WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DUSTIN HERMANSON, *Applicant*

vs.

SAN FRANCISCO GIANTS; ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ11134795
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of February 11, 2020, the workers' compensation administrative law judge ("WCJ") found that during the period April 1, 1995 to April 1, 2007, applicant sustained industrial injury to his cervical spine, bilateral shoulders, bilateral elbows, bilateral wrists, thoracic spine, lumbar spine, bilateral hips, bilateral knees and bilateral ankles/feet/great toes while employed as a professional athlete by the following baseball teams:

- the Cincinnati Reds from 3-2-2007 to 4-1-2007. Carrier: ACE American Insurance Company, administered by Sedgwick;

- the Chicago White Sox from 12-23-2004 to 11-2-2006. Carrier: ACE American Insurance Company, administered by Sedgwick;

- the San Francisco Giants from 1-1-2004 to 11-1-2004. Carrier: ACE American Insurance Company, administered by Sedgwick;

- the San Francisco Giants from 7-10-2003 to 12-31-2003. Carrier: ACE American Insurance Company, administered by Gallagher Bassett Services;

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[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated March 30, 2020. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

- the St. Louis Cardinals from 3-21-2003 to 6-26-2003. Carrier: ACE American Insurance Company, administered by Gallagher Bassett Services;

- the St. Louis Cardinals from 1-25-2003 to 3-20-2003. Carrier: unknown; - Boston Red Sox from 4-4-2002 to 11-1-2002. Carrier Gulf/Travelers;

- the St. Louis Cardinals from 12-14-2000 to 12-15-2001. Carrier: TIG/Zenith

- the Montreal Expos from 3-2-1998 to 3-31-2000. Carrier: From 1998 to 1999 is Fireman's Fund and from 1999 to 2000 is American Specialty USF & G, administered by Gallagher Bassett Services;

- the Florida Marlins from 3-1-1997 to 3-2-1998. Carrier: Fireman's Fund

- the San Diego Padres from 6-20-1994 to 11-21-1996. Carrier from 1994 to 1995 is Legion and from 1995 to 1996 is CNA.

In the Findings and Order of February 11, 2020, the WCJ also found that applicant's claim is not barred by Labor Code section 3600.5, that applicant's claim was timely filed and is not barred by the Statute of Limitations, and that the San Francisco Giants have no liability for applicant's injury pursuant to Labor Code section 5500.5. The WCJ issued a take-nothing-further order.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the WCAB has jurisdiction over his claim pursuant to Labor Code sections 3600.5(a) and 5305, and that alternatively, liability for his cumulative trauma injury "rolls back" to the San Francisco Giants pursuant to Labor Code section 5500.5.

The San Francisco Giants filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that the WCJ's take-nothing order does not follow from the WCJ's finding that applicant's claim is not barred by Labor Code section 3600.5. Therefore, we conclude that the WCJ must revisit Labor Code sections 3600.5, 5412 and 5500.5 and provide a separate analysis of each of the three statutes. Accordingly, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

As noted at the outset, applicant contends that the WCAB has jurisdiction over his claim of cumulative trauma injury pursuant to Labor Code sections 3600.5(a) and 5305. In her Report, the WCJ responds to this contention by referring to pages eight and nine of her Opinion on

Decision, and then the WCJ states that she agrees "there is jurisdiction under both of these statutes." Nevertheless, we conclude that the WCJ must revisit this issue and clarify whether any other part of section 3600.5, besides subdivision (a), is correctly applied in this matter.

The WCJ provided a complex analysis of section 3600.5 at pages nine through fourteen of her Opinion on Decision. Based on that part of the WCJ's Opinion on Decision, it remains unclear the extent to which the WCJ may have applied parts of the statute to support the WCJ's "take-nothing-further" order.[2] For instance, the WCJ states on page fourteen of her Opinion on Decision that "the analysis under Labor Code section 3600(d) is unnecessary really because the elements in Labor Code section 3600(c) were not satisfied. This [WCJ] finds that the employee *and the employer* are not exempt pursuant to Labor Code section 3600.5." This applicant was employed by eight different teams, but the WCJ did not specify which employer was not exempt. In her Report, the WCJ states that during applicant's last year of work the Cincinnati Reds were not exempt and had insurance coverage, so there is no "relation back" of liability to the San Francisco Giants under Labor Code section 5500.5. Based on the following discussion, however, we conclude that the WCJ must revisit the issue of the Reds' exemption or non-exemption in light of the apparent inapplicability of subdivisions (c) and (d) of section 3600.5.

In *Wilson v. Florida Marlins* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 30 [slip opinion, p. 21], the Board panel undertook a detailed analysis of section 3600.5, subdivisions (c) and (d), and concluded that the subdivisions "are intended to apply only to athletes who cannot establish jurisdiction under section 3600.5, subdivision (a) or section 5305. Because it is undisputed that applicant was hired in California multiple times during the cumulative trauma injury period, we may properly exercise jurisdiction over his claim pursuant to those sections… [.]" (Accord, *Neal v. San Francisco 49ers* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 68; *McPherson v. Cincinnati Reds* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 164. Cf. *Farley v. Workers' Comp. Appeals Bd.* (2020) 86 Cal.Comp.Cases 129 (writ den.) [player for SF Giants signed no contracts and played no games in California].)

[2] The WCJ should also clarify whether any defendant has accepted some liability for applicant's compensation benefits. The question is raised because the trial stipulations include stipulations that "the employee has been adequately compensated for all periods of TD through the present," and "the employer has furnished some medical treatment." (Minutes of Hearing, 11/18/19, p. 2:18-20.) If so, the WCJ should clarify why any such liability would not extend to liability for permanent disability benefits, if any.

In this case, applicant had more than minimal contacts with California during the period of his employment from April 1995 through April 2007. Applicant played four or five seasons for two California teams, for the San Diego Padres from 1994 through 1996 and for the San Francisco Giants from 2003 through 2004. Applicant's contract to play for the San Diego Padres was signed in California, in 1994. Applicant also signed a minor league contract with the San Francisco Giants in Fresno, in July 2003, and he signed at least one other contract with the Giants in San Francisco, in August 2003. (Summary of Evidence, 11/18/19, p. 7:11-25.) Though applicant ended his baseball career with the Cincinnati Reds in 2007, he had ample contacts with California, and he signed at least two contracts in this state, within the claimed cumulative trauma period April 1995 through April 2007. Here, as in *Wilson*, there is jurisdiction over applicant's claim against the California teams pursuant to section 3600.5(a). To the extent the WCJ's decision remains unclear as to whether she made a contrary finding based on subdivisions (c) and (d) of section 3600.5, we conclude the WCJ must revisit and resolve the issue based on the analysis of the statute set forth in *Wilson, supra*.

Turning to the WCJ's determination that the San Francisco Giants have no liability for applicant's injury pursuant to Labor Code section 5500.5, we conclude that the record raises several issues that must be revisited and resolved by the WCJ.

As a preliminary matter, the record raises a question as to whether all parties were provided due process concerning Labor Code section 5500.5. This is because the statute, which concerns division of liability amongst multiple employers in a cumulative trauma case, was not specifically raised at trial. (See Minutes of Hearing, 11/18/19, p. 3:1-6.)

As relevant here, Labor Code section 5500.5(a) provides that liability for cumulative injury claims is limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Subdivision (a) further provides that if none of the employers during the one-year period of cumulative injury are insured for workers' compensation coverage, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the cumulative injury for which an employer is insured for workers' compensation coverage.

Section 5500.5(a) speaks to the issue of determining liability for a cumulative injury, while section 5412 speaks to the issue of the date of cumulative injury for purposes of applying the Statute of Limitations. The two issues are related but distinct, in that part of the analysis to determine liability under section 5500.5(a) requires an analysis of the date of cumulative injury under section 5412. (*County of Riverside v. Workers' Comp. Appeals Bd.* (*Sylves*) (2017) 10 Cal.App.5th 119 [82 Cal.Comp.Cases 301] ("*Sylves*").)

In this case, it was stipulated at trial that applicant was employed as a professional athlete from April 1, 1995 through April 1, 2007, the period of his claimed cumulative trauma injury. Although it appears there is no challenge to the WCJ's finding that applicant sustained industrial injury to various body parts from April 1, 1995 through April 1, 2007, the WCJ applied section 5500.5(a) without undertaking the required analysis of the date of cumulative trauma injury pursuant to section 5412. In order to apply section 5500.5(a) correctly, we conclude that the WCJ must revisit and determine the date of cumulative trauma injury pursuant to section 5412, in light of the following discussion.

Under Labor Code section 5412, "[t]he date of injury in cases of…cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

Section 5412 requires a convergence of two elements: (1) the date when the employee first suffers disability; and (2) the employee's acquisition of knowledge that such disability was caused by the employee's present or prior employment. Relevant to the first element, there is no "disability" within the meaning of section 5412 until there has been either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579] ("*Rodarte*"); *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Relevant to the second element, it is settled law that "an applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability and applicant's training, intelligence and qualifications are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Sylves, supra*, 10 Cal.App.5th at 124-125, quoting *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 473.)

In this case, applicant testified he was on the seven-day disabled list while playing for the San Diego Padres in 1996, but he could not recall what the injury was. (Summary of Evidence, 11/18/19, p. 5.) Applicant was on the fifteen-day disabled list while playing for the Montreal Expos in 1998, for an "oblique injury." (*Id*., p. 6.) Applicant was disabled with a groin injury and elbow infection in 2002, while playing for the Boston Red Sox. (*Ibid*.) Applicant was on the disabled list and took time off for his low back in 2004, while playing for the San Francisco Giants; applicant described this season as one of his worst years in the Major Leagues. (*Id*., p. 8.) Applicant continued to have back problems and he injured other body parts while playing for the Chicago White Sox in 2006. (*Ibid*.) By the time applicant joined the Cincinnati Reds for spring training in 2007, his neck, back and upper extremities were too painful to continue playing, and he retired before the regular season began. (*Id*., pp. 8-9.) Applicant further testified that the first time he found out he had permanent disability was when he was informed of the same by Dr. Aval, the Agreed Medical Evaluator ("AME") in orthopedics. (*Ibid*.) Dr. Aval examined applicant on July 26, 2018 and authored a medical report dated August 2, 2018. (Joint Exhibit 6.)

In connection with determining how Labor Code section 5500.5 is correctly applied in this matter, the WCJ should take the above factual circumstances into account and make a new determination on the date of applicant's cumulative trauma injury under section 5412. The WCJ may further develop the record as necessary or appropriate toward that end. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

Turning to the question of the baseball team or teams who may be liable for applicant's injury under section 5500.5(a), we recall that liability for cumulative injury claims is limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. If none of the employers during the one-year period of cumulative injury are insured for workers' compensation coverage, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the cumulative injury for which an employer is insured for workers' compensation coverage.

In this case, applicant was employed by the Chicago White Sox and the Cincinnati Reds from April 2006 to April 2007. Both teams were insured during that period, but the Chicago White Sox earlier were dismissed as a party defendant, leaving the Reds as an ostensibly insured

employer of the applicant from March 2, 2007 to April 1, 2007. In light of these facts, the WCJ reached the following conclusion on page fifteen of her Opinion on Decision:

> "In accordance with Labor Code section 3600.5(b) and Labor Code section 5500.5, the Reds have an approved alternative to workers' compensation coverage and therefore, this Court will not apply the "relation back" doctrine. The applicant was limited to pursuing his claim against the Reds. As the San Francisco Giants were not part of the applicant's last period of industrial exposure, this Court finds the San Francisco Giants have no liability for the alleged injury under Labor Code section 5500.5." (Underscoring added.)

As discussed before, however, applicant worked in California for four or five seasons and signed contracts in this state several times. Therefore, it appears jurisdiction is established pursuant to subdivision (a) of section 3600.5, and it remains unclear why the WCJ relied upon subdivision (b). Further, the WCJ's conclusion in her Opinion on Decision that the Reds have an approved alternative to workers' compensation coverage under section 3600.5(b) – apparently meaning applicant's exclusive remedy is against the Reds outside California pursuant to section 3600.5(b)(2) – is inconsistent with the WCJ's actual finding that "applicant's [California] claim is not barred by Labor Code section 3600.5." In light of *Wilson, supra,* it is uncertain how any part of section 3600.5, except subdivision (a), is correctly applied in this case. We conclude that the WCJ must revisit the issue and make a new determination.

Returning to the issue of how Labor Code section 5500.5 may be properly applied in this case, the WCJ states in her Report (p. 5) that application of the "relation back" doctrine depends upon there being a lack of insurance coverage so as to fulfill the requirement of section 5500.5(a) that "none of the employers during the [last] one-year [exposure] period of cumulative injury are insured for workers' compensation coverage[.]" The WCJ then reasons that since the Cincinnati Reds had insurance during the alleged last year of exposure (2006-2007) and were not exempt, the "lack of insurance" requirement is not met.

We believe there are two problems with the WCJ's analysis. First, the WCJ imports the issue of the Reds' non-exemption into the analysis, but as discussed before the relevance of exemption or non-exemption under section 3600.5, subdivisions (b), (c) and (d), is questionable in this case. Secondly, although the WCJ posits that the Cincinnati Reds were "insured for workers' compensation coverage" during the last year of exposure, the apparent *effect* of the WCJ's take-nothing order is that there is *no* insurance coverage on applicant's claim for California workers'

compensation benefits. Moreover, the weight of cases suggests that where California declines to apply its workers' compensation law against an out-of-state team, liability does "roll back" to the first team over which California elects to exercise jurisdiction. (See *Allen v. Minn. Vikings* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 543; *Langdon v. N.J. Devils* (2017) 82 Cal.Comp.Cases 928 (writ den.), citing *Milwaukee Bucks v. Workers' Comp. Appeals Bd. (Mason)* (2013) 78 Cal.Comp.Cases 1173 (writ den.) and *Toronto Raptors v. Workers' Comp. Appeals Bd. (Foster)* (2013) 78 Cal.Comp.Cases 1188 (writ den.); *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 27-28 [Appeals Board en banc], citing with approval *Injured Workers' Ins. Fund of Maryland v. Workers' Comp. Appeals Bd. (Crosby)* (2001) 66 Cal. Comp. Cases 923 (writ den.); *Tampa Bay Buccaneers v. Workers' Comp. Appeals Bd. (Harper)* (2014) 79 Cal.Comp.Cases 595 (writ den.), citing *Portland Trailblazers v. Workers' Comp. Appeals Bd. (Whatley)* (2007) 72 Cal.Comp.Cases 154 (writ den.); *Washington Wizards v. Workers' Comp. Appeals Bd. (Roundfield)* (2006) 71 Cal.Comp.Cases 897 (writ den.); *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 301 (writ den.), citing *Employers Mutual Liability Insurance Company v. Workers' Comp. Appeals Bd. (Patterson)* 52 Cal.Comp.Cases 284 (writ den.).)

In conclusion, we are persuaded that the WCJ must revisit the date of cumulative trauma injury under section 5412, as well as the possible "relation back" of liability to the San Francisco Giants under section 5500.5, in light of our discussion of sections 3600.5, 5412, 5500.5, and relevant case law. We express no final opinion on these questions. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of February 11, 2020 is **RESCINDED,** and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 20, 2023

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

DUSTIN HERMANSON C/O PRO ATHLETE LAW GROUP
PRO ATHLETE LAW GROUP
BOBER, PETERSON & KOBY, LLP

JTL/*ara*

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