WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL BIANUCCI, *Applicant*

vs.

TEXAS RANGERS; ANGELS BASEBALL LP; ACE AMERICAN INSURANCE, administered by SEDGWICK RIVERSIDE, *Defendants*

Adjudication Number: ADJ15824668
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION ON BOARD MOTION

In our August 5, 2024 "Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration" (Opinion), we affirmed the May 22, 2024 First Amended Findings of Fact (Findings of Fact), wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that the contract between applicant and defendant was not formed in California, but that California has a substantial interest in exercising subject matter jurisdiction over applicant Michael Bianucci's claimed injury because applicant was regularly working in this state. We amended the Findings of Fact solely to indicate that it is unclear where the subject contract between the parties was formed.

Subsequently, defendants Texas Rangers and Angels Baseball LP, both insured by Ace American Insurance and administered by Sedgwick Riverside, filed a Petition for Writ of Review with the Court of Appeal in response to our August 5, 2024 Opinion. Based upon our further review of the matter, after initial review of the contentions raised in the Petition for Writ of Review, we have determined that the matter requires further consideration.

Accordingly, under our statutory authority in Labor Code sections 5900(b) and 5911[1], we grant reconsideration of our August 5, 2024 Opinion. Our order granting reconsideration is not a

[1] Unless otherwise stated, further statutory references are to the Labor Code.

final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits and further consideration of the entire record in light of the applicable statutory and decisional law.

FACTS

As the WCJ stated in his Report,

> Petitioner notes that "…Applicant's professional baseball career began in 2008 and ended in 2015 during which, the Applicant played the 2008, 2009, 2010, 2011, 2012 and 2013 season with the Texas Rangers organization. *See, Joint Exhibit 2*… The Applicant played games in California when he was assigned to the Rangers organization. He was assigned to the Rangers affiliate located in Bakersfield, California for part of the 2009 season; he played in Bakersfield from July 6, 2009 through September 7, 2009 (.33 of a season). *See, Joint Exhibit 2*. He was assigned to play in Bakersfield again for the entire 2010 season. *See, Joint Exhibit 2*… The game logs in Joint Exhibit 2 show that over the 2009 and 2010 seasons he played a total of 170 games in Bakersfield. *See, Joint Exhibit 2*…" (Petition For Reconsideration, page 2:21-3:4 and page 4:6-11.)
>
> Petitioner argues for a rule distinguishing an athlete whose contract is formed in California from an athlete injured while regularly playing 170 games and practicing in California over one and one-third years. Petitioner contends that statutory and case law may support California subject matter jurisdiction over the former but not over the latter. This court has found that this Applicant was regularly working in Bakersfield, California during a significant portion of the cumulative traumatic injury period, within the meaning of California Labor Code Section 3600.5(a). This court has concluded that the WCAB has subject matter jurisdiction over the claim at bar**.** (Report, p. 2.)

In the Petition for Writ of Review, defendants contend that they are exempt from the workers' compensation laws found in Division 4 of the Labor Code based on the provisions of sections 3600.5(c) and (d).

DISCUSSION
I.

Section 5911 states that "Nothing contained in this article shall be construed to prevent the appeals board . . . on its own motion, from granting reconsideration of an original order, decision, or award made and filed by the appeals board within the same time specified for reconsideration

of an original order, decision, or award." (§ 5911.) The time specified for reconsideration of an original order, decision, or award by the appeals board, on its own motion, is 60 days. Section 5900(b) provides that "At any time within 60 days after the filing of an order, decision, or award made by a workers' compensation judge and the accompanying report, the appeals board may, on its own motion, grant reconsideration." (§ 5900(b).) Accordingly, we grant reconsideration of our August 5, 2024 Opinion under the statutory authority granted to us in these statutes. Sixty days from our August 5, 2024 is October 4, 2024. This reconsideration is granted by or on such date.

The issue here is whether the exemption found in sections 3600.5(c) and (d) apply to bar applicant's workers' compensation claim in California. Section 3600.5(d) provides as follows:

> (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. (§ 3600.5(d).)

As section 3600.5(d)(1) makes clear by reference, an important provision for determining the meaning of section 3600.5(d) is section 3600.5(c). Section 3600.5(c) provides as follows:

> (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. (§ 3600.5(c); emphasis added.)

This statutory provision applies to a cumulative trauma claim asserted by a professional athlete who is hired in a state other than California, when that athlete is temporarily doing work in California. (See, e.g., *Carroll v. Cincinnati Bengals* (2013) 78 Cal.Comp.Cases 655, 660 (Appeals Board en banc); *Dailey v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 727.)

In our August 5, 2024 Opinion, we amended the May 22, 2024 First Amended Findings of Fact, to indicate that it is unclear where the contract at issue between the parties was formed. The issue posed in defendants' Petition for Writ of Review is whether an athlete regularly working in California could still fall under the exemption found in section 3600.5(d). We acknowledge that the analysis of whether sections 3600.5(c) and (d) apply may not turn on whether applicant was

"regularly working" in California. Instead, the issue may turn on where the contract of hire was formed. Thus, it may well be that the evidentiary record will require further development with respect to the issue of where the contract was formed before any further legal analysis is appropriate.

II.

We observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

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

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal. Comp. Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d

528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code, section 5901, states in relevant part that:

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

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

III.

Accordingly, we grant reconsideration of our August 5, 2024 Opinion, and order that a final decision after reconsideration is deferred pending further review of the merits and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that reconsideration of our August 5, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **GRANTED ON BOARD MOTION**.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, 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.

MICHAEL BIANUCCI
PRO ATHLETE LAW GROUP, PC
BOBER, PETERSON & KOBY, LLP

LSM/oo

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