**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**PAUL PIUROWSKI,** ***Applicant***

**vs.**

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

**Adjudication Number: ADJ8627409**
**Santa Ana District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petitions for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the February 5, 2024 Amended Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 5, 2024 Amended Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 8, 2024**

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

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

**PAG/abs**

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

**REPORT AND RECOMMENDATION ON PETITIONS FOR RECONSIDERATION**

***BACKGROUND:***

Applicant is a former professional football player who claimed he suffered a cumulative trauma injury while employed by the Dallas Cowboys and Miami Dolphins between April 29, 1981 and August 1981, and then with the Tampa Bay Bandits between February 1983 through to February 1985 [9/23/21 MOH, P4-7].

Mr. Piurowski was invited to training camp held in California by the Dallas Cowboys during which time he signed an employment contract in Thousand Oaks, California [3/24/22 SOE, P7, L24-25; P9, L22]. After spending some time at the Dallas' training camp, he was released and the Dallas team assigned its 3-year employment contract to the Miami Dolphins on 8/5/81 [Ex J-1, P10; 3/24/22 SOE, P10, L5-8] for whom he worked about three weeks, solely in Florida [3/24/22 SOE P10, L10-12]. His work for both the Cowboys and the Dolphins ended in August 1981. Between August 1981 and February 1983 Applicant was out of football, attending college classes in Florida [3/24/22 SOE, P10, L15-16, L20] and working in construction as a laborer in Florida [3/24/22 SOE, P13, L12].

In 1983, he signed in Florida an employment contract with the Tampa Bay Bandits [3/24/22SOE, P10, L22-23]. He remained with that team until 1985 when his contract ended and did not engage in any football-related employment thereafter [3/24/22/SOE, P11, L18]. His active football career ended in February 1985 [9/23/21 MOH, P3, L7; 3/24/22 SOE, P5, L6-10] because he had a back injury just before or during training camp with Tampa Bay during that month [3/24/22 SOE, P5, L7 & L10; P11, L11-13; L18]. Applicant later filed a workers' compensation claim in Florida against Tampa Bay for his back injury and that claim was subsequently settled in 1987 [3/24/22/SOE, P12, L2-6].

In 1983, he signed in Florida an employment contract with the Tampa Bay Bandits [3/24/22SOE, P10, L22-23]. He remained with that team until 1985 when his contract ended and did not engage in any football-related employment thereafter [3/24/22/SOE, P11, L18]. His active football career ended in February 1985 [9/23/21 MOH, P3, L7; 3/24/22 SOE, P5, L6-10] because he had a back injury just before or during training camp with Tampa Bay during that month [3/24/22 SOE, P5, L7 & L10; P11, L11-13; L18]. Applicant later filed a workers' compensation claim in Florida against Tampa Bay for his back injury and that claim was subsequently settled in 1987 [3/24/22/SOE, P12, L2-6].

Mr. Piurowski filed this current disputed California workers' compensation claim on November 15, 2012 [EAMS Doc ID #7854888]. At the September 23, 2021 trial, the parties raised multiple issues, including: subject matter jurisdiction, statute of limitations and estoppel, date of injury under Labor Code section 5500.5, liability period under Labor Code section 5500.5, reciprocity to Florida statutes, preclusion due to prior claim, injury and parts-of-body, temporary disability, permanent and stationary date, permanent disability and apportionment, and need for further medical treatment. At a December 5, 2023 hearing, additional issues were raised regarding rating

instructions and the responsive rating prepared by DEU, and notation was made about lack of personal jurisdiction inadvertently not being stated as an issue on the Minutes of the September 2021 trial.

After conclusion of the trial, the Court found[1] that it had subject matter jurisdiction over Applicant's entire cumulative trauma claim and that it had personal jurisdiction over both the Dallas Cowboys and the Miami Dolphins, but not over the Tampa Bay Bandits, nor over Summit Holdings on behalf of Associated Industries of Florida Self-Insurers Fund. In addition, it determined that reciprocity was inapplicable.

Injury was found to various parts of body, but not the back claim because it was preluded by the prior workers' compensation case in Florida for which Applicant received a settlement. In addition, it was found that Labor Code section 3208.3(d) precluded the psychiatric injury.

The date of injury under Labor Code section 5412 was determined to be in January 2014 and thus the statute of limitations was not a bar to Applicant's claim. The period of liability under Labor Code section 5500.5 was found to revert back to the last injurious exposure with an employer over whom the Court had jurisdiction; that period being from April 1981 through August 1981.

As for benefits, it was found that Applicant's earnings were maximum for indemnity purposes, that all his injuries reached permanent and stationary status by June 28, 2019, that there was no period of temporary disability, that unapportioned permanent disability was 98%, and that there was a need for future medical care.

***PETITIONS FOR RECONSIDERATION:***

Both the Miami Dolphins and the Dallas Cowboys timely filed verified petitions for reconsideration.

Miami contends:

(1) Reciprocity applies to Miami as a self-insured employer.

(2) The statute of limitations bars Applicant's claim, based on testimony about when he was advised that he could file a claim.

(3) It was error to rely on the medical opinion of Dr. Einbund on issues of orthopedic injuries and disabilities, specifically because his opinion on apportionment was flawed because he didn't adequately address evidence showing possible pre-existing disability.

(4) The roll-back of liability under section 5500.5 is invalid because the last employer is insured, and there is jurisdiction over the Tampa Bay team.

[1] Findings and Award issued February 5, 2024. The Award was amended the same day to order withholding of attorney fees.

(5) Medical reports were improperly obtained because the date of injury under section 5412 requires use of the section 4062.2 QME process.

(6) The statute of limitations bars Applicant's claim because he should have known that his physical complaints were attributed to football after he stopped playing professional football in 1985.

(7) The Court is without subject matter jurisdiction over Applicant's claim due to Applicant's *de minimus* contact with California.

(8) There is personal jurisdiction over the Tampa Bay team due to waiver.

The issues raised in these Petitions are addressed below; some issues raised by each petitioner are common or related, and addressing the petitions together avoids repetition.

***DISCUSSION:***

Reciprocity:

Miami states it is self-insured in Florida and implies that it should not have liability in California [Petition, P6, L24-26]. But, there's a bit of lack of clarity here, because Miami didn't address this point to any degree in its petition.

First, this apparent issue with respect to Miami's self-insurance shielding it from liability wasn't specifically raised at trial. Failure to raise an issue at Trial generally forecloses the right to raise that issue on reconsideration. [*Davis v. Interim Healthcare*, 65 CCC 1039 (2000); *Cuevas v. Workers' Comp. Appeals Bd.* (2005), 70 CCC 479 (writ den.); *L.A. Unif. School Dist. v. Workers' Comp. Appeals Bd.* (2001) 66 CCC 1220 (writ den)]. Thus, this issue should be considered waived because it was first raised on reconsideration.

Second, if the argument is with regard to exemption under Labor Code section 3600.5(b), that point was addressed in the opinion (Page 17, section"C"). As noted, Florida's extraterritorial reciprocity statute wasn't enacted until 2011, well after Applicant's employment between 1981 and 1985. Thus, it is inapplicable to Mr. Piurowski's claim. [See: *Levrault v Milwaukee Brewers; Miami Marlins, et al*, 2022 Cal. Wrk. Comp. P.D. LEXIS 116; *Roberts v Tampa Bay Lightning*, 2016 Cal. Wrk. Comp. P.D. LEXIS 404; *Love v Tampa Bay Buccaneers*, 2015 Cal. Wrk.Comp. P.D. LEXIS 688].

Statute of Limitations

Defendants each assert that Mr. Piurowski's claims are barred by California's statute of limitations, which requires a claim for workers' compensation benefits be commenced within one year of the date of injury [Labor Code section 5405]. For a cumulative trauma claim there is no one event of injury because such a claim involves a series of repetitive traumatic activities. Labor Code section 5412 provides the legal date of injury for purposes of determining commencement of the one-year time. The date of injury here was found to be January 2014. The Application for Adjudication was

filed before that date, in November 2012, so it was found that the statute of limitations did not bar Applicant's claim.

Nevertheless, both Miami and Dallas contend the claim was filed late because Applicant should have known: (a) he that he had a right to file a claim more than a year before he filed, and (b) that his injuries were related to football as far back as 1985 because of his prior claim.

(a) Right-to-file knowledge

Defendants' contention that Applicant's claim is barred by the statute of limitations is incorrect.

Miami's assertion is that Applicant testified initially of a 4-year gap between being advised that he might have a right to file a workers compensation claim in California and the date that his claim was actually filed. However, Applicant later changed his testimony, indicating he was mistaken and that it was more like a 4-month gap. Miami contends Applicant's subsequent testimony is not credible and should not be believed[2]. The Court disagrees. Applicant's testimony over every trial session was believable.

A review of Applicant's testimony on the subject of receiving advice, contacting a lawyer, and filing a claim, follows:

> *With respect to his rights to file a workers' comp claim in California, he learned of this through a former teammate Jeff George, who was with him at Tampa Bay. He think this happened in 2009 maybe. He contacted an attorney, he thought, four years later. [3/24/22 SOE, P12, L7-9]*
>
> *The applicant indicated he wanted to make a change in his prior answer about when he saw an attorney after finding out about his right to file a workers' compensation claim in California. He thinks actually the meeting with his friend occurred in 2012. He said he called Attorney Ron Mix about a month later. There were discussions between the two of them, and then they just stopped. He does not think the four-year statement is accurate. He does not recall signing any documents with that attorney. Subsequently he was contacted by Mr. Stuckey. [3/24/22 SOE, P13, L23-25; P14, L1-3]*
>
> * * *
>
> *Reference was made by Applicant's counsel to the Summary of Evidence dated March 24, 2022, at page 12, lines 7 through 9, regarding when the applicant learned about his right to file a claim from Mr. George. Applicant recalled Mr. George had a claim, because Mr. George told him so, and that Mr. George had an attorney, Mr. Ron Mix.*
>
> *Applicant recalled that Mr. George's claim was filed in July 2012 and that his own case was filed in November 2012. The applicant previously testified he contacted his attorney four years after being advised by Mr. George about the possibility of a claim in*

[2] At page 4, line 16 of its Petition, Miami contends the Applicant's knowledge with respect to the statute of limitations wasn't addressed by the Court, but it was: see footnote 6 at page 22 of the Opinion on Decision.

*California, but now he says he actually filed his claim four months after he spoke to Mr. George, not four years.*

*The applicant confirmed he previously testified he learned about the possibility of a Workers' compensation claim from Mr. George and that he saw an attorney four years later. Applicant admits his testimony is now different.*

*He does recall that he took an oath to tell the truth under penalty of perjury, both in March of 2022 and at today's hearing. The applicant explained that the different answers occurred because he was confused about the dates when he talked to Mr. George, about when he talked to the attorney, and about when the claims were filed.*

*Applicant admits a tendency to put things off and that led him to think that four years was an accurate time frame, but he later realized it was a mistake and not accurate.*

*The applicant did read the Summary of Evidence prepared from the last hearing. He testified before the lunch break at that hearing that he met with Mr. George in 2009. After the break, he testified the meeting actually was in 2012. Reference was made to the Summary of Evidence from March 24, 2022 at page 13, line 24, where it indicates that there was a lengthy period between the first contact with the attorney, Mr. Mix, and later contact by Mr.Stuckey. The applicant says there was a long delay, and he recalls his wife asking about it. Applicant also indicated it's possible that the delay occurred because he wanted to avoid being involved in litigation.*
*[1/12/23 SOE, P5, L22-25; P6, L1-25]*

At the outset, it is apparent that Applicant's initial testimony clearly was mistaken, because if he did in fact speak to Mr. George in 2009 and then had contact with an attorney four years later, that would make the time of contact in 2013. However, Applicant signed his Fee Disclosure in August 2012 [EAMS Doc ID #7854891]. The Court notes that attorney Ron Mix filed the Application for Adjudication on November 14, 2012 [EAMS Doc ID #7854888], not in 2013. The four-year gap initially mentioned by Applicant and relied on by Miami simply isn't consistent with these dates. Applicant recognized this and corrected his error.

Mr. Piurowski explained that he conferred with a lawyer about a month after speaking with Mr. George and that his claim was filed about four months after he spoke to Mr. George. The August 2012 signature on the Disclosure form suggests he conferred with the attorney then, and that places his conversation with Mr. George a month earlier, in July. The Application for Adjudication was filed in November—4 months after talking to Mr. George, not 4 years—just as he said when he corrected his testimony at trial.

Mr. Piurowski also said there was a lengthy period between initial contact with an attorney and later contact by Mr. Stuckey. He was correct. The Court notes that Mr. Mix was substituted out as Applicant's attorney in October 2016 [EAMS Doc ID #19782026]. Mr. Stuckey was one of the members of the firm substituting into the case, and that happened to be four years after the claim was filed. That clearly was the delay that Applicant said his wife complained about, not the time between speaking to Mr. George and meeting with the attorney as suggested by Miami.

In assessing credibility with respect to the changed testimony, the Court realized that Mr. Piurowski was being questioned in 2022 and 2023 about events that happened 10 years before, or earlier. Confusion over dates and times and difficulty recalling the sequence of events after such a timelapse is not surprising. Moreover, the Court believes the fact that Applicant testified, later realized his testimony wasn't accurate and changed it, doesn't automatically mean that he was dishonest.

The running of the statute of limitations is an affirmative defense, and therefore, the burden of proof as to whether an application for adjudication is timely filed rests with defendant [Labor Code, sections 5409, 5705]. Although Miami points out Applicant elicited no other testimony about the time-frames, it is Defendant who has the burden to produce evidence on its statute defense. Despite this, no Defendant brought forth any firm contradictory evidence on the subject to rebut Applicant's corrected testimony. Therefore, Applicant's corrected testimony is unrebutted. Moreover, it was believable to the Court.

(b) prior claim

Miami points to the fact that Applicant had an earlier claim in Florida and therefore should have known he could/should have the right to file in California. However, other than his back condition, Applicant's other injuries did not become apparent until well after he concluded his Florida claim. No competent evidence indicates he knew or was told that his subsequent maladies were or could be related to his football career. That didn't happen until he reviewed medical reports from doctors, he was sent to by his attorney well after the claim was already filed. Nor was there evidence that he earlier made that connection on his own.[3]

Dallas also asserts that Applicant should have known his injuries were the result of his football career as far back as 1985 because it was obvious that wear and tear from football was the cause of his disability, and moreover, he had a prior claim against Tampa Bay in Florida.

Applicant's Florida claim involved an injury to his back, which he recognized at the time as being related to football activities, arising as it did while actually engaged or shortly after being engaged in physical activity on the field [See Ex B]. He obviously knew from the circumstances and from the course of medical attention in February 1985 that his back condition and resultant disability arose from work/football related activity. In *Weibl* v. *St. Louis Cardinals* [2012 Cal.Wrk.Comp. P.D. LEXIS 107] it was explained that having prior injuries doesn't establish knowledge of a cumulative injury.

Moreover, Applicant's other maladies arose much later—years later. There is no evidence that at the time of his Florida claim in 1987 he had other problems easily related to football. Applicant indicated that he developed multiple physical and emotional problems subsequent to the termination of his football career, but didn't know for sure that the disabilities that eventually arose from those physical problems were in fact the result of or caused by his football career [3/24/22 SOE, P11, L23- 24]. "*Knowledge of industrial causation does not occur until an Applicant receives a medical opinion expressly stating so, even where the Applicant indicated a belief that the disability is due to employment*." [*Fruehauf Corp. v. WCAB.* (1968) 33 CCC 300, 306]. Mr.

[3] See section D. LEGAL DATE OF INJURY (LC 5412) in the Opinion on Decision.

Piurowski said his first knowledge in that regard was obtained upon review of the medical reporting of Dr. Einbund [3/24/22 SOE P3, L8-11; P6, L16-19].

"Knowledge" is just that; it is not surmise or suspicion as to the relationship between the disability and the work performed. Showing that an employee had symptoms or received medical treatment is not enough to prove knowledge of the source of disability [*Chambers v WCAB*, 33 CCC 722 (1968)]. Generally, applicant will not be found to have sufficient knowledge that his disability is job related without medical advice to that effect [*City of Fresno v. WCAB,* 50 Cal. Comp. Cases 53 (1985)].

In *Graves v Coorstek*, [2022 Cal. Wrk Comp. P.D. Lexis 201] it was explained:

> *The employer has the burden of proving that the employee knew or should have known his disability was industrially caused. (Johnson, supra, at 471, citing Chambers v. Workers' Comp. Appeals Bd. (1968) 69 Cal. 2d 556, 559.) That burden is not sustained merely by a showing that the employee knew he had some symptoms. (Johnson, supra, at 471; Chambers, supra, at 559.) In general, an employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect. (Johnson, supra, at 473; Newton v. Workers'Comp. Appeals Bd. (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].)*

Proof of actual knowledge here is non-existent. The Court disagrees with the assertion that Applicant knew or should have known his multiple disabilities were due to his football career simply because he had a prior back claim or had some aches and pains or physical difficulties in later years.

Invalid Medical Reports

Dallas contends that Applicant's medical reports were erroneously admitted into evidence because the legal date of injury under Labor Code section 5412 is in 2014, making it mandatory that medical evaluations be obtained pursuant to the QME process as directed by Labor Code section 4062.2 which became effective in 2013. The Court disagrees.

> *Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.* [Labor Code section 4062.2(a)]

First, the statute uses the terms "*injury occurring on or after January 1, 2005*" whereas Mr. Piurowski's injury occurred before 2005. The key word is "occurring" which pertains to events happening at a particular time. The legal date of injury is not when the events of the injury happened. If the legislature wanted the legal date of injury to be the guiding date, it would have said so. [4]

[4] For instance, see section 5500.5 or section 3208.1

Second, the position asserted by Dallas is somewhat illogical. How would one determine the legal date of injury without necessary medical evidence to address disability and knowledge; and then, under what procedure would one obtain that medical evidence without first knowing the legal date of injury?

Third, and most importantly, the argument raised by Dallas has been addressed contrary to its position by *Simi v Sav-Max Food*, 70 CCC 217 (2005), T*anksley v City of Santa Ana*, 2010 Cal. Wrk. Comp. P.D. LEXIS 74, *Cyburt v San Francisco Giants*, 2023 Cal. Wrk. Comp. P.D. LEXIS 340 and *Holmberg v. Oakland Raiders Insured by HiH Am. Ins.,* 2024 Cal. Wrk. Comp. P.D. LEXIS 17].

In the *Holmberg*, it was explained:

> *Our decision in Tanksley emphasized that the parties to a claim of injury occurring prior to January 1, 2005 should not be required to obtain a judicial determination as to the date of injury pursuant to section 5412 in order to determine the appropriate procedure by which to obtain medical-legal reporting. (Ibid.) Such a holding would be inconsistent with the California Constitutional mandate that the workers' compensation law "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character."*

The 5412 injury date is not legally relevant to the process of obtaining medical reporting in a continuing trauma claim where the injuries are claimed to have occurred before 2005, such as the one pursued here by Mr. Piurowski. Under the circumstances, the medical evidence was properly obtained.

Apportionment opinion—not substantial evidence

Miami contends that the Court should not have relied on the reporting of Dr. Einbund because his opinion on apportionment ignores team records showing prior injuries and surgery (Petition, Pages 2-4). In particular, Miami points to page 215 of Exhibit J, entitled “Injury Waiver and Release” in which Applicant agreed that there was pre-existing injury to his knees, left wrist and right thigh, and that

> *Player acknowledges the existence of such injury or condition, affirms that it existed prior to his reporting to the Club for the upcoming professional football season, and agrees that such injury or condition violates his warranty and representation to the Club regarding his "excellent physical condition" which entitles the Club, at its option, to terminate his*
> *contract*.

However, the team did not terminate his contract, but allowed Applicant to participate in all training activities with the team. Moreover, Applicant also signed an authorization for medical exam indicating that he disclosed his medical history to the Club's physicians, and that he was not suffering from any disability [Ex J, P(pdf)213]. There is no indication in the records of any restrictions on activity or physical work.

His health history recited to the Dallas team did reflect prior knee surgeries [Ex J, P(pdf)211]. He also advised Dr. Einbund. In Dr. Einbund's initial report in January 2014, he notes the history of prior knee surgeries in 1975 and 1977 during Applicant's high school career [Ex 1, P4]. The AMA Guides do allow impairment for knee surgery [*AMA Guides to the Evaluation of Permanent Impairment, 5th Ed*, P546]. When addressing apportionment, however, Dr. Einbund stated all of Applicant's disability was a consequence of his professional football career. Dr. Einbund did not explain why apportionment to the prior surgeries was inapplicable.

In a subsequent report, Dr. Einbund noted bilateral knee replacements in 2015 [Ex 3, P2] for which he imposed impairments [Ex 3, P12]. He said the knee replacements were due to continuing trauma, not to any other cause [Ex 3, P16]. He did not address the causative effect, if any, of the prior knee surgeries on the need for replacement. It may be that he believed the prior surgeries played no role in the post-replacement disability, but clarification from the doctor is warranted. The remainder of his reporting is appropriate.

Roll-back of liability

Miami also contends that the Court's decision about liability "rolling back" under Labor Code section 5500.5 due to lack of jurisdiction over Tampa Bay is erroneous (Petition, Page 5, et seq), arguing that the Court is required to limit liability to those insured employers who employed Applicant over the last year of his injurious exposure, which excludes Miami.

However, liability rolls back when California jurisdiction is absent over an employer during the last year. [*Harper v Tampa Bay Buccaneers*, 2014 Cal Wrk Comp P.D. Lexis 61; *Tampa Bay Buccaneers v WCAB* (Curry), 73 CCC 944 (2008); *Portland Trail Blazers v WCAB* (Whatley), 72 CCC 154 (2007); *Employers Mutual Liability Ins Co v WCAB,* 52 CCC 284 (1987)].

Nonetheless, the issue of personal jurisdiction needs to be revisited, and this will affect the validity of the roll-back of liability.

Personal Jurisdiction—Tampa Bay

Personal jurisdiction exists only when in relation to the claim the defendant has sufficient contact with the state in which the Court sits. The rationale for this is that if the defendant has sufficient contact with the state, the defendant can reasonably anticipate the possibility of being brought into court in that state.

Here, the Tampa Bay team is domiciled in Florida, so there is no general personal jurisdiction over it. Nor would there appear to be specific personal jurisdiction because there is no proof to establish that Tampa Bay hired him here, or the team regularly employed him here, or that he was injured here while so employed, or his employment with the team played a significant role in the cause of his injury here.

Nonetheless, Dallas believes that personal jurisdiction should be found to exist over Tampa Bay Bandits. The reason, according to Dallas, is that the defense was waived. The Court initially found otherwise, because it believed there was no action by Tampa Bay to waive the defense, that there was no activity to show that the team aggressively pursued issues or developed facts other than

those related to jurisdiction. However, the petition by Dallas, and the assertion about waiver, caused the Court to re-examine FileNet for case activities performed well before the matter was assigned to it for trial.

First, Dallas points out that the Minutes from the 9/23/21 trial does not list "personal jurisdiction" as an issue. Dallas is correct. However, contrary to the claim that the defense was waived because it wasn't raised as an issue, the Court pointed out the omission was not an act of waiver:

> *MSC hearing on June 2, 2021 the matter was set for trial on September 23, 2021 for all issues "including jurisdictional challenges" [EAMS Doc ID #74260506]. The joint Pre-Trial Conference Statement filed by the parties did indicate in scribbled handwriting under "Other Issues" that the defense of "personal jurisdiction" was one of the disputed issues [EAMS Doc ID # 38308857]. Unfortunately, that assertion was inadvertently not included by the Court when reciting the official Minutes of Hearing dated September 23, 2021 [EAMS Doc ID #74725239].*
>
> [Opinion on Decision, Page 12].

Second, Dallas claims Tampa Bay and its self-insured administrator abandoned the defense by objecting to the Court's rating instructions and conducting cross-examination of the DEU rater. Indeed, counsel for Zenith/North River for Tampa Bay did file an objection to Formal Rating Instructions [EAMS Doc ID #45569254] contending that the wrong compensation rates were used, that the impairments described were not in accord with the AMA Guides, and that the absence of apportionment was a mistake. Request was made for modification of the instructions and issuance of a new rating.

At the hearing for cross-examination of the rater, counsel for Zenith/North River for Tampa Bay inquired about the date of injury, PD rates, whether impairments in the medical reports were in accordance with the AMA Guides, apportionment and add-on impairments for sleep, psych disability, and sexual dysfunction. Likewise, counsel for Tampa Bay Bandits and Summit Consulting on behalf of Associated Industries of Florida Self-Insurers Fund also inquired of the rater about date of injury used in the rating, permanent and stationary dates, and medical evidence supporting the GAF score. [See 12/5/23/SOE].

These activities do appear to belie a claim that the Court is without jurisdiction over Tampa Bay. If the assertion that the team could not be held liable under any circumstances because of the absence of jurisdiction over it, no reason exists to pursue these matters involving substantive liability. Doing so suggests an abandonment of the defense.

Third, in *Parker v. Indy Fuel Hockey*, 2017 Cal. Wrk. Comp. P.D. LEXIS 547, defense counsel's activities were deemed an effective waiver of the personal jurisdiction defense. The Board noted:

> *During the more than eight months between the filing of the notice of representation and the filing of the Declaration of Readiness to Proceed, defendant took no action to bring an objection to personal jurisdiction before the WCAB for determination. Instead, defendant took applicant's deposition and asked questions unrelated to the issue of*

*personal jurisdiction on July 18, 2016, without stating that it was making a special appearance.*

Counsel for Tampa Bay and counsel for AIF-SIF/Summit announced that their appearances were solely to address the lack of personal jurisdiction [See MOH dated 4/15/21; EAMS Doc ID #74083077]. However, *Parker* and *Holmberg v. Oakland Raiders Insured by HIH Am. Ins.*, 2024 Cal. Wrk. Comp. P.D. LEXIS 17, say that more than an announcement must be made—specifically there must be an early and prompt request to address the personal jurisdiction defense.

Looking back to activities indicated in FileNet, occurring soon after the application for adjudication was filed, the Court notes a law firm on behalf of North River Insurance Company, as insurer for Tampa Bay Bandits, filed notice[5] of its appearance on 12/6/13, making no mention of "special appearance" nor of any personal jurisdiction issue [EAMS Doc ID #11295484].

However, a Petition to dismiss dated in May 2014, and filed in June 2014, claimed that California lacked jurisdiction over the Tampa Bay team [EAMS Doc ID #12414526]. In September 2014 a declaration of readiness was filed seeking a hearing because "DEFENDANTS DISPUTE LIABILITY BASED ON 5500.5 AND JURISDICTION DEFENSES" [EAMS Doc ID #13004099]. The reference to Labor Code 5500.5 suggests more than just a jurisdictional dispute. Nonetheless, North River and its administrator, Crum & Forster, were subsequently dismissed from the case (without prejudice) for the period of its coverage after 3/3 85 to 6/11/85 [EAMS Doc ID #54556715].

Rejoinder of the insurer was ordered in November 2018 [EAMS Doc ID #68627847]. In May 2019, a new firm entered the case by substitution [EAMS Doc ID #70306618] for Crum & Forster/Tampa Bay Bandits. Then on 6/3/19 attendance at a hearing was made, with the notation that it was "not a special appearance" [EAMS Doc ID #70364582]. The order of joinder was reissued—no objection followed. On June 30, 2020, Crum & Forster, through its new counsel, objected to a declaration of readiness filed by Applicant, requesting that the matter not be set for hearing because its discovery (Social Security earnings records) was not complete [EAMS Doc ID #32937407]. No mention was made of a jurisdictional dispute. Appearance was entered at a hearing of 7/13/20—again, no mention of it being a special appearance or of any personal jurisdiction defense [EAMS Doc ID #72983186].

Contrary to any claim that there has been an ongoing assertion that the Court is without personal jurisdiction over the team, the procedural history shows there were two notices of representation for North River/Tampa Bay, neither indicating anything about a special appearance. There was however, a motion to dismiss for lack of jurisdiction that resulted in dismissal of Tampa Bay's carrier for a limited time. Then, it was rejoined without objection and the personal jurisdiction defense was not raised again until years later.

In the meantime, discovery of earnings was undertaken, a request was made for a hearing to be cancelled to allow discovery, and general appearances were made at hearings. Moreover, even after asserting an objection before trial as to personal jurisdiction, as pointed out by Dallas counsel

[5] Although filed in December 2013, the Notice is dated in December 2012.

for Tampa Bay (and its self-insuring agency) pursued inquiry at trial about facts not germane to any jurisdictional defense.
In light of the foregoing facts, and considering the guidance of *Parker* and *Holmberg*, it would appear that the defense of lack of personal jurisdiction over Tampa Bay was in fact waived. Accordingly, the Court's decision on personal jurisdiction is not supported and should be rescinded. Doing so does affect the liability period previously determined.

Subject matter jurisdiction/De-minimus contacts

Dallas argues that subject matter jurisdiction is non-existent because Applicant's employment with it was minimal. Relying on *Federal Insurance Company v WCAB* (Johnson) [78 CCC 1257 (2013)], Dallas asserts that Applicant's alleged injurious exposure while with Dallas was insufficient to give California a legitimate interest in Applicant's claim of cumulative injury.

In J*ohnson*, the worker was hired outside of California and she worked here only one time during the season to participate on a single game with her team. The court pointed to the out-of-state employment, the location of her team's home base, and her lack of over-all connection to California during the time of her injury and concluded that California had no substantial interest in addressing her claim. There was no indication that Johnson's one game here was a significant contributing factor in her injuries, and accordingly the court pointed out "*A single basketball game played by a professional player does not create a legitimate interest in injuries that cannot be traced factually to one game. The effect of the California game on the injury is at best de minimus."*

Here, however, the situation with Dallas is a bit different. Firstly, Dallas invited Mr. Piurowski to California to attend training camp [3/24/22 SOE, P9, L16-18]. On July 13, 1981—while at that training camp—he signed three separate one-year employment contracts with the team covering the period 4/1/81 through 4/1/84 [Ex J, P(pdf)16-27]. This is an important variance from the factual circumstances in *Johnson*, because the court placed emphasis on the situs of the formation of the employment.

Secondly, by statute[6] the fact of a California hire gives California a legitimate interest in Applicant's claim of injury while employed. Also, Dallas should not be surprised that it would be called to litigate an injury claim here when it brought Applicant here to put him through training camp for three or four weeks, which Applicant described as a physically arduous endeavor, stating:

> *While in the training camp program for two or three weeks, there would be two-a-day practices. These are very long sessions and were physically difficult. These sessions required him to use all parts of his body, including his feet in running, his hips in twisting and turning, and he would have to address players blocking or pushing him. He would receive bumps and bruises and strains and sprains daily in practice ….*
> [3/24/22 SOE, P4, L8-11]

Third, medical evidence implicates that Applicant's activity with Dallas in California was contributory to Applicant's injury [Ex 1, P18; Ex 3, P16].

[6] Both Labor Code sections 3600.5(a) and 5305 condition California interest on hire in the state.

Accordingly, the finding of subject matter jurisdiction over Applicant's claim, based on his hire by and employment with Dallas in California is appropriate. There is no due process violation as to Dallas' obligation to defend here, especially since the entirety of Applicant's employment with Dallas was wholly within California under contract formed in California. .

Moreover, the due process concern with respect to subject matter jurisdiction set out in the *Johnson* case would not apply separately to Tampa Bay's involvement despite the parallels between the facts in Johnson and Mr. Piurowski's case are uncanny.

Ms. Johnson was not a California resident, nor is Mr. Piurowski. Ms. Johnson was hired outside of California, as was Mr. Piurowski. Ms. Johnson's employment was with a team based outside of California—in New Jersey; Mr. Piurowski's employment was with a team based outside of California—in Florida. Ms. Johnson during a full season played one of 34 games in California with no particular admission of any injury during that game. Mr. Piurowski likewise played only one game in California over the course of two full football seasons, and testified he was not injured nor did he need treatment after the game [3/24/22 SOE, P11, L5-6].

The Johnson court stated:

> *The effects of participating in one of 34 games do not amount to a cumulative injury warranting the invocation of California law. As the cases show, a state must have a legitimate interest in the injury. A single basketball game played by a professional player does not create a legitimate interest in injuries that cannot be traced factually to one game The effect of the California game on the injury is at best de minimis.*

A key difference in the two cases is that other than her one game in this state, Ms. Johnson had no other California contacts or employment. On the other hand, Mr. Piurowski did sign an employment contract with Dallas in California and worked here in California for the entirety of his employment with that team, which medical evidence indicated was contributory to his injury.

Under the circumstances, the existence of personal jurisdiction over Tampa Bay due to waiver, and the existence of a California contract of hire with its co-defendant, allows the Tampa Bay team to be caught in the subject matter jurisdiction net for this claim in accordance with *New York Knickerbockers v. WCAB (*Macklin*),* 80 CCC 1141 [See also: *Neal v. San Francisco 49ers,* 2021 Cal.Wrk.Comp. P. D. LEXIS 68]. The *Johnson* case affords no shield for Dallas, nor will it do so for Tampa Bay. Jurisdiction over the entire claim of injury is properly asserted here.

RECOMMENDATIONS:

1. Reconsideration be granted and the matter returned for an inquiry to Dr. Einbund regarding apportionment, and to rescind the findings on permanent disability pending his response;

2. Reconsideration be granted to find personal jurisdiction over the Tampa Bay Bandits due to waiver of the defense, and to rescind the roll-back finding on the period of liability under section 5500.5 of the Labor Code.

DATE: March 12, 2024

**Marco Famiglietti**
WORKERS' COMPENSATION JUDGE