WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT HOLMBERG, *Applicant*

vs.

OAKLAND RAIDERS INSURED BY HIH AMERICAN INSURANCE AND STAR INSURANCE, ADMINISTERED BY AMERITRUST; INDIANAPOLIS COLTS INSURED BY STATE COMPENSATION INSURANCE FUND; NEW YORK JETS, INSURED BY RELIANCE INSURANCE COMPANY, IN LIQUIDATION, ADMINISTERED BY THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (CIGA); MINNESOTA VIKINGS, PERSMISSIBLY SELF-INSURED; MINNESOTA VIKINGS, INSURED BY RELIANCE INSURANCE COMPANY, IN LIQUIDATION, ADMINISTERED BY CIGA; NEW ENGLAND PATRIOTS, INSURED BY LIBERTY MUTUAL; CAROLINA PANTHERS, INSURED BY LEGIONS INSURANCE COMPANY, IN LIQUIDATION, ADMINISTERED BY CIGA; GREEN BAY PACKERS, INSURED BY TRAVELERS, *Defendants*

Adjudication Numbers: ADJ10874193; ADJ10874229
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration 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.

Defendants New England Patriots, insured by Liberty Mutual (New England Patriots) and the Green Bay Packers insured by Travelers Insurance Company (Green Bay Packers) seek reconsideration of the October 14, 2019 Joint Findings, Award and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant, while employed as a professional athlete by various teams in the National Football League (NFL), sustained injury to the head, neck, spine, upper and lower extremities, bilateral hips, bilateral shoulders and in the form of neurological problems. The WCJ found that the date of injury pursuant to Labor Code[1] section 5412 was May 22, 2017, and that the period of liability under section

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

5500.5 was the last year of injurious exposure in 2002 resulting in liability for the New England Patriots, the Green Bay Packers, and the Carolina Panthers, insured by Legions Insurance, now in liquidation, administered by the California Insurance Guarantee Association (Carolina Panthers/CIGA). The WCJ further determined that CIGA had no liability because the New England Patriots and the Green Bay Packers both constituted "other insurance" as set forth in Insurance Code section 1063.1. The WCJ determined that the court had personal jurisdiction over the New England Patriots and the Green Bay Packers, and subject matter jurisdiction over the claimed cumulative injury. Relying on the reports adduced by applicant the WCJ found that applicant sustained 73 percent disability and awarded corresponding indemnity and future medical care.

The New England Patriots contend that the WCJ did not designate a defendant to administer the claim. The New England Patriots further contend that the WCJ's decision violates its due process rights because the Patriots played no games and had no contact with California during the last year of injurious exposure.

The Green Bay Packers contend applicant entered in a contract with a valid and enforceable choice of law provision barring the instant California claim. The Green Bay Packers further contend the court erred in finding personal jurisdiction over the team, and that because applicant did not procure medical-legal reporting pursuant to section 4062.2, the medical-legal reporting in evidence is not admissible.

We have received Answers from the applicant, the New England Patriots, the Oakland Raiders by Star Insurance (Oakland Raiders), and from CIGA. The WCJ has not issued a Report and Recommendation on Petition for Reconsideration (Report).

We have considered the Petitions for Reconsideration and the Answers, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant has filed two Applications for Adjudication. In Case No. ADJ10874229, applicant claimed injury to the right knee while employed as a professional athlete by defendant Oakland Raiders on August 16, 1998. At the time of injury, the employer's workers' compensation carriers were HIH American Insurance, now in liquidation, and Star Insurance, administered by Ameritrust. The parties have stipulated that the 1997 Permanent Disability Rating Schedule

(PDRS) is applicable to the claim, and that applicant sustained seven percent permanent partial disability as a result of the injury.

In Case No. ADJ10874193, applicant claimed injury to the head, neck, spine, upper and lower extremities, bilateral hips, bilateral shoulders and in the form of internal organ injuries, while employed as a professional athlete from April 25, 1994 to September 1, 2002. During this time, applicant played for the Oakland Raiders insured by HIH American Insurance, and Star Insurance administered by Ameritrust, from April 25, 1994 to August 30, 1998; for the Indianapolis Colts insured by State Compensation Insurance Fund from September 9, 1998 to September 29, 1998; for the New York Jets, insured by Reliance Insurance Company, in liquidation, administered by CIGA, from October 27, 1998 to September 5, 1999; for the Minnesota Vikings, insured by Reliance Insurance Company, in liquidation, administered by CIGA from September 7, 1999 to August 31, 2000, and that from January 1, 2000 to March 31, 2000, the Vikings were self-insured; for the New England Patriots, insured by Liberty Mutual from July 24, 2000 to September 2, 2001; for the Carolina Panthers, insured by Legions Insurance Company, in liquidation, administered by CIGA from October 23, 2001 to November 1, 2001; for the Green Bay Packers, insured by Travelers from December 12, 2001 to February 28, 2002, and again from April 19, 2002 to September 1, 2002.

Applicant obtained reporting in orthopedic medicine from David S. Kim, M.D., and in neurology from Kenneth L. Nudleman, M.D. The defendants have also obtained Qualified Medical Evaluator (QME) reporting in orthopedic medicine from Brian D. Rothi, M.D., and in neurology from Charles Glatstein, M.D.

The parties proceeded to trial on May 30, 2019, and stipulated to the various periods of employment and corresponding insurance carriers. (Minutes of Hearing and Summary of Evidence (Minutes), May 30, 2019, at p. 4:2.) The parties further stipulated that applicant's earnings would yield the maximum applicable permanent disability rate, that applicant was hired and employed by the Oakland Raiders, a California team, for nearly 4 years, and that there was no California contract of hire after applicant's employment with the Raiders. (*Id.* at p. 5:8.) The parties further stipulated that applicant did not play in California after his last date of employment with the Raiders on August 30, 1998, and that the applicant reached a permanent and stationary status as of December 1, 2002 "according to the QME report." (*Id.* at p. 5:12.) The parties placed in issue permanent disability, apportionment, the need for further medical treatment, attorney fees, subject

matter and personal jurisdiction, the applicability of the 1997 or 2005 PDRS, the date of injury pursuant to section 5412, the period of liability per section 5500.5, and "covered claim" issues pursuant to Insurance Code section 1063.1(c)(9). (*Id.* at p. 5:14.) Applicant testified, and the parties submitted the matter for decision. Following the WCJ's service of rating instructions, the parties cross-examined the Disability Evaluation Unit (DEU) rater on July 29, 2019, and submitted the matter for decision as of August 23, 2019.

The WCJ issued his F&A on October 24, 2019. Therein, the WCJ found in relevant part that California has a substantial interest in exercising subject matter jurisdiction over the claimed injury because applicant was hired by the Oakland Raiders, a California team, and played for them for more than four years. (Findings of Fact re ADJ10874193, Finding of Fact No. 3.) The WCJ further found that both the New England Patriots and the Green Bay Packers had made general appearances as demonstrated by their failure to contest personal jurisdiction at the first opportunity, and their participation in joint discovery. (Findings of Fact re ADJ10874193, Finding of Fact No. 8.) The WCJ determined that applicant sustained industrial injury to the head, neck, spine, upper and lower extremities, bilateral hips, bilateral shoulders and in the form of neurological problems. (Findings of Fact re ADJ10874193, Finding of Fact No. 4.) The WCJ rated the injuries under the 2005 PDRS and entered findings of 73 percent disability less attorney's fees. The WCJ determined that the section 5412 date of injury was May 22, 2017, and that the period of liability was the last year of injurious exposure, wherein the applicant played for the Carolina Panthers, the New England Patriots, and the Green Bay Packers. (Findings of Fact re ADJ10874193, Finding of Fact No. 6.) The WCJ determined that the New England Patriots and the Green Bay Packers constituted "other insurance" pursuant to Insurance Code section 1063.1, relieving CIGA of any liability.

Defendant New England Patriots seek reconsideration, first observing that the F&A does not designate the carrier responsible for administration of the claim, and that as the team with the majority liability, the Green Bay Packers should administer. (New England Patriots Petition, at p. 2:22.) The New England Patriots further contend the F&A violates their due process rights because the Patriots played no games in California during the final year of the cumulative injury period and had no contact with California. (*Id.* at p. 3:7.)

Defendant Green Bay Packers contend that applicant is bound by the terms of his contract with the Packers, which provides that any workers' compensation claim be decided under the laws

of the State of Wisconsin. (Green Bay Packers Petition, at p. 3:8.) The Green Bay Packers further contest the WCJ's determination that the court has personal jurisdiction over the team, arguing that the issue was not raised at trial, and that the Green Bay Packers have participated in no discovery. (*Id.* at p. 6:5.) Finally, the Green Bay Packers aver that the section 5412 date of May 22, 2017 requires that parties follow the medical-legal process pursuant to section 4062.2, and that all findings of injury and permanent disability based on medical reporting obtained outside section 4062.2 should be stricken. (*Id.* at p. 6:20.)

Applicant's Answer responds that a hiring in California confers subject matter jurisdiction and creates a sufficient California interest to satisfy principles of due process, and that subject matter jurisdiction cannot be waived by agreement of the parties. (Applicant's Answer, at 2:4.) With respect to personal jurisdiction, applicant observes that the Green Bay Packers' initial appearance notes they were specially appearing but did not disclose they were contesting *personal* jurisdiction. Applicant further observes that the Green Bay Packers failed to note their special appearance in multiple ensuing hearings, that they filed no petition for their dismissal on that basis and failed to initiate judicial proceedings necessary to determine the issue of personal jurisdiction. (*Id.* at p. 4:9.) Applicant further observes that contrary to its assertion that it never participated in discovery proceedings, counsel for the Green Bay Packers was in attendance and participated in applicant's deposition on December 3, 2018. (Applicant's Answer, at 4:17.) Finally, applicant contends that the Green Bay Packers waived its objection to the admissibility of applicant's reporting because the issue was not raised at trial, and the issue was not mentioned in the Green Bay Packers' trial brief. (*Id.* at p. 4:24.)

Liberty Mutual's Answer to Travelers' Petition for Reconsideration (New England Patriots' Answer) responds by observing that the fact that applicant was hired by and worked for the Oakland Raiders, a California team, creates a sufficient connection to California to warrant the exercise of jurisdiction over the claim of injury and does not otherwise violate principles of due process. (*Id.* at p. 2:16.) The New England Patriots' Answer also observes that insofar as the Green Bay Packers contest personal jurisdiction, the Green Bay Packers made multiple appearances at various conferences and trial settings without setting forth their status as "specially appearing." Further, the Green Bay Packers played games in California in the same seasons as the applicant's employment, and as such, the Green Bay Packers "purposely availed itself to the privilege of conducting business in the State of California in 2001 and 2002…." (*Id.* at p. 3:19.)

The Answer filed by the Oakland Raiders, insured by Star Insurance, administered by Ameritrust Group (Raiders/Ameritrust Answer) observes that the formation of a California contract is sufficient to confer subject matter jurisdiction pursuant to section 3600.5, and that because applicant was regularly working in California as a member of the Raiders team, California has a legitimate and substantial interest in extending benefits to the injured worker. (Raiders/Ameritrust Answer, at p. 2:17.) The Raiders/Ameritrust Answer also observes that the appropriate analysis of a California interest in the claimed injury should be based on the entire injury and is not confined to the period of applicant's employment with the Green Bay Packers. (*Id.* at p. 4:18.) The Raiders/Ameritrust Answer also contends that both the Patriots and the Packers continue to enjoy the benefits of conducting business with California, obviating the issue of personal jurisdiction generally. However, the Answer further notes that contrary to the assertion contained in the Green Bay Packers Petition, the issue of personal and subject matter jurisdiction was specifically raised at the time of trial. (*Id.* at p. 6:14.) With respect to the admissibility of the medical-legal reporting obtained by applicant, the Raiders/Ameritrust Answer observes that the issue was not raised at trial, and that the Green Bay Packers failed to object to the admissibility of the reporting. Finally, the Raiders/Ameritrust Answer contends that the Green Bay Packers Petition should be denied on the ground it was not served on State Compensation Insurance Fund on behalf of the Indianapolis Colts, in violation of section 5905 which requires that petitions for reconsideration be served on all parties. (*Id.* at p. 7:17.)

CIGA's Answer to Traveler's Petition for Reconsideration (CIGA's Petition) avers the WCJ correctly determined applicant was regularly employed in California by the Oakland Raiders during his cumulative injury, thus conferring subject matter jurisdiction, and creating more than a limited connection between the claim for cumulative injury and California. (CIGA's Petition, at pp. 9-11.) CIGA's Answer also observes that the Green Bay Packers did not promptly contest personal jurisdiction by initiating proceedings to determine the issue, and further failed to note their ongoing special appearance in various hearings. (*Id.* at p. 12.) Finally, CIGA observes that the Green Bay Packers Petition was not served on State Compensation Insurance Fund, rendering it susceptible to dismissal under section 5905. (*Id.* at p. 14.)

DISCUSSION

Under California's workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 3600 et. seq., 5300 and 5301.) The statutes establishing the scope of the Appeals Board's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244], cert den., 362 U.S. 928 [80 S. Ct. 753, 4 L. Ed. 2d 746] (1960) ["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."] (*King*).)

Here, the parties have stipulated that applicant was hired and employed by the Oakland Raiders, a California team for nearly four years. (Minutes, at p. 5:8.) Thus, California has a legitimate interest in the workers' compensation claim advanced by applicant herein.

However, even when California has statutorily conferred subject matter jurisdiction over the claimed injury, it may nevertheless be unreasonable as a matter of due process to adjudicate a case in the California workers' compensation system, if there is an insufficient connection between the State of California the applicant's injuries. (*Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116, 1128 [165 Cal. Rptr. 3d 288] (*Johnson*).)

In *Johnson*, the Court of Appeal evaluated how to apply principles of due process to a case involving a professional basketball player who was not employed by a California team, who never resided in California, who sustained no specific injury in California, and played only one game in California out of 34 played in the 2003 season. The Court in *Johnson* concluded:

> 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.
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> (*Johnson, supra*, at p. 1130, italics original.)

Here, the New England Patriots cite *Johnson* for the proposition that the exercise of California jurisdiction over this claimed injury violates the team's due process rights. (New England Patriots' Petition, at 3:18.) In support of this assertion, the team points out that "the NEW ENGLAND PATRIOTS, based in the State of Massachusetts, did not set foot in the State of CA, played no CA games in the 2001 season which is part of the last year of injurious exposure ending with the PACKERS on 9-1-02 … [t]hat appears to constitute a denial of due process of law under the Federal & State Constitutions for the NEW ENGLAND PATRIOTS." (*Ibid.*)

However, the Second District Court of Appeal, Division Five, which decided *Johnson*, further clarified its analysis in the 2015 opinion in *New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Macklin*) (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] (*Macklin*). Therein, a professional basketball player claimed cumulative injury that included his employment with a California-based team, the Los Angeles Clippers, as well as various non-California teams. The Court of Appeal framed the question as "whether [applicant's] *injuries* have a sufficient relationship with California for the invocation of California workers' compensation law," and further noted that the analysis depended on a number of factors as set forth in *Johnson*. (*Id.* at p. 1239, italics added.) However, the *Macklin* court also observed that applicant's employment with a California based team, *standing alone*, meant "we do not have to determine if the other activities in California are sufficient by themselves to make the application of California workers' compensation law reasonable, although those activities are more than the one game that *Johnson* concluded was de minimis." (*Ibid*.)

Applying the analysis in *Macklin* to the facts of the current matter, we observe initially that the due process argument advanced by the New England Patriots is analytically incomplete insofar as it limits the question of California contacts to the last year of injurious exposure. (New England Patriots Petition, at p. 3:18.) The holding in *Macklin* was based on the relationship between the alleged *injury* and the forum state. Thus, to the extent that applicant alleges a cumulative injury from 1994 to 2002, the analysis must encompass the entire claimed injury, and is not otherwise limited to the last year of injurious exposure. (*Macklin, supra*, at p. 1239; see also *Worrell v. San Diego Padres* (2020) 85 Cal.Comp.Cases 246, 254 [2020 Cal. Wrk. Comp. P.D. LEXIS 1, 13-14] ("It has never been the law that each and every employer who is potentially liable must have a significant connection or nexus to the state of California in order for the WCAB to assert subject-matter jurisdiction over that employer as a matter of due process; as long as the claim as a whole

has such a connection or nexus, this particular requirement is met."].) Moreover, as the *Macklin* court observed, the applicant's time in the employ of a California-based team is sufficient, in and of itself, to make the application of California workers' compensation law reasonable. Accordingly, we are not persuaded that New England Patriots were denied due process by the WCJ's exercise of California jurisdiction herein.

In addition to subject matter jurisdiction, which is the power of the court over a cause of action or to act in a particular way, the Appeals Board's authority to decide a matter is further predicated on personal jurisdiction over the parties, which is not determined by the nature of the action, but by the legal existence of the party and either its presence in the state or other conduct permitting the court to exercise jurisdiction over the party. (*Greener v. Workers' Comp. Appeals Bd. of California* (1993) 6 Cal.4th 1028 [58 Cal.Comp.Cases 793, 795] (*Greener*).) As we have previously observed, "subject matter jurisdiction is the court's power to hear and resolve a particular dispute or cause of action, while personal jurisdiction relates to the power to bind a particular party, and depends on the party's presence, contacts, or other conduct within the forum state. (*Worrell v. San Diego Padres* (2020) 85 Cal.Comp.Cases 246, 255 [2020 Cal. Wrk. Comp. P.D. LEXIS 1, 16-17].)

However, unlike subject matter jurisdiction which cannot be waived or consented to by the parties, a lack of personal jurisdiction is subject to waiver, and is automatically waived by a general appearance. (See, e.g. *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341 [25 Cal.Rptr.3d 488] ["…it has long been the rule in California that a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action."].) Moreover, and notwithstanding a party's initial assertion that it is "specially appearing," a subsequent request by that party for action by the Appeals Board or by a court on a basis other than lack of personal jurisdiction constitutes a general appearance. (*Greener, supra,* 6 Cal.4th 1028; *Roy v. Superior Court* (2005) 127 Cal.App.4th 337 [25 Cal. Rptr. 3d 488, 2005 Cal.App. LEXIS 334] [party waived objection to exercise of personal jurisdiction by making a general appearance through the filing an answer and pursuit of discovery without first moving to quash]; see also *Parker v. Indy Fuel Hockey* (November 29, 2017, ADJ10184700) [2017 Cal. Wrk. Comp. P.D. LEXIS 547].)

Here, the WCJ determined that the conduct of the Green Bay Packers waived any objection it otherwise had to the exercise of personal jurisdiction. (Findings of Fact re ADJ10874193, Finding of Fact No. 8.) The WCJ's Opinion on Decision observes:

> CIGA contends that California has personal jurisdiction over the Patriots and Packers because they did not seek immediate adjudication of any personal jurisdiction defenses, such as immediately filing a Declaration of Readiness of Proceed on personal jurisdiction issues. They did not identify themselves as making special appearances for jurisdiction defense on the Minutes of Hearing for the December 10, 2018 Status Conference and for the March 25, 2019 Mandatory Settlement Conference. Further, the Patriots obtained the Defense Qualified Medical Examination reporting.
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> It is found that CIGA's arguments for waiver of objection to personal jurisdiction is more persuasive. Unlike subject matter jurisdiction, lack of personal jurisdiction may be waived by a party's conduct such as failure to specifically contest personal jurisdiction by making general appearance, by engaging in discovery or promptly raising the issue, *Jonathan Parker v. Indy Fuel Hockey* 2017 Cal. Wrk. Comp. P.D. LEXIS 547 (Panel Decision), or by personal service or voluntary appearance in the case, *Thompson v. Seattle Supersonics, Washington State Department of Labor & Industry* 2009 Cal. Wrk. P.D. LEXIS 245 (Panel Decision). Here, both the Patriots and Packers made general appearance[s] in the proceedings. Both failed to contest personal jurisdiction at the first opportunity, but rather participated in extensive discovery without reservation. Thus, it is found that, by their own conduct, the Patriots and Packers waived objection to the exercise of personal jurisdiction by California WCAB.
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> (Opinion on Decision, p. 10.)

The Green Bay Packers assert the WCJ's determination is factually incorrect, and that the team's November 22, 2017 Notice of Representation entered a special appearance only. The Green Bay Packers further contend "there was no issue at trial," and that the WCJ's determination in the absence of an issue raised at trial violates principles of due process. (Green Bay Packers' Petition, at 5:5.) Finally, the Packers aver that any requirement that defendants promptly contest personal jurisdiction at the first opportunity will invite a "virtual onslaught" of litigation that will potentially overcome the Appeals Board's limited resources. (*Ibid*.)

However, while the Packers' initial Notice of Representation does reflect a special appearance, the notice does not specify the *basis* for the special appearance. In *Janzen v. Workers' Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109 [63 Cal.Comp.Cases 9], the defendant entered a

special appearance to contest subject matter jurisdiction. However, the Court of Appeal ruled that the defendant's failure to specifically contest *personal* jurisdiction subjected the defendant to the jurisdiction of the Appeals Board. (*Id.* at p. 117.) We also observe that Travelers on behalf of the Green Bay Packers did not seek its dismissal on grounds of lack of personal jurisdiction by petition seeking dismissal or by the filing of a declaration of readiness to proceed to hearing on the issue. Moreover, while the Green Bay Packers aver they took no part in discovery efforts amongst the various defendant herein, we note that counsel for the Packers appeared and participated in applicant's deposition held on October 11, 2018, and that Travelers for the Green Bay Packers failed to note its special appearance at hearings held on December 10, 2018 and March 25, 2019. Based on the foregoing, we are persuaded that the Travelers for the Green Bay Packers failed to timely specify the nature of its special appearance, failed to timely prosecute its dismissal based on lack of personal jurisdiction, failed to appropriately maintain notice of its special appearance, and substantively participated in discovery efforts herein. In addition, we observe that contrary to Green Bay Packers' Petition's assertion that it was denied due process because the issue of personal jurisdiction was not raised at the time of trial, the Minutes reflect that the issue was raised with specificity. (Minutes, at p. 5:21.) Accordingly, we agree with the WCJ's conclusion that Travelers on behalf of the Green Bay Packers waived its defense of a lack of personal jurisdiction. (Findings of Fact re ADJ10874193, Finding of Fact No. 8.) We further conclude that the WCJ reached his determination based on an issue appropriately raised with specificity at the time of trial.

The Green Bay Packers further aver the applicant, in exchange for valuable consideration, "legally relinquished his right to seek workers' compensation benefits in any jurisdiction other than Wisconsin and now seeks the Board to condone the breach of his legal obligation." (Green Bay Packers Petition, at p. 3:3.) The Green Bay Packers observe that pursuant to the December 12, 2001 contract entered into between the Green Bay Packers and applicant, "jurisdiction of all workers' compensation claims…shall be exclusively determined by and exclusively decided in accordance with the internal laws of the State of Wisconsin without resort to choice of law rules…." (Green Bay Packers' Petition, at p. 2:15.) The Packers contend that pursuant to the contractual agreement, applicant is precluded from the instant claim in a jurisdiction outside of Wisconsin. (*Id.* at p. 4:18.)

However, it is well-established that a contract of hire entered in California will support the application of California workers' compensation law. (*Johnson, supra*, at p. 1126.) This is because a hiring in this state is, in and of itself, sufficient connection with California to support the application of California law to the resulting claim of worker's compensation injury. (*Johnson, supra,* at p. 1126*; Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21 [86 Cal. Rptr. 2d 95, 64 Cal.Comp.Cases 745]; *Alaska Packers Asso. v. Industrial Acci. Com.* (*Palma*) (1934) 1 Cal.2d 250, 256 [1934 Cal. LEXIS 358].) Accordingly, we have previously held that "a contractual choice of law/forum selection clause will not be enforced if it contravenes California public policy embodied in a statute that prohibits the waiver of state law." (*Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682, 21] (*Jackson*).) We have also observed that "if a forum selection clause contravenes California public policy as embodied by a statute prohibiting waiver of state law, the burden of proof in enforcing the forum selection clause shifts to the party seeking to enforce the clause." (*Jackson, supra*, at p. 22.)

Here, there is no dispute that applicant was hired by the Oakland Raiders and played approximately four years for a California-based team, a substantial portion of the cumulative injury that is the subject matter of this claim. (See Minutes, at p. 5:8.) California's interest in this claim is established by both the hiring in California, as well as the four years of subsequent regular work within California and is further reflected in the statutory provision for jurisdiction over the claim found in sections 5000, 5305 and 3600.5. Moreover, defendant Green Bay Packers have not established that the enforcement of the choice of law/forum selection clause in the employment agreement overrides these public policy provisions as reflected in California statute. We therefore conclude that the choice of law/forum selection clause is not enforceable because it contravenes California's public policy, and because the Green Bay Packers have not established that the choice of law/forum selection clause overrides California's interest in adjudicating applicant's claim of injury. (*Jackson, supra*, at p. 21.)

The Green Bay Packers further contend that the section 5412 date of injury determined by the WCJ occurs after January 1, 2005, requiring the parties to use the medical-legal process set forth under section 4062.2. Because the parties obtained medical reporting pursuant to section 4062 as it existed prior to 2005, the Green Bay Packers contend any such reporting should be stricken from the record. (Green Bay Packers Petition, at 6:20.) However, as is noted in the various

answers herein, the failure to timely raise an issue at trial may act as a waiver of the issue. (See *The Conco Companies v. Workers' Comp. Appeals Bd.* (*Sandoval*) (2019) 84 Cal.Comp.Cases 1067, 1070 [2019 Cal. Wrk. Comp. LEXIS 112, 7] [petitioner forfeited argument when it failed to raise the issue presented in the petition at trial and first raised the issue in its petition for reconsideration]; *City of Anaheim v. Workers' Comp. Appeals Bd.* (*Evans*) (2005) 70 Cal.Comp.Cases 237, 238 [workers' compensation litigants are not entitled to reconsideration on the basis of issues that could have been presented for decision at trial].)

Moreover, we have previously held in *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 [2005 Cal. Wrk. Comp. LEXIS 3] (Appeals Bd. en banc) (*Simi*), that because the legislature did not provide a medical-legal procedure for cases occurring prior to the effective date of SB899, "section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees." (*Id.* at p. 221.)

Conversely, in our significant panel decision in *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 [2006 Cal. Wrk. Comp. LEXIS 313 (writ den.) (*Ward*), we held that pursuant to section 4060(c), disputes regarding compensability with respect to a claimed cumulative injury ending June 8, 2005, that is, after the effective date of SB899, were subject to the medical-legal procedure set forth in section 4062.2. In addition, because the injury occurred after the effective date of SB899, reports obtained pursuant to section 4064(d) would not be admissible. (*Id.* at p. 1314.)

Applying these principles in *Tanksley v. City of Santa Ana* (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74.], a case involving a claimed cumulative injury from December, 2003, to December 2004, we held:

> ...[T]he question of the process that applies to applicant's claim does not first require a finding of the date of injury. Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [38 Cal. Rptr. 3d 914, 71 Cal.Comp.Cases 161] (*Nunez*); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc); c.f. *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).)

(*Id.* at pp. 9-10.)

Our decision in *Tanksley* emphasized that the parties to a claim of injury occurring prior to January 1, 2005 should not be required to obtain a judicial determination as to the date of injury pursuant to section 5412 in order to determine the appropriate procedure by which to obtain medical-legal reporting. (*Ibid.*) Such a holding would be inconsistent with the California Constitutional mandate that the workers' compensation law "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Article XIV, § 4; see also *Lauter v. Baltimore Ravens* (September 19, 2022, ADJ14657802) [2022 Cal. Wrk. Comp. P.D. LEXIS 270]; *Cyburt v. San Francisco Giants* (November 13, 2023, ADJ14613252).)

Here, applicant has claimed an August 16, 1998 specific injury, and a cumulative injury from April 25, 1994 to September 1, 2002. Both injuries clearly occurred prior to the reform legislation implemented in 2005. Pursuant to the reasoning in *Simi* and *Tanskley*, we are persuaded that the WCJ properly admitted both applicant's and defendant's reporting obtained pursuant to section 4062 as it existed prior to 2005.

Finally, the New England Patriots' Petition observes that the WCJ found both the Patriots and the Packers to have liability for the award pursuant to section 5500.5, but that the WCJ did not determine which employer will administer the award. The Patriots aver that we should order the team with the greater percentage of pro rata liability to administer the claim, which in this case is the Green Bay Packers. However, given that the issue of administration of the claim was not raised with specificity at trial, or decided in the WCJ's F&A, we believe that the Packers should have the opportunity to respond to the Patriots' contentions, and offer evidence and argument responsive to the issue. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal. Rptr. 2d 852, 65 Cal.Comp.Cases 805]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Brower*) (2003) 108 CalApp.4th 137, 150 [68 Cal.Comp.Cases 540]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (*Pinkney*) (1994) 26 Cal.App.4th 789, 803 [32 Cal. Rptr. 2d 293, 59 Cal.Comp.Cases 461].) Accordingly, while we encourage the parties to seek amicable resolution of the issue, if that is not possible, any party may file a Declaration of Readiness to Proceed and request a hearing on the issue of claims administration.

In summary, we are persuaded that applicant's claimed injury provides a sufficient relationship with California for the exercise of California workers' compensation law, based on

applicant's hiring by a California-based team and subsequent four years of employment in California. We further conclude that the due process analysis must encompass the entirety of the claimed *injury*, which is the subject matter of these proceedings, and that the analysis is not limited to the one-year period of liability pursuant to section 5500.5. We also agree with the WCJ that any claim of a lack of personal jurisdiction over the defendants was waived by the conduct of the parties, and that the issues of subject matter and personal jurisdiction were appropriately identified and decided from trial proceedings. We further conclude that the Green Bay Packers have not established that the enforcement of the choice of law/forum selection clause in the employment agreement overrides the public policy provisions as reflected in California statute. Finally, we agree with the WCJ's admission of the medical reporting obtained pursuant to former section 4062. Accordingly, we will affirm the WCJ's October 14, 2019 decision. Insofar as the issue of the identity of the party to administer the claim was not raised or decided at trial, any party may file a declaration of readiness to proceed on the issue.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 24, 2019 Joint Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 11, 2024

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

ROBERT HOLMBERG
LEVITON, DIAZ & GINNOCHIO
LAW OFFICES OF MUHAR, GARBER, AV & DUNCAN
LAW OFFICES OF ALLWEISS & MCMURTRY
DIMACULANGAN & ASSOCIATES
SEYFARTH SHAW
STATE COMPENSATION INSURANCE FUND
GUILFORD, SARVAS & CARBONARA
STANDER, REUBENS, THOMAS & KINSEY

SAR/abs

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