WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EVAN MOORE, ***Applicant***

vs.

CLEVELAND BROWNS, permissibly self-insured; SEATTLE SEAHAWKS, permissibly self-insured c/o CCMSI; PHILADELPHIA EAGLES and GREEN BAY PACKERS, GREAT DIVIDE INSURANCE COMPANY c/o BERKLEY ENTERTAINMENT, ***Defendants***

Adjudication Number: ADJ9095473
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendants Cleveland Browns, and Great Divide Insurance Company (GDIC), on behalf of the Green Bay Packers and the Philadelphia Eagles, LLC, seek reconsideration of our December 30, 2022 Opinion and Decision After Reconsideration (ODAR), wherein we rescinded the WCJ's June 27, 2019 Findings of Fact, and substituted Findings of Fact that applicant and the Cleveland Browns formed a contract of hire in California, conferring California jurisdiction over applicant's claimed injury.[1]

The Cleveland Browns contend that the record does not support a determination of a California hire because applicant's trial testimony did not specify his location at the time he spoke with his agent, and because there is evidence that applicant left the state of California shortly before he accepted the offer from the Cleveland Browns. (Cleveland Browns' Petition, dated January 23, 2023, at 5:20.) The Cleveland Browns further contend applicant's agent was not authorized to accept a contract on his behalf, and that the only contract the parties entered into was a written contract executed in Cleveland, Ohio. (*Id*. at 10:19.) The Browns also contend the issue of whether

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[1] Commissioner Sweeney, who was on the panel issuing prior decisions in this matter, has retired. A new panelist has been assigned in her place.

there is a California contract of hire is preempted by Federal law, and that applicant's petition for reconsideration was deemed statutorily denied pursuant to Labor Code section 5909,[2] thus invalidating our December 30, 2022 ODAR. (*Id*. at 10:23; 12:11.)

GDIC has also filed a Petition for Reconsideration (GDIC Petition), contending that applicant's agent did not have authority to accept or commit applicant to a contract, or to convey applicant's agreement to a contract, under the terms of the Standard Representation Agreement (SRA). (GDIC Petition, dated January 23, 2023, at 9:11.) GDIC also contends that the signed, written contract as between applicant and the Browns contained an "integration clause" obviating any prior written or oral agreements. (*Id*. at 11:10.) GDIC also avers the liability exemptions of section 3600.5(c) apply as to both the Green Bay Packers and the Philadelphia Eagles. (*Id*. at 13:3.) Finally, GDIC avers the WCJ appropriately enforced the forum selection clauses contained in the written contracts as between applicant and the Green Bay Packers and the Philadelphia Eagles, and that the WCJ properly declined to exercise jurisdiction over applicant's claim. (*Id*. at 15:4.)

We have received an Answer from Applicant. Applicant contends the GDIC petition was untimely, and that the record is sufficient to support a finding of California jurisdiction via a contract formed in California. (Answer, at 2:10.) Applicant also avers the Cleveland Browns' petition impermissibly refers to evidence outside the record and that defendant's federal preclusion argument is raised in bad faith. (*Id*. at 5:1; 6:1.)

GDIC has further filed a Supplemental Reply to applicant's Answer, averring its petition was timely pursuant to WCAB Rule 10605(a), which provides for five days to act following service of a document by email. (Cal. Code Regs., tit. 8, § 10605(a).) Pursuant to WCAB Rule 10964, we accept GDIC's supplemental pleading, and have considered it herein. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of the Petitions for Reconsideration, the Answer, and the Supplemental Reply. Based on our review of the record, we will grant the Petitions for Reconsideration, amend our December 30, 2022 ODAR to defer issues of whether a contract of hire was formed in California pending development of the record, and return this matter to the WCJ for further proceedings.

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

The primary issue discussed in our December 30, 2022 ODAR was California jurisdiction over the claimed injury, and whether a contract of hired was formed in California. We noted applicant's unchallenged testimony at trial:

> Q. Now, with regards to the Cleveland Browns, how did you become a member of that team?
> A. After being released from the Green Bay Packers in September of 2009, I believe, I came back to California to continue to rehab a hand injury, and I was there for the better part of the 2009 season, and then was contacted by my agent informing me that he had been in discussions with the Cleveland Browns about becoming a member of the Cleveland Browns, and I became a member of the Cleveland Browns. I believe it was early November of 2009.
> Q. Did Dubin & Yee explain to you the terms and conditions of the Browns' offer?
> A. They did, yes.
> Q. Did you direct them to accept that offer on your behalf?
> A. Yes.
> Q. And at that point do you believe you became a member of the Browns' team?
> A. Yes.
> (Partial Transcript of Proceedings, dated May 15, 2019, at 10:10.)

Based on this testimony, we concluded that applicant was physically present in California at the time his agent conveyed to him an offer of employment from the Cleveland Browns. (ODAR, dated December 30, 2022, at pp. 6-7.) Our ODAR observed that insofar as applicant was in California at the time he caused his acceptance to be transmitted back to the offering party, the Cleveland Browns, an oral contract of hire was formed in California. (*Ibid.*) Thus, and pursuant to sections 5305 and 3600.5, California jurisdiction was conferred over the claimed injury as a result of a contract of hire made within California's territorial jurisdiction.

The Petition for Reconsideration filed by the Cleveland Browns (Cleveland Browns Petition) contends that applicant's trial testimony does not establish his physical location at the specific time he accepted the offer of a contract of hire. (Cleveland Browns Petition, at 5:20.) In support of this contention, the Cleveland Browns Petition repeatedly cites to deposition testimony that was not admitted into evidence. (*Id*. at 3:16; 4:2; 6:23; 7:14; 8:14; 9:9.) In a footnote to its Petition, the Browns concede that the relevant portions of applicant's deposition transcript it offers as a basis for reconsideration were *not* offered or admitted into evidence. The Browns contend that applicant's trial testimony did not state he was in California at the time he received the offer of employment from the Cleveland Browns. (*Id*. at 3:26.) Defendant does not contend, however, that it was precluded from seeking to introduce evidence at the time of trial in light of applicant's

testimony, especially in light of the fact that other portions of the deposition transcript were admitted into evidence, e.g. Ex. A2, Deposition Transcript of Applicant, pages 20 through 22, dated October 11, 2016.

We further note that WCAB Rule 10945, requires that a Petition for Reconsideration make specific references *to the record*. A party may not escape its obligation to comply with our Rules, including confining their arguments to the evidentiary record, by reference to extrinsic records in a footnote.

Nor are we persuaded that the parties were unaware that subject matter jurisdiction was at issue at the time of trial. The only issues submitted for decision were "jurisdiction" and "sanctions." (Minutes of Hearing and Summary of Evidence (Minutes), dated May 15, 2019, at 2:22.) The issue of a contract of hire as a basis for subject matter jurisdiction clearly falls within the rubric of "jurisdiction" as raised and submitted by the parties. Additionally, the Cleveland Browns' Trial Brief argues applicant was not hired in California, and by extension, that applicant was precluded from arguing his California-based agent entered into a contract on his behalf because the agent had no authority to bind him to a contract. (Defendant's Trial Brief, dated May 29, 2019, at 6:21.) Accordingly, we find no merit to the assertion that the Cleveland Browns were essentially unaware of the issue at trial, and as a result were unable to recognize the relevance of applicant's testimony. (Cleveland Browns Petition, at 6:10.)

However, the *admitted* evidence demonstrates that applicant was actively trying out for various NFL terms in October and November, 2009. As is noted in the Cleveland Browns Petition, the NFL Transaction Record indicates that applicant participated in a free agent tryout with New England on October 29, 2009, as well as the Cleveland Browns on November 5, 2009, prior to being signed to play with the Cleveland Browns Practice Squad on November 9, 2009. (Ex. G, NFL Transaction Record, undated, at p. 2.) The record does not substantively address the specifics of these tryouts, their location or circumstance, and whether applicant was outside of California in the weeks just before he accepted an offer to play with the Browns' practice squad. We also acknowledge that applicant's testimony in this regard is not specific as to his exact location at the time he accepted the offer, and that he was in California for the "better part" of the 2009 season. (Partial Transcript of Proceedings, dated May 15, 2019, at 10:14.)

Section 5305 provides for California jurisdiction over injuries sustained outside California, where the contract of hire was formed within California's territorial jurisdiction. (See *Commercial*

Casualty Ins. Co. v. Industrial Acci. Com. (Porter) (1952) 110 Cal.App.2d 83 [17 Cal.Comp.Cases 84]; *Reynolds Electrical & Engineering Co v. Workers' Comp. Appeals Bd. (Egan)* (1966) 65 Cal.2d 429 [31 Cal.Comp.Cases 415]; *Bundsen v. Workers' Comp. Appeals Bd* (1983) 147 Cal.App.3d 106 [48 Cal.Comp.Cases 673] *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15 [64 Cal.Comp.Cases 745].)

The time and place of contract formation is an integral factor in the evaluation of whether there is California jurisdiction over a claimed extraterritorial injury. The exercise of California jurisdiction often hinges on fact specific testimony or evidence as to the time and place of acceptance of an offer. (See *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175] [insufficient evidence to establish either applicant or his agent in California at time of acceptance of offer]; *Hafkey v. American Airlines, Inc.* (June 15, 2018, ADJ10293214) [2018 Cal. Wrk. Comp. P.D. LEXIS 283] [applicant's acceptance of offer of employment while in California established jurisdiction, irrespective of where initial claim for benefits was filed]; *Pierce v. Washington Redskins* (May 23, 2017, ADJ8937991) [2017 Cal. Wrk. Comp. P.D. LEXIS 244] [agent and applicant both in California when applicant accepted terms of contract sufficient for jurisdiction, notwithstanding applicant traveled out of state to sign the contract]; *Withrow v. St. Louis Rams* (May 23, 2017, ADJ6970905) [2017 Cal. Wrk. Comp. P.D. LEXIS 249] [applicant's acceptance of offer of employment in California sufficient for California jurisdiction]; *Walker v. Petrochem Insulation* (ADJ9674694, February 2, 2016) [2016 Cal. Wrk. Comp. P.D, LEXIS 60] [applicant's acceptance in Georgia of California employer's offer of employment is not hire in California]; *Stephens v. Nashville Kats* (ADJ4213301, April 1, 2015) [2015 Cal. Wrk. Comp. P.D. LEXIS 207] [applicant hired in California when he accepted employment by telephone in this state].)

The WCJ and the Appeals Board have a duty to further develop the record when there is insufficient evidence to adjudicate an issue. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261].) The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) Accordingly, the WCJ or the Board may not leave undeveloped matters within its acquired specialized knowledge (*Id.* at 404).

Here, the record is unclear as to whether a contract of hire was formed within California. While applicant's testimony speaks to the issue of contract formation generally, it is nonspecific as to the time and place of the acceptance, and there is other evidence in the record that suggests applicant may have been outside the state near the time he agreed to the offer from the Cleveland Browns. Accordingly, we are persuaded that substantial justice requires that the development of the record to more fully address the issues of whether there is California jurisdiction over the injuries claimed herein. In ordering development of the record, we encourage the parties to carefully explicate their respective contentions regarding the basis for jurisdiction, or lack thereof, and to the extent that jurisdiction may be alleged on the basis of a California contract of hire, the specific evidence relied upon in support thereof. The parties are further encouraged to address the location of both applicant and his agent at the time of acceptance of the various contracts herein, as well as the agent's authority to bind applicant to a contract, if any.

Additionally, we acknowledge that GDIC's Petition maintains both the Philadelphia Eagles and the Green Bay Packers are exempt from these proceedings pursuant to section 3600.5(c). However, given that the possible interplay between a California contract of hire and the applicability of the exemptions offered under section 3600.5(c), we` will defer those issues pending development of the record. (See *Hansell v. Arizona Diamondbacks* (2022) 87 Cal.Comp.Cases 602 [2022 Cal. Wrk. Comp. P.D. LEXIS 83.)

In summary, we are persuaded that the evidentiary record does not fully address the factual basis necessary to a determination of whether California maintains jurisdiction over the claimed injury. Accordingly, we will amend Finding of Fact No. 2 of our December 30, 2022 ODAR to reflect that the issue of whether California has jurisdiction over the claimed injury is deferred pending development of the record.

For the foregoing reasons,

IT IS ORDERED that the Cleveland Browns' Petition for Reconsideration of the Opinion and Decision After Reconsideration dated December 30, 2022 is **GRANTED.**

IT IS FURTHER ORDERED that the Great Divide Insurance Company Petition for Reconsideration of the Opinion and Decision After Reconsideration dated December 30, 2022 is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Decision After Reconsideration of December 30, 2022 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

2. The issue of California jurisdiction over this claimed injury is deferred pending development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 24, 2023

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

EVAN MOORE
BOBER PETERSON LAW FIRM
GOLDBERG SEGALLA LAW FIRM
LAW OFFICE OF LEVITON DIAZ
PEARLMAN BROWN LAW FIRM

SAR/abs

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