WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEFFREY CIRILLO, *Applicant*

vs.

ARIZONA DIAMONDBACKS; MINNESOTA TWINS; SAN DIEGO PADRES; SEATTLE MARINERS; MILWAUKEE BREWERS, INSURED BY ACE, ADMINISTERED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10373424
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Ace American Insurance Company/CHUBB, administered by Sedgwick CMS, for the Arizona Diamondbacks, the Minnesota Twins, the Milwaukee Brewers, the San Diego Padres, and the Seattle Mariners (Defendant) seeks reconsideration of the July 1, 2024 Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete, sustained industrial injury to his head, jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and internal systems, and in the form of headaches, post-traumatic head syndrome, sleep, hypertension, acid reflux and dental conditions. The WCJ found, in relevant part, that the Workers' Compensation Appeals Board (WCAB) has subject matter jurisdiction over the dispute; that applicant sustained injury arising out of and in the course of employment; that applicant sustained a cumulative injury; that applicant's claim was not barred by Labor Code[1] section 5405; and that applicant did not violate section 4060 et seq. regarding the procedures for obtaining medical-legal reporting.

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

Defendant contends that the WCAB has no jurisdiction over this dispute pursuant to section 3600.5(b); that applicant sustained multiple injuries with corresponding dates of injury between 2002 and 2007; that the reporting of treating physician Dr. Fonceca is not substantial medical evidence; that the WCJ erred in entering findings on an incomplete record; and that applicant failed to follow the applicable procedures regarding obtaining medical-legal reporting.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration to amend the findings of fact that the section 5412 date of injury was May 16, 2016, but otherwise affirm the F&O.

FACTS

Applicant claimed injury to his head, jaw, back, neck, shoulders, elbows, wrists, hands, fingers, hips, knees, angles, feet and toes, psyche, neurological system in the forms of headaches and post traumatic head syndrome, internal systems in the form of hypertension and acid reflux, dental, and sleep, while employed as a professional baseball player by defendant the Arizona Diamondbacks, Minnesota Twins, Milwaukee Brewers, San Diego Padres, Seattle Mariners, and Colorado Rockies from June 5, 1991 to October 1, 2007.

The parties have selected Jeffrey Berman, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine The parties previously selected David Wood, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine. Applicant selected Allen Fonseca, M.D., as his primary treating physician (PTP) in orthopedic medicine, Ted Greenzang, Ph.D., as the secondary treating physician in psychology, and Kenneth Nudleman, M.D., as the secondary treating physician in neurology.

The parties initially proceeded to trial on July 25, 2023 and framed issues for decision, in relevant part, subject matter jurisdiction, including the applicability of the exemptions of section 3600.5, subdivisions (b), (c) and (d); whether applicant's claim was barred by the statute of limitations; injury arising out of and in the course of employment (AOE/COE); whether applicant

complied with the procedure for obtaining medical-legal reporting under sections 4060 to 4062; permanent disability and apportionment; and the need for further medical treatment. (Transcript of Proceedings, dated July 25, 2023, at p. 11:15.) The WCJ heard testimony from applicant and ordered the matter continued for additional testimony.

On February 15, 2024, the WCJ heard additional testimony from the applicant and ordered the matter continued for additional testimony.

On May 30, 2024, the WCJ heard additional testimony from defense witness There Baxter, and from applicant. The WCJ ordered the matter submitted for decision as of June 17, 2024. (Minutes of Hearing and Summary of Evidence, dated May 30, 2024, at p. 1:24.)

On July 1, 2024, the WCJ issued the F&O, determining in relevant part that the WCAB has subject matter jurisdiction over applicant's claims (Findings of Fact No. 4); that applicant's claim is not barred by the statute of limitations (Finding of Fact No. 2); that applicant sustained injury AOE/COE to the head, jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, internal systems, headaches, post-traumatic head syndrome, sleep, hypertension, acid reflux and dental conditions (Finding of Fact No. 10); and that applicant was entitled to future medical treatment due to his industrial injuries (Finding of Fact No. 12). The WCJ deferred the issue of permanent disability and ordered the parties to file their proposed ratings with the court. (Order No. 1.)

Defendant's Petition contends the WCJ erred in finding that labor code section 3600.5(b) does not preclude the exercise of subject matter jurisdiction over the Arizona Diamondbacks. Defendant further contends error in the determination of the date of injury pursuant to section 5412 and that applicant's claim is barred under the notice requirements of section 3600.5(e). Defendant submits that the WCJ's decision was premature, and that the record should be developed especially with respect to applicant's current physical activities; and that it was likewise premature to award future medical treatment. Defendant asserts the reporting of PTP Dr. Fonseca does not constitute substantial medical evidence and that the reporting of secondary treating physicians Dr. Greenzang and Dr. Nudleman were improperly obtained and inadmissible.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on August 5, 2024, and the next business day that is 60 days from the date of transmission is October 4, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after October 4, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 5, 2024, and the case was transmitted to the Appeals Board on August 5, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 5, 2024.

II.

We begin our discussion with the issue of subject matter jurisdiction. The WCJ determined that "[t]here is California subject matter jurisdiction over [a]pplicant's claim(s)." (Finding of Fact No. 4.) The WCJ has further determined that subdivision (c) of section 3600.does not apply to the Arizona Diamondbacks, the Minnesota Twins, the Milwaukee Brewers, or the Seattle Mariners, and that subdivision (d) does not exempt defendants from liability herein. (Findings of Fact Nos. 8 & 9.)

Defendant challenges these findings, asserting that section 3600.5(b) precludes subject matter jurisdiction as it relates to the Arizona Diamondbacks. (Petition, at p. 4.) Defendant avers that while the applicant was employed by the Arizona Diamondbacks he was temporarily working in California, and that the Diamondbacks maintained collateral workers' compensation insurance coverage as required under section 3600.5(b), such that the applicant's claim of injury is exempt from California jurisdiction.

Under California's workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 3600 et seq., 5300 and 5301.) The statutes establishing the scope of the WCAB's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v. Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244], cert den., 362 U.S. 928, 80 S. Ct. 753, 4 L. Ed. 2d 746 (1960).)

In general, the WCAB can assert subject matter jurisdiction in a presented workers' compensation injury claim when the evidence establishes that an employment related *injury*, which is the subject matter, has a significant connection or nexus to the state of California. (See §§ 5300, 5301; *King, supra*, 270 F.2d at 360; *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116, 1128 [165 Cal.Rptr.3d 288]).)
1960).)

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Labor Code section 3600.5 provides, in relevant part:

> (a) 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.
>
> (b)
>
> (1) An employee who has been hired outside of this state and his or her employer shall be exempted
> from the provisions of this division while the employee is temporarily within this state doing work for his or her employer if the employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than California, so as to cover the employee's work while in this state if both of the following apply:
>
> (A) The extraterritorial provisions of this division are recognized in the other state.
>
> (B) The employers and employees who are covered in this state are likewise exempted from the
> application of the workers' compensation insurance or similar laws of the other state.
>
> (2) In any case in which paragraph (1) is satisfied, the benefits under the workers' compensation insurance or similar laws of the other state, and other remedies under those laws, shall be the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the employee while working for the employer in this state.

(c)

(1) With respect to an occupational disease or cumulative injury, a professional athlete who has been hired outside of this state and his or her employer shall be exempted from the provisions of this division while the professional athlete is temporarily within this state doing work for his or her employer if both of the following are satisfied:

(A) The employer has furnished workers' compensation insurance coverage or its equivalent under the laws of a state other than California.

(B) The employer's workers' compensation insurance or its equivalent covers the professional athlete's work while in this state.

(2) In any case in which paragraph (1) is satisfied, the benefits under the workers' compensation insurance or similar laws of the other state, and other remedies under those laws, shall be the exclusive remedy against the employer for any occupational disease or cumulative injury, whether resulting in death or not, received by the employee while working for the employer in this state.

(3) A professional athlete shall be deemed, for purposes of this subdivision, to be temporarily within this state doing work for his or her employer if, during the 365 consecutive days immediately preceding the professional athlete's last day of work for the employer within the state, the professional athlete performs less than 20 percent of his or her duty days in California during that 365-day period in California.

(d)

(1) With respect to an occupational disease or cumulative injury, a professional athlete and his or her employer shall be exempt from this division when all of the professional athlete's employers in his or her last year of work as a professional athlete are exempt from this division pursuant to subdivision (c) or any other law, unless both of the following conditions are satisfied:

(A) The professional athlete has, over the course of his or her professional athletic career, worked for two or more seasons for a California-based team or teams, or the professional athlete has, over the course of his or her professional athletic career, worked 20 percent or more of his or her duty days either in California or for a California-based team. The percentage of a professional athletic career worked either within California or for a California-based team shall be determined solely by taking the number of duty days the professional athlete worked for a California-based team or teams, plus the number of duty days the professional athlete worked as a professional athlete in California for any team other than a California-based team, and dividing that number by the total

number of duty days the professional athlete was employed anywhere as a professional athlete.

(B) The professional athlete has, over the course of his or her professional athletic career, worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section.

(2) When subparagraphs (A) and (B) of paragraph (1) are both satisfied, liability for the professional athlete's occupational disease or cumulative injury shall be determined in accordance with Section 5500.5.

(Lab. Code, § 3600.5.)

Defendant's Petition contends that as it relates to applicant's employment with the Arizona Diamondbacks, applicant was hired outside California and was temporarily working within California during his period of injury. Defendant contends that because applicant was covered by collateral workers' compensation insurance obtained by his employer that meets the extra-territorial coverage and reciprocity requirements specified under section 3600.5(b), the WCAB lacks jurisdiction over this dispute.

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.
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> (Lab. Code, § 5305.)

Thus, the jurisdiction of the WCAB arises out of the *subject matter* of the *controversy*, which is applicant's assertion he sustained a cumulative injury. The question of subject matter jurisdiction is therefore not confined to a particular employment, but rather the relationship between the claimed *injury* and California. "It has never been the law that each and every employer who is potentially liable must have a significant connection or nexus to the state of California in order for the WCAB to assert subject-matter jurisdiction over that employer as a matter of due process; as long as the claim as a whole has such a connection or nexus, this particular requirement is met." (*Worrell v. San Diego Padres* (2020) 85 Cal.Comp.Cases 246, 254 [2020 Cal. Wrk. Comp. P.D. LEXIS 1, 13-14].)

The Court of Appeal has similarly framed the issue as one of jurisdiction over the *injury* in *New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Macklin*) (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] (*Macklin*), a case in which applicant alleged a four-year cumulative injury spanning his employment with multiple NBA teams. Defendant New York Knickerbockers asserted the WCAB's exercise of subject matter jurisdiction abrogated their due process rights because of applicant's limited contact with California *while employed by the Knicks organization*. However, the court of appeal disagreed with defendant's premise, observing that the scope of the inquiry was not limited to applicant's time spent playing for the Knicks, but rather "whether [applicant's] *injuries* have a sufficient relationship with California for the invocation of California workers' compensation law." (*Id.* at p. 1239, italics added.)

Accordingly, our inquiry into subject matter jurisdiction over the presented controversy is not limited to the facts arising out of applicant's employment by a single team during his cumulative injury claim, but instead we examine the issue in the context of the entire subject matter of controversy, which is applicant's claimed injury from June 5, 1991 to October 1, 2007.

The legislature has 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"]; *Johnson, supra,* 221 Cal.App.4th 1116, 1126 ["the 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.

Sections 3600.5 and 5305 represent the exercise of the legislature's plenary power to create and enforce a complete system of workers' compensation in California. (Cal. Const., art. XIV, § 4.) These statutory provisions, in turn, reflect California's strong interest in applying a "protective legislative scheme that imposes obligations on the basis of a statutorily defined status." (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Coakley)* (1967) 68 Cal.2d 7, 12-13 [32 Cal.Comp.Cases 527] *(Coakley)*.)

> [California's] interest devolves both from the possibility of economic burden upon the state resulting from non-coverage of the workman during the period of incapacitation, as well as from the contingency that the family of the workman might require relief in the absence of compensation. The California statute, fashioned by the Legislature in its knowledge of the needs of its constituency, structures the appropriate measures to avoid these possibilities. Even if the employee may be able to obtain benefits under another state's compensation laws, California retains its interest in insuring the maximum application of this protection afforded by the California Legislature.
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> (*Coakley, supra,* 62 Cal.2d 7, citing *Reynolds Electrical etc. Co. v. Workmen's Comp. Appeals Board* (1966) 65 Cal.2d 429, 437-438 [31 Cal.Comp.Cases 415].)

Thus, the California legislature has enacted sections 3600.5 and 5305 as a reflection of public policy:

> If this were not so there could be no compensation for an injury arising out of and in course of the employment but occurring before the jurisdiction in which the services were to be performed had been entered, or where that jurisdiction had no compensation statute. This would seriously interfere with the policy of the act*, which is to charge to the industry those losses which it should rightfully bear, and to provide for the employee injured in the advancement of the interests of that industry, a certain and prompt recovery commensurate with his loss and, in so doing, lessen the burden of society to care for those whom industry has deprived, either temporarily or permanently, of the ability to care for themselves*. Having a social interest in the existence within its borders of the employer-employee relationship, the state may, under its police power, impose reasonable regulations upon its creation in the state. That the imposition of such conditions is in line with the present-day policy in compensation legislation cannot be doubted.
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> (*Palma, supra,* 1 Cal.2d 250, 256, italics added.)

Accordingly, a hiring in California, 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, applicant asserts that he was physically located in California at the time he was hired by multiple teams during the alleged cumulative injury. Applicant testified that he signed his first professional baseball contract in 1991 at his parents' home in Van Nuys, California. (Transcript of Proceedings, dated July 25, 2023, at p. 38:11.) In addition, applicant agreed to an offer of employment for a four-year contract with the Milwaukee Brewers while in California in 1997. (*Id.* at p. 41:3.) Applicant further testified that he reached an agreement as to the essential terms for a contract extension with the Brewers while in California in 2000. (*Id.* at p. 4.:2.)

The WCJ's Report discusses in detail the applicant's testimony regarding the time and place of his hirings. (Report, at p. 4.) The Report also considers the testimonial infirmities alleged in defendant's Petition, but ultimately concludes that applicant's testimony was the more convincing and credible. (*Id.* at p. 5.) We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) We therefore agree with the WCJ's conclusion that applicant's testimony "supports finding verbal if not written contracts of hire with them, occurring within [California's] territorial limits," (Report, at p. 6.)

The record thus establishes that applicant was hired on multiple occasions while physically present in California during his professional baseball career. Pursuant to sections 3600.5(a) and 5305, the formation of these contracts of hire within California's territorial borders confers on the WCAB subject matter jurisdiction over the claimed cumulative injury. (Lab. Code, §§ 3600.5(a), 5305; *Palma, supra*, 1 Cal.2d 250; *Benguet Consol. Mining Co. v. Industrial Acci. Com., supra,* 36 Cal.App.2d 158, 159; *McKinley, supra,* 78 Cal.Comp.Cases 23.)

We further observe that the finding of subject matter jurisdiction based on the formation of a California contract of hire obviates the requirements set forth in section 3600.5(c) and (d). In *Hansell v. Arizona Diamondbacks* (April 7, 2022, ADJ10418232) [2022 Cal. Wrk. Comp. P.D.

LEXIS 83] we addressed the question of whether "subdivisions (c) and (d) of section 3600.5 override the general jurisdictional provisions of sections 3600.5(a) and 5305 that provide for jurisdiction where there is a California hire during the period of injury, or do these subdivisions apply only to claims where there is no California hire?" (*Id.* at p. 17.) We noted that "the stated purpose of the amendments to section 3600.5 was to limit the ability of 'out of state professional athletes' with 'extremely minimal California contacts' to file workers' compensation claims in California … The amendments were reacting in large part to a line of decisions that allowed athletes employed by out-of-state teams, who had not been hired in California or played regularly here, to recover California workers' compensation benefits based solely on a handful of games played in this state while employed by their out-of-state teams." (*Id.* at pp. 21-22.) However, we also observed that in narrowing the scope of California jurisdiction applicable to certain professional athletes, the legislature made clear their desire not to disturb the principle that jurisdiction is appropriately conferred when there is a California contract of hire:

> As is relevant here, the Legislature stated: "It is the intent of the Legislature that the changes made to law by this act shall have no impact or alter in any way the decision of the court in [*Bowen v. Workers' Comp. Appeals Bd.*] (1999) 73 Cal. App. 4th 15 [86 Cal. Rptr. 2d 95]." (Stats. 2013 ch. 653 (AB 1309) § 3.) The central holding of Bowen, affirming sections 3600.5(a) and 5305, is that a contract of hire in this state will support the exercise of California jurisdiction even over a claim based purely on out-of-state injury, and that a player's signing of the contract while in this state constitutes hire in this state for that purpose. (*Bowen, supra*, 73 Cal. App. 4th at 27.)
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> Taken together, these two expressions suggest that the Legislature did not intend for subdivisions (c) and (d) to apply to athletes who have been hired in California by at least one employer during the cumulative trauma injury period.
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> (*Id.* at p. 23.)

We also concluded that, "[i]f a hire in California during the injury period is a compelling connection to the state, by definition such athletes would not fall into the category of those with 'extremely minimal California contacts' whose claims the Legislature sought to exempt." (*Ibid*.) Accordingly, we found that the formation of a California contract of hire was sufficient to confer subject matter jurisdiction over a claimed injury, obviating the exemption/exception analysis required under section 3600.5(c) and (d). (See also *Neal v. San Francisco 49ers* (March 9, 2021, ADJ9990732) [2021 Cal. Wrk. Comp. P.D. LEXIS 68]; *Wilson v. Florida Marlins* (February 26,

2020, ADJ10779733) [2020 Cal. Wrk. Comp. P.D. LEXIS 30]; cf. *Harrison v. Texas Rangers* (May 26, 2023, ADJ13604193) [2023 Cal. Wrk.Comp. P.D. LEXIS 151] [no jurisdiction over injury where applicant had no California contract of hire, played more than seven seasons with out-of-state teams, and worked less than 20 percent of duty days in California]; cf. *Kouzmanoff v. Texas Rangers* (May 17, 2024, ADJ10501182, ADJ10501198) [2024 Cal. Wrk. Comp. P.D. LEXIS 189] (section 3600.5(c) and (d) analyses apply to subject matter jurisdiction dispute if professional athlete was not hired in California under 3600.5(a)).)

We therefore conclude that in conjunction with section 5305, the conferral of subject matter jurisdiction under section 3600.5(a) based on a hiring in California obviates the analyses that would otherwise be required under section 3600.5(c) and (d). (Report, at pp. 8-9.)

Defendant next contends the WCJ erred in determining a date of injury of June 15, 1991-May 16, 2016. (Petition, at p. 11; Finding of Fact No. 5.) Defendant submits that applicant's multiple injuries and surgeries over the course of his career each resulted in compensable disability, and that applicant knew, or through the exercise of reasonable diligence should have known, that the disabilities were industrially-related. (Petition, at p. 12.)

In cases involving an alleged cumulative trauma injury, the date of injury is governed by Labor Code section 5412, which provides:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

The court of appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*).)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).) An employee is not charged with knowledge that his or her disability is job-related

without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability. (*Johnson, supra,* at 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].)

The burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms. (*Johnson, supra*, 163 Cal.App.3d 467, 471.) This is because "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Here, defendant contends that applicant sustained compensable disability following various injuries requiring medical treatment over the course of his professional baseball career. (Petition, at p. 12.) Defendant further contends that applicant knew or should have known of the work-relatedness of his injuries because applicant "is an educated individual, having graduated with a degree from University of Southern California," and because applicant received notice of his rights to file a claim for workers' compensation benefits in the State of Washington. (Petition, at p. 15.)

The WCJ determined that the first evidence of medical advice as to the existence of a cumulative injury arising out of his professional baseball career occurred when applicant received the reporting of PTP Dr. Fonseca, dated May 16, 2016. (Report, at p. 6.) Defendant contends, however, that the factual infirmities in the reporting of the PTP preclude reasonable reliance on the reporting for purposes of establishing a date of injury under section 5412. (Petition, at p. 11.) The WCJ's Report responds:

> Asserted deficiencies of Dr. Allen S. Fonseca's reporting by Defendants is misplaced. It is relied upon as substantial evidence Applicant first knew and should have known his California cumulative trauma injuries were caused by his present or prior employment regarding this issue.
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> Reliance on that report for the issue of knowledge requires nothing other than it being evidence of initial knowledge Applicant knew or should have known he had a California workers' compensation cumulative trauma injury. The undersigned finds Dr. Fonseca's reporting precisely this evidence, not to be confusing, misunderstood or misinterpreted by Applicant, and supportive of

> finding the date of cumulative trauma injury in the [F&O] given Applicant's credible testimony of baseball related micro traumas throughout his career.
>
> Defendants appear to couch Applicant's series of micro traumas as multiple cumulative trauma injuries despite each being followed by return to usual and customary work as a professional baseball player until career-end. It is noted these issues appear not to be specifically raised in the parties' [pre-trial conference statement], the parties stipulate and admit a date of injury during the period of 06/05/91-10/1/07, but the issue is addressed here as raised for the first time.
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> The undersigned finds insufficient record of separate cumulative trauma injuries. The record of micro traumas with subsequent returns to professional baseball activities reflect occurrence of a single "macro" cumulative trauma date of injury, caused by multiple micro traumas over an entire career of professional baseball. This single California cumulative trauma injury could not have been known or capable of being known by Applicant until he saw Dr. Fonseca who issued his initial May 16, 2016 report.
>
> (Report, at pp. 7-8.)

We agree with the WCJ's analysis. We also observe that the evidentiary record does not disclose any particular training, background or experience that would otherwise enable applicant to identify a cumulative injury or to discern the industrial nature of that disability. (*Johnson, supra*, 163 Cal.App.3d 467.) The first evidence in the record of notice to the applicant of the existence of a cumulative injury arising out of his industrial exposures was the May 16, 2016 report of Dr. Fonseca. (Ex. 1, Report of Allen Fonseca, M.D., dated May 16, 2016.) Because the first concurrence of compensable disability and knowledge of its work-relatedness occurred when applicant was so advised by his PTP, the date of injury under section 5412 was May 16, 2016.

We note, however, that the date of injury as defined in section 5412 refers to a single date rather than a range of dates. Accordingly, we will grant reconsideration herein to amend the findings of fact to reflect that date of injury pursuant to section 5412 was May 16, 2016.

Defendant further contends that the reporting of applicant's treating physicians are not substantial evidence and that the WCJ erred in not ordering development of the record prior to issuing his decision. (Petition, at pp. 15-18.) Defendant asserts that these physicians essentially issued medical-legal reports, and that the physicians were outside a reasonable geographic distance from applicant. As such, the reports of applicant's treating physicians were an inappropriate basis upon which to determine the submitted issues herein. (*Ibid*.)

The WCJ's Report observes, however, that while reporting of Dr. Fonseca follows a medical-legal format, the contents of the reporting are "well within the scope of a treating physician[']s duties by even a cursory reading of Title 8 California Code of Regulations §§ 9785, 10682 and Labor Code §4628." (Report, at p. 9.) The WCJ also observes that in any event, the reporting of applicant's treating physicians are admissible pursuant to *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209] (*Valdez*), which held that the Appeals Board is broadly authorized to consider the reports of attending or examining physicians.

Regarding the weight the evidence was accorded by the WCJ, the Report states:

> In this matter a heavy preponderance of evidence finds Applicant's professional baseball career due to cumulative trauma. Dr. Fonseca addressed each body part alleged industrially injured therefrom. The undersigned relies on it in finding injuries to the body parts he found compensable in conjunction with all other physicians providing opinions Applicant suffered cumulative trauma injuries because of his professional baseball activities. The undersigned points out the following in the Findings of Fact and Orders:
>
> > "A decision cannot be issued because further development of the record is required in the form of each party's proposed permanent disability rating or ratings, applying the Schedule for Rating Permanent Disabilities (January 2005). Disputes thereof if any may require referral to the Disability Evaluation Unit, rating by the undersigned, further development of the medical-legal record or other action that cannot be determined before ensuring statutory compliance addressed above."
>
> Thus, orders 1-2 specifically address a limited need further development of the record. It is limited but contemplates possible necessity for further development of the record only after parties demonstrate statutory compliance regarding ratings.
>
> (Report, at p. 12.)

Here, there has been no final award of permanent disability because the WCJ has ordered that the parties file proposed ratings with the Court. As the WCJ notes in his report, the issue of permanent disability remains pending, as does the issue of whether additional development of the record will be required. Accordingly, we decline to disturb the WCJ's orders regarding the filing of proposed ratings, or for development of the record. (Findings of Fact Nos. 1 & 2.)

In summary, we conclude that the question of subject matter jurisdiction must be evaluated with respect to the entire claimed injury, rather than with respect to a single employer during the claimed cumulative injury period. We agree with the WCJ that the evidence supports applicant's hiring in California, thus conferring subject matter jurisdiction on the WCAB over the claimed injury. In addition, we discern no error in the WCJ's reliance on the treating physician reporting offered in evidence as to the issues of injury AOE/COE and, in part, as to the nature and extent of the injury. Nor do we discern error in the WCJ's orders for the parties to file proposed ratings with the court. We write to clarify, however, that the date of injury pursuant to section 5412 is a specific date, and not a range of dates. We will grant reconsideration for the limited purposes of amending Finding of Fact No. 5 to reflect that the date of injury under section 5412 was May 16, 2016, the date of the initial report of PTP Dr. Fonseca, but otherwise affirm the F&O.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 1, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 1, 2024 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

5. The date of injury pursuant to Labor Code section 5412 was May 16, 2016.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 4, 2024

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

JEFFREY CIRILLO
GLENN, STUCKEY & PARTNERS
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*