WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WAYNE GANDY, *Applicant*

vs.

ATLANTA FALCONS, GREAT DIVIDE INSURANCE COMPANY, administered by BERKLEY ENTERTAINMENT; PITTSBURGH STEELERS, STATE WORKERS INSURANCE FUND (SWIF); NEW ORLEANS SAINTS, LOUISIANA WORKERS' COMPENSATION CORPORATION; ST. LOUIS RAMS, FAIRMONT PREMIER INSURANCE COMPANY, administered by ZENITH AND TRAVELERS INSURANCE COMPANY; ST. LOUIS RAMS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, for LEGION INSURANCE, in liquidation, *Defendants*

Adjudication Number: ADJ10110126
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Atlanta Falcons, insured by Great Divide Insurance, administered by Berkley (Atlanta Falcons) seek reconsideration of the May 16, 2024 Opinion and Decision After Reconsideration (ODAR), wherein we rescinded the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) and substituted new Findings of Fact that the Workers' Compensation Appeals Board (WCAB) has subject matter jurisdiction over applicant's claimed injury.

We held that applicant's contract of hire with the Los Angeles Rams, made within California's territorial jurisdiction, was sufficient to confer subject matter jurisdiction over the claimed cumulative injury pursuant to Labor Code[1] sections 5305 and 3600.5(a). We also applied the analysis of *Hansell v. Arizona Diamondbacks* (April 7, 2022, ADJ10418232) [2022 Cal. Wrk. Comp. P.D. LEXIS 83) (*Hansell*) to determine that the Legislature did not intend for section 3600.5(c) and (d) to apply to athletes who have been hired in California by at least one employer during the cumulative trauma injury period. (ODAR, p. 10.)

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

The Atlanta Falcons acknowledge that while there may be subject matter jurisdiction, pursuant to prior WCAB panel decisions the Falcons should be dismissed as being exempt from these proceedings pursuant to Labor Code section 3600.5(c).

The Falcons direct our attention to *Grahe v. Philadelphia Phillies* (2018) 84 Cal.Comp.Cases 123 [2018 Cal. Wrk. Comp. P.D. LEXIS] (*Grahe*), wherein a panel[2] of the WCAB applied the analysis of section 3600.5(c) to find that the Philadelphia Phillies were exempt from the provisions of the section. Thus, while applicant could still pursue his claim of injury against other employers during the cumulative injury period, applicant could not recover against the Phillies in the California workers' compensation system because the portion of the claim asserted against the Phillies was barred by subdivision 3600.5(c).

And in *Riggs v. Miami Marlins* (2022) 88 Cal.Comp.Cases 170 [2022 Cal. Wrk. Comp. P.D. LEXIS 343] (*Riggs*), a panel of the WCAB determined that while the Miami Marlins were exempt from defending applicant's claim of cumulative injury before the WCAB pursuant to section 3600.5(c), applicant met the exception of section 3600.5(d), and therefore liability for applicant's claim would need to be determined pursuant to section 5500.5.

We find the Falcons' argument unpersuasive, however, for several reasons.

Initially, we note that *Grahe* antedated *Hansell* by nearly four years and did not analyze the distinction between the conferral of jurisdiction based on a California contract of hire versus injury sustained by an out-of-state employee temporarily in California.

We further note that in *Grahe*, *supra*, the parties agreed that the Phillies met the conditions for an exemption pursuant to subdivision 3600.5(c). (*Grahe, supra*, 84 Cal.Comp.Cases at p. 129.) Thus, the issue of whether the exemption of section 3600.5(c) would apply notwithstanding a California hiring was not before us.

Moreover, in *Riggs*, we specifically noted that "no party alleges that any of applicant's contracts of hire were made within California." (*Riggs, supra*, 89 Cal.Comp.Cases at p. 172.) Thus,

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[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

the question of subject matter jurisdiction arising out of a California contract of hire was not considered therein.

In addition, our ODAR follows the analysis in *Hansell, supra*, which notes that in drafting the 2013 amendments to section 3600.5 concerning professional athletes, the legislature was clear: "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.) Our analysis in *Hansell* continued:

> 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. The Legislature appears to have been mainly concerned with athletes who were not hired in this state, who were filing claims and recovering benefits under the law as it existed prior to *Johnson* based upon a small handful of games. The reference to *Bowen* demonstrates the Legislature recognized and approved of the longstanding principle of California law, stretching back close to a century, that a contract of hire in California is itself a compelling connection to the state that validates the exercise of jurisdiction. (See *Alaska Packers, supra*, 1 Cal. 2d at 261–262.) If 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. If the Legislature had intended to depart from the position that California will exercise jurisdiction over a claim if the applicant was hired in California, we think the Legislature would clearly have said as much, and, at a minimum, would not have reaffirmed that principle by referencing *Bowen*.
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> (*Hansell, supra*, at p. 614.)

We also noted that the original version of Assembly Bill 1309 included specific provisions applicable to athletes hired in California, but that the amendments to the bill in the Senate version, which are reflected in the final version of the statute, removed those provisions and instead added affirmation of the holdings in *Bowen*. Thus, we concluded in *Hansell* that the Senate's "deletion of the reference to a California contract of hire in subdivision (d), combined with [the affirmation

of the holdings in *Bowen*], was intended to render the subdivision applicable only to athletes without a California contract of hire, and therefore to bar only claims from those athletes without the strong contact with California that is created by a California contract of hire." (*Id.* at p. 617.) Here, applicant entered into a California contract of hire, made within California's territorial jurisdiction. Accordingly, the Appeals Board is vested with subject matter jurisdiction over the claimed injury, and sections 3600.5(c) and (d) are inapplicable. We therefore find the Falcons' reliance on those subdivisions in furtherance of their arguments regarding the parties' respective liabilities to be inapposite.

The Falcons further contend that our decision in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 [2013 Cal. Wrk. Comp. LEXIS 2], writ den. *sub nom. McKinley v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 872 [2013 Cal. Wrk. Comp. LEXIS 122] (Appeals Board en banc) requires that we enforce a choice of law/forum clause in the applicant's contracts with the Falcons. (Petition, at p. 4:10.) Defendant avers, "*McKinley* requires, just as do the previously cited cases of *Grahe, supra; Riggs supra* and *Smith supra*, that while Applicant may be able to maintain a viable claim against the club over whom he entered in to a contract of hire in California (the Rams); there is however no liability against the club over whom there is a reasonable choice of law and choice of forum selection clause and they cannot be held liable for the cumulative trauma claim." (Petition, at p. 4:23.)

However, as we observed in our ODAR, *McKinley* is distinguishable insofar as the applicant therein enjoyed no California contract of hire, "which would otherwise provide a 'jurisdictional basis for legislating the terms of the employment agreement and hearing the workers' compensation claim.'" (ODAR, at p. 14, citing *McKinley, supra*, 78 Cal.Comp.Cases at p. 32.) Our analysis in *McKinley* specifically acknowledged the United States Supreme Court's holding in *Alaska Packers Assn. v. Industrial Acc. Com.* (*Palma*) (1934) 1 Cal.2d 250 [34 P.2d 716, 20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L. Ed. 1044, 20 I.A.C. 326] (*Palma*), that "where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure, to the legislative control of the state…the fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power with a state may constitutionally exercise…." (*McKinley, supra*, 78 Cal.Comp.Cases at p. 32, citing *Palma, supra,* 294 U.S. at 540-542.) Thus, the application of the due process and minimum contacts analysis in *McKinely* was necessary *only*

in the absence of a California hiring and its concomitant grant of jurisdiction under section 5305. Our analysis as set forth in the en banc decision in *McKinley* is controlling authority in this context.[3]

We also observe that to the extent that the Falcons rely on our panel decisions in *Grahe*, *Riggs*, and *Smith, supra*, for the proposition that the Appeals Board should decline to exercise its jurisdiction in this matter, we believe that reliance is misplaced. As we explained above, *Grahe* did not consider the question of whether section 3600.5(c) and (d) would apply when subject matter jurisdiction was conferred pursuant to a California hiring. (*Grahe, supra*, 84 Cal.Comp.Cases at p. 129.) And in *Riggs*, the parties stipulated that no contract of hire was formed in California. (*Riggs, supra*, 89 Cal.Comp.Cases at p. 172.)

The Falcons also cite to *Smith v. Detroit Lions* (November 18, 2022, ADJ6579284) [2022 Cal. Wrk. Comp. P.D. LEXIS 368 (writ den. sub nom. *Smith v. Workers' Comp. Appeals Bd.* (2023) 88 Cal.Comp.Cases 484 [2023 Cal. Wrk. Comp. LEXIS 7]. However, on November 23, 2022, we granted reconsideration of our November 18, 2022 decision on our own motion to further study the factual and legal issues presented therein. The matter remains pending.

Thus, we continue to believe that *McKinley* is, by its own terms, inapplicable to the present facts because "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].)

We deny the petition, accordingly.

[3] En banc decisions of the Worker's Compensation Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [23 Cal. Rptr. 3d 782] [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105] [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 24, 2024

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

WAYNE GANDY
PRO ATHLETE LAW
BOBER, PETERSON & KOBY
CHERNOW & LIEB
DIMACULANGAN & ASSOCIATES
LAW OFFICES OF GRAY & PROUTY
LAW OFFICES OF JOSHUA B. VINOGRAD
WALL, MCCORMICK, BAROLDI & DUGAN

SAR/abs

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