WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EVAN MOORE, *Applicant*

vs.

CLEVELAND BROWNS, permissibly self-insured; SEATTLE SEAHAWKS, permissibly self-insured c/o CCMSI; PHILADELPHIA EAGLES and GREEN BAY PACKERS, GREAT DIVIDE INSURANCE COMPANY c/o BERKLEY ENTERTAINMENT, *Defendants*

Adjudication Number: ADJ9095473
Anaheim District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.[1] Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the June 27, 2019 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from May 22, 2008 through April 29, 2013, claimed injury to multiple parts of body, including but not limited to the head, neck, spine, hips, upper extremities, lower extremities, neurological and internal systems. The WCJ determined that applicant failed to show that his contract of hire was made in the State of California, that the court had no jurisdiction over applicant's claim under Labor Code section 3600.5, and that the forum selection clauses in applicant's contracts were reasonable and valid, resulting in the court declining to exercise jurisdiction over applicant's claim.

Applicant contends that he authorized his California-based agent to accept and bind him to an employment contract, and that superseding written contracts do not obviate the grant of jurisdiction. Applicant further contends the WCJ improperly relied on the parol evidence rule to invalidate prior oral agreements between the parties.

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[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

We have received Answers from Great Divide Insurance Company, the insurer of the Green Bay Packers and the Philadelphia Eagles, the Seattle Seahawks, permissibly self-insured, and the Cleveland Browns, permissibly self-insured. 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. Based on our review of the record, and for the reasons described below, we will rescind the F&O and substitute new Findings of Fact determining that California has jurisdiction over the claimed injury.

FACTS

Applicant claimed injury to multiple parts of body, including but not limited to the head, neck, spine, hips, upper extremities, lower extremities, orthopedic, neurological and internal systems while employed as a professional athlete by the Green Bay Packers from May 22, 2008 to September 15, 2009, the Cleveland Browns from November 9, 2009 to August 31, 2012, the Seattle Seahawks from September 1, 2012 to December 19, 2012, and the Philadelphia Eagles from December 20, 2012 to April 29, 2013. Defendants dispute California jurisdiction over the claimed injury.

The parties proceeded to trial on May 15, 2019 on issues of jurisdiction and sanctions. Applicant testified that throughout his career as a professional athlete, he retained sports agents Dubin & Yee, with offices in Los Angeles, and that he gave his agents full authority to enter into contracts on his behalf. (Minutes of Hearing and Summary of Evidence (Minutes), dated May 15, 2019, at 6:8.) Applicant never negotiated directly with any of the defendants. (*Ibid.*)

Applicant's professional sports career began with short-term work as a "weekender" for the New Orleans Saints. Following his release from the New Orleans Saints, applicant returned to California. (Partial Transcript of Proceedings, dated May 15, 2019, at 6:1.) The Green Bay Packers then contacted applicant's agents with an offer for a contract. Applicant directed his agent to accept the terms. (*Id*. at 6:12.) Applicant did not recall where he signed the contract with the Green Bay Packers. (*Id*. at 9:8.)

Following his release from the Green Bay Packers, applicant returned to California, at which time he was contacted by his agent regarding an offer to play for the Cleveland Browns.

(Partial Transcript of Proceedings, dated May 15, 2019, at 10:12.) Applicant while in California accepted an offer to play on the "practice squad" for the Browns. Applicant did not recall where he signed the initial contract. (*Id*. at 11:4.) While in Cleveland, applicant signed another contract to join the active roster approximately four weeks later. (*Id*. at 20:18.) Applicant signed two further contracts in 2010 and 2011 while physically located in Cleveland.

Following his release from the Cleveland Browns, the Seattle Seahawks expressed interest in signing applicant. Applicant's agents negotiated the contract, and applicant directed his agents to accept the contract. (*Id*. at 12:7.) Applicant flew from Cleveland to Seattle, where he signed a contract.

Following his release from the Seattle Seahawks, the Philadelphia Eagles offered applicant a contract, which applicant directed his agents to accept. (Minutes, at 7:2.) Applicant signed the contract in Philadelphia.

The WCJ issued the F&O on June 27, 2019, determining in relevant part that applicant had "failed to show that his contract for hire was made in the State of California." (F&O, Finding of Fact No. 2.) In the absence of a contract for hire, the WCJ determined that California was without jurisdiction over the claimed injuries pursuant to Labor Code section 3600.5.[2] The WCJ's opinion observed that pursuant to sections 3600.5 and 5305, the California workers' compensation system has jurisdiction over all "'controversies arising out of injuries suffered outside the territorial limits of this state,' when the 'contract of hire' is made in California." (Opinion on Decision, p. 3.) Citing to California appellate authority in *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal. App. 5th 556 [83 Cal. Comp. Cases 1175], the WCJ observed that the fact that "applicant's [Tripplett's] agent was in California when he entered negotiations with the Colts was insufficient to establish that an oral employment contract was actually formed when there was no evidence the agent had the authority to bind the player to an employment agreement or to accept on his behalf." (Opinion on Decision, pp. 3-4.) The WCJ noted that here, as in *Tripplett*, applicant always had the final say as to whether to accept or reject a contract, and that applicant always directed his agents to accept the various contracts on his behalf. (*Id*. at p. 4.) The WCJ further observed that the Standard Representation Agreement (SRA) as between applicant and his agents specifically precluded any agent authority to bind or commit applicant to a contract. (*Ibid.*) The WCJ also deemed the forum

[2] All further statutory references are to the Labor Code unless otherwise stated.

selection clauses in applicant's various contracts to be reasonable and enforceable, and as a result, declined to exercise jurisdiction over the claimed injury. (Finding of Fact No. 4.)

Applicant's Petition for Reconsideration contends that a contract for hire was formed in California when applicant's agents accepted the offers made by the various teams, and that applicant's agents had the authority to bind him to an agreement. (Petition, at 7:1.) Applicant asserts that the oral agreements reached between himself and the various defendants provide a valid basis upon which to assert California jurisdiction under sections 3600.5 and 5305, and that the execution of the written contracts was a condition subsequent to the hiring. (*Id*. at 16:27, 17:15.) Applicant contends the holdings in *Tripplett, supra*, 25 Cal. App. 5th 556, conflict with statutory and case law authority. (*Id*. at 12:4.) Applicant further asserts that California law allows for the extension of authority to an agent to bind the client to a contract, and that the WCJ incorrectly applied the Parol Evidence rule. (*Id*. at 20:1.)

The Answers filed by the Seattle Seahawks, the Cleveland Browns and Great Divide Insurance on behalf of the Green Bay Packers and Philadelphia Eagles assert that *Tripplett, supra,* 25 Cal. App. 5th 556, is controlling authority for the proposition that the various integration clauses obviate any assertion of a prior oral contract for hire. The defendants' Answers further contend that the applicant's agents did not have the authority to bind the applicant to a contract, and that the applicant signed each of the various contracts outside of California. (Answer of the Seattle Seahawks, dated July 29, 2019, at p. 8; Answer of the Cleveland Browns, dated July 29, 2019, at 6:16; Answer of Great Divide Insurance, dated July 30, 2019, at 7:25; 8:18.)

The WCJ's Report observes that applicant was not present in California at any of the times he signed employment contracts with the various defendants. The WCJ further noted that applicant's assertion that his agent was authorized to bind him to an employment contract was not supported in the record. (Report, at pp. 3, 9.) In the absence of authority to bind, the WCJ determined that applicant's hiring took place when he signed the various contracts, always outside of California. (*Id*. at p. 8.) The WCJ further observed that because applicant was not aware of all of the terms of the contract until he signed the contracts, there could be no complete and binding contract for hire prior to applicant's execution of the written contracts. (*Id*. at p. 10.) Additionally, the WCJ noted that the integration clause found in each of applicant's written contracts obviated any prior agreement, oral or written. (*Ibid.*)

DISCUSSION

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.

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.

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.) 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]. 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].) 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], citing *Coakley, supra*, 68 Cal.2d 7, 14.) 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." (Cal. 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, applicant offered testimony regarding his whereabouts at the time he received and accepted the offer of employment by the Cleveland Browns:

> Q. Now, with regards to the Cleveland Browns, how did you become a member of that team?
> A. After being released from the Green Bay Packers in September of 2009, I believe, I came back to California to continue to rehab a hand injury, and I was there for the better part of the 2009 season, and then was contacted by my agent informing me that he had been in discussions with the Cleveland Browns about becoming a member of the Cleveland Browns, and I became a member of the Cleveland Browns. I believe it was early November of 2009.
> Q. Did Dubin & Yee explain to you the terms and conditions of the Browns' offer?
> A. They did, yes.
> Q. Did you direct them to accept that offer on your behalf?
> A. Yes.
> Q. And at that point do you believe you became a member of the Browns' team?
> A. Yes.
> (Partial Transcript of Proceedings, dated May 15, 2019, at 10:10.)

Applicant was thus physically located in California at the time he accepted the offer of employment from the Cleveland Browns, and through his agent, put his acceptance in the course

of transmission to the proposer. (Cal. Civ. Code, § 1583.) Defendants offered no rebuttal witnesses or documentary evidence to dispute applicant's testimony.

In *Ledbetter Erection Corp. v. Workers' Comp. Appeals Bd. (Salvaggio)* (1984) 156 Cal. App. 3d 1097 [49 Cal. Comp. Cases 447] (*Salvaggio*), the Court of Appeal held that applicant's oral contract for hire was formed in Nevada, when the applicant uttered his acceptance of an offer of employment over the telephone while physically located in Nevada. (*Id*. at 1105.) Similarly, in *Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd. (Egan)* (1966) 65 Cal. 2d 429 [31 Cal. Comp. Cases 415] (*Egan*), applicant's contract of hire was formed in California when he physically went to the union local to pick up a referral slip and immediately departed for the jobsite. (*Id*. at 433-434.)

Here, the undisputed evidence establishes that applicant was physically located in California at the time a contract of hire was communicated to him. Applicant accepted the offer, and instructed his agent to communicate his acceptance to the Browns, thus putting his acceptance in the course of transmission to the proposer.[3]

Accordingly, we conclude that a contract of hire was formed at the time and place of applicant's acceptance of the offer in California. (*Salvaggio, supra,* 156 Cal.App.3d 1097; *Egan, supra,* 65 Cal.2d 429; see also *Royster v. NFL Europe* (ADJ7597520, September 9, 2014) [2014 Cal. Wrk. Comp. P.D. LEXIS 445] [acceptance of employment by applicant and agent while in California is hiring in this state]; *Stephens v. Nashville Kats* (ADJ4213301, April 1, 2015) [2015 Cal. Wrk. Comp. P.D. LEXIS 207] [applicant hired in California when he accepted employment by telephone in this state]; *Pierce v. Washington Redskins* (May 23, 2017, ADJ8937991) [2017 Cal. Wrk. Comp. P.D. LEXIS 244] [agent and applicant both in California when applicant accepted terms of contract sufficient for jurisdiction, notwithstanding applicant traveled out of state to sign the contract]; *Withrow v. St. Louis Rams* (May 23, 2017, ADJ6970905) [2017 Cal. Wrk. Comp. P.D. LEXIS 249] [applicant's acceptance of offer of employment in California sufficient for California jurisdiction]; *Paddio v. Cleveland Cavaliers* (May 26, 2017, ADJ7041227) [2017 Cal. Wrk. Comp. P.D. LEXIS 242] [applicant accepted offers of employment from Cleveland Cavaliers through his agent while in California and finalization of written contract and other employment

[3] We further note that applicant's agent Mr. Yubin testified that with one exception, not relevant here, he was physically present in California at the time he communicated the acceptance of every one of his various clients over the past 19 years. (Ex. 1, Transcript of the Deposition of Stephen L. Dubin, dated September 20, 2017, at 19:6.)

documents after hiring in California are conditions subsequent to hiring and are not determinative of place of hiring].)

The WCJ's Report observes that when applicant accepted the oral offer for a contract of hire, he was not aware of the totality of terms set forth in the contracts, including relevant conditions such as a pre-employment workout. (Report, at p. 8.) With respect to the Seattle Seahawks offer, for example, applicant was aware of only the length of the contract and the corresponding compensation and no other terms. (*Ibid.*) Accordingly, the WCJ concludes that in the absence of a discussion of all relevant terms, there was no meeting of the minds and no contract of hire formed until applicant signed the ensuing written employment contracts. (*Ibid.*)

However, California courts have held that a contract for hire is formed for purposes of California jurisdiction even when not every term has been negotiated, so long as the essential terms of engagement have been agreed upon. Decided nearly 100 years ago, the case of *Globe Cotton Oil Mills v. Industrial Acc. Com.* (1923) 64 Cal.App. 307, 309-310 [1923 Cal. App. LEXIS 130], involved a contract for hire made in Calexico, California for work to be performed outside the state. The parties to the agreement did not reach an accord regarding applicant's wages until applicant had been working for several days. The court of appeal observed that "[t]he place of the contract is the place at which the last act was done by either of the parties essential to a meeting of the minds." (*Id*. at 309-310.) Thus, "[t]he substance of the negotiations was that at Calexico, within the state of California, [applicant] asked the superintendent for a job; the superintendent said he would see about it and later told [applicant] that he could go to work." (*Id*. at 309.) Accordingly, a contract was formed in California when the parties reached a meeting of the minds regarding the employment, despite issues such as a rate of pay having not yet been negotiated. *(Ibid.)*

In *Egan, supra,* 65 Cal.2d 429, the employee accepted an offer of Nevada employment, conveyed by a representative of his union, while physically located at a union hiring hall in California. The Supreme Court held that the contract for hire was made in California even when certain out-of-state contingencies were to be satisfied at a date subsequent to the date of agreement, including the completion of a lengthy questionnaire in Nevada, applicant obtaining a security clearance once in Nevada before he could commence work, and where the employer could reject applicant when he appeared at job site in Nevada. (*Egan, supra,* 65 Cal.2d 429, 431-432.)

One year after the decision in *Egan*, the Supreme Court confirmed in *Coakley, supra*, 68 Cal.2d 7, that a contract for hire in California was established even where all of the conditions of employment were not yet finalized. In *Coakley*, applicant in California accepted an offer for work in Wyoming. Notwithstanding this oral contract for hire, the employer required the completion of additional documents and conditions, including, inter alia, documents specifying applicant's work, addressing patent rights, requiring four weeks' notice of termination, completion of a W-2 form, and completion of both a medical examination and a driver's test. Moreover, applicant's job title was changed following the initial agreement from Geological Aid/Technician to Assistant Engineer - Mud Logging. The Supreme Court held:

> [T]he oral California agreement included the essential terms of the contract: the parties, time and place of employment, salary, and the general category of employment (geologist). An employment contract need not detail every condition of employment (*Gordon v. Wasserman* (1957) 153 Cal.App.2d 328, 329 [314 P.2d 759]). That particular terms remain undesignated does not render the original contract invalid for uncertainty. Later agreement on the unspecified terms does not rescind the original contract (*Wilson v. Wilson* (1950) 96 Cal.App.2d 589, 594 [216 P.2d 104]), especially if the parties' performance indicates that they intended to be bound by the prime agreement. (*Bohman v. Berg* (1960) 54 Cal.2d 787, 794-795 [8 Cal.Rptr. 441, 356 P.2d 185].) Second, an alteration of details of the contract which leaves undisturbed its general purpose constitutes a modification rather than a rescission of the contract (*Grant v. Aerodraulics Co.* (1949) 91 Cal.App.2d 68, 74-75 [204 P.2d 683]); it does "not affect the original contract, which still remains in force." [Citations.] (*Coakley, supra*, 68 Cal.2d 7, 17.)

Accordingly, the Supreme Court thus concluded that a valid contract for hire was established in California, conferring California jurisdiction over the subsequent workers' compensation claim.

In *Bowen v. Workers' Comp. Appeals Bd.* (1993) 73 Cal.App.4th 15 [64 Cal. Comp. Cases 745], the court of appeal determined that a contract of hire between a player and a major league baseball team was formed in California, conferring California jurisdiction, notwithstanding the need for the contract to be ratified by the baseball Commissioner. Citing the St. Clair workers' compensation treatise, the court of appeal observed:

> [T]he fact that there are formalities which must be subsequently attended to with respect to such extraterritorial employment does not abrogate the contract of hire or California jurisdiction. Such things as filling out formal papers regarding the specific terms of the employment or obtaining a security clearance from the

> federal government are deemed 'conditions subsequent' to the contract, not preventing it from initially coming into existence." (*Bowen, supra,* at 22.)

Here, following applicant's verbal acceptance of the offer of a contract of hire, applicant was required to undergo a physical or a tryout. (See Ex. A2, Transcript of the Deposition of applicant, dated October 11, 2016, pp. 20-22.) Applicant testified that, "[t]o me, the word 'tryout' implies there's been no contract offered; we're going to make a decision after we watch you play. A physical is one of the hoops we have to jump through to get to a point where I can sign the contract." (*Id*. at 21:6.) Applicant testified he was offered a contract prior to his travel to Cleveland, and prior to his workout with the Browns. (Partial Transcript of Proceedings, dated May 15, 2019, at 20:10.) Applicant further testified that the post-agreement physical and the signing of the written contract were typical of such agreements, and that the post-workout execution of a written contract was all that was required of him upon his arrival at the training facility. (*Id*. at 11:7.)

Applicant has also testified that he cannot remember where he signed the various contracts, or that he signed the contracts outside of California's territorial jurisdiction. (Report, at p. 8.) However, just as in *Egan, supra,* 65 Cal.2d 429, *Coakley, supra,* 68 Cal.2d 7, and *Bowen*, supra, 73 Cal.App.4th 15, the contract signing was a condition subsequent to the oral agreement reached between applicant and the Browns. The record discloses no substantive negotiations, contractual changes, markup, amendments, or any other alterations to the previously negotiated terms reached while applicant was physically located in California. Applicant's agent Mr. Dubin further testified that the contract terms he reached telephonically with each team and verbally conveyed to Mr. Moore were ultimately reflected in the final contract terms. (Ex. 1, Transcript of the Deposition of Stephen Dubin, dated September 20, 2017, at 37:4.)

Moreover, following applicant's oral agreement to the offers of employment, the parties' performance in each instance suggested that they intended to be bound by the primary agreement. (*Coakley, supra*, 68 Cal.2d 7, 17.) Following applicant's oral assent to the offer of employment, applicant "put his acceptance in the course of transmission to the proposer," by instructing his agent to convey his acceptance to the Cleveland Browns. For its part, the Browns then immediately arranged and paid for applicant's travel to their training facility for a prompt workout and contract signing. Thus, the parties reached an accord regarding applicant's employment while applicant was still in California, and promptly acted in conformance with that accord, with the evidence disclosing no subsequent alteration or re-negotiation of that accord. On this record, we conclude

that the team workout as well as the contract signing were conditions subsequent to the establishment of an oral contract of hire.

The defendants' Answers also contend that the holding in *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175] is relevant to the issues at bar. *Tripplett* involved a professional football player and California resident who asserted a contract for hire was formed when he signed a contract together with his agent at the agent's office in Newport Beach, California. (*Id.* at 559.) However, when presented with the actual signature pages to the contract which appeared to demonstrate his agent signed the document separately from applicant, and that the agent faxed the signature page from a telephone number in Buffalo, New York, applicant admitted he did not remember where he signed the agreement. (*Id.* at 1177.) The WCJ found that applicant's agent had negotiated the contract in California, thus conferring California jurisdiction over the dispute.

In a split panel decision, the WCAB reversed, finding that the evidence demonstrated "neither [Tripplett] nor his agent were in California when the employment was accepted and the contract was signed." (*Tripplett, supra,* 25 Cal.App.5th 556, at 561.) On applicant's Petition for Writ of Review, the court of appeal affirmed the determination of no jurisdiction, noting the factual discrepancies in the record did not support a finding that either applicant or his agent were present in California at time of the making of the contract of hire. The court went on to hold that because Tripplett retained the ability to reject any contract his agent negotiated, the agent could not bind applicant to a contract, and because the agent's negotiations in California were the only contract-related activities in the state, there was no basis for California jurisdiction. (*Id.* at 567.) The opinion in *Tripplett* further rejected applicant's contentions that an oral agreement was reached in California because, "Tripplett's employment agreement was in writing and specified that it became effective only after execution," and because "there was no evidence any party believed a binding agreement had been formed before the parties executed the written document." (*Id.* at 563.) In addition to these determinations, the court in *Tripplett* opined:

> Additionally, the outcome here remains the same even if we assume that Tripplett's agent had some authority to bind him to an oral employment agreement at the conclusion of the agent's negotiation with Indianapolis. Tripplett's written employment agreement includes an integration clause that specifies it supersedes any prior oral agreement between the parties. Thus, the written agreement Tripplett signed while attending the team's minicamp in

> Indianapolis was the only agreement governing his employment relationship with the team. (*Id.* at 567.)

We find *Tripplett* distinguishable on a factual basis, however, because *Tripplett* presented the question of whether applicant had met the burden of proof of establishing a contract of hire made in California. The jurisdictional question was decided adversely to applicant because he *did not meet that burden of proof*.

Here, the uncontested facts in the record demonstrate that applicant was physically located in California when he accepted the offer of employment by the Cleveland Browns. (*Palma, supra*, 1 Cal.2d 250; *Benguet Consol. Mining Co., supra,* 36 Cal.App.2d 158, 159; *Egan, supra,* 65 Cal.2d 429; *Coakley, supra,* 68 Cal.2d 7.) The evidence further establishes that applicant's agent was in California when he conveyed applicant's acceptance to each of the defendant NFL teams.

Additionally, applicant testified without rebuttal to his subjective belief that he was a member of the Browns' team as of the moment he gave his verbal assent to the team's offer. (*Id*. at 10:10.) Applicant's agent confirmed this understanding, noting that "when a player communicated to us, I'm going to sign that agreement, please communicate that, to me, we have a bound contract." **(**Ex. 1, Transcript of the Deposition of Stephen Dubin, dated September 20, 2017, at 21:24.) Mr. Dubin further confirmed that in 19 years as a sport agent, no player has ever backed out of an oral agreement to sign with a team. *(Ibid.)* Following applicant's acceptance of their offers, the Cleveland Browns acted promptly on the oral agreement and provided applicant with paid transportation to its training facilities, immediately initiating the attendant subsequent conditions including a workout and the signing of the written contract. Applicant's assent to the teams' offers was the event that triggered performance by the Cleveland Browns, which suggests that they intended to be bound by the initial (i.e., oral) agreement to enter into a contract of hire. (*Coakley, supra*, 68 Cal.2d 7, 17.)

The defendants' Answers observe that the standardized NFL Player Contract contains an "integration clause," that confirms the written contract to be the entire agreement, obviating any prior agreement, oral or written, except as attached to or specifically incorporated in the written contract. (Answer of the Cleveland Browns, dated July 29, 2019, at 7:21; Answer of the Seattle Seahawks, dated July 29, 2019, at p. 10; Answer of the Green Bay Packers and Philadelphia Eagles, dated July 30, 2019, at 5:14.) Defendants aver that pursuant to *Tripplett*, the integration

clause in each of applicant's written contracts with the various teams invalidates any prior agreements, including an oral contract of hire.

However, the discussion in *Tripplett* of the interaction between an oral contract of hire reached in California and a subsequent contract containing an integration clause is *obiter dictum*, and therefore not binding. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 945, pp. 986–987.) Although dictum may be persuasive authority if made by a court after careful consideration or in the course of an elaborate review of the authorities, it is axiomatic that cases are not authority for propositions they did not consider or address. (*Id. at* § 947, pp. 989–991, *Gomez v. Superior Court* (2005) 35 Cal. 4th 1125, 1153 [29 Cal. Rptr. 3d 352]; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [46 P.3d 372, 119 Cal. Rptr. 2d 903]; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1195 [969 P.2d 613, 81 Cal. Rptr. 2d 521] [64 Cal.Comp.Cases 1].) The issue of whether an integration clause can invalidate a prior oral agreement for contract for hire in California was neither raised nor discussed at the trial level in *Tripplett*, nor was it raised or discussed in subsequent WCAB proceedings. (See *Tripplet [sic] v. Indianapolis Colts* (March 1, 2017, ADJ6943108) [2017 Cal. Wrk. Comp. P.D. LEXIS 123] (WCAB panel decision).)

Of course, the question of whether the dictum expressed in *Tripplett* should be followed warrants careful consideration in each case, and we note the California Supreme Court's subsequent denial of petition for review in *Tripplett*. (*Tripplett v. Workers' Compensation Appeals Bd.*, 2018 Cal. LEXIS 8421.) "To say that dicta are not controlling…does not mean that they are to be ignored, on the contrary, dicta are often followed. A statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 785, p. 756.)

The interplay between California's public policy-driven decision to extend jurisdiction based on a "contract of hire" and traditional principles of contract formation has been the subject of a significant body of California jurisprudence. In *Palma, supra*, 1 Cal.2d 250, the Supreme Court opined:

> [T]he California [workers' compensation] act is compulsory and it is now settled that the right to, and the liability for, compensation established by it are not founded upon contract but are statutory rights and duties arising from the employer-employee relationship and are imposed by the law as incidents to that

> status. [Citations.] Consequently a decision upholding the so-called extraterritorial effect of our act cannot be placed upon this ground. We are of the opinion that the creation of the 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. (*Id.* at 257-258.)

In *Coakely, supra*, 68 Cal. 2d 7, the Supreme Court further delineated the distinction between the public policy-driven decision to extend California jurisdiction over contracts for hire made within the state, and traditional principles of contract law:

> California has rejected the traditional mechanical solutions to choice-of-law problems and adopted foreign law only when it is appropriate in light of the significant interests in the particular case. The significance of extra-state elements varies directly with the nature of the forum's interest in a given case. Thus, California maintains a stronger interest in applying its own law to an issue involving the right of an injured Californian to benefits under California's compulsory workmen's compensation act than to an issue involving torts or contracts in which the parties' rights and liabilities are not governed by a protective legislative scheme that imposes obligations on the basis of a statutorily defined status. (*Id.* at 11-12.)

The court further explained:

> "Workmen's compensation contemplates a substitution of the contractual rights and obligations which normally flow between worker and employer with a complete and exclusive statutory scheme based not upon contract but upon status. The relationship of employer and employee itself generates the rights and obligations; the legislation describes the content and extent of those rights and obligations." (*Noe v. Travelers Ins. Co.* (1959) 172 Cal.App.2d 731, 733 [342 P.2d 976].) "[The] liability under workmen's compensation acts is...imposed as an incident of the employment relationship…[California has] as great an interest in affording adequate protection to this class of its population [California employees injured outside California] as to employees injured within the state." (*Id.* at 12, fn. 3.)

Additionally, the court addressed the question of "who should be embraced within the class of beneficiaries," by applying the liberal construction provisions of Section 3202, wherein the court "follow[ed] the legislative mandate to construe liberally the provisions of the statute, including those defining the class of persons who are entitled to the statutory benefits." (*Id.* at 13.)

In *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771 [37 Cal.Comp.Cases 185], the Supreme Court again addressed the interplay between common law principles of contract

formation and California's public policy interests in extending workers' compensation benefits to all persons hired in California. Applicant John Laeng was injured while participating in a physical agility challenge as part of a job tryout for defendant City of Covina. (Id. at 774.) The workers' compensation referee, although sympathetic to the "equities" of Laeng's claim, nevertheless ruled that under traditional employment principles, Laeng, who was participating in pre-employment "tryout" was not an employee at the time of his injury. The WCAB affirmed. The Supreme Court, ultimately overturning the WCAB, ruled that "[a]lthough at the time of his injury Laeng was concededly not an 'employee' of the city in a strict, contractual sense of that term, we are not constrained in interpreting the provisions of the Workmen's Compensation Act by the common law contractual doctrine but must instead be guided by the purposes of the legislation at issue. (*Id.* at 774.)

> Given these broad statutory contours, we believe that an "employment" relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act. (*Id.* at 777.)

However, the Supreme Court further observed in a footnote to the above text that:

> By this statement, of course, we do not imply that common law notions of the employment relationship should never be considered in determining the issue of 'employment' under work[ers'] compensation, but only that such common law principles are not determinative of the issue. The differences between the common law and work[ers'] compensation usage of the term 'employment' stem from the fundamentally different purposes served by the employment concept in each context...Although there is considerable overlap between the two fields, in each context the determination of the presence or absence of a sufficient 'employment' relationship must ultimately depend on the purpose for which the inquiry is made." (*Id.* at pp. 777-778, fn. 7.)

Laeng thus provided for the application of traditional principles of contract formation within a workers' compensation context, but further provided that any such application should be in furtherance of the principles and public policy informing the legislature's implementation of the California workers' compensation system. While we acknowledge that the decision in *Laeng* addressed fundamental issues of what constituted employment under section 3351, the decision in *Laeng* is instructive for its conclusion that common law principles of contract formation may

inform, but should not *limit*, California's interests in extending its workers' compensation benefits for the protection of persons injured in the course of their employment. (Lab. Code § 3202.)

Thus, although we distinguish *Tripplett* on its facts, we further observe that the integration clause described at paragraph 21 of each of the NFL Player Contracts in evidence would not preclude California jurisdiction if that jurisdiction was previously conferred when the parties entered into an oral contract of hire from within California. (Exs. A through D, relevant portions of team records for the Seattle Seahawks, Green Bay Packers, Cleveland Browns, and Philadelphia Eagles, various dates.)

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."].) Given our factual determination that a contract for hire was formed in California, and that applicant's subsequent ratification of a written employment contract does not serve to invalidate California statutory jurisdiction, we conclude that California continues to maintain jurisdiction over the claimed injury herein.

We also address defendants' contention that the forum selection clauses contained in the various NFL Players Contracts require that we decline to exercise our jurisdiction in this matter. (Answer of the Seattle Seahawks, dated July 29, 2019, at p. 18; Answer of Great Divide, dated July 30, 2019, at p. 12.) Citing to our en banc decision in *McKinley v. Arizona Cardinals* (2013) 78 Cal. Comp. Cases 23 [2013 Cal. Wrk. Comp. LEXIS 2], defendants contend that we must decline to exercise our jurisdiction in this matter because the contracts contain a "reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation shall be filed in a forum other than California," and because, "there is limited connection to California with regard to the employment and claimed injury." (Answer of Seattle Seahawks, dated July 29, 2019, at p. 18.)

However, our analysis of California contacts in *McKinley* was necessary because applicant 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." (*McKinley, supra*, 78 Cal.Comp.Cases 23, at 32.)

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.

In summary, the evidence demonstrates that applicant was in California at the time he put his acceptance in the course of transmission to the proposer, and accepted the contract of hire offered by the Cleveland Browns. This acceptance constituted the time and place of the making of an oral contract of hire, conferring California jurisdiction over the injury claimed herein under sections 3600.5 and 5305. We further conclude that the ensuing physicals and the signing of the written contracts were conditions subsequent to the contract of hire. We further conclude that the making of a contract of hire in California is sufficient to invoke California jurisdiction, which is a reflection of California public policy, and precludes the enforcement of forum selection provisions that would serve to obviate that jurisdiction

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 27, 2019 Findings and Order is **RESCINDED**, and the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. EVAN MOORE, while employed during the period May 22, 2008 through April 29, 2013 as a professional athlete, occupational group number 590, by GREEN BAY PACKERS, CLEVELAND BROWNS, SEATTLE SEAHAWKS, and PHILADELPHIA EAGLES, whose workers' compensation insurance carrier was Great Divide Insurance Company for the Packers and Eagles, and the Browns and Seahawks being permissibly self-insured, claims to have sustained injury arising out of and occurring in the course of employment to multiple parts of body, including but not limited to orthopedic, head, neck, spine, hips, upper extremities, lower extremities, neurological and internal.

2. Applicant and the Cleveland Browns formed a contract of hire within California's territorial jurisdiction, thus conferring California subject matter jurisdiction over the claim pursuant to Labor Code sections 3600.5 and 5305.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR, (See attached concurring opinion)

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 30, 2022

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

EVAN MOORE
BOBER PETERSON LAW FIRM
GOLDBERG SEGALLA LAW FIRM
LAW OFFICE OF LEVITON DIAZ
PEARLMAN BROWN LAW FIRM

SAR/*pc*

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

CONCURRING OPINION OF COMMISSIONER SWEENEY

I concur with my colleagues' determination that a valid and binding oral contract of hire was formed when applicant accepted the offer made by the Cleveland Browns while physically located within California's territorial jurisdiction.

I write separately to observe that the Standard Representation Agreement (SRA) bears many of the hallmarks of an adhesion contract, and the SRA appears to abrogate an otherwise valid exercise of California jurisdiction, which is itself an expression of California public policy. It further appears that the parties to the various NFL contracts in evidence may have treated the agent's acceptance of an offer of employment as binding on the player, irrespective of the limited authority ostensibly imposed by the SRA. Accordingly, the SRA does not preclude jurisdiction based on the formation of an oral contract in California, and applicant's agent's acceptance of the offer of the various contracts of hire accepted from within California served as an additional basis for the conferral of California subject matter jurisdiction.

The doctrine of unconscionability provides that a court may refuse to enforce an unconscionable provision of a contract. (Civ. Code § 1670.5; *Perdue v. Crocker National Bank* (1985) 38 Cal. 3d 913, 925 [216 Cal. Rptr. 345, 702 P.2d 503].) "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citations omitted.] 'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745] (*Armendariz*).)

> Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second--a principle of equity applicable to all contracts generally--is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' [Citations.] Subsequent cases have referred to both the "reasonable expectations" and the "oppressive" limitations as being aspects of unconscionability. (*Armendariz, supra*, 24 Cal.4th 82, citing *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 486-487 [186 Cal. Rptr. 114, 38 A.L.R.4th 1] (*A & M Produce Co.*).)

Unconscionability "has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*A & M Produce Co., supra,* 135 Cal. App. 3d 473, 486.) California courts have required a showing of both "procedural" and a "substantive" elements:

> The procedural element focuses on two factors: "oppression" and "surprise." [Citations omitted.] "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." [Citations omitted.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations omitted.] Characteristically, the form contract is drafted by the party with the superior bargaining position. (*A & M Produce Co., supra,* 135 Cal. App. 3d 473, 486.)

Substantive unconscionability may include "overly harsh" or "one-sided" results. (*A & M Produce Co., supra,* 135 Cal. App. 3d 473, 487.) "The most detailed and specific commentaries observe that a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner." (*Ibid.*) Additionally, a private agreement may be deemed substantively unconscionable when it contravenes public policy. (See *Armendariz*, *supra*, 24 Cal.4th 83 ["a law established for a public reason cannot be contravened by a private agreement"].)

Here, applicant alleged that his agent was at all relevant times within California's territorial jurisdiction, when the agent accepted the various contracts at applicant's behest. (Opinion on Decision, dated June 27, 2019, at p. 3.) The WCJ correctly observes, however, that the express terms of the SRA prohibit the agent from binding applicant to any contract. (*Id*. at pp. 4-5.) Citing to *Jenkins v. Arizona Cardinals* (Apr. 17, 2012, ADJ4519826) [2012 Cal. Wrk. Comp. P.D. LEXIS 189], the WCJ concludes that because applicant's agent could not, per the terms of the SRA, bind applicant to a contract, no contract was formed at the time of the agent's putative "acceptance" from within California. (Report, at p. 9.)

The WCJ's conclusion finds support in the WCAB's jurisprudence in this area. In cases involving agents representing players of a variety of professional sports, the agreement between the agent and the player typically includes language disclaiming the agent's ability to bind the player to a contract. (*Konan v. ECHL Personnel Management* (April 8, 2022, ADJ10729883) [2022 Cal. Wrk. Comp. P.D. LEXIS 94] [applicant was outside California at time of contract agreement and signing, and standard agency contract specifically enjoined agent from accepting

offers of employment on applicant's behalf without applicant's written consent]; *Kropog v. New York Giants, et al.* (March 3, 2020, ADJ10220275) [2020 Cal. Wrk. Comp. P.D. LEXIS 112] [no contract of hire where agent not authorized to bind applicant per agent agreement, despite conflicting trial testimony]; *Brown v. Ariz. Cardinals* (October 24, 2019, ADJ10354615) [2019 Cal. Wrk. Comp. P.D. LEXIS 460] [no subject matter jurisdiction because agent did not have authority to bind applicant to agreement, based on provisions in standard representation agreement]; *Christman v. Mariners* (August 16, 2019, ADJ11062702) [2019 Cal. Wrk. Comp. P.D. LEXIS 363] [no subject matter jurisdiction when contract signed outside California, and California agent could not bind applicant to contracts]; *Telemaco v. Phila. Phillies* (November 7, 2018, ADJ9084481) [2018 Cal. Wrk. Comp. P.D. LEXIS 541] [record insufficient to establish agent had power to bind player, or that agent was in California at time of contract acceptance]; *Banta v. Detroit Lions* (ADJ2447813, June 1, 2017) [2017 Cal. Wrk. Comp. P.D. LEXIS 232] [basis for WCAB jurisdiction not shown in absence of evidence that agent was authorized to accept employment on behalf of employee]; *Fauria v. Carolina Panthers* (April 10, 2017, ADJ6671169) [2017 Cal. Wrk. Comp. P.D. LEXIS 159] [applicant failed to meet burden of proof that his agent was in California at time of acceptance of offer of employment]; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682] [applicant established that he was hired in California based on evidence that his agent was authorized by applicant to accept contracts on applicant's behalf and that applicant was bound by terms negotiated and agreed to by his agent in California]; *Johnson v. San Diego Chargers* (ADJ6784479, July 31, 2012) [2012 Cal. Wrk. Comp. P.D. LEXIS 354] [contract not accepted by agent in California but by applicant outside the state]; *Barrow v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 988 [2012 Cal. Wrk. Comp. LEXIS 140] (writ den.) [no WCAB jurisdiction when agent in this state merely communicated acceptance of the employee who was outside of California]; *Jenkins v. Arizona Cardinals* (ADJ4519826, October 19, 2011) [2011 Cal. Wrk. Comp. P.D. LEXIS 485] (April 17, 2012) [2012 Cal. Wrk Comp. P.D. LEXIS 189] [agent's negotiation and signing of contract insufficient to establish subject matter jurisdiction when acceptance by employee occurred outside California]; *Ioane v. Oakland Raiders* (ADJ171639, September 14, 2010) [2010 Cal. Wrk. Comp. P.D. LEXIS 416] [basis for WCAB jurisdiction not shown in absence of evidence that agent was authorized to accept employment on behalf of employee].)

The WCJ thus determined that the terms of the SRA prevented applicant's agent, either within or without California, from binding applicant to an offer of employment. (Opinion on Decision, dated June 27, 2019, at p. 5.)

However, we have also found that when an agent is empowered to bind a player, a contract of hire is formed at the time and place of the agent's acceptance of an offer. (Lab. Code §5305; see also *Paddio v. Cleveland Cavaliers* (May 26, 2017, ADJ7041227) [2017 Cal. Wrk. Comp. P.D. LEXIS 242] [applicant accepted offers of employment from Cleveland Cavaliers through his agent while in California and finalization of written contract and other employment documents after hiring in California are conditions subsequent to hiring and are not determinative of place of hiring]; *Clemons v. Indianapolis Colts* (May 3, 2017, ADJ9380444) [2017 Cal. Wrk. Comp. P.D. LEXIS 187] [agent in California authorized to accept contract on applicant's behalf sufficient to establish California contract for hire].)

Here, the SRA displays many of the traditional features of a contract of adhesion. "A contract of adhesion is a standard contract that, imposed and drafted by a party of superior bargaining strength, relegates to another party only the opportunity to accept the contract or reject it." (*Crystal River Oil and Gas, LLC v. Pacific Gas and Electric Co.*, 2000 Cal. PUC LEXIS 817, (Cal. P.U.C. October 5, 2000).) The SRA in evidence is a standard contract, the use of which is mandated by the players' association. (See Ex. 1, Transcript of the Deposition of Stephen Dubin, dated September 20, 2017, at 7:2; see also *Perez v. Melton Franchise Systems* (October 11, 2013, ADJ7300567) [2013 Cal. Wrk. Comp. P.D. LEXIS 509].) This agreement does not appear to be the original product of a meeting of the minds of applicant and his agent following arms-length negotiations specific to applicant's circumstance. Rather, the SRA is a mandatory pre-drafted form. (*Ibid.*) The proposed agency relationship between the player and the agent was *itself* indicative of the significant disparity between the parties in both bargaining position and sophistication. Additionally, because there is no evidence that any of the terms of the SRA were bargained for, the question is raised whether applicant exercised a "meaningful choice" in entering into the representation agreement. (*A & M Produce Co., supra,* 135 Cal. App. 3d 473, 486.) Standing alone or taken together, these factors are the hallmarks of a contract of adhesion. (*Perez v. Melton Franchise Systems* (October 11, 2013, ADJ7300567) [2013 Cal. Wrk. Comp. P.D. LEXIS 509].)

Applying these facts to the unconscionability analysis, the SRA then appears procedurally unconscionable due to the absence of meaningful choice provided to the player, and the "take it or leave it" nature of the agreement. Additionally, the SRA discloses none of the jurisdictional consequences of contract language mandated by the players' union that ostensibly bars the agent from ever entering into a contract of hire on the player's behalf. The SRA thus exhibits elements of both "oppression" and "surprise" necessary to a finding of procedural unconscionability.

In addition to the concerns of procedural unconscionability, the SRA also appears substantively unconscionable, because it extinguishes any possibility of California jurisdiction through the player's chosen representative, even when that agent is physically present in California and, after consulting with the player, assents to the offer of employment. The foreclosure of the possibility of an oral agreement as between the team and the player is reinforced by the rule that the teams may not contact players directly, but are instead required to contact their agents. (See Ex. 1, Transcript of the Deposition of Stephen Dubin, dated September 20, 2017, at 31:11.)

The California legislature has, in the exercise of its plenary powers, provided that a hiring in this state, standing alone, is sufficient to confer California jurisdiction. (Lab. Code § 5305; 3600.5; *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)*; see also *Smith v. TW Transportation* (February 2, 2017, ADJ10069789 MF, ADJ10069817, ADJ10069939) [2017 Cal. Wrk. Comp. P.D. LEXIS 74].) The choice to designate a contract of hire as the basis for the conferral of California jurisdiction over an injury reflects the public policy interests of the legislature:

> **…**which is to charge to the industry those losses which it should rightfully bear, and to provide for the employee injured in the advancement of the interests of that industry, a certain and prompt recovery commensurate with his loss and, in so doing, lessen the burden of society to care for those whom industry has deprived, either temporarily or permanently, of the ability to care for themselves. Having a social interest in the existence within its borders of the employer-employee relationship, the state may, under its police power, impose reasonable regulations upon its creation in the state. That the imposition of such conditions is in line with the present-day policy in compensation legislation cannot be doubted. (*Palma, supra,* 1 Cal.2d 250, 258.)

Thus, and insofar as the SRA abrogates an otherwise valid basis for the exercise of California jurisdiction by preventing an agent from binding a player to an offer, and by extension

creating a contract of hire, the relevant clauses in the SRA appear to be procedurally and substantively unconscionable.[4]

Accordingly, in addition to the determination of my colleagues in the majority with respect to the Cleveland Browns, I would further find that applicant's agent was able to bind applicant to a contract of hire, and that a valid and binding contract of hire was created with all four of the defendant professional sports teams.

In addition, applicant and his agent have testified without rebuttal to their subjective belief that the agent's acceptance of an offer bound applicant to the agreement. Applicant testified that he granted his agents the authority to enter into a contract on applicant's behalf. (Partial Transcript of Proceedings, dated May 15, 2019, at 7:10.) Applicant testified that when he instructed his agent to accept the offer from Green Bay, he believed he was bound by the agreement, "otherwise I would not have gotten on a plane to go to Wisconsin." (*Id*. at 8:22.) Applicant similarly testified to his belief that as soon as he accepted the offers from the Cleveland Browns, the Seattle Seahawks and the Philadelphia Eagles, he was from that moment on a member of each team. (*Id*. at 11:3; 13:11; 14:23.) Applicant's agent further confirmed this understanding in his testimony that, "when a player communicated to us, I'm going to sign that agreement, please communicate that, to me, we have a bound contract." (Ex. 1, Transcript of the Deposition of Stephen Dubin, dated September 20, 2017, at 21:24.) As explained by Mr. Dubin, "when the player says to us, 'Let's do it,' we communicate that acceptance to the teams, and then the player probably flies into the city, usually how it works, signs the contract. But the agreement has been bound when we've communicated to the team." (*Id*. at 13:14.) Additionally, as is noted in the majority opinion, Mr. Dubin confirmed that in 19 years as a sport agent no player has ever backed out of an oral agreement to sign with a team. (*Id.* at 20:23.) Both applicant and his agent testified without rebuttal that the various NFL teams were prohibited from directly contacting applicant, leaving the agent as the only point of contact for negotiating terms and accepting an offer. (*Id*. at 31:11.) To the extent that the record does not speak to the corresponding understanding of the various teams, it is well-established that

[4] The Court of Appeal has also observed that, "not all unreasonable risk reallocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability [citations omitted] such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487 [186 Cal.Rptr. 114].) Here, the significant disparity in experience and bargaining power is not only reflected in the SRA, it was likely the impetus behind the player obtaining a professional sports agent. The undisclosed consequences of the SRA as well as the disparate bargaining positions of the parties to the agreement interposes a low tolerance for substantive unconscionability insofar as the agreement violates California public policy as expressed in its jurisdictional statutes.

the WCJ may, at her discretion, order development of the record to further address whether the teams shared applicant's and his agents' belief that he was bound to the agent's acceptance. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App. 4th 389 [62 Cal. Comp. Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal. App. 4th 1117 [63 Cal. Comp. Cases 261].)

I further agree with the observation made by my colleagues in the majority that following an agent's putative acceptance of an offer of a contract, the actions of the contracted parties are the best indicator of the nature and extent of the agreement. It is a "cardinal rule of construction that when a contract is ambiguous or uncertain the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties." (*Bohman v. Berg* (1960) 54 Cal.2d 787, 795 [8 Cal.Rptr. 441, 356 P.2d 185].) Thus, the practical construction placed upon the various oral agreements reached between applicant, his agents, and the defendant NFL teams is reflected in the parties' specific performance following acceptance of the offer. Here, the acceptance by applicant's agents of a contract of hire resulted in immediate performance by all contracted parties, suggesting that they intended to be bound by the agent's acceptance of each team's offer. (*Coakley, supra*, 68 Cal.2d 7, 17.) In each instance, once the acceptance was communicated to them, the team immediately arranged and paid for applicant's travel to their respective training facility for a prompt physical examination and contract signing. (Partial Transcript of Proceedings, dated May 15, 2019, at 9:25; 11:25; 12:16; 14:14.) There is no indication in the record that any of the various teams required any additional confirmation from applicant of his assent beyond the representation made by the agent that applicant had accepted the teams' offers. Applicant, for his part, made himself available for such travel, and promptly departed for the training facilities of each team to participate in a workout and to sign a written contract. In each instance, the representation by the agent that applicant had accepted the offer was sufficient to trigger specific performance by all parties to the agreement.

Thus, the record demonstrates that both applicant and his agent subjectively understood that the agent's acceptance of a contract was binding on the player, and this belief was further supported by the immediate specific performance of both player and contracting team.

In summary, I concur with my colleagues that applicant's oral acceptance of an offer of employment from the Cleveland Browns while physically in California confers jurisdiction over this claim of injury pursuant to sections 3600.5 and 5305. Additionally, and inasmuch as the SRA bears many of the hallmarks of a contract of adhesion, and also constrains the exercise of California jurisdiction without adequate disclosure to the player, I would decline to enforce the corresponding provisions of the SRA. I would further hold that Mr. Dubin's acceptance of the offers of employment from all four defendants bound the applicant to those agreements, as reflected in applicant's and his agent's subjective belief and the specific performance of all parties, creating a contract of hire within California, and providing an additional basis for the conferral of California jurisdiction over this claim of injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 30, 2022

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

EVAN MOORE
BOBER PETERSON LAW FIRM
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LAW OFFICE OF LEVITON DIAZ
PEARLMAN BROWN LAW FIRM

SAR/*pc*

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