WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NICHOLAS LUCHEY, *Applicant*

vs.

GREEN BAY PACKERS; TRAVELERS INDEMNITY COMPANY and GREAT DIVIDE INUSRANCE COMPANY, in care of BERKELEY ENTERTAINMENT; *Defendants*

Adjudication Numbers: ADJ7217330
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant sought reconsideration of the February 21, 2019 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) concluded that although applicant had been hired in California, the WCAB nevertheless lacked jurisdiction over his claim due to the presence of a forum selection clause in his contract, requiring him to bring his workers' compensation claim in Wisconsin instead of California. Applicant contests this determination, arguing that the fact of his hire in California renders the forum selection clause unenforceable and makes California an appropriate forum for his claim.

We received two Answers from defendants, from Travelers and from Great Divide as insurers of the Green Bay Packers ("Packers") during the relevant injury period. 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 Findings of Fact and return the matter to the WCJ for further proceedings, because we

[1] Commissioners Sweeney and Lowe, who were on the panel that granted reconsideration, no longer serve on the Appeals Board. Other panelists have been assigned in their places.

agree with applicant that if he was hired in California, the forum selection clause in his contract is not enforceable to bar the WCAB from adjudicating his claim. Because the WCJ did not actually make a finding that applicant was hired in California, we will return the matter to the trial level for the WCJ to make a finding on that issue, and for further proceedings consistent with this opinion and that finding.

FACTS AND PROCEDURAL HISTORY

Applicant filed an Application for Adjudication, claiming a cumulative trauma injury sustained to multiple body parts while employed by defendants as a professional football player from January 1, 1999 through December 31, 2006, including for the Green Bay Packers ("the Packers") from March 11, 2003 through September 6, 2005. Other employers – the Baltimore Ravens, Houston Texans, and Cincinnati Bengals – were all dismissed over the course of the litigation on the basis of lack of jurisdiction, without appeal.

The matter went to trial on February 7, 2019, on the issues of: (1) jurisdiction; (2) parts of the body injured; (3) permanent and stationary date; (4) permanent disability and apportionment; (5) need for further medical treatment; (6) attorney's fees; and (7) post-termination defense. (Minutes of Hearing / Summary of Evidence, MOH/SOE, 2/7/2019, at pp. 2–3.)

Applicant testified that he played in the National Football League ("NFL") from 1999, and worked with a number of agents over his career. (*Id.* at p. 6.) Ken Landphere, applicant's agent for his 2003 contract with the Packers, was initially based in Georgia, but later moved to California. (*Ibid.*)

When applicant was offered his 2003 Packers contract, he was in California, having travelled there from Las Vegas with a friend. (*Ibid.*) He was at the Beverly Hills Marriott Residence Inn when Landphere contacted him and advised him about the contract. (*Ibid.*) He signed the contract in California. (*Ibid.*) When applicant was first deposed, he didn't remember where he signed the contract, but since then, he found the contract at his house and remembered some of the details. (*Ibid.*)

Applicant remembered going to Las Vegas, but not precisely when or how long he was there, or precisely when he came to California, what the name off the friend he came to California was, or how many days he stayed. (*Id.* at p. 7.)

Applicant thought he received the contract by fax, but it could have been by overnight mail. (*Ibid.*) He remembered signing the contract and sending it back to his agent directly, though it might have been to the agency. (*Ibid.*)

Applicant has never been a resident of California, and he was a resident of Georgia at the time he signed the 2003 Packers contract. (*Ibid.*) The signed contract was apparently sent to him in Georgia, and he signed some documents in Green Bay as well, but he didn't think he re-signed the actual contract there. (*Id.* at pp. 7–8.)

On February 21, 2019, the WCJ issued her Findings of Fact, determining that the WCAB lacked jurisdiction over the claim. (Findings of Fact, at p. 1.) The appended Opinion on Decision makes clear that although the WCJ believed applicant's testimony that he had been hired in California, and believed he had sustained cumulative trauma injuries, the WCJ nevertheless believed that the WCAB lacked jurisdiction to hear the claim and award benefits because of the presence of a forum selection clause in applicant's 2003 Packers contract requiring that any dispute over the contract be heard in Wisconsin. (Opinion on Decision, at pp. 2–3.)

This Petition for Reconsideration followed.

DISCUSSION

Labor Code[2] 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." (§ 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.
> (§ 5305.)

[2] Further references are to the Labor Code unless otherwise stated.

The burden of establishing that a contract of hire was made in California rests with applicant, who has the affirmative of the issue. (§§ 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 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].

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, affd. (1935) 294 U.S. 532 *(Palma)*; *Benguet Consol. Mining Co. v. Industrial Acci. Com.* (1939) 36 Cal.App.2d 158, 159; *McKinley v. Arizona Cardinals (*2013) 78 Cal.Comp.Cases 23, 32-33; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].)

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."].)

Recently, in *Keiaho v. Indianapolis Colts* (May 16, 2024, ADJ8124831) 2024 Cal. Wrk. Comp. P.D. LEXIS 172, the WCAB had cause to consider the situation of an injured worker who was hired in California, but whose contract included a forum selection clause purporting to

mandate that any claim for workers' compensation benefits be filed in another state. After an extended discussion of precedent, dating all the way back to the 1934 California Supreme Court case of *Palma, supra,* the *Keiaho* panel ultimately concluded that the presence of a forum selection clause could not prevent the WCAB's exercise of jurisdiction over a case where the injured worker was hired in California, because the public policy of the State of California supports the provision of benefits to workers injured while performing work on contracts entered into in this state. (See *Keiaho, supra,* 2024 Cal. Wrk. Comp. P.D. LEXIS at pp. *21–34.) As stated in that case by way of summary:

> 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.

(*Keiaho, supra,* 2024 Cal. Wrk. Comp. P.D. Lexis at p. *33–34.)

Here, it appears from the Opinion on Decision and the Report that the WCJ believed applicant had been hired in California, but that the WCJ also believed that the presence of the forum selection clause nevertheless precluded the exercise of WCAB jurisdiction. For the reasons expressed above, and for the reasons articulated in *Keiaho,* we disagree with this conclusion as to the significance of the forum selection clause. Assuming applicant was hired in California, the presence of a forum selection clause cannot divest the WCAB of jurisdiction to adjudicate his claim and award any benefits owed.

That said, we are cognizant that the WCJ did not technically make a finding that applicant was hired in California. Instead, the Findings of Fact are limited to a single finding that the forum selection clause prevents the exercise of jurisdiction. We also observe that the issue of whether applicant was hired in California was the primary issue litigated by the parties, but that the lack of a finding as to that issue significantly complicated the ability of the parties to argue that issue on reconsideration. We are therefore hesitant to simply substitute a new order finding that applicant was hired in California, as we think that issue is best left to the WCJ herself, whose credibility determinations are due great weight due to her ability to observe the demeanor of the witnesses, and who can articulate her reasons more clearly in a new decision. (See *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318–319.)

Accordingly, we believe the best approach to take here is to rescind the Findings of Fact and return the matter to the WCJ to issue a new order which makes a factual finding as to whether applicant was hired in California. Assuming the WCJ finds that applicant was hired in California, as the Opinion on Decision and Report suggest she was inclined to do, that finding would preclude enforcement of the forum selection clause, and the WCJ could therefore proceed to issue findings as to the other issues that were submitted for decision, and to continue any further proceedings as necessary for the ultimate resolution of the case. This manner of resolution thereby preserves the due process rights of any aggrieved parties to seek reconsideration, as appropriate, of issues decided by the WCJ's new order, including the finding as to whether applicant was hired in California.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 21, 2019 Findings of Fact is **RESCINDED**, and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 10, 2024

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

NICHOLAS LUCHEY
PEARLMAN, BROWN & WAX, LLP
LEVITON, DIAZ & GINOCCHIO
WALL McCORMICK BAROLDI & DUGAN

AW/pm

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