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 DECISION AFTER RECONSIDERATION

We previously granted reconsideration on our own motion of our August 5, 2024 "Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration" (Opinion) to provide an opportunity to further study the legal and factual issues raised by the September 19, 2024 Petition for Writ of Review filed by defendants Texas Rangers and Angels Baseball LP, both insured by Ace American Insurance and administered by Sedgwick Riverside. This is our Opinion and Decision After Reconsideration.

On June 4, 2024, defendants filed a Petition for Reconsideration of 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.

In our August 5, 2024 "Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration" (Decision), we affirmed the May 22, 2024 Findings of Fact but amended it solely to indicate that it is unclear where the subject contract between the parties was formed.

Subsequently, defendants filed a Petition for Writ of Review with the Court of Appeal in response to our August 5, 2024 Decision. After further review of the record, we determined that

the matter requires further attention. On October 4, 2024, we granted reconsideration on our own motion of the August 5, 2024 Decision.

Defendant contends that that they are exempt from the workers' compensation laws found in Division 4 of the Labor Code[1] based on the provisions of section 3600.5(c) and (d).

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the May 22, 2024 Findings of Fact and return this matter to the trial level for further proceedings.

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.)
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> 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.)

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

DISCUSSION

I.

The issue here is whether the WCAB has subject matter jurisdiction over applicant's workers' compensation claim. 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]).)

A. Hire in California

The legislature has provided that a hiring in California within the meaning of 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"].)

Section 3600.5(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. (§ 3600.5(a).)

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. (§ 5305.)

Sections 3600.5(a) 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,* 68 Cal.2d at 12-13, 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, as we stated in our August 5, 2024 Decision, the record is unclear where the subject contract between the parties was formed. Some of applicant's testimony supports the trial court's finding that the contract was orally formed in Mexico (Minutes of Hearing and Summary of Evidence (MOHSOE), p. 6:6-8 [applicant would not have traveled to San Diego if he did not think he had a deal in place].) However, some of his testimony indicate that he was working towards a deal in Mexico but that the contractual offer and acceptance did not happen until he reached San Diego (MOHSOE, p. 5:9-19; 6:20-25; 9:15-16 [while in San Diego, he received an offer to play in Arkansas for an affiliate of the Angels].) There is no other evidence in the record with regards to contract formation.

Acceptance of an offer of employment in California by the injured worker or by his or her agent supports a finding of hire in California under sections 3600.5 and 5305. (*Palma, supra,* 1 Cal.2d 250 at 252; *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (1967) 68 Cal.2d 7, 12-13; *Bowen, supra,* 73 Cal.App.4th at 17-18, 21-22, 26-27.) The burden of proof rests with the applicant to establish acceptance of an offer within California. (§ 5705.)

The time and place of contract formation is an integral factor in the evaluation of whether there is California jurisdiction over a claimed extraterritorial injury. The exercise of California jurisdiction often hinges on fact specific testimony or evidence as to the time and place of acceptance of an offer. (See *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175] [insufficient evidence to establish either applicant or his agent in California at time of acceptance of offer]; *Hafkey v. American Airlines, Inc.* (June 15, 2018, ADJ10293214) 2018 Cal. Wrk. Comp. P.D. LEXIS 283 [applicant's acceptance of offer of employment while in California established jurisdiction, irrespective of where initial claim for

benefits was filed]; *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]; *Walker v. Petrochem Insulation* (ADJ9674694, February 2, 2016) 2016 Cal. Wrk. Comp. P.D, LEXIS 60 [applicant's acceptance in Georgia of California employer's offer of employment is not hire in California]; *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].)

Furthermore, the fact that a subsequent written contract may have been signed in a different state does not preclude the possibility that a prior oral contract was formed in California. If such a contract was formed, the fact that a subsequent written contract with an integration clause may supersede the prior oral contract for purposes of contract law does not negate the fact that a California contract of hire was formed, thereby establishing the basis for the exercise of California jurisdiction over the claim.

B. Regularly Working in California

An athlete regularly working in California also has sufficient nexus to California. (*New York Knickerbockers v. Workers' Comp. Appeals Bd. (Macklin)* (2015) 240 Cal.App.4th 1229, 1239; *Sutton v. San Jose Sharks* (2018) 83 Cal. Comp. Cases 1613.) Defendants argue that an athlete may be regularly employed in California yet still be exempt from the protections of workers' compensation under section 3600.5(c) and (d). In *Kouzmanoff v. Texas Rangers* (ADJ10501182, ADJ10501198, May 17, 2024) [2024 Cal. Wrk. Comp. P.D. LEXIS 189], a different Appeals Board panel concluded that the exemptions found in sections 3600.5(c) and (d) apply to athletes who regularly worked in California.

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

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.) Temporary work is defined in section 3600.5(c)(3) as performing less than 20 percent of an athlete's duty days in California during the 365 consecutive days preceding the athlete's last day of work for the employer within California. (§ 3600.5(c)(3).) "Duty days" is defined as a day in which any services are performed by an athlete under the direction and control of his or her employer pursuant to a player contract." (§ 3600.5(g)(3).) In order to qualify for this exemption, however, the employer must meet both subsections (c)(1)(A): the employer has furnished workers' compensation insurance coverage or its equivalent under the laws of a state other than California; and (c)(1)(B): the employer's workers' compensation insurance or its equivalent covers the professional athlete's work while in this state. If the employer fails to show these two elements, the exemption does not apply.

Even if the exemption applies as to a particular employer, we must further analyze the two exceptions found in section 3600.5(d). Section 3600.5(d) provides:

> (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.
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> (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.
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> (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).)

If an athlete meets the conditions under section 3600.5(d)(1)(A) and (d)(1)(B), the athlete may still bring a claim in California in accordance with section 5500.5 despite having one or more employers exempt under section 3600.5(c).

Section 5500.5 ordinarily affixes liability for a cumulative trauma injury on the employer or employers who employed the applicant during the final year of the period of the cumulative trauma. (See § 5500.5(a).) However, "[i]n the event that none of the employers during the [one year period] are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof." (*Ibid*.) The employer found so liable then has a right of reimbursement against the unlawfully uninsured employer. (*Ibid*.) That is, when the employer who would normally be the liable party under section 5500.5 may not be joined to the litigation because the WCAB has no jurisdiction, liability is similarly assessed against the last employer over whom the WCAB can assert jurisdiction. (See, e.g., *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (1996) 61 Cal. Comp. Cases 301 (writ den.); *Employers Mutual*

Liability Ins. Co. v. Workers' Comp. Appeals Bd. (1987) 52 Cal. Comp. Cases 284 (writ den.) (*Patterson*).)

The provisions of section 3600.5(c) and (d), however, do not apply if the athlete was hired in California. In drafting the exemption in section 3600.5(c) and (d), the Legislature included a note of intent, stating that the addition of subdivisions (c) and (d) to section 3600.5 should "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, 27 [64 Cal.Comp.Cases 745]]." (Stats. 2013 ch. 653 (AB 1309) § 3.). Because *Bowen* affirmed the exercise of jurisdiction based upon a hire in California, we have held in the past that subdivisions (c) and (d) of section 3600.5 apply only where an applicant cannot establish hire in California on at least one contract during the relevant cumulative trauma injury period. (See *Hansell v. Arizona Diamondbacks* (2022) 87 Cal. Comp. Cases 602, 611–618.)

C. Conclusion

Before the provisions found in section 3600.5(c) and (d) can be applied, as defendant would like us to do, the first inquiry is whether applicant was hired in California, that is, whether the subject contract was formed in California. If the contract was formed in California, there is sufficient connection to the state to confer jurisdiction over applicant's industrial claim and we do not reach the analysis found in section 3600.5(c) and (d). If the contract was not formed in California, then we look to see if section 3600.5(c) applies. Section 3600.5(c) applies if the following are met: (1) applicant is a professional athlete; (2) the injury is an occupational disease or a cumulative trauma injury; (3) applicant was hired outside of California; (4) applicant was temporarily within California doing work for his employer; (5) the employer has furnished workers' compensation insurance coverage under the laws of a state other than California; and (6) the employer's workers' compensation insurance covers the applicant while in California. Even if section 3600.5(c) applies to exempt one or more employers, we also look to see if the exceptions found in section 3600.5(d) apply, in which case the claim may still be heard in California and liability rolls back according to section 5500.5.

Here, the record is lacking as to where to subject contract was formed. We cannot reach an analysis of section 3600.5(c) and (d) until that question is answered. For that reason, we rescind the May 22, 2024 Findings of Fact and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 22, 2024 First Amended Findings of Fact is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 7, 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

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