WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIEL BROCK, *Applicant*

vs.

SAN FRANCISCO GIANTS; ACE AMERICAN INSURANCE COMPANY, ADMINISTERED BY SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ14218009
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Orders (F&O), issued on August 15, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from June 1, 2010 to March 3, 2012, claims to have sustained industrial injury to the right arm, right elbow and right shoulders. The WCJ determined that applicant was not hired in California, and was not injured in California, and accordingly that there was no subject matter jurisdiction over the claimed injury.

Applicant contends that subject matter jurisdiction is established by Labor Code[1] section 3600.5(a) and (d), and that applicant's two seasons played for an affiliate of the San Francisco Giants satisfies the requirements of the section.

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

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting applicant's 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

[1] All further statutory references are to the Labor Code unless otherwise stated.

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. Labor Code section 3600.5 provides, in relevant part:

> (a) If 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, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state.
>
> …
>
> (d)
>
> (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:
>
> (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.)

Applicant's Petition contends that subdivision (d) of section 3600.5 provides for subject matter jurisdiction under certain circumstances which applicant has satisfied herein. Applicant observes that in *Neu v. Los Angeles Dodgers* (September 28, 2015, ADJ9223382) [2015 Cal. Wrk. Comp. P.D. LEXIS 603] (*Neu*), the fact that the injured worker played for the out-of-state affiliate of a California-based team did not relieve the team of its obligation to provide notice of workers' compensation rights. (*Id.* at p. 8.) Applicant further cites to *Ruhl v. Kansas City T-Bones, et al.* (2022) 88 Cal.Comp.Cases 653 [2022 Cal. Wrk. Comp. P.D. LEXIS 372] (*Ruhl*), for the proposition that employment for an out-of-state affiliate of a California-based team will qualify as "duty days" under section 3600.5(d)(1)(A). Based on the holdings in *Neu* and *Ruhl*, applicant concludes that section 3600.5(a) and (d) provide a basis for subject matter jurisdiction, and that the requirements of subdivision (d) are satisfied by applicant's two season career with the affiliate of a California-based team. (Petition for Reconsideration (Petition), August 29, 2023, at p. 4:13.)

Defendant's Answer contends that applicant is conflating the definition of a "duty day" with the definition of a "California based team," and that "one cannot create a duty day in California by arguing one was employed by a California based team." (Answer, at 4:24.) Defendant concludes there are no facts to support jurisdiction under section 5305 or 3600.5, and that the WCJ properly determined the California had no subject matter jurisdiction over the claimed injury.

Subdivisions (c) and (d) of section 3600.5 apply to a cumulative trauma claim asserted by a professional athlete who is hired in a state other than California, when that athlete is temporarily doing work in California. (See, e.g., *Carroll v. Cincinnati Bengals* (2013) 78 Cal.Comp.Cases 655, 660 (Appeals Board en banc); *Dailey v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 727.) However, applicant's Petition raises the question of whether a professional athlete and employee of a California-based team who works exclusively outside of California's territorial jurisdiction may nonetheless be working regularly within the California for the purposes of WCAB subject matter jurisdiction. The WCJ's Report relies in part on our panel decision in *Ruhl*, where we noted in part that section 3600.5(d) "itself only applies when all of an athlete's employers during the last year of their career are exempt according to subdivision (c) or according to 'some other law,' meaning the subdivision does not apply at all to athletes who finish their careers in California, or who have been hired in California.' (*Ruhl, supra*, at pp. 16-17.) In our decision in *Hansell v.*

Arizona Diamondbacks (2022) 87 Cal.Comp.Cases 602 [2022 Cal. Wrk. Comp. P.D. LEXIS 83], we similarly observed that, "the two-season requirement of work for 'a California-based team or teams' does not require that the work be in the state of California … Because professional athletes in some of the covered sports are regularly dispatched out of state to affiliate teams or for training camps, it is not as rare as one might think that an athlete could be employed by a California-based team without being regularly employed in California." (*Id.* at p. 615.) We therefore concluded that, "a careful reading of the statute suggests that subdivision (d)(1) is concerned with determining under what circumstances an athlete who does not meet the requirements of section 3600.5, subdivision (a) or section 5305 should nevertheless be able to bring a claim in California, because their relationship to the state is sufficiently strong despite the lack of a hire in California or regular California employment." (*Ibid.*)

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.

We also observe that 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, 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 Orders issued by a workers' compensation administrative law judge on August 15, 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 30, 2023

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

DANIEL BROCK
LAW OFFICES OF MARK SLIPOCK
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*