation has been the subject

of a significant body of California jurisprudence. In *Palma, supra*, 1 Cal.2d 250, the Supreme Court opined:

> [T]he California [workers' compensation] act is compulsory and it is now settled that the right to, and the liability for, compensation established by it are not founded upon contract but are statutory rights and duties arising from the employer-employee relationship and are imposed by the law as incidents to that status. [Citations.] Consequently a decision upholding the so-called extraterritorial effect of our act cannot be placed upon this ground. We are of the opinion that the creation of the 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. (*Id.* at 257-258.)

In *Coakely, supra*, 68 Cal. 2d 7, the Supreme Court further delineated the distinction between the public policy-driven decision to extend California jurisdiction over contracts for hire made within the state, and traditional principles of contract law:

> California has rejected the traditional mechanical solutions to choice-of-law problems and adopted foreign law only when it is appropriate in light of the significant interests in the particular case. The significance of extra-state elements varies directly with the nature of the forum's interest in a given case. Thus, California maintains a stronger interest in applying its own law to an issue involving the right of an injured Californian to benefits under California's compulsory workmen's compensation act than to an issue involving torts or contracts in which the parties' rights and liabilities are not governed by a protective legislative scheme that imposes obligations on the basis of a statutorily defined status.
>
> (*Id.* at pp. 11-12.)

The court further explained:

> "Workmen's compensation contemplates a substitution of the contractual rights and obligations which normally flow between worker and employer with a complete and exclusive statutory scheme based not upon contract but upon status. The relationship of employer and employee itself generates the rights and obligations; the legislation describes the content and extent of those rights and obligations." (*Noe v. Travelers Ins. Co.* (1959) 172 Cal.App.2d 731, 733 [342 P.2d 976].) "[The] liability under workmen's compensation acts is...imposed as an incident of the employment relationship…[California has] as great an interest in affording adequate protection to this class of its population [California employees injured outside California] as to employees injured within the state."

(*Id.* at p. 12, fn. 3.)

Additionally, the court addressed the question of "who should be embraced within the class of beneficiaries," by applying the liberal construction provisions of Section 3202, wherein the court "follow[ed] the legislative mandate to construe liberally the provisions of the statute, including those defining the class of persons who are entitled to the statutory benefits." (*Id.* at p. 13.)

In *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771 [37 Cal.Comp.Cases 185], the Supreme Court again addressed the interplay between common law principles of contract formation and California's public policy interests in extending workers' compensation benefits to all persons hired in California. Applicant John Laeng was injured while participating in a physical agility challenge as part of a job tryout for defendant City of Covina. (Id. at p. 774.) The workers' compensation referee, although sympathetic to the "equities" of Laeng's claim, nevertheless ruled that under traditional employment principles, Laeng, who was participating in pre-employment "tryout" was not an employee at the time of his injury. The WCAB affirmed. The Supreme Court, ultimately overturning the WCAB, ruled that "[a]lthough at the time of his injury Laeng was concededly not an 'employee' of the city in a strict, contractual sense of that term, we are not constrained in interpreting the provisions of the Workmen's Compensation Act by the common law contractual doctrine but must instead be guided by the purposes of the legislation at issue. (*Id.* at p. 774.)

> Given these broad statutory contours, we believe that an "employment" relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act.
>
> (*Id.* at p. 777.)

However, the Supreme Court further observed in a footnote to the above text that:

> By this statement, of course, we do not imply that common law notions of the employment relationship should never be considered in determining the issue of 'employment' under work[ers'] compensation, but only that such common law principles are not determinative of the issue. The differences between the common law and work[ers'] compensation usage of the term 'employment' stem from the fundamentally different purposes served by the employment concept in each context...Although there is considerable overlap between the two fields, in

> each context the determination of the presence or absence of a sufficient 'employment' relationship must ultimately depend on the purpose for which the inquiry is made."
>
> (*Id.* at pp. 777-778, fn. 7.)

Laeng thus provided for the application of traditional principles of contract formation within a workers' compensation context, but further provided that any such application should be in furtherance of the principles and public policy informing the legislature's implementation of the California workers' compensation system. While we acknowledge that the decision in *Laeng* addressed fundamental issues of what constituted employment under section 3351, the decision in *Laeng* is instructive for its conclusion that common law principles of contract formation may *inform*, but should not *limit*, California's interests in extending its workers' compensation benefits for the protection of persons injured in the course of their employment. (Lab. Code § 3202.)

Thus, although we distinguish *Tripplett* on its facts, we further observe that the integration clause described at paragraph 21 of each of the NFL Player Contracts in evidence would not preclude California jurisdiction if that jurisdiction was previously conferred when the parties entered into an oral contract of hire from within California. (Ex. 104, Relevant Portions of records from Indianapolis Colts, various dates, Bates stamp p. 15; Ex. 105, Relevant Portions of records from Jacksonville Jaguars, various dates, p. 16.)

Once conferred, that jurisdiction is prescribed by law and it cannot be increased or diminished by contract. (See, e.g., *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285, 289 (277 P. 1039) ["The rules to determine in what courts and counties actions may be brought are fixed upon consideration of general convenience and expediency by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law, and interfere with such convenience."]; *Beirut Universal Bank v. Superior Court* (1969) 268 Cal.App.2d 832, 843 (74 Cal.Rptr. 333) ["[A]n express provision in a contract that no suit shall be maintained thereon, except in a particular court or in the courts of a particular county, state or nation, is not effective to deprive any court of jurisdiction that it otherwise could have over litigation based on that contract."].) Given our factual determination that applicant entered into three separate contracts for hire while present in California, and that applicant's subsequent ratification of a written employment contract does not serve to invalidate California statutory jurisdiction, we conclude that California continues to maintain jurisdiction over the claimed injury herein.

We also address defendants' contention that the forum selection clauses contained in the various NFL Players Contracts require that we decline to exercise jurisdiction in this matter. (Jaguars' Answer, at p. 12.) Citing to our en banc decision in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 [2013 Cal. Wrk. Comp. LEXIS 2] (*McKinley*), the Jaguars contend that "California has a strong public interest in following the parties' terms to a contract in exercising jurisdiction over an applicant's workers' compensation claim." (Jaguars' Answer, at p. 12.)

In *McKinley*, the Appeals Board held if the claimed injury has a limited connection to California, the WCAB will decline to exercise jurisdiction when there is a reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation shall be filed in a forum other than California. (*McKinley, supra*, 78 Cal.Comp.Cases at p. 24.) However, our analysis of California contacts in *McKinley* was necessary because applicant enjoyed no California contract of hire, which would otherwise provide a "jurisdictional basis for legislating the terms of the employment agreement and hearing the workers' compensation claim." (*McKinley, supra*, 78 Cal.Comp.Cases 23, at p. 32.)

Here, the formation of an oral contract of hire within California is sufficient to confer subject matter jurisdiction. (*Palma, supra,* 1 Cal.2d 250, 256; *Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson)* (2013) 221 Cal.App.4th 1116, 1126 [165 Cal.Rptr.3d 288] ["the creation of the employment relationship in California, which came about when he signed the contract in San Francisco, was a sufficient contact with California to warrant the application of California workers' compensation law"].) Thus, a hiring in this state is by itself sufficient connection with California to support the exercise of WCAB jurisdiction over a workers' compensation claim. (*Jackson v. Cleveland Browns* (December 26, 2014; ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].) Where the hiring is made in California, the employee "shall be entitled to the compensation … provided by this division" (Lab. Code, § 5305), and "shall be entitled to compensation according to the law of this state." (Lab. Code, §3600.5(a).) The word "shall" as used in the Labor Code is mandatory. (Lab. Code, § 15; *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357 [127 Cal. Rptr. 2d 516, 58 P.3d 367].) As we noted in *Jackson, supra,* 2014 Cal. Wrk. Comp. P.D. LEXIS 682, the conferral of jurisdiction arising out of California contracts of hire as embodied in sections 5000, 5305, and 3600.5(a) reflects the public policy of California, and precludes the enforcement of the choice of law/forum selection clauses that purport

to deprive California of that jurisdiction.

In summary, the record discloses that applicant was physically located within the territorial boundaries of California when he received three offers of employment from the Indianapolis Colts and the Jacksonville Jaguars. In all three instances, the relevant and material terms of the contract were conveyed by applicant's agent telephonically, and applicant accepted the offer of employment and directed his agent to convey the acceptance back to the offeror. Thus, applicant formed a valid contract of hire in California with the Colts on two occasions, and with the Jaguars on one additional occasion. The place of contract formation in each of these three contracts was California, and the oral contract of hire was sufficient to confer California jurisdiction over controversies arising out of the ensuing employments pursuant to section 5305. We are thus persuaded that pursuant to section 5305, the evidentiary record supports California subject matter jurisdiction over applicant's alleged cumulative injury. We further conclude that the making of a contract of hire in California is sufficient to invoke California jurisdiction, which is a reflection of California public policy, and precludes the enforcement of forum selection provisions that would otherwise obviate that jurisdiction.

Accordingly, we will rescind the November 15, 2019 F&O, and substitute new findings that the Workers' Compensation Appeals Board has subject matter jurisdiction over the claimed cumulative injury, and deferring all other issues. We will further return this matter to the trial level for further proceedings and decision by the WCJ, from which any aggrieved person may seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order, issued on November 18, 2019, is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Freddy Keiaho, while employed during the period April 15, 2005 through December 1, 2010, with the last exposure being August 13, 2010, as a professional athlete, occupational group number 590, by Indianapolis Colts and Jacksonville Jaguars, claims to have sustained injury arising out of and in the course of employment to head, brain, jaw, neck, teeth, back, psyche, bilateral shoulders, bilateral hips, bilateral legs, bilateral arms, bilateral knees, bilateral ankles, bilateral feet, bilateral wrists, bilateral elbows, bilateral hands, fingers, toes, and sleep disturbance.
2. At the time of injury the employers' workers' compensation carrier were ACE American Insurance Company for the Jacksonville Jaguars for the period March 31, 2010 through March 31, 2011, and Great Divide Insurance Company for the Indianapolis Colts for the period August 20, 2006 through March 4, 2010.
3. Applicant is at the maximum statutory amount for permanent disability and no periods of temporary total disability is being claimed.

4. The Workers' Compensation Appeals Board has subject matter jurisdiction over the claimed cumulative injury.
5. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2024

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

FREDDY KEIAHO
LAW OFFICES OF MARK SLIPOCK
PEARLMAN, BROWN & WAX
GOLDBERG SEGALLA

SAR/abs

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