

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

BENJAMIN CLAXTON, *Applicant*

vs.

**ARIZONA CARDINALS and GREAT DIVIDE INSURANCE COMPANY, administered
by BERKLEY SPECIALTY UNDERWRITING MANAGERS; OAKLAND RAIDERS
and ACE AMERICAN INSURANCE COMPAMY, administered by ESIS, *Defendants***

**Adjudication Number: ADJ8481999
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O)¹ issued by the workers' compensation administrative law judge (WCJ) on November 1, 2019, wherein the WCJ found in pertinent part applicant's claim of injury in the form of cognitive disorder is barred by Labor Code section 3208.3, "and his evaluation of such alleged disorder is therefore unnecessary."

Applicant contends that he is entitled to a neuropsychological evaluation as recommended by neurology qualified medical examiner (QME) Daniel Shalom, M.D., and that since he was employed by the Arizona Cardinals from 2009, through 2011, his claim of injury in the form of cognitive disorder is not barred by the provisions of Labor Code section 3208.3(d).²

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be dismissed, or in the alternative, if it is deemed a Petition for Removal it should be denied. We received an Answer from defendant Oakland Raiders; we did not receive an Answer from defendant Arizona Cardinals.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind

¹ The WCJ's decision was improperly identified as a Findings and Award but it does not contain an Award and does include an Order. This appears to be a clerical error and is not relevant to the outcome of this matter.

² All further statutory references are to the Labor Code unless otherwise noted.

the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his head, neck, back, shoulders, elbows, wrists, hips, knees, ankles, feet, and toes, to his psyche, neurological system, and internal parts, and in the form of sleep disorder, while employed as a professional football player by various teams during the period from September 12, 2005, through September 1, 2011; his employers included the Oakland Raiders (Raiders) from May 3, 2007, through August 21, 2007, and the Arizona Cardinals (Cardinals) from January 7, 2009, through September 3, 2011. (See Def. Exh. A, NFL Transaction Record; Def. Exh. B, NFL Game Logs; see also, Answer, p. 2.) Applicant filed a Petition for Joinder of the Cardinals on April 7, 2014, and counsel for the Cardinals appeared at the May 19, 2014 conference.

On September 18, 2017, QME Dr. Shalom evaluated applicant. Dr. Shalom examined applicant, took a history, and reviewed the medical record. The diagnoses included “Post traumatic headache” and Dr. Shalom noted:

I find industrial causation for his headaches, which are considered post-traumatic in origin. ¶ Mr. Claxton offered multiple other complaints of a cognitive and [sic] emotive character, as described above and at multiple points his deposition (for example on pages 74-75, 105-107, et al) [in] which he also describes a change in his abilities after playing. ¶ Regarding these issues, which he states has significant [effects] upon his professional life in particular, it is suggested that [Mr.] Claxton undergo neuropsychological assessment with testing [to] address and/or quantify these issues.
(Def. Exh. E, Dr. Shalom, October 3, 2017, p. 6.)

Dr. Shalom’s deposition was taken on December 6, 2018. Counsel for applicant, defendant Oakland Raiders, and defendant Arizona Cardinals, appeared at the deposition. (Def. Exh. I, Dr. Shalom, December 6, 2018, deposition transcript, p. 3.) At various times during his testimony, Dr. Shalom repeated his opinion that applicant should undergo a neuropsychological evaluation; for example:

The whole point of me stating later in the report that a neuropsychological evaluation was needed was to address all of these things that I discussed, namely

the cognitive things and of course the mood swings, which are outside my area of expertise.
(Def. Exh. I, p. 9, lines 19 – 23.)

Applicant filed an Amended Application for Adjudication of Claim identifying the Cardinals as the employer on March 13, 2019, and counsel for the Cardinals appeared at the August 30, 2019 status conference.

The parties proceeded to trial on October 30, 2019. The “Appearances” were: for applicant Benjamin Claxton, James Sims; for defendant Oakland Raiders, Melissa DuChene; and for defendant Arizona Cardinals, Amy Hoffman. (Minutes of Hearing (MOH) October 30, 2019, p. 2.) The issues submitted for decision included whether applicant was entitled to a neuropsychological evaluation, and whether injury in the form of neuropsychological disorder is compensable under Labor Code section 3208.3(d). (MOH, pp. 2 – 3.)

DISCUSSION

A petition for reconsideration may only be taken from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1078 [65 Cal.Comp.Cases 650].)

Here, Finding 2 states that, “Applicant’s claim of injury in the form of cognitive disorder is barred by section 3208.3 of the Labor Code...” (F&O, p. 1.) Although a finding as to an injured worker’s entitlement to a medical-legal evaluation may well be an interlocutory order, Finding 2 prohibits applicant from seeking and/or receiving any benefits for the cognitive disorder injury he has claimed. Under these circumstances, the F&O constitutes a final order and is properly subject to reconsideration.

We first note that section 3208.3 states in part:

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against

an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. ... (Lab. Code, § 3208.3(d).)

Review of the record, including the Electronic Adjudication Management System (EAMS) ADJ file, clearly shows that the Cardinals and its insurance carrier Great Divide Insurance Company (Great Divide) have long been involved in the litigation of this matter as a party defendant.³ Also, as noted above, counsel for the Cardinals/Great Divide participated in the deposition of QME Dr. Shalom, and the October 30, 2019 trial. There is no dispute that the Cardinals and Great Divide are party defendants in this matter. There also is no dispute that applicant was employed by the Cardinals for the period from January 7, 2009, through September 3, 2011. It is not clear how or why the issue of the section 3208.3(d) six month defense was limited to applicant's employment with the Raiders. Since the Cardinals/Great Divide are defendants, are actively participating in the litigation of applicant's injury claim, and the Cardinals were the employer for the last year of the alleged cumulative injury period, there is no legal basis for limiting the section 3208.3(d) six month defense to the "less than six months" that applicant was employed by the Raiders. Therefore, the psychiatric injury claim is not barred by section 3208.3(d).

Further, it is important to note that cognitive disorders are a type of mental health disorders that primarily affect learning, memory, perception, and problem solving. Neuropsychology is a branch of psychology that focuses on how a person's cognition and behavior are related to the brain/nervous system. Neuropsychologists often focus on how injuries or illnesses of the brain affect cognitive and behavioral functions and they conduct evaluations to characterize behavioral and cognitive changes resulting from central nervous system disease or injury. (See the Merriam-Webster Medical Dictionary.) Thus, it appears that applicant's claim of injury in the form of cognitive disorder is separate and distinct from the psychiatric injury claim and in turn is not subject to the provisions of section 3208.3.

Regarding the neuropsychology evaluation, QME Dr. Shalom clearly stated that applicant should be evaluated by a neuropsychologist in order to address the issues of his cognitive impairment. Dr. Shalom testified that the issue of applicant's cognitive impairment was outside

³ See for example: the August 13, 2012 Application for Adjudication of Claim identifying the Arizona Cardinals as the employer; the October 9, 2014 Petition to Dismiss Party Defendants - Arizona Cardinals; the October 20, 2014 Order dismissing party defendant Arizona Cardinals; and the November 18, 2014 Order Vacating Order of Dismissal.

his area of expertise, and based thereon, a neuropsychological evaluation was needed. (Def. Exh. I, p. 9, lines 19 – 23.) There is no evidence in the trial record that is inconsistent with Dr. Shalom’s opinion that applicant should be examined by a neuropsychologist. As such, it is appropriate that applicant undergo a medical-legal examination by a neuropsychologist.

Finally, it is important that the parties understand that we are not making a ruling on the issue of whether applicant sustained a psychiatric injury; our decision is limited to whether the psychiatric injury claim and/or the cognitive neurological system injury claim are barred by section 3208.3(d), and whether it is appropriate that applicant be evaluated by a neuropsychologist.

Accordingly, we rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 1, 2019 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 31, 2022

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

**BENJAMIN CLAXTON
COLANTONI COLLINS MARREN PHILLIPS & TULK
PEARLMAN BROWN
PRO ATHLETE LAW**

TLH/pc

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