WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAUL PIUROWSKI, *Applicant*

vs.

DALLAS COWBOYS; ACE AMERICAN INSURANCE COMPANY, administered by ESIS; MIAMI DOLPHINS; MULTI-LINE CLAIMS SERVICES, INC.; TAMPA BAY BANDITS; ZENITH INSURANCE COMPANY on behalf of NORTH RIVER INSURANCE COMPANY; SUMMIT CONSULTING LLC on behalf of ASSOCIATED INDUSTRIES OF FLORIDA SELF-INSURERS FUND, *Defendants*

Adjudication Number: ADJ8627409
Santa Ana District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION
AFTER RECONSIDERATION

Defendant Tampa Bay Bandits ("Bandits") / Associated Industries of Florida Self-Insurers Fund ("AIFSIF"), seeks reconsideration of the Findings and Award and Order ("F&A") issued on December 5, 2024, wherein the workers' compensation administrative law judge ("WCJ") found that the Bandits and AIFSIF had waived any objection to personal jurisdiction, and awarded workers' compensation benefits against them. The Bandits / AIFSIF contend that the WCJ erred because AIFSIF did not waive personal jurisdiction, and further object to the issuance of an award against AIFSIF and/or Summit, the administrator, on the basis that the issue of the Bandit's insurance was deferred at a prior hearing.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, we will affirm the WCJ's finding that the Bandits and AIFSIF waived any defense based upon an alleged lack of personal jurisdiction by failing to appear specially, and by failing to timely litigate the issue while also taking part in the trial on the merits. We will, however, grant the petition for reconsideration and defer the entry of an award, pending further proceedings

to determine the proper entity or entities against which the award should issue pursuant to Labor Code section 5500.5.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a cumulative trauma injury sustained to multiple body parts from April 1, 1981 through December 31, 1985 while employed as a professional football player. According to the stipulations of the parties at trial, applicant played for the following teams for the following periods:

Dallas Cowboys	April 29, 1981 through August 6, 1981
Miami Dolphins	August 6, 1981 through August 198, 1981
Tampa Bay Bandits	February 1983 through February 1985

AIFSIF / Summit was not initially a party to the litigation; the Bandits were initially joined with Zenith Insurance Company ("Zenith") acting on behalf of North River Insurance Company ("North River"), an insurer which apparently provided coverage only from March 1985 onwards.[1] Summit's first appearance in the case came on April 12, 2021, when the attorneys for AIFSIF / Summit filed a Notice of Appearance ("NOA"), stating: "Please enter this firm's appearance as counsel of record on behalf of SUMMIT HOLDINGS." (NOA, at p. 1.) The NOA does not contain any indication that Summit was appearing specially to contest personal jurisdiction.

Three days later, on April 15, 2021, the parties appeared before the WCJ. The Minutes of Hearing list "Tampa Bay / Summit" as appearing specially. (Minutes of Hearing, April 15, 2021, at p. 1.) In the comments section, the WCJ wrote: "Parties to provide forthwith the correct name of the entity in Florida for coverage of the Tampa Bay team so an Order of Joiner can Issue." The WCJ also noted the attorneys for both entities associated with the Bandits were making special appearances "solely to address personal jurisdiction." (*Ibid.*) AIFSIF was subsequently joined to the litigation on May 11, 2021. (See Order Joining Party Defendant, 5/11/2021, at p. 1.)[2]

On June 2, 2021, the parties appeared again at the continued Mandatory Settlement Conference ("MSC"), and trial was set for September 23, 2021, with the attorneys for the Bandits

[1] North River continues to be involved in the case. Although not clearly articulated in the record, it appears that the parties do not dispute that North River's period of coverage began only after the conclusion of applicant's playing career.

[2] In this order, AIFSIF is also referred to as Bridgehead Insurance Company. It is unclear from the remainder of the record whether this association is accurate; subsequently, the parties and the WCJ refer to AIFSIF only by its own name. We therefore follow their practice.

again noted as appearing specially. (Minutes of Hearing, 6/2/2021, at p. 1.) The Pre-Trial Conference Statement ("PTCS"), also dated June 2, 2021, lists "personal jurisdiction" as one of the issues. (PTCS, at p. 4.)

The matter proceeded to trial over a number of trial dates, beginning on September 23, 2021, with the attorneys for the Bandits / North River and the Bandits / AIFSIF both "specially appearing." (Minutes of Hearing / Summary of Evidence, ("MOH/SOE"), 9/21/21 at p. 2.) According to the MOH/SOE, the parties stipulated, as relevant here, that: (1) applicant was employed by the Bandits from February 1983 to February 1985; and (2) "for the [Bandits], there's no evidence of coverage from February 1983 to February 19, 1984; and they are covered through [AIFSIF], administered by [Summit], for the period February 18, 1984 through March 3, 1985." (*Id.* at p. 3.) The "Issues" section of the MOH/SOE notes that the WCJ was deferring the "[i]ssue raised regarding the lack of insurance by the Miami Dolphins and by the Tampa Bay Bandits[.]" (*Id.* at p. 3.) In addition to standard issues including permanent disability, apportionment, whether the injury arose out of and in the course of injury and body parts injured, "Additional Issues" are listed including "California Subject Matter Jurisdiction," but personal jurisdiction is *not* listed as one of the issues for adjudication. (*Id.* at pp. 3–4.) Applicant began his testimony, and the matter was continued to a later date. (*Id*. at pp. 1, 8–9.)

At the further hearing on March 24, 2022, the attorneys for the Bandits / North River and the Bandits / AIFSIF are again listed as specially appearing. (MOH/SOE, 3/24/22, at p. 2.) Applicant testified at length about his playing career, both on direct examination and cross-examination from lawyers for the Dallas Cowboys ("Cowboys") and Miami Dolphins ("Dolphins"). (*Id.* at pp. 3–16.)

The trial continued on January 12, 2023, with the lawyers for the Bandits / North River and Bandits / AIFSIF again listed as specially appearing. (MOH/SOE, 1/12/23, at p. 2.) At this hearing, applicant testified under cross-examination from lawyers for both AIFSIF and North River. (*Id.* at pp. 3–5.) It is clear from the MOH/SOE that this questioning concerned not only personal jurisdiction, but also the merits of the other issues being litigated at trial. (*Ibid.*) The matter was thereafter taken under submission. (*Id.* at p. 1.)

On February 23, 2023, the WCJ vacated the submission and referred the case to the Disability Evaluation United ("DEU") for formal rating. (Order Vacating Submission, at p. 1.)

On March 10, 2023 – nearly two years after first appearing in the case – AIFSIF filed a "Petition for Dismissal" seeking dismissal from the case on the basis of lack of personal jurisdiction. Concurrently, AIFSIF filed a motion to strike the rating instructions sent to the DEU and to cross examine the DEU rater. Both the Petition for Dismissal and the Motion to Strike recite that AIFSIF was not waiving personal jurisdiction, and the Petition for Dismissal asserts that "the trial judge conducted trial with personal jurisdiction remaining an issue[.]" (Petition for Dismissal at p. 2; Motion to Strike at p. 2.)

After various continuances, the parties appeared again for trial on December 5, 2023; attorneys for the Bandits / North River and the Bandits / AIFSIF again are listed as appearing specially. (MOH/SOE, at p. 2.) "Additional Issues" are listed as: "Personal jurisdiction over the Tampa Bay Bandits and whether the personal jurisdiction defense has been waived" and "Motion to strike the instructions and the subsequent ratings." (*Ibid.*) Attorneys for North River and AIFSIF both conducted examination of the DEU rater, and the matter was subsequently taken under submission for a second time. (*Id.* at pp. 3–5.)

On February 5, 2024, the WCJ issued his first Findings and Award and Order ("First F&A"), finding in relevant part that applicant sustained 98% permanent disability as a result of his work-related injury, but that the court lacked personal jurisdiction over the Bandits, and therefore that the award should instead run against the Cowboys and Dolphins pursuant to Labor Code section 5500.5. (First F&A, at p. 4, ¶¶ 13, 19; p. 5.) The First F&A also ordered the Bandits, North River and AIFSIF, along with their associated administrators, dismissed as parties due to lack of personal jurisdiction. (*Id.* at p. 6.)

Both the Cowboys and Dolphins filed Petitions for Reconsideration, contesting, among other issues, whether the Bandits and their insurance companies and administrators had waived personal jurisdiction. The WCJ filed a Report recommending that the petitions be granted and the matter returned to him for further consideration of the personal jurisdiction issue. On April 8, 2024, we issued our prior Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration, rescinding the First F&A per the WCJ's Report.

After remand, the matter proceeded to trial again on September 24, 2024. Attorneys for the North River and AIFSIF are not listed on this document as specially appearing. (MOH/SOE, 9/24/24, at p. 2.) Additional Issues are listed as "Apportionment" and "Personal Jurisdiction."

(*Ibid.*) The matter was taken under submission on October 18, 2024. (Order Submitting Case for Decision, at p. 1.)

On December 5, 2024, the WCJ issued the instant F&A. In contrast to the First F&A, the F&A finds that AIFSIF waived or abandoned its personal jurisdiction defense "over the course of litigation herein." (F&A, at pp. 2–3, ¶ 5.) Accordingly, the F&A includes an award against "TAMPA BAY BANDITS and Associated Industry of Florida Self-Insurers Fund, administered by Summit Consulting[.]" (*Id.* at pp. 4–5.)

The instant Petition for Reconsideration followed.

DISCUSSION
I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on December 19, 2024 and 60 days from the date of transmission is Monday, February 17, 2025. The next business day that is 60 days from the date of transmission is Tuesday, February 18, 2025. (See Cal. Code

Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Tuesday, February 18, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on December 19, 2024, and the case was transmitted to the Appeals Board on December 19, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 19, 2024.

II.

We consider first AIFSIF's argument that it did not waive its objection to personal jurisdiction. The Appeals Board's authority to decide a matter is predicated on personal jurisdiction over the parties, which is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct permitting the court to exercise jurisdiction over the party. (*Greener v. Workers' Comp. Appeals Bd. of California* (1993) 6 Cal. 4th 1028 [25 Cal. Rptr. 2d 539, 863 P.2d 784, 58 Cal. Comp. Cases 793, 795] (*Greener*).) As we have previously observed, "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

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

forum state. (*Worrell v. San Diego Padres* (2020) 85 Cal. Comp. Cases 246, 255 [2020 Cal. Wrk. Comp. P.D. LEXIS 1, 16–17].)

It has long been the rule in California that "a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action." (*Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341 (*Roy*); see also *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 52 [12 Cal. Rptr. 3d 711] [" ' "A general appearance operates as a consent to jurisdiction of the person … ." [Citation.]' "].)

In the civil context, Code of Civil Procedure section 1014 reads in part: "A defendant appears in an action when the defendant answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, moves for reclassification pursuant to Section 403.040, gives the plaintiff written notice of appearance, *or when an attorney gives notice of appearance for the defendant*." (Code Civ. Proc., § 1014, emphasis added). This list is not exclusive; the operative question is whether "defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed." (*Sanchez v. Superior Court* (1988) 203 Cal. App. 3d 1391, 1397.) This inquiry is fact-specific and dependent on the particulars of each case. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147.) Code of Civil Procedure section 418.10, meanwhile, provides that a party may file an answer, demurrer or motion to strike without making a general appearance, but only if it simultaneously or previously files a motion to quash service on the basis of lack of jurisdiction concurrently. (Code Civ. Proc., § 418.10(e)(3).)

Moreover, and notwithstanding a party's initial assertion that it is "specially appearing," a subsequent request by that party for action by the Appeals Board or by a court on a basis other than lack of personal jurisdiction constitutes a general appearance. (*Greener, supra,* 6 Cal. 4th 1028; *Roy*, *supra,* 127 Cal. App. 4th 337 [party waived objection to exercise of personal jurisdiction by making a general appearance through the filing an answer and pursuit of discovery without first moving to quash]; see also *Parker v. Indy Fuel Hockey* (November 29, 2017, ADJ10184700) 2017 Cal. Wrk. Comp. P.D. LEXIS 547; *Holmberg v. Oakland Raiders* (January 11, 2024, ADJ10874193, ADJ10874229) 2024 Cal. Wrk. Comp. P.D. LEXIS 17.)

The rule that emerges is the following: a party makes a general appearance when they take any action that recognizes the authority of the court to proceed, including their attorney filing a notice of appearance, without first or concurrently stating a clear objection to proceeding based upon a lack of personal jurisdiction. Similarly, taking any action on the merits of the case without

concurrently filing a pleading asserting the lack of personal jurisdiction and seeking dismissal of the case constitutes waiver of any prior articulated objection. Finally, even once asserted, an objection based on personal jurisdiction may be waived by a failure to timely pursue it.

Here, AIFSIF's attorneys filed a Notice of Appearance on behalf of Summit, the administrator, on April 12, 2021. This Notice of Appearance contains no indication that Summit – and therefore AIFSIF – was appearing specially to contest personal jurisdiction. Strictly speaking, it appears that this conduct was sufficient, standing alone, to waive any objection to personal jurisdiction, despite the attorney's assertion three days later of the personal jurisdiction objection at the first hearing the attorney attended.

We need not rely on that admittedly harsh result, however, because even if AIFSIF did not waive personal jurisdiction by failing to assert it in the Notice of Appearance, AIFSIF's subsequent course of conduct forfeited any objection that might have been asserted. Specifically, despite asserting a lack of personal jurisdiction at the April 15, 2021 MSC, AIFSIF took no further action to assert its objection – for example, filing a Petition to Dismiss – until, at a minimum, the continued MSC date of June 2, 2021, when it listed "personal jurisdiction" on the PTCS as one of the issues for trial.

Moreover, at the September 23, 2021 trial date, personal jurisdiction was not listed as an issue, and no objection or other indication was memorialized suggesting that AIFSIF attempted to include personal jurisdiction as an issue at trial only to be refused. In fact, it was not until the filing of the March 10, 2023 Petition to Dismiss – close to two years after asserting the initial objection to personal jurisdiction on April 15, 2021 – that AIFSIF took any concrete step to seek adjudication of the issue.

No explanation appears in the record or in AIFSIF's pleadings for this delay. Although we agree with AIFSIF that a party should not be precluded from participating in the merits of a case while its personal jurisdiction objection is pending but through no fault of its own remains undecided, we cannot agree that this is the case here. It is one thing to continue to participate in a case where, having diligently attempted to advance one's personal jurisdiction argument, the issue has been consolidated or deferred by the WCJ. It is quite another to nominally assert a personal jurisdiction objection and then proceed to focus on the merits of the case for nearly two years, before belatedly returning to the personal jurisdiction issue.

Under the facts of this case, we need not decide at precisely what moment AIFSIF's personal jurisdiction objection was waived – whether by the initial Notice of Appearance, by the failure to take action between April 15, 2021 and June 2, 2021, or by the failure to ensure that the issue was included at the initial September 23, 2021 trial. What is clear from the record is that any objection was forfeited well before the filing of the March 10, 2023 Petition to Dismiss. We therefore affirm the WCJ's finding that AIFSIF's assertion of lack of personal jurisdiction was waived.

AIFSIF's other argument is that the WCJ deferred the issue of insurance coverage, and that the WCJ therefore had no authority to award benefits against AIFSIF without first resolving that issue. AIFSIF further appears to argue that an award cannot be rendered against it without first proceeding to arbitration under Labor Code section 5275, and that it is insolvent and incapable of satisfying any award against it.

Here, although we render no opinion on the specific arguments, we agree with the basic point – having deferred an issue related in some way to the presence or absence of insurance for the Bandits for the relevant period, it was incumbent on the WCJ to revisit the issue and provide the parties an opportunity to be heard prior to entry of an award.

Specifically, the record shows that at the September 23, 2021 trial, the WCJ deferred the "Issue raised regarding the lack of insurance by the Miami Dolphins and by the Tampa Bay Bandits." (MOH/SOE, 9/21/21, at p. 3.) Our review of the subsequent MOH/SOEs for further trial dates does not uncover any indication that this issue was subsequently revisited. Accordingly, it appears that AIFSIF's failure to address the issue at trial was based upon a reasonable belief that the issue was deferred, explaining the WCJ's observation that AIFSIF did not actually provide any proof of insolvency or otherwise prove the assertions made in the Petition for Reconsideration.

The necessity of addressing the issue prior to the issuance of an award is illustrated by Labor Code section 5500.5, which generally requires that each entity who employed the injured worker during the last year of injurious exposure be found jointly and severally liable for benefits. (See Lab. Code, § 5500.5(a).) However, "[i]n the event that none of the employers during the above referenced periods . . . are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee . . . for which an employer is insured for workers' compensation coverage or an approve alternative thereof." (*Ibid.*)

It is not entirely clear from the Petition what AIFSIF's argument is with regard to the properly liable parties. However, based upon the Petition and the Report, it appears uncontested that whatever coverage AIFSIF did provide began on February 19, 1984, and therefore did not cover the period of February 1, 1984 through February 18, 1984, which formed a part of applicant's last year of injurious exposure. Some finding must be therefore rendered as to the existence or non-existence of "workers compensation coverage or an approved alternative thereof" for this period in order to determine the proper party or parties that should be held liable under section 5500.5. Similarly, although the Petition is not entirely clear as to its argument relating to AIFSIF's coverage, if AIFSIF's coverage were found not to be "workers' compensation or an approved alternative thereof," liability would then roll back to a prior employer (assuming no coverage for the period of February 1, 1984 through February 18, 1984) pursuant to the provisions of Labor Code section 5500.5.

We emphasize that we are not endorsing the Petition's arguments, merely holding that AIFSIF should be presented the opportunity to make and prove them – and the other parties given the opportunity to respond. In this context, we note that AIFSIF appears to have stipulated to coverage from February 19, 1984 to March 3, 1985. (See MOH/SOE, 9/23/21, at p. 3.) The apparent conflict between the stipulation and AIFSIF's argument should be addressed, along with any other pertinent arguments or facts the parties believe may bear on these issues.

Accordingly, we will affirm the F&A in all respects, except that we will amend it to defer findings as to insurance and the liability period under Labor Code section 5500.5, and to defer the issuance of an award pending the determination of those issues.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the December 5, 2024 Findings and Award and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 5, 2024 Findings of Fact and Award and Order. Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

11. Determination of the liability period under Labor Code section 5500.5 is deferred.

12. The issue of insurance for the Miami Dolphins and Tampa Bay Bandits was previously deferred.

AWARD/ORDERS

It is ordered that entry of an award is deferred pending resolution of the insurance issue alluded to in Findings of Fact 12, and therefore of the identification of the liable party or parties pursuant to Labor Code section 5500.5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 18, 2025

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

PAUL PIUROWSKI
GLENN, STUCKEY & PARTNERS
SEYFARTH SHAW
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
SIEGEL, MORENO & STETTLER
LAW OFFICES OF SAUL ALLWEISS

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