WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARCUS ROBINSON, *Applicant*

vs.

CHICAGO BEARS, FAIRMONT PREMIER INSURANCE COMPANY, administered by ZENITH and TRAVELERS INDEMNITY COMPANY, successor in interest to GULF INSURANCE; MINNESOTA VIKINGS, self-insured and administered by GALLAGHER BASSETT SERVICES; BALTIMORE RAVENS, TRAVELERS INDEMNITY COMPANY, successor in interest to GULF INSURANCE; *Defendants*

Adjudication Number: ADJ9146501
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Order (F&O) dated October 11, 2018, wherein the workers' compensation administrative law judge (WCJ) found that applicant's claim cannot be heard in California because his injuries lack a sufficient connection to this state under the meaning of *Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson)* (2013) 221 Cal.App.4th 1116. Applicant contends the WCJ erred, and that *Johnson* is distinguishable from his case because he introduced medical evidence of injury sustained in California.

We received Answers from the Chicago Bears ("Bears"), Baltimore Ravens ("Ravens"), and Minnesota Vikings ("Vikings"), all arguing that the WCJ correctly determined that applicant's claim is barred by *Johnson*. We also received a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the record and considered the arguments of the Petition and the Answers. For the reasons discussed below, as our decision after reconsideration, we will affirm

[1] Commissioner Sweeney, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place. Commissioner Razo, who signed the grant for reconsideration, did not participate in this decision.

the WCJ's finding that the claim is barred by *Johnson*, though we will amend the F&O to make clear that the lack of a sufficient connection between applicant's injuries and the state is an issue of due process, rather than statutory subject-matter jurisdiction.

FACTUAL BACKGROUND

Applicant Marcus Robinson asserts that, while employed as a professional football player, he sustained a cumulative trauma injury to multiple body parts during the period of April 15, 1997, through December 31, 2006. Applicant's dates of employment for each employer during the cumulative injury period were as follows:

Chicago Bears	April 15, 1997 to April 16, 2003
Baltimore Ravens	May 6, 2003 to March 2, 2004
Minnesota Vikings	March 10, 2004 to December 27, 2006

(Opinion on Decision, at p. 4.)

The matter proceeded to trial on May 3, 2018, with further proceedings on August 9, 2018, on the issues of California Jurisdiction and the Ravens' contention that the portion of the claim against them was also exempt pursuant to Labor Code section 3600.5(b).[2] Applicant testified at length as to the specifics of his playing career, and as to the nature of the practice routines he would engage in prior to games. (Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 5/3/2018, at pp. 4–8; Further Minutes of Hearing / Summary of Evidence ("FMOH/SOE"), 8/9/2018, at pp. 3–12.)

In particular, applicant testified that he was injured and received treatment after every game he played, including those played in California. (MOH/SOE at pp. 5–6.) He also testified, with the aid of documentary evidence, to several specific instances of injuries sustained or medical treatment received while working in California during his employment with all three employers. First, in 1999, while employed by the Bears, applicant played in Oakland against the Raiders, sustaining a cervical sprain. (See MOH/SOE at p. 6; J. Ex. 3, at p. 307.) Second, he played a game in San Diego on November 21, 1999, injuring his elbow, for which he received Toradol and ice. (MOH/SOE at p. 6; J. Ex. 3, at p. 340.) Third, applicant also played in California for the Ravens, on September 21, 2003. (MOH/SOE at p. 7; FMOH/SOE at p. 10.) Applicant received a

[2] Further references are to the California Labor Code unless otherwise specified.

Vioxx shot before game, for "wear and tear all over his body," but in particular for knee pain; applicant had torn his ACL two years before. (*Ibid.*; J. Ex. 4, at p. 24.) Applicant also appears to have played in California against the Raiders in December of 2003, though it appears that no testimony was provided as to any injuries or treatment sustained in connection with that game or practices before that game. (See Ravens' Answer to Petition for Reconsideration at p. 2.)

Applicant acknowledged that he had testified in a deposition to having travelled to San Francisco in 2006 for a game while employed by the Vikings; at trial, he did not recall playing in the game, but did remember travelling for it. (MOH/SOE, at pp. 7–8.) Based on documentary evidence, applicant believed that he had practiced for the game, but was "deactivated" on the day of the game, November 5, 2006, and therefore did not play. (MOH/SOE at p. 8; J. Ex. 9 & 10.) Applicant also acknowledged that none of his contracts were signed in California, and he was never a California resident during his professional playing career. (MOH/SOE at p. 8.)

Under cross-examination, applicant generally agreed that the conditions of his employment while in California and the medical treatment he sustained for injuries during that time were similar to the conditions and treatment he received while employed outside California. (See, e.g., FMOH/SOE, at p. 10 (Vioxx shot received before Sept. 21, 2003 game identical to others received at other times); FMOH/SOE at pp. 10–11 (list of injuries sustained while employed by Bears outside California).)

The WCJ issued his F&O on October 11, 2018, after receipt of post-trial briefing. Finding of Fact 4 states: "California does not have a legitimate and substantial interest in applicant's workers' compensation claim." (F&O, p. 2, ¶ 4.) Finding of Fact 5 states: "The Court finds that there is lack of California jurisdiction." (F&O, p.2, ¶ 5.) The Opinion on Decision explains that the WCJ's decision was based upon a finding that applicant played approximately 146 games during his professional career, that applicant's injuries stemmed from exposure across the course of that career, and that there was a "minimal" connection between these injuries and the state of California. (Opinion on Decision, at pp. 5–6.)

This Petition for Reconsideration followed.

DISCUSSION

Under California workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; §§

3600 et seq., 5300 and 5301.) The statutes establishing the scope of the WCAB's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v. Pan American World Airways* (1959) 270 F.2d 355, 360 ["The [California Workmen's Compensation] Act applies to all injuries whether occurring within the State of California, or occurring outside the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California."].)

Where there is statutory subject-matter jurisdiction, the WCAB may assert that jurisdiction in a given workers' compensation injury claim when the evidence establishes that an employment related injury, which is the subject matter, has a significant connection or nexus to the state of California. (See §§ 5300, 5301; *King, supra,* 270 F.2d at 360; *Johnson, supra*, 221 Cal.App.4th at 1128.) Whether there is a significant connection or nexus to the State of California is best described as an issue of due process, though it has also been referred to as a question of subject-matter jurisdiction. (*New York Knickerbockers v. Workers' Comp. Appeals Bd. (Macklin)* (2015) 240 Cal.App.4th 1229, 1238; *Johnson, supra*, 221 Cal.App.4th at 1128.)

Where, as here, the injured employee neither signed a contract in California nor was regularly employed in this state during the relevant period, whether the claim may be heard in the California workers' compensation system is generally determined by assessing the degree to which the claimed injuries relate to activities undertaken in this state. (*Johnson, supra*, 221 Cal.App.4th at 1128; *Macklin,* 240 Cal.App.4th at 1239.)

In *Johnson*, the injured employee played a single game in California; the game was one of 34 played during the 2003 season, her last season of play. (*Johnson, supra,* 221 Cal.App.4th at 1121.) Noting that her sole connection to California was that single game, and that she did not appear to sustain any particularly disabling injury during that game, the *Johnson* Court held:

> The effects of participating in one of 34 games do not amount to a cumulative injury warranting the invocation of California law. As the cases show, a state must have a legitimate interest in the injury. A single basketball game played by a professional player does not create a legitimate interest in injuries that cannot be traced factually to one game. The effect of the California game on the injury is at best de minimis.

(*Id.* at p. 1130 (footnotes omitted).)

Here, applicant appears to have played four games in California during the course of his professional career, and also testified to participating in practices during a fifth trip to California, though he did not actually play in that game. Applicant does not appear to contest the WCJ's finding that he played in at least 146 games across his career, each with their own associated practices.[3] Therefore, even viewing matters in the light most favorable to applicant, it appears that his total California exposure amounts to at best approximately 3% of his total playing career – almost exactly the same percentage as in *Johnson*, where one game out of 34 also represented roughly 3% of the injury exposure the *Johnson* Court considered.

Applicant attempts to distinguish *Johnson* by referencing specific instances of injuries sustained and medical treatment received in this state, noting that *Johnson's* holding was predicated on the fact that the injury in that case could not be specifically traced to California. Theoretically, we agree with applicant that medical evidence showing that an applicant's cumulative trauma injury was particularly traceable to California exposure could possibly serve to establish a sufficient connection between an applicant's injuries and this state, even if such exposure was otherwise a small portion of an injured employee's total cumulative trauma injury period. For example, if an applicant could show that their California work was uniquely damaging to their body and was responsible for a much larger percentage of their cumulative trauma injury than the percentage of time spent in California would otherwise suggest, this might well create a relationship between the injury and this state sufficient to support the application of California workers' compensation law to the claim.

That said, we do not agree that the evidence presented in this case is such evidence. To be sure, applicant did introduce evidence showing that applicant sustained injuries and received medical treatment while in this state. However, the thrust of applicant's testimony was that his job duties in California, and therefore the resulting injuries and medical treatment, were of the same kind as what he experienced in the remainder of his job. Far from showing that his cumulative trauma injury is particularly traceable to his work in California, applicant's testimony illustrates the opposite. In other words, applicant's testimony and the medical records introduced at trial show that it is in fact reasonable to infer that the percentage of applicant's games and

[3] One of the Answers suggests the real figure is closer to 160, but for purposes of this decision we will use the number relied upon by the WCJ in his F&O.

practices played in California roughly corresponds to the degree to which his injury was caused by California-based exposure – somewhere in the region of 3%.

In the absence of some other connection to the state, such as a contract signed here or regular California employment, we do not see any basis for overruling the WCJ's judgment that a 3% exposure is insufficient to justify application of California workers' compensation law to applicant's claim, pursuant to the standards articulated in *Johnson*.

That said, we do believe one aspect of the F&O requires modification. Although we agree with the WCJ's conclusion that applicant's injuries lack sufficient connection to this state to support the *exercise* of jurisdiction, we do not agree with Finding of Fact 5, wherein the WCJ found that "there is a lack of California jurisdiction." The *Johnson* line of case fundamentally deal not with the presence or absence of jurisdiction per se, but rather with whether the exercise of that jurisdiction comports with due process. Here, although there is statutory California jurisdiction over applicant's claim, the exercise of that jurisdiction would violate due process. Accordingly, we will amend the F&O to modify Finding of Fact 5 to reflect this distinction.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 11, 2018 Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

5. The exercise of California jurisdiction over this claim would not comport with due process pursuant to the holding of *Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson)* (2013) 221 Cal.App.4th 1116.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 6, 2023

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

MARCUS ROBINSON
SEYFARTH SHAW LLP
CHERNOW & LIEB
DIMACULANGAN & ASSOCIATES
LAW OFFICE OF LYSETTE RIOS
LITTLER MENDELSON, P.C.

AW/ara

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