WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ISAAC DAVIS, *Applicant*

vs.

OAKLAND ATHLETICS; ACE AMERICAN INSURANCE, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ14711373
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the October 9, 2023 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from June 1, 2008 to October 1, 2017, claims to have sustained industrial injury to the head, neck, shoulders, elbow, wrists, hands, fingers, back, hips, knees, ankles, feet, toes, "neuro," psyche, sleep issues, and chronic pain. The WCJ found that California lacks subject matter jurisdiction over the claimed injury.

Applicant contends that he was regularly working in the state during a portion of his claimed cumulative injury, conferring California subject matter jurisdiction over the claim.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following legal principles that may be relevant to our review of this matter:

The WCJ determined that applicant did not meet the exception provided by Labor Code section 3600.5(d) to the exemption of section 3600.5(c). (Opinion on Decision, at pp. 4-5.)

Applicant contends that his one season played for the Oakland Athletics qualifies as "regularly working" in California, thus conferring subject matter jurisdiction under section 3600.5(a). Applicant further contends that the conferral of subject matter jurisdiction under section 3600.5(a) obviates the entirety of the WCJ's analysis of section 3600.5(d).

The WCJ's Report observes that applicant played but one season out of eleven for a California-based team, and that applicant's duty days played for a California team were less than the 20 percent threshold of section 3600.5(d). (Report, at p. 2.) The WCJ further observes that the term "regularly working" as used in 3600.5(a) encompasses applicant's entire professional career, and that the "duty days" calculation of section 3600.5(d)(1)(A) contemplates work for California based teams. (*Id.* at p. 3.)

Labor Code section 3600.5(a) provides for subject matter jurisdiction over injuries sustained by employees hired or regularly working in California. For claims of injury filed after September 15, 2013, subsection (d) provides:

> (1) With respect to an occupational disease or cumulative injury, a professional athlete and his or her employer shall be exempt from this division when all of the professional athlete's employers in his or her last year of work as a professional athlete are exempt from this division pursuant to subdivision (c) or any other law, unless both of the following conditions are satisfied:
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> > (A) The professional athlete has, over the course of his or her professional athletic career, worked for two or more seasons for a California-based team or teams, or the professional athlete has, over the course of his or her professional athletic career, worked 20 percent or more of his or her duty days either in California or for a California-based team. The percentage of a professional athletic career worked either within California or for a California-based team shall be determined solely by taking the number of duty days the professional athlete worked for a California-based team or teams, plus the number of duty days the professional athlete worked as a professional athlete in California for any team other than a California-based team, and dividing that number by the total number of duty days the professional athlete was employed anywhere as a professional athlete.

(B) The professional athlete has, over the course of his or her professional athletic career, worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section.

(2) When subparagraphs (A) and (B) of paragraph (1) are both satisfied, liability for the professional athlete's occupational disease or cumulative injury shall be determined in accordance with Section 5500.5.

(Lab. Code, § 3600.5(d).)

In *Farley v. San Francisco Giants* (September 14, 2020, ADJ10510769) [2020 Cal. Wrk. Comp. P.D. LEXIS 292], a panel of the Appeals Board determined:

> [E]ven where there is general statutory subject-matter over a claim, and where there are sufficient connections between the injury and the State of California to support the exercise of jurisdiction, the claims of professional athletes are subject to specific statutory exemptions, codified in section 3600.5, subdivisions (c) and (d). (§ 3600.5(c) & (d).) These subdivisions are not grants of statutory subject-matter jurisdiction themselves; rather, they serve to limit the general grants of statutory subject-matter jurisdiction for certain claims by professional athletes.

(*Farley, supra*, at p. 4.)

In *Wilson v. Florida Marlins* (February 26, 2020, ADJ10779733) [2020 Cal. Wrk. Comp. P.D. LEXIS 30], a panel of the Appeals Board discussed the legislative intent with respect to the 2013 amendments to section 3600.5:

> The Legislature appears to have been mainly concerned with athletes who were not hired in this state, who were filing claims and recovering benefits under the law as it existed prior to Johnson based upon a small handful of games. The reference to Bowen demonstrates the Legislature recognized and approved of the long-standing principle of California law, stretching back close to a century, that a contract of hire in California is itself a compelling connection to the state that validates the exercise of jurisdiction. (See *Alaska Packers Asso. v. Industrial Acci. Com.* (1934) 1 Cal.2d 250, 261-262, 34 P.2d 716.) If a hire in California during the injury period is a compelling connection to the state, by definition such athletes would not fall into the category of those with "extremely minimal California contacts" whose claims the Legislature sought to exempt. If the Legislature had intended to depart from the position that California will exercise jurisdiction over a claim if the applicant was hired in California, we think the Legislature, would clearly have said as much, and, at a minimum, would not have reaffirmed that principle by referencing Bowen.
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> This reading of the statute is also supported by the nature of subdivisions (c) and (d), both of which reference a 20% threshold for determining the strength of an

> injured athlete's connection to the state. Subdivision (c) uses this 20% threshold to determine whether a worker injured here while working for an out-of-state team on an out-of-state contract is within the state "temporarily." (§ 3600.5(c).) This focus on how much work time in the state transforms an injured worker's status from "temporary" to "regular" mirrors the due process concerns identified in Johnson with ensuring a sufficient connection to the state — concerns which only apply where there is not a hire in California at some point during the cumulative trauma period.
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> (*Wilson, supra,* at pp. 17-18.)

Here, we must consider whether the statutory grant of jurisdiction for employees "regularly working" in California is sufficient to obviate consideration of subsections (c) and (d) of section 3600.5. Our prior jurisprudence has addressed the jurisdictional implications of a contract of hire formed within California's territorial jurisdiction pursuant to subsection (a). However, we must consider the question of whether a professional athlete who has not entered into a California contract of hire but was nonetheless regularly working in California must overcome the requirements of subsection (d) as a prerequisite to the exercise of California subject matter jurisdiction.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

Additionally, the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a

constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.) Here, based on our preliminary review, it appears that further development of the record may be appropriate.

II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) 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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

III.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by a workers' compensation administrative law judge on October 9, 2023 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 18, 2023

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

ISAAC DAVIS
PRO ATHLETE LAW GROUP
GOLDBERG SEGALLA

SAR/abs

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