WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVON HOUSE*, Applicant*

vs.

GREEN BAY PACKERS; GREAT DIVIDE INSURANCE COMPANY, administered by BERKLEY ENTERTAINMENT*, Defendants*

Adjudication Number: ADJ15657256
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

DAVON HOUSE
PRO-ATHLETE LAW GROUP
BOBER PETERSON & KOBY

SAR/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 OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

Defendants have filed a timely, verified Petition for Reconsideration. Petitioner seeks Reconsideration contending it is prejudiced by this Judge's decision of July 3, 2023, finding that Applicant successfully met the burden of demonstrating that California's exercise of jurisdiction is reasonable.

STATEMENT OF FACTS:

Davon House while employed during the period April 1, 2011 through March 19, 2019, as a professional athlete, Occupation Group No. 590, at various cities and states, by the Green Bay Packers from 2011 through 2014 and 2017 through March 19, 2019, and by Jacksonville Jaguars from 2015 through 2016, claims to have sustained injury arising out of and in the course of employment to his head, neck, shoulders, elbows, back, hands, wrists, fingers, hips, knees, ankles, feet, toes, neurological issues, internal issues, psychiatric issues, chronic pain and sleep issues.

At the time of injury, the employer's workers' compensation carrier was Great Divide Insurance administered by Berkley Entertainment.

This matter proceeded to Trial on April 5, 2023. The parties stipulated at the time of Trial that the employer has furnished no medical treatment for the claimed injury. Further stipulations included that no attorney fees have been paid and no attorney fee arrangements have been made.

The sole issue for Trial was whether there is subject matter jurisdiction over this claim. The parties requested, and were allowed time, to file Post Trial Briefs. The Briefs were due on or before April 24, 2023, at which time this matter was submitted for decision.

A Findings of Fact issued on July 3, 2023. Defendants filed a timely, verified Petition for Reconsideration on July 19, 2023. Applicant filed an Answer to the Petition for Reconsideration on July 27, 2023.

DISCUSSION:

Petitioner contends that the Workers Compensation Appeals Board is preempted by federal law from determining when and how a contract of hire is formed with a player in the National Football league. The sole issue for Trial was there is subject matter jurisdiction over this claim. At no time during the trial did Petitioner raise the issue of federal law preemption. Failure to raise an issue at trial with specificity poses a serious question of due process on the party that was not put on notice. Petitioner raised the issue of federal preemption for the first time in its Trial Brief. Respondent was therefore prejudiced because of the lack of opportunity to raise additional issues or present additional evidence on the issue. As such, because Petitioner failed to raise the issue of federal preemption at the time of trial, it should be considered waived.

If however, the WCAB determines that federal preemption is a subcategory of subject matter jurisdiction, this will be addressed as it was in the Findings of Fact. Determination of Subject Matter Jurisdiction is within this Court's purview per statute. Specifically, pursuant to Labor Code §5305, 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. This case, falls directly under Labor Code §5305 because it involves an issue as whether a contract of hire was made in this state.

Petitioner cites *14 Penn Plaza LLC v. Pyett (2009) 556 US 247, 255*, stating that the "NRA governs federal labor relations law… for the purposes of collective bargaining in respect to rates of pay, wages, hours of employer and other conditions of employment." Conditions of employment refers to cases where employment is established. When the aspects of the employment are sources of contention they then fall within the collective bargaining agreement. Conditions of employment does not involve jurisdictional issues of where the creation of the contract of employment was made. This Court has sole discretion in determining jurisdictional issues in accordance with Labor Code § 5305.

Petitioner mistakenly argues that the Collective Bargaining Agreement (Exhibit F) specifically states that a contract of hire must be in writing. This is not what it says on Page 10

of Exhibit F. It reads as follows:

> "Any agreement between any player and any Club concerning terms and conditions of employment shall be set forth in writing in a Player Contract as soon as practicable." It does not state that a contract of hire must be in writing. Moreover as stated above, this refers to terms and conditions of employment, which does not include contract formation or subject matter jurisdiction. This Court is not persuaded that Federal Law precludes subject matter jurisdiction, specifically contract formation, from being decided pursuant to state law outlined in Labor Code §5305.

Petitioner mistakenly asserts there was no contract offered in the telephone call telling Applicant he was drafted and no contract was accepted. During the telephone call, he was told that he was becoming a Green Bay Packer, and they had his rights; so he could not go with any other team (MOH/SOE 04/05/2023, page 5, lines 12- 14). The applicant agreed to the terms while he was in the state of California (MOH/SOE 04/05/2023, page 8, lines 22- 23), which was during the telephone call. Shortly after the telephone call, the offer and acceptance was confirmed via the fax sent to the applicant's agent (Exhibit 4) and reads as follows:

> Dear Davon: This will serve as notice that pursuant to Article XVI, Section 3 of the CBA, the Club is deemed to have automatically **tendered** you a one year NFL Player Contract with a Paragraph 5 Salary of $330,000. Sincerely, Russ Ball, Vice Present Football Administration Player Finance (emphasis added)

The word "tendered" is used in the confirmation fax. The word "tendered" is defined as "to make a formal written offer." The fax would not have been sent if an offer had not been made during the telephone call, much less if an acceptance was not made. The facts support that an offer and acceptance was made on draft day and an oral contract was formed between Coach Mike McCarthy and the Applicant.

Petitioner argues that pursuant to the En Banc decision in *McKinley v. Arizona Cardinals (2013) 78 Cal. Comp. Cases 23*, the WCAB shall enforce a reasonable mandatory Choice of Law and Choice of Forum Selection Clause contained in a player's contract. As stated in Respondent's Answer, our case differs from *McKinley*. Here, the employment contract was formed in California and the Applicant was a resident of California. In *McKinley*, all of the contracts were formed in Arizona, outside of California's jurisdiction. Thus, the rule in

McKinley is not applicable in this case. Further, the issue of Choice of Law/Forum was not raised at trial and also should be considered waived.

RECOMMENDATION:

For the reasons stated above it is respectfully recommended that the Petition for Reconsideration be **DENIED.**

Date: August 10, 2023

Laura Mendivel
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

FACTUAL BACKGROUND

Davon House while employed during the period April 1, 2011 through March 19, 2019, as a professional athlete, Occupation Group No. 590, at various cities and states, by the Green Bay Packers from 2011 through 2014 and 2017 through March 19, 2019 and by Jacksonville Jaguars from 2015 through 2016, claims to have sustained injury arising out of and in the course of employment to his head, neck, shoulders, elbows, back, hands, wrists, fingers, hips, knees, ankles, feet, toes, neurological issues, internal issues, psychiatric issues, chronic pain and sleep issues. At the time of injury, the employer's workers' compensation carrier was Great Divide Insurance administered by Berkley Entertainment.

This matter proceeded to Trial on April 5, 2023. The parties stipulated at the time of Trial that the employer has furnished no medical treatment for the claimed injury. Further stipulations included that no attorney fees have been paid and no attorney fee arrangements have been made. The sole issue for Trial was whether there is subject matter jurisdiction over this claim. The parties requested, and were allowed time, to file Post Trial Briefs. The Briefs were due on or before April 24, 2023 at which time this matter was submitted for decision.

EVIDENTIARY ISSUES

Applicant objected to Exhibit C on the basis of relevance. Defendant contends that the issue for trial is subject matter jurisdiction and the contracts contain a choice of law, choice of forum selection clause, which require the applicant to file claims in Wisconsin. Moreover, the fact that the applicant did file claims in Wisconsin is relevant to whether this Court should exercise subject matter jurisdiction over this claim. Applicant's objection is **OVERRULED**. Exhibit C is hereby **ADMITTED** into evidence.

DISCUSSION

WHETHER THERE IS SUBJECT MATTER JURISDICTION OVER THIS CLAIM

Labor Code §5305 reads, in pertinent part, as follows:

> 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. (emphasis added)

As such, the issue at hand turns to whether the applicant was a resident of the state of California and that the contract for hire was also made in this state.

The Court assessed the applicant during trial testimony and found him to be credible and therefore, considers his testimony unimpeached and reliable.

The applicant testified that he interviewed for various teams. The Green Bay Packers was one of the teams. The members that were present during the applicant's interview was the head coach, Mike McCarthy; Dom Capers; Joe Whitt, Jr.; Ted Thompson, the general manager; and he was pretty sure Russ Ball was there as well (MOH/SOE 04/05/2023, page 4, lines 22-25). The interview process was long. He did not consider this a normal meeting because of how extensive it was. It was as if they knew that they were going to draft him. The Green Bay Packers talked about how impressed they were with him. They intended on drafting him (MOH/SOE 04/05/2023, page 5, lines 1- 4).

On Draft Day, the applicant was back home in Palmdale, California. Prior to being selected, Coach Mike McCarthy called the applicant to tell him that they were going to draft him. The draft was then announced on television. During the phone call, he was told that he was becoming a Green Bay Packer, and they had his rights; so he could not go with any other team (MOH/SOE 04/05/2023, page 5, lines 12- 14). The applicant agreed to the terms while he was in the state of California (MOH/SOE 04/05/2023, page 8, lines 22- 23).

Shortly after the draft, the applicant received a fax that had been sent to his agent. On the fax cover sheet there were two names, Russ Ball and Ken Zuckerman. Mr. Zuckerman was the

applicant's agent. The applicant understood this to mean that he was officially a Green Bay Packer at that time (MOH/SOE 04/05/2023, page 5, lines 19 - 22). Applicant's Exhibit 4 is a fax cover sheet dated May 2, 2011, addressed to Ken Zuckerman, the applicant's agent. The fax number has an 818 area code which is a California area code. The fax was from Russ Ball "Vice President of Football Administration/Player Finance." The second page of Exhibit 4 is a letter that reads as follows:

> Davon House 2225 Carolyn Drive Palmdale, CA 93551
> Dear Davon: This will serve as notice that pursuant to Article XVI, Section 3 of the CBA, the Club is deemed to have automatically tendered you a one year NFL Player Contract with a Paragraph 5 Salary of $330,000. Sincerely, Russ Ball, Vice Present Football Administration Player Finance

Here, pursuant to the unrebutted testimony of the Applicant and evidentiary evidence, the applicant was a resident of California at time of telephone call with Coach McCarthy on Draft Day.

Therefore, the question then turns to where the contract for hire was made. Was the contract for hire made orally during the telephone call with Coach McCarthy or when the applicant actually signed the contract? The Applicant testified that in order to play, the applicant had to sign the actual contracts (MOH/SOE, page 6, lines 18-19). When he was under contract with the team, he was a member of the NFL Players Association, and the rules of the collective bargaining agreement were in place (MOH/SOE, page 6, lines 20- 21). It is possible that the applicant was in Green Bay on July 29, 2011, when the contract was signed (MOH/SOE, page 6, lines 23-25).

In general, in order for a contract to be formed there must be an offer, acceptance and consideration, here, the offer was made during the telephone call between the applicant and Coach McCarthy. The applicant accepted the offer and he believed he knew how much he would be paid, which is the consideration of the oral contract. The offer, acceptance and the consideration was confirmed via the fax sent to the applicant's agent (Exhibit 4). A contract of hire, in the workers' compensation context departs from the common law of contracts. In workers' comp, a contract is formed where the acceptance of the offer physically tasks place. The physical location of the person accepting the employer's offer is crucial to the determination of whether the contract of hire was formed in this state. An employment contract is deemed to have been made in California

if the act of acceptance takes place in California (*Reynolds Electrical & Engineering Co., Inc. v. WCAB (Egan)* 1966 31 CCC 415.) Here, an oral contract consummated over the telephone on Draft day between the applicant and Coach McCarthy.

California can assert subject matter jurisdiction over a team because the terms of the contract were agreed to in California and the applicant's signing of the formal documents were a condition subsequent. *The Travelers Insurance Co. v. WCAB, (Coakley)* (1967), 68 Cal. 2d 7, 64 Cal. Rptr. 440, 434 P.2d 992); Bowen, v. WCAB, (1999), 73 Cal. App. 4th 15.

The applicant signed the contract in order to play, it was signed on July 29, 2011 and this was the condition subsequent to the terms of the oral contract that was made on Draft Day when the applicant was in his home in California.

Defendant contends that the issues of contract formation is precluded by Federal law. This was not an issue raised with specificity at the time of trial and therefore, appears to have been waived. This argument was first raised in Defendant's trial brief. On the other hand, this may fall under the broader category of jurisdiction and whether this Court does in fact have the power to hear the issues presented in this case. Thus, the Court will address Defendant's contention and will not consider it waived.

Determination of Subject Matter Jurisdiction is within this Court's purview per statute. Specifically, pursuant to Labor Code §5305, 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. This case, falls directly under Labor Code §5305 because it involves an issue as whether a contract of hire was made in this state.

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made. This Court has sole discretion in determining jurisdictional issues in accordance with Labor Code § 5305.

Defendant mistakenly argues that the Collective Bargaining Agreement (Exhibit F) specifically states that a contract of hire must be in writing. This is not what it says on Page 10 of Exhibit F. It reads as follows: "Any agreement between any player and any Club concerning terms and conditions of employment shall be set forth in writing in a Player Contract as soon as practicable." It does not state that a contract of hire must be in writing. Moreover as stated above, this refers to terms and conditions of employment, which does not include contract formation or subject matter jurisdiction. This Court is not persuaded that Federal Law precludes subject matter jurisdiction, specifically contract formation, from being decided pursuant to state law outlined in Labor Code §5305.

Based on a review of the record and applicant's credible testimony, the Court finds that there is substantial evidence that the employment was accepted in California. The applicant successfully met the burden of demonstrating that California's exercise of jurisdiction is reasonable.

Date: July 3, 2023

Laura Mendivel
WORKERS' COMPENSATION JUDGE