WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WES MATTHEWS, ***Applicant***

vs.

TULSA FAST BREAKERS;
COMPSOURCE MUTUAL INSURANCE COMPANY, et al., ***Defendants***

Adjudication Number: ADJ9094160

Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings and Order (F&O) issued on June 11, 2019, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant sustained industrial cumulative injury to multiple body parts while playing as a professional basketball player through 1996. The WCJ further found that liability for cumulative injury per Labor Code[2] section 5500.5 existed against the Rapid City Thrillers, who made general appearances and entered into a Compromise and Release with applicant, and thus personal jurisdiction existed over the Rapid City Thrillers. Finally, the WCJ found that applicant cannot proceed against the Tulsa Fast Breakers, which employed applicant outside the one-year liability of section 5500.5.

Applicant contends that the WCJ erred because personal jurisdiction did not exist over the Rapid City Thrillers, and the Rapid City Thrillers were not insured for workers' compensation and thus, liability under section 5500.5 should have fallen back to the Tulsa Fast Breakers.

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[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been substituted in her place.

[2] All future references are to the Labor Code unless noted.

We have received an answer from SCIF. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report.[3] Based on our review of the record and for the reasons discussed below, and for the reasons stated by the WCJ in the Report, as our Decision After Reconsideration we will affirm the June 11, 2019 F&O.

FACTS

Per the WCJ's Report:

> The applicant played professional basketball from October 1980 through 1996. He played in the NBA from October 1980 through June 1988. He then joined the Continental Basketball League (CBA) In between he played in the Philippines. From 1995 through 1996 the applicant played for various teams and with the United States Basketball League and finally ended his career in Brazil in 1996. The order of playing seasons is as follows:
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> 1) Washington Bullets Oct. 1980- Jan. 1981
> 2) Atlanta Hawks through March 1984 (Settled by C&R)
> 3) Philadelphia 76ers March - April 1984
> 4) Chicago Bulls Oct. 1984 - April 1985
> 5) San Antonio Spurs 1985 - 1986
> 6) Los Angeles Lakers through June 1988, various broken periods. (Settled by C&R)
> 7) Tulsa Fast Breakers 2/17/89- 4/22/89 & 2/26/90 – 3/7/90 (CURRENT DEFENDANT AT TRIAL)
> 8) Philippines broken periods in 1989
> 9) Rapid City Thrillers, 1992-1993 (Settled by C&R)
> 10) Rochester Renegade 1993-1994 season
> 11) Ft Wayne Fury 1994-1995 season
> 12) United States Basketball League 1995-1996 season
> 13) Brazil 1996
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> The applicant resolved his claim against three of the teams including the Rapid City Thrillers in a compromise & release in the amount of $102,000 which included all permanent disability / whole person impairment as referenced in the orthopedic QME report by Dr. Michael Einbund dated October 6, 2015. After that settlement, the applicant proceeded to trial against the last remaining defendant, the Tulsa Fast Breakers where he played from February 17, 1989 through April 22, 1989 and again from February 26, 1990 through March 7,

[3] Applicant filed a supplemental petition for reconsideration on August 20, 2019. Defendant filed a response to the supplemental petition on September 4, 2019. We have reviewed these filings in reaching our decision.

> 1990 to properly address Labor Code §5500.5, the record was ordered developed to determine if Rapid City Thrillers had insurance that included California. The parties presented a policy that was not complete so a deposition of person most knowledgeable was taken and the matter submitted for decision.

(WCJ's Report, pp. 2-3.)

DISCUSSION

In sports law, as happened here, a professional athlete may sustain a cumulative trauma injury over the span of many years, and in some cases, many jurisdictions. Yet, it must be resolved in a forum. If the claim is filed in California, then we must answer three basic questions:

1) Does California have subject matter jurisdiction over the alleged injury; if so,

2) Over what parties may California exercise personal jurisdiction; and finally,

3) Amongst those parties, and assuming an injury is proven to exist, who employed applicant for the last year of injurious exposure? Where any otherwise liable employers are unlawfully uninsured, then liability falls back to the last lawfully insured employer. (§ 5500.5.)

A. Subject Matter Jurisdiction

Subject matter jurisdiction must exist over the cumulative trauma claim for the Appeals Board to have any power to decide any substantive issue.

> [T]he term "jurisdiction" or "subject matter jurisdiction" in connection with the issue of whether the application of the California workers' compensation law would be unreasonable so as to be a denial of due process. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 [109 P.2d 942].)

(*New York Knickerbockers v. Workers' Comp. Appeals Bd.*, (2015) 240 Cal. App. 4th 1229, 1232, FN1.)

The analysis of subject matter jurisdiction begins with the question of where the contract of hire was made. If at least one of applicant's contracts of hire was made in California, subject matter jurisdiction exists to resolve the cumulative trauma injury. (See, § 3600.5(a) [establishing

subject matter jurisdiction over extra-territorial injuries where either the contract of hire was made in California, or applicant regularly works in California]; see also, § 5305 [establishing subject matter jurisdiction over extra-territorial injuries where the contract of hire was made in California and applicant is a Californian resident at the time of injury]; see also *Bowen v. Workers' Comp. Appeals Bd.*] (1999) 73 Cal.App.4th 15; see also *Hansell v. Arizona Diamondbacks* (April 7, 2022, ADJ10418232) [2022 Cal. Wrk. Comp. P.D. LEXIS 83.)

The burden of establishing that a contract of hire was made in California rests with applicant, who has the affirmative of the issue. (Cal. Lab. Code §§ 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 Labor Code 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]. Where parties have agreed in writing upon the essential terms of a contract, there is a binding contract even though a formal one is to be prepared and signed later. (*Commercial Casualty Insurance Company of Newark, New Jersey v. Indus. Acc. Comm. (Porter)* (1952) 110 Cal.App.2d 83 [17 Cal.Comp.Cases 84].)

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 [1934 Cal. LEXIS 358], affd. (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L. Ed. 1044, 20 I.A.C. 326] *(Palma)*; *Benguet Consol. Mining Co. v. Industrial Acci. Com.* (1939) 36 Cal.App.2d 158, 159 [1939 Cal.App. LEXIS 28]; *McKinley v. Arizona Cardinals (*2013) 78 Cal.Comp.Cases 23, 32-33 [2013 Cal. Wrk. Comp. LEXIS 2]; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].)

California courts have also held that the formation of an oral contract in California is sufficient to confer jurisdiction under section 5305. Under California law, "an oral contract

consummated over the telephone is deemed made where the offeree utters the words of acceptance." (*Janzen v. Workers' Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109, 114 [71 Cal.Rptr.2d 260] (*Janzen*), citing *Travelers Ins. Co. v. Workmens' Comp. Appeals Bd. (Coakley)* (1967) 68 Cal.2d 7, 14 [32 Cal.Comp.Cases 527] (*Coakley*).) Pursuant to Civil Code section 1583, "[c]onsent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section." (Civ. Code, § 1583.) Thus, in *Paula Insurance Co. v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 426 [2000 Cal. Wrk. Comp. LEXIS 6264] (writ denied), the telephonic offer of employment by an Oregon employer, as accepted by the father of a California farm laborer, was sufficient to form a contract of hire.

Here, no party disputes subject matter jurisdiction, and subject matter jurisdiction was found as applicant played for the Los Angeles Lakers during the cumulative trauma period. (§ 3600.5.)

B. Personal Jurisdiction

After deciding the question of subject matter jurisdiction, we must next decide over which parties California may exercise personal jurisdiction.

> Due process requires that a defendant have certain minimum contacts with a state so that the maintenance of an action in the state does not offend traditional notions of fair play and substantial justice. (International Shoe Co. v. Washington (1945) 326 U.S. 310 [66 S. Ct. 154, 90 L. Ed. 95].)

(*McKinley v. Arizona Cardinals*, 78 Cal. Comp. Cases 23, 26 (Appeals Board en banc).)

It is important that parties not conflate personal jurisdiction and subject matter jurisdiction as personal jurisdiction may be waived, but subject matter jurisdiction may not.

> [W]e must initially address defendant's conflation of subject-matter and personal jurisdiction with regard to subdivision (c) and (d) of section 3600.5. Generally, subject matter jurisdiction is the court's power to hear and resolve a particular dispute or cause of action, while personal jurisdiction relates to the power to bind a particular party, and depends on the party's presence, contacts, or other conduct within the forum state. (*Donaldson v. National Marine, Inc*. (2005) 35 Cal.4th 503, 512, 25 Cal. Rptr. 3d 584, 107 P.3d 254, citing *Greener v. Workers' Comp. Appeals Bd*. (1993) 6 Cal.4th 1028, 1034-1035.)
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> The exclusions under section 3600.5, subdivisions (c) and (d) are subject-matter jurisdiction exclusions, and do not depend on the presence or absence of

> personal jurisdiction. Subdivision (c) exempts some defendants from liability for workers' compensation benefits if they meet certain requirements, but nothing in the text of the subdivision makes any reference to personal jurisdiction. This is with good reason, because employers over whom the WCAB cannot exercise personal jurisdiction would have no reason to need the exemption of subdivision (c) in the first place.
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> Subdivision (d), meanwhile, states that a claim is "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 the exceptions of (d)(1)(A)&(B) are met. A lack of personal jurisdiction over a defendant does not render an employer "exempt" from the substantive provisions of California workers' compensation law; it merely indicates that a particular defendant cannot be required to defend a claim in this state.
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> This conclusion follows necessarily from basic principles governing the exercise of personal jurisdiction. First, a lack of personal jurisdiction is not only subject to waiver, but automatically waived by a general appearance. (See, e.g., *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341, 25 Cal. Rptr. 3d 488.) However, whether California can apply the substantive provisions of its workers' compensation system to a claim is a question that cannot be waived, because subject-matter jurisdiction can neither be waived nor consented to by the parties. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 781, 93 Cal. Rptr. 3d 178; *Harrington v. Superior Ct. of County of Placer* (1924) 194 Cal. 185, 188, 228 P. 15 ["Jurisdiction of the subject matter cannot be given, enlarged or waived by the parties."].) If a lack of personal jurisdiction were an exemption from the substance of California workers' compensation law, it would not be subject to waiver, and a general appearance would not suffice to confer applicability of that substantive law over a party.

(*Neal v. San Francisco 49ers*, 2021 Cal. Wrk. Comp. P.D. LEXIS 68, *11-13.)

Accordingly, once subject matter jurisdiction exists over a cumulative trauma injury, California may adjudicate the entire claim, including the portions of injury occurring outside the state. However, our jurisdiction is exercised against only those parties over whom personal jurisdiction exists.

C. Liability under section 5500.5

Once jurisdiction is established, the Appeals Board may decide the issue of whether a cumulative injury exists, and if so, which parties are liable. First, substantial medical evidence must support the finding of industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Once injury is found, the Appeals Board must determine the

last year of injurious exposure. (§ 5500.5.) Once injurious exposure is established, the employer(s) liable for payment are those who employed applicant during the last year of injurious exposure, unless those employer(s) are illegally uninsured, in which case liability falls back upon the last year of lawfully insured employment:

> In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury 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.

(§ 5500.5(a).)

D. Applicant's Petition for Reconsideration

Applicant argues that the Rapid City Thrillers cannot have any liability under section 5500.5 because applicant did not play a single game with them in California, and thus, no personal jurisdiction exists over the Rapid City Thrillers Applicant further argues that no insurance coverage existed in California and that any dispute as to coverage should have gone to mandatory arbitration.

Applicant's petition fails to acknowledge that the Rapid City Thrillers waived personal jurisdiction in this matter. It may be true that the Rapid City Thrillers had valid arguments that they could have raised as to personal jurisdiction. But they never raised them. As soon as one makes a general appearance in a case, personal jurisdiction is waived. Not only did the Rapid City Thrillers make general appearances, **but they also entered into a Compromise and Release settlement and submitted it to the Appeals Board for approval**. Personal jurisdiction was clearly waived in this case.

Whether applicant played any games in California with Rapid City Thrillers is immaterial. The Tulsa City Fast Breakers employed applicant during the injurious exposure period and their employment was later in time. This case is no different than any other cumulative injury claim where applicant has multiple employers over the span of many years. The employer(s) who employ applicant during the last covered year of injurious exposure is liable for the entire claim. (§ 5500.5.) The fact that applicant entered into a Compromise and Release with the last liable employer does not permit applicant to proceed against other defendants further back in time.

As to the issue of whether insurance coverage existed with the Rapid City Thrillers, the WCJ addressed this in her Report as follows:

> The next team back in time is the Rapid City Thrillers in the Continental Basketball Association. The applicant played for them in South Dakota from December 28, 1991 through December 1993, or in essence the 1992 and 1993 seasons. That team acknowledged the State of California has personal jurisdiction over them along with their insurance carrier, Allianz (formerly Fireman's Fund) by asking to be joined as a defendant to allow them to participate in the C&R.
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> Since the Rapid City Thrillers/Allianz were not defendants participating in this trial, the court ordered development of the record to review the insurance policy for the seasons the applicant played for the team in order to determine if they disputed personal jurisdiction or extraterritorial coverage for the state of California. The court accomplished this by requesting that the attorney who represented the team and their insurance carrier in this case appear as a witness at trial to answer questions related to jurisdiction and the insurance policy. The policy that was presented to the court (Exhibit X) was printed from a microfiche and appeared to be missing approximately 1 inch of print from the right side of the document therefore parties were ordered to find a more complete copy. As they were unable to locate a more complete copy, the parties were ordered to draft an interrogatory to person most knowledgeable however due to a dispute regarding the questions in the interrogatory, the parties obtained the information via deposition.
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> Delmar Malec, person most knowledgeable, testified on March 26, 2019 (Exhibit Y) that the excluded states were Nevada, North Dakota, Ohio, Washington, West Virginia and Wyoming. He testified that an employee temporarily in California would be covered if there was an injury.
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> * * *
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> Applicant is using the 26-year gap between inception of the policy and the current litigation to make arguments that cannot be supported as those documents have been destroyed based on the testimony of Mr. Malec. As those documents have been destroyed, the court relies on the actions and words of the insurance company. They added themselves as a party to the case, availed themselves of WCAB jurisdiction, paid money to the applicant and admitted under oath that they had coverage in California. They are not a party to the current action and have no reason to admit coverage if it did not exist. As applicant has not shown any bias or lack of credibility on the part of Mr. Malec, the court takes him at his word that there was California coverage.

(WCJ's Report, pp. 7, 9.)

The last argument raised is that the WCJ was without power to find that insurance coverage existed with the Rapid City Thrillers as issues of coverage are subject to mandatory arbitration. (§ 5275.) This argument borders on frivolous. Section 5275 exists to resolve disputes when coverage is **denied**. When an insurance company admits that coverage exists, applicant cannot dispute coverage in good faith.

The WCJ correctly found that the Rapid City Thrillers was the employer liable for applicant's cumulative injury per section 5500.5. As applicant had already entered into a C&R with the Rapid City Thrillers, the WCJ correctly ordered that applicant take nothing further on his claim.

Accordingly, as our Decision After Reconsideration we will affirm the June 11, 2019 F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on June 11, 2019, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 13, 2024

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

WES MATTHEWS
GLENN STUCKEY
BOBER, PETERSON & KOBY, LLP

EDL/mc

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