WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SHAWNA JOHNSON, *Applicant*

vs.

SOUTHWEST AIRLINES; ACE AMERICAN, *Defendants*

Adjudication Number: ADJ10363662
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings of Fact and Order of April 8, 2020, the Workers' Compensation Judge ("WCJ") found, "California is not the appropriate jurisdiction to litigate the applicant's claim as to whether or not the injuries the applicant sustained as a result of an attack occurred during the course and scope of her employment[[1]] as a flight attendant for the defendant, Southwest Airlines, on November 20, 2015."

Applicant filed a timely petition for reconsideration of the WCJ's finding. Applicant contends that the interests of the State of California, as set forth in our Constitution and in the Labor Code, are sufficient to permit applicant to have her rights adjudicated in California, despite the terms of a Collective Bargaining Agreement ("CBA") with Southwest Airlines.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that notwithstanding applicant's "domicile" in Southwest's Las Vegas Airport hub, as prescribed in her union's CBA with defendant Southwest Airlines, the California WCAB has subject matter jurisdiction over

[1] The correct term of art for an industrial injury in California workers' compensation law is one that arises out of and occurs in the course of employment. (See, e.g., Lab. Code, § 3600(a).) Going forward, we strongly recommend that the WCJ refrain from using the terminology, "scope of employment," in favor of the correct term of art found in section 3600(a).

applicant's workers' compensation claim for injury suffered in a beating attack at her home in Long Beach on November 20, 2015. Accordingly, we will rescind the WCJ's decision and substitute our finding that the WCAB has jurisdiction over applicant's claim of injury herein.

FACTUAL BACKGROUND[2]

Applicant has lived in Long Beach, California since 1999. She was hired as a flight attendant by Southwest Airlines ("Southwest") in November 1999. Applicant's hiring took place either in Texas, immediately following applicant's successful completion of comprehensive training there, or in California after she completed the required cockpit jump seat training flight between Los Angeles and Oakland, which took place on November 23, 1999.[3] (Defense exhibit D, 10/19/2016 deposition of applicant, p. 17; applicant's exhibit 2, certificate of completed cockpit jump seat training flight dated 11/23/1999.)

Applicant is a member of the Transportation Workers Union ("TWU") and is subject to a CBA her union negotiated with Southwest. The CBA has a forum selection clause stating: "The laws governing occupational injuries and illness shall be the laws of the jurisdiction in which the flight attendant is domiciled." (Exhibit A, p. 12, CBA p. 94.) Applicant initially was assigned Baltimore, Maryland as Southwest's airport base from which she worked, but after five months on the job she chose Oakland, California. Applicant chose Oakland as her Southwest airport base because it was closest to her home in Long Beach; Southwest did not have a base in Southern California. At the time of the attack upon applicant in Long Beach, where she lived, she had Las Vegas, Oakland or Phoenix from which to choose as her airport of "domicile." Though Oakland had been her home base for nine years (from about 2000-2009), sometime after 2009 Las Vegas "opened up" as a choice for her domicile airport. Applicant then chose Las Vegas because from there it was easier to get to her home in Long Beach than from Oakland. Applicant also testified that she was not aware of workers' compensation laws or how workers' compensation laws affected her regarding her base or location.

The day before applicant was attacked at her home in Long Beach, she had started a three-day work trip as a flight attendant for Southwest; she was assaulted and beaten the night of the

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[2] Unless otherwise noted, the statement of facts is derived from the testimony applicant gave at trial on January 29, 2020, located in the Summary of Evidence pages three through five.

[3] The state of employment contract formation does not affect our analysis because (1) defendant does not claim Texas jurisdiction in this matter; and (2) compared to Nevada, California's interests in asserting subject matter jurisdiction are overwhelming in this case.

first day of the three-day assignment. Applicant had been in Ohio the night before the assault. If applicant went to Los Angeles (LAX), John Wayne Airport in Orange County or Ontario Airport (east of Los Angeles), she would go to her home in Long Beach to sleep. Other flight attendants would stay in hotels if they did not live locally. Once the assigned flight landed and attendants knew their workday had ended, applicant would let Southwest know she was not staying in the hotel where her other crew members stayed. In this instance, applicant apparently let Southwest know that she was in Long Beach on the first night of the three-night assignment. After she was assaulted on November 20, 2015, she was in the hospital in Long Beach for a month and in a coma for most of that time. Applicant's boyfriend notified Southwest of her injuries while she was in the hospital.

Applicant also testified that in the year before the assault, she spent about 20 percent of her time in California. Sometime before the assault, applicant had a workers' compensation claim in Nevada for which she received treatment in California. She filed no paperwork and there was no settlement or payment or resolution of the Nevada claim. Applicant further testified that she did not even know she had filed a workers' compensation claim in Nevada. Applicant knew she belonged to the union but did not know the specifics of the CBA. Applicant was unsure whether there was a provision in the CBA to determine the domicile of an injured worker, but she knew flight attendants referred to their base, and applicant's base was Las Vegas at the time she was assaulted in Long Beach.

DISCUSSION

Labor Code section 5000 states in relevant part: "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division[.]"

We are persuaded that the general statement of policy embodied in the statutory language quoted above justifies the conclusion that California has subject matter jurisdiction over applicant's claim of injury herein. We reach this conclusion because applicant is a long-time resident of this state, and her claimed injury happened here. We also note that for almost ten years earlier in her career as a flight attendant for Southwest, Oakland was her home-base airport. Later in her career, because Southwest had no "domicile" airport in Southern California, applicant chose Las Vegas as her home airport. Applicant made this choice only because it was the easiest way for her to get back and forth to her home in Long Beach. When applicant was attacked and severely beaten, she was in the midst of a three-day work trip and had gone home to Long Beach because

her first day of work ended in Southern California. After the attack, applicant was hospitalized for a month and in a coma in a Long Beach hospital. And in the year before the assault, applicant estimated that she spent about 20 percent of her time in California.

All the factors described above establish that California has a strong interest in asserting jurisdiction and in applying its workers' compensation laws for the protection of the applicant herein. To repeat, applicant is a resident of this state, and she was injured here while working for an employer who is subject to the workers' compensation laws of this state.[4] (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Coakley*) (1967) 68 Cal.2d 7, 12 (32 Cal.Comp.Cases 527) [California's strong interest in applying its own law to an issue involving the right of an injured Californian to benefits under its compulsory workers' compensation scheme devolves from possibility of economic burden upon the state resulting from non-coverage of worker incapacitation.]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15 (64 Cal.Comp.Cases 745) [Even if baseball player's acceptance of Florida team's offer did not form a contract in California under common law, he was still entitled to benefits under California workers' compensation law pursuant to Lab. Code § 5000.]; *Daily v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 726 (61 Cal.Comp.Cases 216) [California Workers' Compensation Act applies to worker employed in another state, injured while working in California.]; *Smith v. Tw Transp.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 74 [Defendant failed to show enforcement of choice of law clause was more important than public policy underlying sections 5000, 5305, and 3600.5(a), which prohibit a waiver of rights under the state's workers' compensation laws.]; *Stephens v. Nashville Kats* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 207 [no enforcement of forum selection/choice of law clause that contravenes state's public policy as embodied in statute that prohibits the waiver of rights under California law]; *Burt v. Carolina Hurricanes* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 124, citing Cal. Const., Article XIV, § 4 and Lab. Code, §§ 5300 and 5301 [Under California constitution, this state's "social public policy" assures that "any or all" workers injured "in the course of their employment" receive workers' compensation, providing the WCAB with exclusive jurisdiction over all work-related injuries that occur here, absent a statutory or constitutional exemption.].)

[4] Lab. Code, § 3600(a)(1); § 5300(a), (b); § 5301.

The next question is whether the forum-selection clause of the CBA deprives California of jurisdiction established by Labor Code section 5000 and the authorities cited above. We conclude the answer is no.

As noted before, the clause of the CBA at issue states: "The laws governing occupational injuries and illness shall be the laws of the jurisdiction in which the flight attendant is domiciled." If the clause is found to be enforceable herein, Nevada has worker's compensation jurisdiction because applicant's airport of domicile is Las Vegas. But it bears noting that neither Nevada, nor any other state aside from California, has any particular interest in asserting jurisdiction over applicant's workers' compensation claim herein. This is because the forum-selection clause does not specify any particular state, rather the forum is selected at the discretion of the flight attendant. For example, a flight attendant may select a "domicile" airport according to the convenience of the airport to the flight attendant's flight assignments and residence. Indeed, here the applicant maintained Oakland as her airport of domicile for many years before switching to Las Vegas, because from Las Vegas it was easier to get to her home in California. For similar reasons, it does not appear that Southwest has any particular interest in Nevada's assertion of jurisdiction here. This is because presumably, the forum-selection clause routinely requires Southwest to handle workers' compensation claims in Nevada and other states wherein Southwest has airports that flight attendants may choose as their "domicile" airports.

Given that the forum selection clause is indifferent as to which state may end up entertaining a flight attendant's workers' compensation claim, and in recognition of California's strong interest in extending the protection of its workers' compensation laws to California residents who work here and are injured here, we conclude that the forum selection clause within the CBA negotiated by applicant's union is unenforceable under the circumstances of this case.

In its answer, defendant relies heavily on *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 [Appeals Board en banc] to argue that enforcement of the forum selection clause is mandatory. We disagree.

In *McKinley*, the Board held that the WCAB will exercise jurisdiction over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurs within the state, unless 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 the employment and the

claimed cumulative injury. In *McKinley*, the Board upheld a forum selection clause specifying jurisdiction in Arizona because the contract containing the clause was signed there. The Board explained:

> "…[T]he negative view of such [forum selection] clauses changed in 1972 following the United States Supreme Court decision in a maritime case, in which the Court held that 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, as follows: (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." (*M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 15 [92 S. Ct. 1907, 32 L. Ed. 2d 513] (*Bremen*); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614 [105 S. Ct. 3346, 87 L. Ed. 2d 444]; Rest.2d, Conf. of Laws, § 80 ["The parties agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."].)

In this case, it appears that exceptions two, three and four of *McKinley* may be applicable, but we need not and do not reach the issue because *McKinley* is distinguishable altogether. Unlike this case, which involves catastrophic injuries suffered in this state by an employee who lives and works here, *McKinley* involved the cumulative trauma claim of a professional football player with a limited connection to California. The football player played for the Arizona Cardinals, who played 40 of their 80 games in Arizona during the player's period of employment, while 33 of the other 40 games were played in states other than California. Further, the football player was a relatively sophisticated claimant, who was represented by an agent in the negotiations that resulted in the forum selection clause specifying workers' compensation jurisdiction in Arizona. In contrast, the applicant in this case testified that she was not aware of workers' compensation laws or how workers' compensation laws affected her regarding her base or location. (SOE, 1/29/20, p. 4.)

We conclude that *McKinley* simply does not apply here because the facts of this case are vastly different. (See *Gray v. Arena Football League* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 378, Fn. 1 [unnecessary to address forum selection clause fixing jurisdiction in Illinois, per

McKinley, where case had more than minimal contacts to California]; *Stephens v. Nashville Kats* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 207 [hire in California is sufficient contact with this state for WCAB to exercise jurisdiction over workers' compensation claim, making it unreasonable to enforce choice of law/forum selection clause in employment contract]; *Jackson v. Cleveland Browns* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 132 [same]; *Clark v. Green Bay Packers* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 180 [WCAB jurisdiction over claim where cumulative trauma contributed to the injury while applicant was regularly employed in California, with more than limited connection between this state, the injury and employment; unreasonable to enforce the choice of law provision in conflict with California public policy]; *Jackson v. Cleveland Browns* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 682 [defendant failed to show that enforcing the choice of law/forum selection clause overrides the public policy provisions of Labor Code sections 5000, 5305, and 3600.5(a)]; *Royster v. NFL Europe* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 445 [same]; *Randle v. Seahawks* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 621 [same].)

We also note that *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257] ("*Johnson*"), like *McKinley*, is factually distinguishable from this case. In *Johnson*, the Court of Appeal addressed subject matter jurisdiction over the workers' compensation claim of a professional basketball player who was not employed by a California team, never resided in California, played one professional game in California out of 34 games played over the 2003 season, and suffered no specific injury in California. Defining the issue as one of due process under the 14th Amendment and the full faith and credit clause of the United States Constitution, the Court concluded that the test is whether the forum state has a legitimate interest in the workers' compensation case. That is, a state with sufficient connections with a workers' compensation matter can apply its workers' compensation law without offending the law pertaining to the full faith and credit clause.

In *Johnson*, the Court found that California did not have a sufficient interest to retain jurisdiction and apply its workers' compensation law because the situs of the applicant's employment relationship was Connecticut or New Jersey, and the applicant received a Connecticut workers' compensation award. Thus, the location of applicant's injuries, employment relationship, employment contract, and residence - all possible connections for the application of a state's workers' compensation law - did not have any relationship to California.

Here, unlike *Johnson*, the applicant had an ongoing employment relationship with Southwest in California, including at the time of injury. Further, as discussed at length before, the applicant in this case is a long-time California resident, the injury happened in this state, and she has received lengthy and intensive medical treatment in California. *Johnson* is inapplicable here because this applicant's contacts with California are numerous and substantial.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order of April 8, 2020 is **RESCINDED**, and the following Finding is **SUBSTITUTED** in its place:

FINDING

California is the appropriate jurisdiction to litigate this applicant's claim as to whether the injuries she sustained as a result of an attack on November 20, 2015 arose out of and occurred in the course of her employment as a flight attendant by the defendant, Southwest Airlines.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this case is **RETURNED** to the trial level for further proceedings and determination of the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2022

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

SHAWNA JOHNSON
CHUDACOFF, FRIEDMAN, SIMON, GRAFF & CHERIN
WAI & CONNOR, LLP

JTL/ara

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