WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TERRY ALLEN, *Applicant*

vs.

MINNESOTA VIKINGS, permissibly self-insured; NEW ORLEANS SAINTS, LOUISIANA WORKERS' COMPENSATION CORPORATION (LWCC), *Defendants*

Adjudication Number: ADJ8423470
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant New Orleans Saints (Saints) seek reconsideration of the October 22, 2020 Third Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from April 15, 1991 to August 31, 2002, sustained industrial injury to his head, neck, shoulders, elbows, wrists, fingers, back, knees, ankles, blood pressure, sleep, psyche, headaches, post-traumatic head syndrome, hands and hips. The WCJ found that applicant was hired in California by the Minnesota Vikings (Vikings), and that the hiring was sufficient to confer California subject-matter jurisdiction over the claimed cumulative injury. The WCJ further determined that applicant sustained a single cumulative injury resulting in permanent disability, and that the Saints were liable for the award pursuant to Labor Code[2] section 5500.5.

The Saints contend that the Workers' Compensation Appeals Board (WCAB) should decline to exercise jurisdiction over applicant's claim of cumulative industrial injury because there

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

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

is a reasonable mandatory forum selection clause in the employment contract with the Saints specifying that claims for workers' compensation shall be filed in a forum other than California, and there is a limited connection to California with regard to the employment and the claimed cumulative injury. The Saints further contend applicant sustained two separate cumulative injuries, each requiring its own evaluation of whether there was more than a limited connection to California with regard to the claimed cumulative injury.

We have received an Answer from applicant. 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. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant claimed injury to his head, neck, shoulders, elbows, wrists, fingers, back, knees, ankles, blood pressure, sleep, psyche, headaches, blurred vision, memory loss, post-traumatic head syndrome, hands, hips, and in the form of depression while employed as a professional athlete by various teams in the National Football League (NFL) from April 15, 1991 to August 31, 2002. Pursuant to the stipulations of the parties at trial, applicant played for the Minnesota Vikings from 1991 to 1994, the Washington Redskins from 1995 to 1998, the New England Patriots in 1999, the New Orleans Saints in 2000 and 2002, and the Baltimore Ravens in 2001. (Transcript of Proceedings, dated June 21, 2016, at p. 4:16.)

On February 12, 2015, the parties stipulated to dismiss the Saints as party defendants without prejudice because both of applicant's employment contracts with the Saints contained "choice of venue" clauses in favor of Louisiana. (Stipulation to Dismiss LWCC/New Orleans Saints Without Prejudice, dated February 12, 2015.) Pursuant to the parties' stipulation, a WCJ ordered the Saints dismissed without prejudice. (Order of Dismissal of Party Defendant Without Prejudice, dated February 12, 2015.)

On June 21, 2016, the parties proceeded to trial on the case in chief and placed in issue, in relevant part, injury arising out of and in the course of employment (AOE/COE), the date of injury, permanent disability and apportionment, "California jurisdiction and minimum contacts," and

"Labor Code section 5500.5 and no roll back." (Transcript of Proceedings, dated June 21, 2016, at p. 5:12.) The WCJ heard testimony from applicant, and ordered the matter submitted for decision after submission of post-trial briefs.

Following the issuance of an initial decision and a subsequent rescission of that decision to allow for reassessment of the date of injury pursuant to section 5412, the WCJ conducted additional trial proceedings on August 22, 2017. (Transcript of Proceedings, dated August 22, 2017, at p. 3:12.) The WCJ heard testimony from applicant and defense witness James Waldhauser, and ordered the matter submitted for decision.

On October 17, 2017, the WCJ issued his Second Amended Findings and Award, determining in relevant part that applicant's hiring in California by the Minnesota Vikings was a sufficient basis for the conferral of California subject-matter jurisdiction as to applicant's claim. (Second Amended Findings and Award, Finding of Fact No. 4, dated October 17, 2017.) The WCJ determined that applicant had sustained injury arising out of and in the course of employment (AOE/COE) resulting in permanent partial disability and the need for further medical care. (Findings of Fact Nos. 5 & 6.) The WCJ issued an Award as against the Vikings.

On November 6, 2017, the Vikings petitioned for Reconsideration, contending in relevant part that liability for applicant's injuries could not relate back to the Vikings because applicant's employment with the Vikings fell outside the one-year liability period established under section 5500.5, and because the measure of due process articulated in *Federal Insurance Co. v. Workers' Comp Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257) (*Johnson*) must be evaluated against applicant's claim as a whole, not as against an individual employer. (Petition for Reconsideration, dated November 6, 2017, at p. 8:9.)

On November 26, 2018, we affirmed the WCJ's Second Amended Findings and Award.

On January 9, 2019, the Vikings filed a Petition for Writ of Review with Division Five of the California Court of Appeal for the Second Appellate District, reiterating in relevant part their contentions with respect to evaluation of due process under *Johnson*, and liability under section 5500.5.

On February 11, 2019, the WCAB filed a letter brief requesting our Opinion on Decision After Reconsideration be annulled because we had concluded that the New Orleans Saints should be rejoined as a party defendant and the question of liability reevaluated.

On May 23, 2019, the Court of Appeal annulled the WCAB's November 26, 2018 Opinion and Decision After Reconsideration, and directed the Appeals Board to consider rejoinder of the New Orleans Saints after notice and the opportunity to be heard and for further proceedings as appropriate. (Order, dated May 23, 2019.)

On August 9, 2019, we issued our Opinion and Decision After Remand, noting that we had previously affirmed the WCJ's decision barring applicant from proceeding against the New Orleans Saints under the due process standard articulated in *Johnson*. We stated:

> In light of the proceedings before the Court of Appeal, we agree that the WCJ misapplied *Johnson* to bar applicant's claim against the Saints by focusing not upon the relationship of the *entire claim* to the State of California, but instead on the relationship of the particular defendant – the Saints – to this state. As the Court wrote in *Johnson*, the question is whether California has a "sufficient relationship with [the employee's] *injuries* to require the petitioner - the employer - to defend the case here ...." (*Johnson*, *supra*, 221 Cal.App.4th at p. 1128, emphasis added.) Thus, the number of games played by a professional athlete in California for a particular employer is not determinative of whether that employer can be held liable under state law for purposes of Johnson.
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> This holding was endorsed in *New York Knickerbockers v. WCAB* (*Macklin*), 240 Cal.App.4th 1229 (2015) ("*Macklin*"), which found that an employer could properly be held liable for an applicant's injuries based upon an overall connection between the claim and California, even though the applicant only played one game and three practice sessions for that employer in California. (*Id.* at pp. 1238-39.) We have subsequently issued a number of decisions holding that Johnson applies to a claim as a whole, not against any particular employer. (See, e.g., *Sutton v. Workers' Comp. Appeals Bd.* (2018) 83 Cal.Comp.Cases 1613 (board panel decision).) Moreover, as stated in *Macklin*, the issue in *Johnson* is one of due process, not of subject-matter jurisdiction per se. (See *Macklin*, *supra*, 240 Cal.App.4th at 11 1238.) Here, applicant's claim may be brought in California because the WCJ found that two of applicant's contracts of hire were entered into in this state pursuant to *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21-22 [64 Cal.Comp.Cases 745]. Accordingly, the fact that applicant played only a single game in California for the Saints and did not sign his contract of hire for the Saints in this state is irrelevant under Johnson, and there is no due process bar to finding the Saints liable for applicant's injuries.

(Opinion and Decision After Remand, dated August 9, 2019, at p. 1:22.)

On November 18, 2019, the WCJ ordered the Saints rejoined as party defendants.

On August 24, 2020, the parties returned for additional trial proceedings and stipulated to use all prior stipulations and issues as set forth in prior trial proceedings, with additional issues of "whether the New Orleans Saints have any liability for workers' compensation benefits in this case," and "the choice of forum clause for the New Orleans Saints." (Minutes of Hearing (Further) and Summary of Evidence, dated August 24, 2020, at p. 2:19.) The WCJ heard additional testimony from applicant and ordered the matter submitted for decision.

On October 22, 2020, the WCJ issued the F&A, determining in relevant part that applicant's hiring in California by the Vikings was sufficient to confer subject-matter jurisdiction as to applicant's entire claim, and that "California has a connection with the injury that is unlimited by the situs of injury, and may exercise jurisdiction over all employers involved in the injury, including the New Orleans Saints, notwithstanding the forum selection clause in applicant's agreements with the Saints." (Finding of Fact No. 4.) The WCJ determined that applicant had sustained permanent partial disability with need for future medical care and issued an award as against the Saints. The WCJ's Opinion on Decision observed that insofar as applicant's hiring in California was sufficient to confer subject-matter jurisdiction pursuant to sections 3600.5 and 5305, the grant of jurisdiction applied to applicant's entire claim of injury and was not limited to any specific employer. The WCJ further reasoned that applicant's California hiring was itself a sufficient connection to California to warrant the exercise of WCAB jurisdiction as to the entire claim notwithstanding the forum selection clauses in applicant's employment contracts with the Saints. Because the Saints, as insured by the Louisiana Workers' Compensation Corporation (LWCC), employed applicant during the section 5500.5 period of liability, the WCJ issued the award solely against the LWCC. (Opinion on Decision, at p. 5.)

The Saints' Petition contends that its limited connection to California coupled with the mandatory forum selection clauses in its employment contracts with applicant requires the WCAB to decline to exercise jurisdiction over applicant's claim. (Petition, at p. 4:21.) The Saints Petition further contends that the applicant sustained two separate "periods of injurious exposure" which should be evaluated separately for determination as to whether there is more than a limited connection to California. (Petition, at p. 6:12.)

Applicant's answer observes that there is no medical evidence to support the existence of more than one cumulative injury, and that California's jurisdiction in this matter applies to the entire cumulative injury, which is the subject-matter of the claim. (Answer, at p. 1:23.)

DISCUSSION

I.

We first address the Saints' contention that applicant sustained two distinct injuries, and that each injury must be evaluated for its connection to California. (Petition, at p. 6:12.) In support of this contention, the Saints submit that applicant was employed by the Minnesota Vikings from July 2, 1990 to May 8, 1995, by the Washington Redskins from June 16, 1995 to April 22, 1999, and by the New England Patriots from August 27, 1999 to February 14, 2000. (Petition, at p. 6:28.) The Saints observe that applicant was self-employed as a truck driver between February 14, 2000 and November 14, 2000 when he signed his first employment contract with the Saints. The Saints thus contend that "there are two separate period of injurious exposure in this matter and potentially two separate cumulative trauma injuries." (*Id.* at p. 6:26.)

We note in the first instance, however, that having been rejoined and now appearing at trial on August 24, 2020, the Saints did not raise the issue of whether there was more than one cumulative injury. Instead, the Saints raised this issue for the first time on reconsideration. The issues framed for decision at trial were, (1) whether the New Orleans Saints have any liability for Workers' compensation benefits in this case, and (2) the choice of forum clause for the New Orleans Saints. (Minutes of Hearing (Further) and Summary of Evidence, dated August 24, 2020, at p. 2:18.)

Although the Saints were not a party to the initial trial proceedings of June 21, 2016, all parties stipulated to use the issues raised in the June 21, 2016 and August 22, 2017 trial proceedings. (Minutes, dated August 24, 2020, at p. 2:6.) The original trial issues framed on June 21, 2016 did not identify the issue of whether applicant sustained multiple injuries, and the issue was not raised during the August 22, 2017 proceedings. (Transcript of Proceedings, dated June 21, 2016, at p. 5:12.) Thus, the issue of whether applicant sustained two or more injuries was not raised in three separate trial proceedings.

The failure to raise an issue at the first hearing in which it may properly be raised may result in waiver of the issue. (See *U.S. Auto Stores v. Workers' Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases) 173; *Los Angeles Unified Sch. Dist. v. Workers' Comp. Appeals Bd.* (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ denied) [Lab. Code, § 3208.3(h) defense waived by failure to raise before trial]; *Hollingsworth v Workers' Comp. Appeals Bd.*

(1996) 61 Cal.Comp.Cases 715 (writ denied); *Sanchez v Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 485 (writ denied); *Sycamore Pharmacy, Inc. v Workers' Comp. Appeals Bd.* (*Reynoso*) (1997) 62 Cal.Comp.Cases 1322 (writ denied); *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Coker*) (1980) 45 Cal.Comp.Cases 535 (writ denied).) Here, the Saints' failure to timely raise the issue of the nature and number of injuries sustained by applicant is prejudicial to both applicant and codefendants who are deprived of the opportunity to present evidence relevant to the issue. Accordingly, it appears that the Saints waived the issue of whether applicant sustained a single overarching cumulative injury or two separate injuries.

Even were the issue not subject to waiver, however, we would find that the record does not support the existence of multiple independent injuries. Section 3208.1 defines "injury" as either "'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. . . ." (Lab. Code, § 3208.1.)

In California workers' compensation law there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers' Comp Appeals Bd.* (*Steele*) (1990) 219 Cal.App.3d 1265, 1271 [55 Cal.Comp.Cases 107]; *City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Calvert*) (1978) 88 Cal.App.3d 19, 29 [43 Cal.Comp.Cases 1280]; *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.* (*Burris*) (1969) 1 Cal.App.3d 812, 819 [34 Cal.Comp.Cases 587].) The issue of how many cumulative injuries an employee sustained is a question of fact for the WCAB. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]; *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720].)

In *Coltharp*, the applicant's initial work duties, which he described as "heavy labor," caused cumulative trauma resulting in disability and a need for medical treatment, including back surgery. After the applicant returned to work, he was assigned "lighter work," but he still had to do some lifting as well as crawling through pipe. He said of his post-return work duties, "regardless of everything I did, it was aggravating on my back." A physician stated that applicant's post-return cumulative work activities were "the immediate precipitating factor that necessitated" another back surgery. Based on these facts, the *Coltharp* court found that the applicant had sustained two

separate cumulative injuries, i.e., one before and one after the initial period of disability and need for treatment, and that to conclude, otherwise would violate the anti-merger provisions of sections 3208.2 and 5303.

In *Austin*, the applicant's increasing work responsibilities precipitated a major depression, resulting in temporary disability and a need for treatment, including psychiatric hospitalization. After receiving psychiatric treatment and being off work for a period of time, the applicant returned to work. However, when the applicant returned to work, he had not fully recovered from his depressive episode, he remained under a doctor's care and on medication, and he became progressively worse. It was the same stress that resulted in the initial hospitalization that further exacerbated applicant's problem after he returned to work. Based on these facts, the *Austin* court concluded the applicant had only one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not "distinct."

When the holdings of *Austin* and *Coltharp* are harmonized and read in conjunction with the section 3208.1 definition of "cumulative injury" and the anti-merger provisions of sections 3208.2 and 5303, the following principles are revealed:

(1) if, after returning to work from a period of industrially-caused disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma, i.e., if the employee's occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment, then there are two separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code, §§ 3208.1, 3208.2, 5303; *Coltharp*, *supra*, 35 Cal.App.3d at p. 342); and

(2) if, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are not injurious, i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an exacerbation of the original injury, then there is only a single cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Austin*, *supra*, 16 Cal.App.4th at p. 235.)

The general rule is that when an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative

injury. For example, in *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618 [45 Carl.Comp.Cases 1098], a deputy sheriff£ suffered trauma to his back from July 22, 1968 through November 9, 1977 and trauma to his esophagus and stomach from 1974 to November 1977. The Court of Appeal found a single cumulative injury, stating among other things: "we conclude that the cumulative back injury and cumulative esophagus and stomach injury cannot be said to be truly successive injuries, they must be treated as contemporaneous and therefore rated as multiple factors of disability from one injury." (*Norton*, *supra*, 111 Cal.App.3d at p. 629.)

Similarly, in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Hurley*) (1977) 70 Cal.App.3d 599 [42 Cal.Comp.Cases 481], a welder employed from April 30, 1959 to January 5, 1973 suffered trauma to his eyes due to the heat and flashes of the welding torches, to his ears due to the noises of the shop, and to his lungs due to exposure to dust and fumes he inhaled. The Court of Appeal found a single cumulative injury, stating among other things: "From all of the foregoing we conclude that Hurley suffered repetitive physically traumatic experiences extending throughout his employment … the combined effect of which resulted in bodily injury, and permanent disability. (See Lab. Code, § 3208.1.)." (*Hurley*, *supra*, 70 Cal.App.3d at pp. 606.) The Court further held that the disabilities had to be rated together because the various traumas the employee had suffered were not "separate and independent," but "instead suffered contemporaneously." (*Hurley*, *supra*, 70 Cal.App.3d at pp. 605; cf. *Morgan*, *supra*, 85 Cal.App.3d 710 [police officer employed from November 1, 1946 through April 30, 1974 suffered trauma causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award].)

Accordingly, without more, a pause in exposure to the repetitive traumatic activities at work followed by a return to the same type of work does not equate to a separate period of cumulative injury.

Moreover, separate disabilities arising out of a single injury are rated together, even if those disabilities do not become permanent and stationary at the same time. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] [chef suffered specific back injury but, as a result of blood transfusions given during later back surgery, contracted hepatitis; employee's spinal disability and liver disability were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [43 Cal.Comp.Cases 1116] (*Morgan*) [police officer

suffered a cumulative injury causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720 [41 Cal.Comp.Cases 81] [employee's chest and left knee injuries rated together]; *Gravlin v. City of Vista* (September 22, 2017, ADJ513626 (SDO 0296833)) [2017 Cal. Wrk. Comp. P.D. LEXIS 413] [police officer suffered a single cumulative injury involving skin and heart/hypertension when injurious exposure was ongoing without intervening separate periods of disability]; *Hunter v. State of Cal. Dept. of Justice* (March 28, 2018, ADJ8193963) [2018 Cal. Wrk. Comp. P.D. LEXIS 126] [following petition to reopen prior Award, applicant sustained a single cumulative injury including skin cancer when period of injurious exposure was applicant's entire period of employment]); *Brothers v. State of Cal. Dept. of Forestry and Fire Protection* (October 21, 2019, ADJ7785251) [2019 Cal. Wrk. Comp. P.D. LEXIS 394] [applicant sustained a single cumulative injury including orthopedic and cardiovascular injury when period of injurious exposure overlapped completely and evidence demonstrated no separate dates of injury or periods or disability].)

Here, the medical history of the claimant and the medical testimony received in the form of medical-legal reporting identify only a single overarching cumulative injury. (See, e.g., Ex. F, Report of Phillip Kanter, M.D., dated May 6, 2015, at pp. 43-44; Ex. 7, Report of Michael Einbund, M.D., dated April 24, 2014, at pp. 46-48.) The Saints' Petition, on the other hand, cites to no medical opinion in the evidentiary record identifying anything other than a single cumulative injury.

Moreover, there is no evidence that applicant sustained compensable disability when he was between football employments. In *Coltharp, supra,* 35 Cal.App.3d 329, the WCAB found that two specific incidents that caused injury to the employee's back were part of one continuous trauma injury to that body part. The Court annulled that decision because the record revealed that the two specific incidents caused distinct periods of disability that were separated by a period when there was no compensable injury. As held in *Coltharp*, separate cumulative injuries cannot be treated as a single cumulative injury when there are separate periods of disability and separate periods of need for medical treatment. (*Id.* at pp. 342–343; cf. *Ferguson v. City of Oxnard* (1970) 35 Cal.Comp.Cases 452 (Appeals Board en banc).) Here, the record reveals no compensable

disability arising out of applicant's intermittent self-employment during the off-season between his football employments, nor does the Saints' Petition cite to such evidence.

An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) To be considered substantial evidence, a medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).)

Here, the record offers neither medical evidence identifying more than a single cumulative injury nor distinct periods of disability arising from distinct injuries. Accordingly, and having reviewed "the events leading to the injury, the medical history of the claimant, and the medical testimony received," we discern no error in the WCJ's determination that applicant sustained a single cumulative injury. (*Coltharp*, *supra*, 35 Cal. App. 3d 329; *Austin*, *supra*, 16 Cal.App.4th 227, 234-235.)

II.

The Saints further contend the WCAB should enforce the forum selection clauses contained in two of its contracts with applicant and decline to exercise subject-matter jurisdiction over the instant claim. (Petition, at p. 4:21.) The contracts provide, in relevant part, that "any worker's compensation claim, dispute, or cause of action arising out of [applicant's] employment with the Club shall be the subject to the worker's compensation laws of Louisiana exclusively and not the worker's compensation laws of any other state." (Ex. S, Addendum to NFL Player Contract, dated November 14, 2000, at p. 4.) The Saints contend that pursuant to our analysis in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 (WCAB en banc) (*McKinley*), the forum selection clauses are mandatory and enforceable. (Petition, at p. 4:25.)

In *McKinley*, applicant NFL player filed a claim in California for injuries sustained between 1999 and June 24, 2003 while employed by the Arizona Cardinals football team. Applicant asserted that his workers' compensation claim should be adjudicated in California

because some portion of the injurious exposure said to have caused the claimed injury occurred during the five-day training camp and in the seven football games the Cardinals played in California during his four years of employment. However, applicant's employment contract with the Cardinals contained a forum selection clause in favor of Arizona. (*Id.* at p. 25.)

We began our analysis in *McKinley* by noting that the question was not one of the Appeals Board's subject-matter jurisdiction, per se, but rather whether applicant's connection with California was sufficient to warrant the *exercise* of that subject-matter jurisdiction. (*McKinley*, *supra*, 78 Cal.Comp.Cases at p. 30.) We held that the Appeals Board will decline to exercise jurisdiction over a claim of cumulative industrial injury when there is a *reasonable* mandatory forum selection clause in the employment contract specifying that claims for workers' compensation shall be filed in a forum other than California, and there is *limited connection to California* with regard to the employment and the claimed cumulative injury. (*Id.* at pp. 24-25.)

Applying this standard to the facts of the case, we noted that applicant enjoyed at most a *limited connection with California* with regard to the employment and claimed cumulative injury. Both applicant and his employer were based in Arizona, applicant was hired in Arizona, and applicant spent the substantial majority of his work time in Arizona. (*Id.* at p. 31.) Given this attenuated connection to California, we concluded that the "limited connection is insufficient for the WCAB to exercise jurisdiction over his claim for workers' compensation in derogation of the Arizona forum he and the Cardinals reasonably identified in their employment contracts as the place where any claim for workers' compensation would be filed." (*Ibid*.)

We also discussed the question of whether the mandatory forum selection clauses were reasonable. We observed that pursuant to the holding of the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1 [92 S. Ct. 1907] (*Bremen*), a "forum clause should control absent a strong showing that it should be set aside," and described four grounds that could overcome the presumption of validity: (1) the clause was the product of "fraud or overreaching," (2) "enforcement would be unreasonable and unjust," (3) proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will for all practical purposes be deprived of his day in court," and (4) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." (*Id.* at p. 15.) The applicant in *McKinley* asserted the forum selection clauses were per se unreasonable, citing to section 5000 which contains a prohibition against contracting away

California workers' compensation protections, and further the decision of the California Supreme Court in *Alaska Packers Assn. v. Industrial Acc. Com.* (1934) 1 Cal.2d 250 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [20 I.A.C. 326] (*Palma*). Therein, the Court held that a California hiring, standing alone, afforded a sufficient connection to the state to warrant the exercise of jurisdiction as to workers' compensation claims arising out of the employment. (*McKinley*, supra, 78 Cal.Comp.Cases at pp. 32-33.) While our decision in *McKinley* acknowledged that *Palma* continued to be valid and binding authority, we distinguished the facts in *McKinley* by noting "the employment contracts were not made in California and that jurisdictional basis for legislating the terms of the employment agreement and hearing the workers' compensation claim is not present." (*Ibid*.) Rather, "the specific reason California had jurisdiction over the employment contract and injury claim in *Palma* is not present in this case because applicant's employment agreements were not made in California." (*Id.* at p. 32.) Having determined that applicant in *McKinley* lacked a California hiring *that would otherwise have afforded a sufficient basis to overcome a forum selection clause*, we proceeded to discuss collateral considerations of reasonableness as set forth in *Bremen*, *supra*, including whether there was evidence of fraud or overreach, the difficulty to the parties in litigating in the selected forum of Arizona, and whether California maintained a strong public policy that would otherwise invalidate the forum selection. After considering each of these factors, we concluded that none of the factors identified in *Bremen* were present to a degree that would invalidate the parties' forum selection. We thus concluded that (1) the mandatory forum selection clauses were *reasonable*, and that applicant enjoyed only a *limited connection* to California with regard to the employment and claimed cumulative injury. Consequently, we affirmed the WCJ's decision declining to exercise subject-matter jurisdiction as to the claim.

Here, in contrast to the fact pattern in *McKinley*, applicant's claim involves multiple employers across a claimed cumulative injury that includes a California hiring. As the United States Supreme Court noted in *Palma*, "where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure, to the legislative control of the state … [t]he fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power…." (*Palma*, *supra*, 294 U.S. at 540.) Moreover, as the California Supreme Court has observed, "California's strong interest in the employment status of the applicant compels resolution of the place-of-contracting

issue according to California law."[3] (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Coakley*) (1967) 68 Cal.2d 7, 13 [32 Cal.Comp.Cases 527].)

More recently, in *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257] (*Johnson*), the California Court of Appeal recognized the continued primacy of a California hiring as a basis for a workers' compensation claim to be heard under California law. In discussing the need for California to have a legitimate interest in a worker's injury or employment in order to support jurisdiction over the workers' compensation claim, the Court in *Johnson* distinguished the facts in that case from those in *Palma* by noting that Ms. Johnson was hired in New Jersey, and not in California like the employee in *Palma* and the applicant in this case. (*Id.* at p. 1120.) The Court in *Johnson* further wrote, "the creation of the employment relationship in California, which came about when [Mr. Palma] signed the contract in San Francisco, was a sufficient contact with California to warrant the application of California workers' compensation law." (*Id.* at p. 1126.)

Applicant's California hiring by the Minnesota Vikings thus provides a sufficient connection between California and applicant's claim of cumulative injury to allow applicant to pursue his claim under California law. (*Palma*, *supra*, 1 Cal.2d 250, 256; *Benguet Consol. Mining Co. v. Industrial Acci. Com.* (1939) 36 Cal.App.2d 158, 159; *McKinley*, *supra*, 78 Cal.Comp.Cases 23, 32-33; *Coakley*, *supra*, 68 Cal.2d 7, 14; see *Matthews v. National Football League Management Council* (2012) 688 F.3d 1107 [77 Cal.Comp.Cases 711]; *Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682].)

The Saints contend, however, that the California hiring which provides the strong connection between applicant's claim and California was made with the Minnesota Vikings, rather than the Saints. (Petition, at p. 8:28.) The Saints distinguish this matter from *Palma* which involved only a single employer and argue that in the absence of a California hiring by the Saints there is only a "limited connection to the applicant's employment with the New Orleans Saints and the claim during the period of injurious exposure from November 14, 2000 through August 31, 2002." (*Id.* at p. 10:1.)

[3] Similarly, claims arising out of rights conferred by the Labor Code will be evaluated under California law by federal courts sitting in diversity notwithstanding the presence of contractual choice of law provisions. (See, e.g., *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 899 ["appellants claims arose under the Labor Code, a California regulatory scheme, and consequently, California law should apply to define the boundaries of liability under that scheme"].)

The claimed injury, however, is not limited to the last two years of applicant's employment as a professional athlete. Rather, the claim extends from April 15, 1991 to August 31, 2002, and includes applicant's employment with the Minnesota Vikings from 1991 to 1994 and the Saints in 2000 and again in 2002. To the extent that the Saints' argument is premised on the existence of a separate injury which does not include applicant's employment with the Vikings, we have rejected this argument as both subject to waiver and not factually supported in the record. We thus decline to evaluate the connection between California and a separate claim between 2000 and 2002 that was not pleaded and is otherwise unsupported in the record.[4]

In addition, however, we also observe that by its own terms, the analysis in *McKinley* involved the relationship between California and the "claim of industrial injury" rather than the relationship between California and any specific employer. (*McKinley*, *supra*, 78 Cal.Comp.Cases at p. 25.) The scope of the relevant inquiry as addressing the *injury*, rather than an *employer*, is borne out in our statutory framework. Section 3208.1 provides that "[a]n *injury* can only be, (a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1, italics added.) Pursuant to section 3600.5, subd. (a), "[i]f an employee who has been hired or is regularly working in the state receives personal *injury* by accident arising out of and in the course of employment outside of this state, he or she … shall be entitled to compensation according to the law of this state." (Lab. Code, § 3600.5(a), italics added.) Similarly, section 5305 provides the Division of Workers' Compensation and the appeals board with "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." (Lab. Code, § 5305, italics added.) **Pursuant to these statutes, a**

[4] Although we do not find the argument factually supported in the record, we observe that the argument advanced by the Saints for a separate injury would essentially bifurcate applicant's claim into two injuries, an earlier injury that includes a California hiring by the Vikings and a second injury involving only the Saints and the Baltimore Ravens, one devoid of a California hiring. In the absence of a California hiring – a triggering event our Legislature has determined to be a dispositive connection to California standing alone – the Saints' would enjoy a significantly more compelling argument in support of enforcing the mandatory forum selection clauses during this later injury covering their employment of applicant.

California hiring provides for the application of California law to any resulting "injury," whether it is specific or cumulative. It was for this reasons that the court in *Macklin* observed that an employer could properly be held liable for an applicant's injuries based upon an overall connection between the claim and California, even though the applicant only played one game and three practice sessions for that specific employer in California. (*Macklin*, *supra*, 240 Cal.App.4th at pp. 1238-39.) The analysis required under both California statutory and decisional authority weighs the connection between the claimed *injury* and California, not an individual *employer* and California.[5] (*Id.* at p. 1238; *Johnson*, *supra*, 221 Cal.App.4th at p. 1128; *Bowen*, *supra*, 73 Cal.App.4th at pp. 21-22.)

III.

We acknowledge the procedural history in this matter and note that we have previously requested that the California Court of Appeal remand this case for further analysis and decision following a petition for writ of review filed by the Minnesota Vikings asserting the applicability of section 5500.5 notwithstanding the forum selection clauses with the Saints. We note that arguments advanced in the Saints' Petition herein are premised on the existence of two separate cumulative injuries, and insofar as we find that the facts and medical evidence support only a single cumulative injury, we conclude that applicant's hiring in California is a reasonable basis upon which to exercise subject matter jurisdiction, notwithstanding the existence of the forum selection agreements asserted by the Saints.

We have further considered the implications of having one or more forum selection clauses applicable in a mixed claim environment where some employers have choice of law/choice of forum agreements while other employers do not. Our analysis in *McKinley*, *supra*, 78 Cal.Comp.Cases 23, did not involve a mixed employer environment. Rather, in *McKinley*, applicant alleged a single cumulative injury over his entire four-year NFL career, during which time he was employed solely by the Arizona Cardinals. Thus, the facts of *McKinely* did not require

[5] A bar to recovery against specific employers *is* contemplated in the amendments to section 3600.5 as applicable to certain professional athletes filing claims after September 15, 2013. (Lab. Code, § 3600.5, subd. (c), (d) & (h).) Recovery against individual employers may also be barred by reason of a lack of personal jurisdiction and/or statutory subject-matter exclusions, but such a bar applies only against the particular employer, not against the claim as a whole, and liability may "roll back" according to section 5500.5 if the terminal employer cannot be found liable. (See § 5500.5(a); *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (1996) 61 Cal. Comp. Cases 301 (writ den.); *Employers Mutual Liability Ins. Co. v. Workers' Comp. Appeals Bd.* (1987) 52 Cal. Comp. Cases 284 (writ den.).)

consideration of whether and how to apply a forum selection to some but not all of the employers in a cumulative injury claim. In the present matter, applicant was hired by five different NFL teams during the claimed cumulative injury period, and the choice of law provisions in favor of Louisiana which are currently at issue apply only to the Saints.

California has expressed a strong legislative policy preference that cumulative injury claims involving multiple employers be handled together as a single injury, and typically with only a single liable employer.[6] "California has established, first by judicial decision and then by statute, a rule of its own, under which the employee may recover in full against any carrier who was on the risk for any portion of the injurious exposure, leaving it for the carrier to seek contribution from other carriers in a separate action.…" (*Schrimpf v. Consolidated Film Indus.* (1977) 42 Cal. Comp. Cases 602, 605-606, citing *Larson*, *Workmen's Compensation Law*, Section 95.25).)

Section 5500.5 thus sets the liability period among multiple employers during a claimed cumulative injury (§ 5500.5, subd. (a)), provides specific dispensation for an employee election against a single employer during the claimed cumulative injury (§ 5500.5, subd. (c)), and for the liable employer to seek contribution from other employers (§ 5500.5, subd. (e)). The liability period described in the statute is limited to a one-year window preceding the earlier of either the last date of injurious exposure or the date of injury.

Notably, the liability assessed is *independent of the comparative causation of the employer(s)* in the one-year liability period and reflects legislative intent that injured workers be able to *promptly resolve their entire claim without the expense and delay* involved in proceedings against multiple employers and multiple insurance carriers. Thus, an employer in the one-year period of liability may be liable for the entire claim, even where the bulk of the comparative percentage of causation rests with other employers either earlier or later over the course of a cumulative injury. In enacting section 5500.5, the legislature understood that the results may not be equitable as to each employer in every cumulative injury case, and that certain employers falling

[6] The Legislature has significantly amended section 5500.5 over time to reflect its preferences in this regard. "Following a legislative study of all the problems surrounding cumulative and occupational disease injuries by a committee, meeting with representatives from all segments of the workmen's compensation community, Assembly Bill 767 was presented in the Legislature … [t]hat bill was enacted into law as a part of the overhaul and revision of section 5500.5 … the board points out that it is apparent that the new provision will materially reduce the number of employers and insurance carriers who are proper parties in occupational disease or cumulative injury cases. Also, the problem of tracing employment and insurance coverage into the remote past is eliminated. The statute thus ameliorates the procedural morass faced by the board and the parties in multiple defendant cases." (*Harrison v. Workmen's Comp. Appeals Bd.* (1974) 44 Cal.App.3d 197, 201 [39 Cal. Comp. Cases 867].)

within the one-year liability period "may be required to assume a larger burden in some cases, yet in other cases these same employers and carriers will be absolved from any liability even though their employments may have contributed, in some degree, to an employee's ultimate disability." (*Harrison v. Workmen's Compensation Appeals Board* (1974) 44 Cal.App.3d 197, 203 [39 Cal.Comp.Cases 867].)

An exception to allocating liability to the last year's employer is allowed under section 5500.5, but only when there is no insured defendant subject to WCAB jurisdiction during that one-year liability period. In that situation there is "relation back" of liability as provided in section 5500.5(a) as follows:

> In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers' compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof.

(Lab. Code, § 5500.5(a).)

The provision for relation back in section 5500.5(a) has been held to apply when the WCAB does not have personal jurisdiction over an employer during the otherwise applicable liability period and there is no other employer with insurance during that period. (*Employers' Mutual Liability Ins. Co. v. Workers' Comp. Appeals Bd.* (*Patterson*) (1987) 52 Cal.Comp.Cases 284 [1987 Cal. Wrk. Comp. LEXIS 2415] (writ den.); *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (*Green*) (1996) 61 Cal.Comp.Cases 301 (writ denied); *Portland Trailblazers v. Workers' Comp. Appeals Bd.* (*Whatley*) 72 Cal.Comp.Cases 154 (writ den.); *St. Louis Cardinals v. Workers' Comp. Appeals Bd.* (*Guerrero*) (2008) 74 Cal.Comp.Cases 77 (writ den.).)

We must therefore consider whether the application of the Saints' forum selection clause would preclude the Saints' overall liability in this matter, thus triggering the relation-back doctrine. Bearing in mind the legislative policy underlying section 5500.5, we observe that honoring the Saints' forum selection clause would effectively *transfer liability to other teams earlier in the cumulative injury period*, potentially well beyond the one-year statutory liability period. The net effect of such a transfer would be to allow a contractual arrangement between the applicant and a particular team to shift liability to a different team that did not consent to such an arrangement. In other words, such an interpretation would allow parties to contractually shift liability that would

otherwise attach under section 5500.5. This type of unilateral, contractual transfer of liability to other employers is inconsistent with section 5000, which provides that "[n]o contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division…." (Lab. Code, § 5000.) In addition, allowing select parties to a cumulative injury claim to effectively contract away their liability under section 5500.5 would be wholly inconsistent with the legislative intent underlying enactment of the statute.

We acknowledge that the enforcement of a forum selection clause becomes more reasonable when there is only a single employer with a single forum selection agreement involved. (*McKinley*, *supra*, 78 Cal.Comp.Cases at p. 24 ["the Appeals Board will decline to exercise jurisdiction over a claim of cumulative industrial injury when there is a reasonable mandatory forum selection clause in the employment contract"].) The test of reasonableness might also be met where multiple employers all agreed to the same forum or the same choice of law provisions with the employee. However, the test of reasonableness is not met when liability is unilaterally transferred from one employer to other employers that did not accede to proceedings in a different forum or under a different body of law. Here, applicant's California hiring provides a reasonable basis for the application of California law to the claim, and section 5500.5 governs the resulting liability of the parties. We also observe that the existence of other employers that do not have a forum selection agreement or an agreement to the same forum, but are nonetheless parties to the cumulative injury claim, likely renders enforcement of a standalone forum selection clause unreasonable.

In summary, we conclude that the issue of whether applicant sustained two or more separate cumulative injuries was not timely raised, and that in any event, the record does not support the existence of more than a single cumulative injury in this matter. The medical reporting is of an accord as to the existence of a single cumulative injury sustained over the course of applicant's professional football career, and defendant identifies no evidence of intervening periods of disability arising out of separate injuries. (*Coltharp*, *supra*, 35 Cal.App.3d 329, 341; *Austin*, *supra*, 16 Cal.App.4th 227, 234-235.) We are further persuaded that applicant's hiring in California, albeit by another team during the cumulative injury period, provides a sufficient connection to California "with regard to the employment and the claimed cumulative injury" to allow applicant to bring his claim in California, notwithstanding the forum selection clauses in the employment contracts between applicant and the Saints. (*McKinley*, *supra*, 78 Cal.Comp.Cases at

p. 24; *Macklin*, *supra*, 240 Cal.App.4th at p. 1238.) Accordingly, and having considered the Saints' petition in light of the entire evidentiary record, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Third Amended Findings and Award issued on October 22, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 5, 2026

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

TERRY ALLEN
LAW OFFICES OF MARK SLIPOCK
BOBER PETERSON & KOBY
SEYFARTH SHAW

SAR/abs

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