WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RANDY NEAL, *Applicant*

vs.

SAN FRANCISCO 49ERS; FAIRMONT PREMIERE INSURANCE COMPANY, administered by ZENITH INSURANCE COMPANY; *Defendants*

Adjudication Number: ADJ9990732
Van Nuys 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.

Defendant San Francisco 49ers ("49ers") sought reconsideration of the September 8, 2017 Findings of Fact, Decision & Orders ("F&O"), wherein the workers' compensation administrative law judge (WCJ) concluded that applicant's claim may be brought in California, and that Labor Code section 3600.5[1] subdivisions (c) and (d) do not operate to exempt his claim because those sections apply only to applicants who have not been hired in California by at least one employer during the cumulative trauma injury period. Defendant asserts that the claim is barred by section 3600.5, subsections (c) and (d), because applicant did not spend more than 20% of his duty days in California during his last year as a professional athlete, and was not hired in California by any employer who employed him during that year. Defendant further contends that subdivisions (c) and (d) apply to all cumulative trauma claims by professional athletes, even if they have a previous hire in California, in effect carving out an exception to subdivision (a) of the same section, and to section 5305, which provide that an employee who has been hired in California can recover under California workers' compensation law for injuries sustained outside this state based upon the location of the contract of hire.

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

We did not receive an Answer. 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 and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the WCJ's finding of jurisdiction.

FACTS AND PROCEDURAL HISTORY

Applicant filed an Application for Adjudication, claiming a cumulative trauma industrial industry sustained while employed as a professional football player by defendant and others during the period from May 2, 1995 to July 21, 2000. According to the stipulations of the parties, applicant's playing history during the cumulative trauma period was as follows:

Cleveland Browns	May 2, 1995 through August 18, 1995
Green Bay Packers	August 29, 1995 through November 22, 1995
Cincinnati Bengals	November 22, 1995 through August 22, 1997
England Monarchs	March 10, 1998 through June 7, 1998
San Francisco 49ers	July 21, 1998 through September 23, 1998
Cleveland Browns	January 18, 1999 through June 14, 1999
Tampa Bay Storm	March 19, 2000 through April 5, 2000
Carolina Cobras	May 31, 2000 through July 21, 2000

(Minutes of Hearing/Summary of Evidence (MOH/SOE), 7/19/2017, at p. 2.)

The matter proceeded to trial on July 19, 2017, on the sole issue of jurisdiction. Applicant testified that the 49ers provided him a plane ticket, flew him to California from New Jersey, and offered him a three-year contract after a workout session. (*Id.* at p. 3.) He accepted the contract in California. (*Ibid.*) No contract terms were discussed while he was in New Jersey. (*Ibid.*) Applicant was never a resident in California, never used a California-based agent, and never signed any other contracts in California. (*Ibid.*)

Both parties submitted trial briefs. Defendant's trial brief argues that section 3600.5, subdivision (d) precludes the exercise of WCAB jurisdiction over a claim if the WCAB cannot exercise personal jurisdiction over at least one employer during the applicant's last year as a professional athlete. In this case, defendant asserts that the WCAB "lacks personal jurisdiction . . . pursuant to Labor Code section 3600.5(c)" over applicant's last two employers, the Tampa Bay Storm ("the Storm") and the Carolina Cobras ("the Cobras") and therefore his claim is barred from being adjudicated in this forum. (Defendant's Post-Trial Brief, at p. 3.)

Applicant's trial brief, by contrast, argues that section 3600.5, subdivision (d) only applies to applicants who have not been hired in California on at least one of their contracts during the cumulative trauma injury period; applicant asserts that where there is a contract of hire in California, jurisdiction may be exercised under section 3600.5, subdivision (a) and section 5305.

On September 8, 2017, the WCJ issued his F&O, finding jurisdiction over the claim based upon applicant's hire in California. The Opinion on Decision makes clear that the WCJ considered defendant's contentions regarding section 3600.5, subdivision (d), but concluded that the Legislature did not intend via that section to abrogate the long-held principle that hire in California is a sufficient basis in and of itself to support the exercise of California jurisdiction over a claim. (Opinion on Decision, at pp. 5–7.)

DISCUSSION

Under California's workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; §§ 3600 et seq., 5300 and 5301.) The statutes establishing the scope of the WCAB's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244], cert den., 362 U.S. 928 (1960) ["The [California Workmen's Compensation] Act applies to all injuries whether occurring within the State of California, or occurring outside the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California."].)

In general, the WCAB may assert its subject matter jurisdiction in a given 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).) Whether there is a significant connection or nexus to the State of California is best described as an issue of due process, though it has also been referred to as a question of subject-matter jurisdiction. (*New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Macklin*) (2015) 240 Cal.App.4th 1229, 1238; *Johnson, supra,* 221 Cal.App.4th at 1128.)

In addition to injuries occurring in California, the WCAB can also assert subject matter jurisdiction over injuries occurring outside this state in certain circumstances. Section 3600.5, subdivision (a) states: "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).) Similarly, section 5305 states: "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." (§ 5305.)[2]

It has long been recognized that a hiring in California within the meaning of Labor Code 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 at p. 1126.)

In addition to the above, additional requirements apply to professional athletes filing workers' compensation claims involving occupational disease or cumulative trauma injuries. Section 3600.5(d) provides as follows:

> (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

[2] The residency requirement of section 5305 has long been recognized as unconstitutional. (See *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 20, fn. 6 [64 Cal.Comp.Cases 745].)

> 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.
>
> (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.
>
> (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).)

We are directed to interpret statutory language "consistently with its intended purpose, and harmonized within the statutory framework as a whole." (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 585 [75 Cal.Comp.Cases 817].) "Statutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.) We accordingly cannot interpret section 3600.5(d) in isolation; it must be construed in the context of the entire statute of which it is a part. As section 3600(d)(1) makes clear by reference, an important provision for determining the meaning of section 3600.5(d) is section 3600.5(c).

Section 3600.5(c) provides as follows:

> (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.

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

(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.

(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.)

Section 3600.5 also defines some of the terms used in the above subdivisions. Subdivision (g)(1) states: "The term 'professional athlete' means an athlete who is employed at either a minor or major league level in the sport of baseball, basketball, football, ice hockey, or soccer." (§ 3600.5(g)(1).) "California-based team" means "a team that plays a majority of its home games in California." (§ 3600.5(g)(2).) "Duty day" means "a day in which any services are performed by a professional athlete under the direction and control of his or her employer pursuant to a player contract." (§ 3600.5(g)(3).) The term "season" means "the period from the date of the first preseason team activity for that contract year, through the date of the last game the professional athlete's team played during the same contract year." (§ 3600.5(g)(4).)

In light of the above, we 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, citing *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1034–103.)

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.

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.

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.) 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; *Harrington v. Superior Ct. of County of Placer* (1924) 194 Cal. 185, 188 ["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.

Second, the question of whether a state may apply its laws to a given claim – choice of law – is separate and distinct from the question of whether it may exercise personal jurisdiction over a defendant. (*Allstate Ins. Co. v. Hague* (1981) 449 U.S. 302, 317, fn. 23.) Therefore, it cannot be said that a lack of personal jurisdiction over a party amounts to an exemption from the substantive law in question; it is possible that such law could be applied by a different court that does have personal jurisdiction over the party in question.

Therefore, we disagree that a lack of personal jurisdiction over a defendant is an "exemption" from California workers' compensation law, and therefore a trigger for subdivision (c) or (d) of section 3600.5.

This clarification aside, we turn to defendant's assertion that applicant's last two employers, the Storm and the Cobras, are exempt pursuant to subdivision (c). Subdivision (c) applies when a worker is "temporarily within this state doing work for his or her employer" if "during the 365 days immediately prior to the professional athlete's last day of work for the employer within the state, the athlete performs less than 20% of his or her duty days in the state." (§ 3600.5(c)(3).) In other words, subdivision (c) defines the relevant one-year period based upon the professional athlete's last day of work within this state for the given employer. If the athlete never worked in this state for the relevant employer, subdivision (c) cannot apply, because there is no 365-day period to evaluate whether the athlete meets the twenty percent threshold. The fact that zero days is less than twenty percent is irrelevant, because there is no date from which to measure.

Here, as the party seeking to prove the application of the subdivision, the burden of proof lies with defendant. (§ 5705). However, as far as can be told from the record, applicant never performed any work activities in California for either the Storm or the Cobras. In fact, the Petition for Reconsideration affirmatively asserts that applicant never played in California for either team. (Petition for Reconsideration, at p. 7.) Because the record does not show that applicant was ever temporarily within this state while performing work for either team, defendant fails to prove that subdivision (c) applies to either the Storm or the Cobras.

Prior caselaw interpreting the exemption now codified in subdivision (c) confirms that the exemption applies only when the applicant's entitlement to benefits depends on a theory that injury was sustained in this state while the worker was here temporarily. For example, in *McKinley*, the Appeals Board stated the exemption applies "if all of the following four conditions are satisfied: (1) the employee was only temporarily working in California . . .." (*McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 29 (Appeals Board en banc).) In enacting the amendments to section 3600.5, the Legislature specifically stated: "It is the intent of the Legislature that the changes made to law by this act have no impact or alter in any way the decision of the Workers' Compensation Appeals Board in *Dennis McKinley v. Arizona Cardinals et al.* (2013) 78 CCC 23 (ADJ7460656)." (Stats 2013, ch. 653, § 5.)

Furthermore, even if applicant's claim had involved temporary employment in California contributing to his injury, we note the record does not show that defendant proved the other necessary elements of the exemption, namely that the Storm and the Cobras had workers' compensation policies or their equivalent that would cover injuries sustained in this state while here temporarily. (See § 3600.5(c)(1)(A), (c)(1)(B); *McKinley, supra,* 78 Cal. Comp. Cases 29.)

Finally, we note that in this case, applicant was hired in California by the 49ers. This fact, standing alone, is sufficient to establish WCAB subject-matter jurisdiction over his claim, because subdivisions (c) and (d) of section 3600.5 apply only to athletes who cannot establish jurisdiction under section 3600.5, subdivision (a) or section 5305.[3]

Accordingly, we will affirm the WCJ's finding of jurisdiction.

[3] We do not discuss this conclusion in depth, because defendant's failure to prove the factual predicates necessary to assert the application of subdivisions (c) or (d) of section 3600.5 is a sufficient basis to uphold the WCJ's jurisdictional finding, even if applicant had not been hired in California. A more involved analysis of this issue can be found in *Wilson v. Marlins* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 30 (Appeals Board panel decision).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 8, 2017 Findings of Fact, Decision, and Orders is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MARCH 9, 2021

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

COLANTONI COLLINS MARREN PHILLIPS & TULK
MARK SLIPOCK
RANDY NEAL

AW/bea

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