WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MATTHEW KONAN, *Applicant*

vs.

ECHL PERSONNEL MANAGEMENT, LLC, DBA TULSA OILERS; GREAT DIVIDE INSURANCE COMPANY C/O BERKLEY ENTERTAINMENT, LLC; PHILADELPHIA FLYERS; FEDERAL INSURANCE CO. C/O CHUBB, *Defendants*

Adjudication Number: ADJ10729883
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.

Applicant seeks reconsideration of the February 4, 2019 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional hockey player from 2012 through 2016, claimed to have sustained injury arising out of and occurring in the course of employment to multiple body parts, including but not limited to orthopedic, head, neck, spine, hips, upper and lower extremities, neurological, internal, eyes and ears. The WCJ found that applicant had not met the burden of proving a contract for hire was made within California, and as a result, that the court was without jurisdiction over applicant's claim pursuant to Labor Code section 3600.5. (F&O, Findings of Fact Nos. 2, 3.)

Applicant contends that a contract of hire was formed in California because applicant's agent had the authority to bind applicant to an employment agreement. (Petition for Reconsideration (Petition) at 6:22.) Applicant also contends the contract for hire abrogates his California workers' compensation rights, and that existing caselaw supports California jurisdiction. (Petition at 11:1.) Applicant further contends that his belief in his agent's authority to bind him to a contract was dispositive, and that the WCJ incorrectly applied the parol evidence

rule to discount evidence supporting the formation of a contract for hire in California. (Petition, at 17:17; 18:19.)

We have received an Answer from ECHL Personnel Management, LLC DBA Tulsa Oilers, insured by Great Divide Insurance Company c/o Berkley Entertainment LLC (Tulsa Oilers). We have also received an Answer from the Philadelphia Flyers, insured by Federal Insurance Company by Chubb Group of Insurance Companies (Philadelphia Flyers). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, both Answers, and the contents of the Report, and we have reviewed the record in this matter. For the reasons stated in the Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&O.

FACTS

Applicant claimed injury "to multiple body parts, including but not limited to orthopedic, head, neck, spine, hips, upper and lower extremities, neurological, internal, eyes and ears," while employed by defendants Philadelphia Flyers and the Tulsa Oilers/ECHL from 2012 through 2016. (October 17, 2018 Minutes of Hearing and Summary of Evidence (Minutes), at 2:13.) Defendants Philadelphia Flyers and Tulsa Oilers denied liability, contending that California lacks jurisdiction over the claimed injury.

The parties presented the sole issue of California jurisdiction at trial on October 17, 2018. (October 17, 2018 Minutes, at 3:2.) Defendants Philadelphia Flyers and Tulsa Oilers asserted a lack of sufficient contacts with California, and that no contract for hire was formed in California under Labor Code section 3600.5(a) and 5305.[1] (*Id*. at 3:3.)

Applicant testified to his history as a professional hockey player from April 2, 2012 through April 20, 2016. (October 17, 2018 Minutes, at 6:2.) Applicant played for the Philadelphia Flyers from April 2, 2012 through April 19, 2015, and for the ECHL dba Tulsa Oilers from October 5, 2015 through April 20, 2016. (*Ibid.*) Applicant never played or practiced in California for either team. (*Id*. at 7:12.)

Applicant has at all relevant times herein been represented by professional sports agent Eustace King, who maintains offices in Los Angeles, California. (*Id*. at 6:7; 7:2; 10:3.) On

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

November 11, 2007, applicant and Mr. King entered into a Standard Player-Agent Contract. (Ex. 1, Standard Player-Agent Contract, dated November 11, 2007.) The agreement states:

> It is understood and agreed that the Agent shall not have the authority to bind or commit the Player in any manner without prior written consent of the Player. In no event shall the agent execute a Player contract for, or on behalf of, the Player. (*Id*., at p.2, para. 2.)

In 2012, applicant was playing "Junior Hockey" in Canada while Mr. King negotiated a contract with the Philadelphia Flyers. (October 17, 2018 Minutes, at 7:21.) Applicant was in Medicine Hat, Alberta, Canada when he was informed by Mr. King that a contract agreement had been reached, and applicant accepted the contract. (*Ibid.*) Applicant denied participating in the negotiation of the terms of the contract, or that the terms of the contract were presented to him. (*Id*. at 6:17; 7:25.) The Flyers then paid for applicant to travel to a team facility. On April 23, 2012, applicant was physically located in Alberta, Canada when he signed the contract with the Philadelphia Flyers. (October 17, 2018 Minutes, at 6:20; Ex. 3, Standard Player Contract for the Flyers dated April 23, 2012; December 3, 2018 Minutes, at 3:15.) Applicant played for the Flyers until 2015.

Applicant returned to California at the conclusion of his contract with the Flyers. (October 17, 2018 Minutes, at 8:20.) Applicant was in California when Mr. King contacted him in late September of 2015, advising applicant he had reached a deal with the ECHL/Tulsa Oilers team. (*Id*. at 6:25.) The Tulsa Oilers paid for applicant to travel to their facilities in Tulsa, Oklahoma. (*Id*. at 9:1.) Applicant underwent a physical examination, and was presented with a contract. Applicant made no changes to the contract. On October 5, 2015, applicant signed the contract while physically located in Tulsa, Oklahoma. (October 17, 2018 Minutes, at 9:12; Ex. 4, Standard Player Contract for the Oilers, dated September 25, 2015, signed October 5, 2015.) Applicant played for the Tulsa Oilers until April 20, 2016. (October 17, 2018 Minutes, at 6:3.)

Applicant's agent Mr. King testified to the nature of his agency on behalf of applicant:

> In real life the player gives full authority to the agent. He gives authorization to the agent to manage and negotiate on his behalf and it is always verbal. All negotiations are verbal as well as any discussions which lead to a contract to follow. He negotiated applicant's contract with the Flyers. It was a three-year contract, and he only negotiated with the Flyers. He would speak to the applicant regarding a target contract. They discussed his likes, his wants and his musts. They discussed in advance what he was looking for. Before a contract was

> executed, he would follow-up with the player to explain what he was getting into. Prior to negotiation, he had authority to bind the applicant to a contract. He does not sign the contract for the players and he has never signed an ECHL, AHL or NHL contract on behalf of any player. (October 17, 2018 Minutes, at 10:7.)

Mr. King conducted his negotiations with both the Philadelphia Flyers and the Tulsa Oilers from his office in Los Angeles. (*Id*. at 11:22; 13:12.) Mr. King testified that after reaching a verbal agreement, if the contract he was provided did not contain the material terms previously agreed to, he would go back and seek reformation of the points in question. (*Id*. at 10:24.) Mr. King was authorized to bind applicant to the contract. (*Id*. at 12:22.) Following a verbal agreement, but before receipt of a written contract, Mr. King would notify other interested teams that the player was no longer available. (*Id*. at 11:4.) Mr. King confirmed that once an agreement was reached with one team, it would be "professional suicide" to continue to negotiate in bad-faith with other teams. (*Id*. at 12:1.)

The WCJ issued the F&O on April 4, 2019, finding in relevant part that applicant did not meet the burden of showing his employment contract was accepted in the state of California as to either the Philadelphia Flyers or the Tulsa Oilers, and that the court was without jurisdiction over applicant's claim under section 3600.5. (F&O, Findings of Fact Nos. 2, 3.) The Opinion on Decision explained that the acceptance of an offer of employment in California by an agent may support a finding of a contract of hire for jurisdictional purposes:

> Acceptance of an offer of employment in California by the injured worker or by his or her agent supports a finding of hire in California pursuant to Labor Code §3600.5 and §5305. *Alaska Packers Assn. v. Industrial Acc. Com. (Palma)* (1934) 1Cal.2d 250, 252. In *Paula Insurance Co. v. WCAB (Montes)* (2000) 65 Cal.Comp.Cases 426, the terms of a contract were agreed to by telephone through a California agent. In this matter, Applicant accepted the terms of his contracts with the Flyers and Oilers through the telephone by way of Mr. King. Applicant testified Mr. King accepted an offer on his behalf to play with the Flyers. Mr. King spoke on behalf and "…stepped into his shoes to accept the contract with the Flyers." MOH/SOE dated 10/17/2018 pg. 6, lines 16-19. With regard to the Oilers, Applicant was present in California when he spoke with Mr. King and accepted the offer to play with them. *Id.* at pg. 7, lines 1-3. (Opinion on Decision, p.3, para. 1.)

The WCJ further noted applicant's deposition testimony that after the agreement was reached, applicant would "okay it," but that applicant did not have the option to reject the contract

negotiated by Mr. King. (*Id*., at p.4.) However, the WCJ also observed that the Standard Player-Agent Contract specified that the agent had no authority to bind or commit the player in any manner without prior written consent of the player. (*Ibid.*) The WCJ further noted the integration clause contained in both contracts, which stated that the signed contract superseded any prior agreements, and constituted the sole understanding between the parties. The WCJ concluded that applicant's agent did not have the authority to bind applicant to a contract, and that the contract of hire with the Philadelphia Flyers was formed in Alberta, Canada, where applicant signed the contract. (*Id*., at p.5.) The WCJ further determined that applicant's contract with the Tulsa Oilers by its own terms was only effective upon execution, and superseded any prior agreements. Applicant signed the agreement with the Tulsa Oilers in Tulsa, Oklahoma. Given Mr. King's lack of express authority to bind applicant to a contract, and the actual execution of the contract in Oklahoma, the WCJ determined there to be no basis for California jurisdiction under section 3600.5. (F&O, Findings of Fact No., 3; Opinion on Decision at pp. 5-6.)

Applicant's Petition contends his agent had authority to bind him to a contract, and because the agent was in California at the time he accepted the offers from both the Flyers and the Oilers, a contract for hire was made with each team within the meaning of section 3600.5. (Petition, at 6:22.) The petition also contends the parol evidence rule does not bar evidence concerning the location of contract formation, because the contracts themselves do not speak to the issue of location of contract formation. (*Id*. at 18:19.) The Petition asserts that the contract language contained in the Standard Player Contract improperly attempts to subvert California jurisdiction. (*Id*. at 8:11.) Applicant also asserts that it was error for the WCJ to rely on *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp.Cases 1175], because *Tripplett* is incongruent with California caselaw authority which establishes that "common law contract analysis has no bearing on California Workers' Compensation and the strong policy of the Legislature is to provide benefits to those hired in California." (Petition, at 11:26.)

The WCJ's Report observes that despite his agent's efforts in finalizing a contract, applicant did not believe he could play professional hockey without a written contract. (Report, at p.3.) The Report also observes that per the terms of both the contract itself and the Professional Hockey Players Association Collective Bargaining Agreement, applicant's employment was only effective upon execution of the Standard Players Contract. (*Ibid.*) The Report points out that the Standard Players Contract does not extinguish applicant's right to claim workers' compensation

benefits, and that applicant remains free to seek benefits "under the correct jurisdiction, which in this case is the State of Oklahoma and/or Pennsylvania." (*Id*. at p.5.) The WCJ also asserts that the holding in *Tripplett* is applicable because the "contract was consummated when applicant arrived in Oklahoma and the Tulsa Oilers coach and Applicant signed the binding employment agreement, which specified it only became effective after execution." (*Ibid.*) Finally, the report asserts that applicant's agent was not aware of all of the terms of the agreement, rendering the California-based contract negotiations preliminary in nature. Because the employment agreement was not finalized until execution of the contract, the parol evidence rule would preclude evidence of prior negotiations to prove the intent of the parties. (*Id*. at pp. 6-7.)

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 Workers' Compensation Appeals Board (WCAB)'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 (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."].)

In general, the WCAB can assert subject matter jurisdiction in a presented workers' compensation injury claim when the evidence establishes that an employment related injury, which is the subject matter, has a sufficient connection or nexus to the state of California. (See §§ 5300, 5301; *King, supra*, 270 F.2d at 360; Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson) (2013) 221 Cal.App.4th 1116, 1128 [165 Cal.Rptr.3d 288]).) Where an applicant sustains injurious exposure in California, jurisdiction is generally established under section 5300.4

In addition to injuries occurring in California, the WCAB can also assert subject matter jurisdiction over injuries occurring outside this state in certain circumstances. Section 3600.5, subdivision (a) states: "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." (Lab. code § 3600.5(a).) Similarly, section 5305 states: "The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." (Lab. code § 5305.)

Acceptance of an offer of employment in California by the injured worker or by his or her agent supports a finding of hire in California under sections 3600.5 and 5305. (*Alaska Packers Assn. v. Industrial Acc. Com. (Palma)* (1934) 1 Cal.2d 250, 252 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [55 S.Ct. 518, 79 L.Ed. 1044, 20 I.A.C. 326]; (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (1967) 68 Cal.2d 7, 12-13 [64 Cal.Rptr. 440, 434 P.2d 992]); *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 17–18, 21–22, 26–27 and fn. 14 [64 Cal.Comp.Cases 745].)

The burden of proof rests with applicant to establish acceptance of an offer within California. (Cal. Lab. Code § 5705.)

Here, applicant was playing Junior League hockey in Medicine Hat, Alberta, Canada, when he was informed by his agent of a negotiated contract with the Philadelphia Flyers. (October 17, 2018 Minutes, at 7:21.) Applicant then traveled to a team facility in Alberta, Canada, where, on April 23, 2012, applicant signed the contract with the Philadelphia Flyers. (October 17, 2018 Minutes, at 6:20; Ex. 3, Standard Player Contract for the Flyers dated April 23, 2012; December 3, 2018 Minutes, at 3:15.)

Upon the conclusion of applicant's contract with the Philadelphia Flyers, applicant returned to California, where his agent advised applicant he had reached a deal with the ECHL/Tulsa Oilers team. (*Id*. at 6:25.) The Tulsa Oilers paid for applicant to travel to their facilities in Tulsa, Oklahoma, and on October 5, 2015, applicant executed the contract while physically located in Tulsa, Oklahoma. (October 17, 2018 Minutes, at 9:12; Ex. 4, Standard Player Contract for the Oilers, dated September 25, 2015, signed October 5, 2015.)

Accordingly, we agree with the WCJ that applicant was outside California when he executed both contracts. (F&O, Opinion on Decision, p.3, para. 4; Report, at p.3.)

Applicant contends his agent had authority to bind applicant to an employment contract. Applicant avers "a contract for hire was formed when the words of assent were uttered by

Mr. King from California," and that Mr. King drafted a confirming e-mail and notified other teams that applicant was no longer available to be drafted. (Petition, at 4:1.) Applicant testified at trial that he "did not negotiate or talk to management about his contract either with the Flyers or with the Oilers," and that "Mr. King spoke on his behalf for the Flyers and stepped into his shoes to accept the contract with the Flyers." (October 17, 2018 Minutes, at 6:16.)

The Opinion on Decision notes the conflicting testimony in this regard, with applicant testifying that he "okayed" the contract, but also testifying that he did not have the option to reject the contract once his agent accepted the offer. (F&O, Opinion on Decision, p.4, para. 2.) However, the WCJ further noted that the Standard Player-Agent Contract as between applicant and his agent specifically *enjoins* the agent from accepting an offer on behalf of applicant:

> It is understood and agreed that the Agent shall not have the authority to bind or commit the Player in any manner without prior written consent of the Player. In no event shall the Agent execute a Player contract for, or on behalf of, the Player. (Ex. 1, Standard Player-Agent Contract, dated November 11, 2007, p.2, section 2.)

In *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal.App.5th 556 [83 Cal.Comp. Cases 1175], a former professional football player contended his agent whose principal place of business was in California, had negotiated the terms of an employment contract over the phone. (*Id.* at 561.) However, the WCAB determined that applicant had not met the evidentiary burden of establishing that either he or his agent were actually in California at the time of acceptance of the contract, or when the contract was executed. (*Ibid.*) Additionally, Tripplett testified that "he had such trust in his agent that 'whatever he advised me to do, that's what I signed.'" (*Id*. at 566.) However, the fact that applicant retained the right to reject the contract resulted in the Court of Appeal concluding that, "Tripplett's agent's negotiation of terms to be included in a written employment contract was not sufficient to bind Tripplett to anything." *(Ibid.)*

Here, as in *Tripplett*, *supra*, 25 Cal.App.5th 556, applicant testified that he trusted his agent Mr. King, and that Mr. King chose for applicant what was best for him. (F&O, Opinion on Decision, at p.4.) Applicant further testified that once Mr. King negotiated the terms of the contract, applicant could not reject the contract. (*Ibid.;* October 17, 2018 Minutes, at 8:4.) However, applicant also testified that he "okayed" the contract, and when he was presented with the contract, told his agent, "Let's do it." (*Id.,* at 8:1.) The WCJ further observed that the agency contract between applicant and Mr. King states categorically that Mr. King had no authority to

bind applicant to any agreement. The explicit language of the Standard Player-Agent contract coupled with an inconsistent record regarding whether applicant's agent had the authority to bind him to a contract provides a reasonable basis for the determination of the WCJ that Mr. King could not bind applicant to a contract for hire in California. (*Tripplett v. Workers' Comp. Appeals Bd, supra*, 25 Cal.App.5th 556.)

We note further that the language of the Standard Player-Agent contract provides authority for the agent to bind his client to an offer *with prior written consent*. (Ex. 1, Standard Player-Agent Contract, dated November 11, 2007, p.2, section 2.) However, applicant offers no evidence of any such consent in writing prior to the execution of the contract with either the Philadelphia Flyers or the Tulsa Oilers.

Applicant contends the WCJ improperly determined that "the oral agreement is voided without legal justification." (Petition at 18:24.) Citing to the Parol Evidence Rule, applicant asserts that evidence of a prior parol agreement is not barred from consideration because the place of contract formation is not discussed in the final contracts as between applicant and the Flyers or the Oilers.[2] (*Id.*, at 18:27.) The California Parol Evidence Rule is set forth in Cal. Code Civ. Proc. section 1856, which provides, in relevant part, that "(a) [t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement… (c) [t]he terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance…(f) [w]here the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue." (Cal. Code Civ. Proc. § 1856.) Applicant submits that because the final contracts with the Philadelphia Flyers and the Tulsa Oilers are silent as to the issue of the location of contract formation, the parol evidence rule would not serve to bar evidence responsive to that issue. We agree that "[o]ral testimony is admissible concerning points on which written agreement is silent, provided such

[2] "The parol evidence rule, as is now universally recognized, is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in writing (the "integration"), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations." (*Roberts v. Roberts* (1964) 226 Cal.App.2d 507, 518. [1964 Cal. App. LEXIS 1305].)

testimony does not contradict writing." (*Potter v. Bland* (1955) 136 Cal.App.2d 125, 288 [1955 Cal. App. LEXIS 146].)

Applicant's argument presupposes, however, that the WCJ applied the parol evidence rule, and further discounted or failed to consider evidence regarding contract formation, a contention not supported in the record. Rather, the WCJ clearly weighed the sworn testimony of Mr. King, applicant's conflicting testimony regarding Mr. King's authority to bind him to a contract, and the explicit language contained in the Player-Agent agreement barring Mr. King from committing applicant to any employment contract without prior written consent. Upon consideration of all of these factors, the WCJ concluded, "[i]t would appear Mr. King had the actual authority to both negotiate and accept an offer of employment on Applicant's behalf but for the clause in the Standard Player-Agent Contract." (F&O, Opinion on Decision, p.4.) Moreover, the parol evidence rule is neither invoked nor discussed in the F&O or the Opinion on Decision. Rather, the WCJ's final determination that the execution of the written contracts are controlling rests on the fact that *no prior agreement* has been established in the evidentiary record. (F&O, Finding of Fact No. 2; Report, at p.3.)

Accordingly, we agree with the WCJ's conclusion that applicant has not sustained the burden of proof necessary to establish that a contract for hire was made in California, either directly or through his agent. (*Tripplett v. Workers' Comp. Appeals Bd, supra*, 25 Cal. App. 5th 556; *Jenkins v. Arizona Cardinals* (ADJ45I9826, October 19, 2011) [2011 Cal. Wrk. Comp. P.D. LEXIS 485]; *Banta v. Detroit Lions* (June 1, 2017, ADJ2447813) [2017 Cal. Wrk. Comp. P.D. LEXIS 232]; *Brown v. Arizona Cardinals, et al.* (October 24, 2019, ADJ10354615) [2019 Cal. Wrk. Comp. P.D. LEXIS 460]; *Kropog v. New York Giants, et al.* (March 3, 2020, ADJ10220275) [2020 Cal. Wrk. Comp. P.D. LEXIS 112].) We affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 4, 2019 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT, (See Dissenting Opinion)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2022

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

MATTHEW KONAN
GOLDBERG SEGALLA
LEVITON, DIAZ & GINOCCHIO
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. I would rescind Findings of Fact Nos. 2 and 3, and substitute findings of fact that applicant met the burden necessary to show his employment contract was accepted in California by his agent, conferring California jurisdiction pursuant to Labor Code sections 3600.5(a) and 5305.

I agree with the majority that "acceptance of an offer of employment in California by the injured worker *or by his or her agent* supports a finding of hire in California under sections 3600.5 and 5305. (*Alaska Packers Assn. v. Industrial Acc. Com. (Palma)* (1934) 1 Cal.2d 250, 252 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [55 S.Ct. 518, 79 L.Ed. 1044, 20 I.A.C. 326]; (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (1967) 68 Cal.2d 7, 12-13 [64 Cal.Rptr. 440, 434 P.2d 992]); *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 17–18, 21–22, 26–27 and fn. 14 [64 Cal.Comp.Cases 745].)

Here, there is no factual dispute that applicant's agent negotiated key terms of both contracts from his office in California. (October 17, 2018 Minutes, at 10:17; l1:22.) On this fact alone, this case is distinguishable from *Tripplett v. Workers' Comp. Appeals Bd.* (2018) 25 Cal. App. 5th 556 [83 Cal. Comp. Cases 1175], where applicant did not meet the burden of proving he or his agent accepted the offer while in California.

Given the presence of applicant's agent in California during the negotiations and at the time of offer, the salient question becomes whether applicant's agent, Mr. King, had the authority to bind applicant to a contract for hire. If the agent had such authority, the negotiation of terms and subsequent acceptance of the contracts were effectuated in California because a contract for hire was made within California's territorial jurisdiction under section 5305. (*Jackson v. Cleveland Browns* (December 26, 2014, ADJ6696775) [2014 Cal. Wrk. Comp. P.D. LEXIS 682] (panel dec.) [applicant established that he was hired in California based on evidence that his agent was authorized by applicant to accept contracts on applicant's behalf and that applicant was bound by terms negotiated and agreed to by his agent in California]; *Royster v. NFL Europe* (ADJ7597520, September 9, 2014) [2014 Cal. Wrk. Comp. P.D. LEXIS 445] (panel dec.) [acceptance of employment by applicant and agent while in California is hiring in this state]; *Palepoi v. Seattle Seahawks* (ADJ7087477, February 5, 2015) (panel dec.) (*Palepoi*) [hiring in California by one team through agents' acceptance of employment in this state provided WCAB with jurisdiction

over cumulative injury claim and supported joinder of another team that did not hire the applicant in California].)

The record shows that both applicant and his agent believed that Mr. King had the authority to bind applicant. Applicant testified that Mr. King spoke on his behalf and stepped into his shoes in the negotiations with the Philadelphia Flyers, before accepting the proposed contract on his behalf. (October 17, 2018 Minutes, at 6:16.) When Mr. King called to advise applicant of the contract with the Flyers, Mr. King did not present the specific terms of the contract, because applicant believed "the contract had already been done." (*Id*. at 8:3.) Applicant did not discuss or agree to the specific terms of the contract, and believed he could not reject it. (*Id*. at 8:4.) For his part, Mr. King testified that "in real life the player gives full authority to the agent. He gives authorization to the agent to manage and negotiate on his behalf and it is always verbal. All negotiations are verbal as well as any discussions which lead to a contract to follow." (*Id*. at 10:7.) Mr. King was clear that "prior to negotiation, he had authority to bind the applicant to a contract." (*Id*. at 10:14; 10:21)

The record further demonstrates that all parties to the contract acted in accordance with, and reliance on, their belief that Mr. King had authority to bind applicant. Following the accord reached with Mr. King in California, the Flyers promptly paid for applicant's travel to their facilities in Canada. (October 17, 2018 Minutes, at 6:19.) There, applicant signed the document, with no further negotiations, no discussion of terms, and no changes to the contract. (*Id*. at 6:20.) Similarly, following Mr. King's agreement to the proposed contract with the Tulsa Oilers, the team paid applicant's travel expenses to fly to their facilities in Tulsa, OK. (*Id*. at 6:22.) Once again, there were no further discussions of terms, no tryouts or drills, and no changes to the contract. Applicant simply signed the previously agreed-upon contract. (*Ibid.*) Mr. King testified credibly that after the contract with the Philadelphia Flyers was negotiated, he hung up the phone believing applicant was now employed by the Flyers. (*Id*. at 11:4.) Following professional standards and practices, Mr. King confirmed their agreement with Mr. Hanrahan from the Flyers organization, and then informed all other interested teams that applicant had accepted the contract and was "off the market." (*Ibid.*) Defendants Flyers and Oilers interposed no witnesses or testimony to contradict Mr. King's credible discussion of accepted practices of agents representing professional hockey players.

On these facts, it is clear that all parties to the contract, including applicant, Mr. King, and both professional hockey teams, possessed an operational understanding that Mr. King was empowered to negotiate on behalf of applicant, and to bind applicant to an employment contract.

In 1967, the California Supreme Court wrote:

> California maintains a stronger interest in applying its own law to an issue involving the right of an injured Californian to benefits under California's compulsory workmen's compensation act than to an issue involving torts or contracts in which the parties' rights and liabilities are not governed by a protective legislative scheme that imposes obligations on the basis of a statutorily defined status. Its interest devolves both from the possibility of economic burden upon the state resulting from non-coverage of the workman during the period of incapacitation, as well as from the contingency that the family of the workman might require relief in the absence of compensation. The California statute, fashioned by the Legislature in its knowledge of the needs of its constituency, structures the appropriate measures to avoid these possibilities. Even if the employee may be able to obtain benefits under another state's compensation laws, California retains its interest in insuring the maximum application of this protection afforded by the California Legislature. (*Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Coakley)* (1967) 68 Cal.2d 7, 11-12 [64 Cal.Rptr. 440, 434 P.2d 992].)

Here, it is clear that applicant, "a California resident injured in the course of his employment contracted for in California, falls within the class of persons whom the Legislature intended to protect under the comprehensive California workmen's compensation statute." (*Coakley, supra*, 68 Cal.2d 7, at 17-18.)

For these reasons, I would find that applicant has met his burden of establishing that a contract for hire was formed in California when his agent negotiated and accepted a contract on applicant's behalf with both the Philadelphia Flyers, and the Tulsa Oilers.

Accordingly, I would rescind Findings of Fact Nos. 2 and 3, and substitute findings of fact that applicant has met the burden of proof necessary to show a contract for hire was made in California by his agent, conferring California jurisdiction pursuant to Labor Code sections 3600.5(a) and 5305.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2022

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

MATTHEW KONAN
GOLDBERG SEGALLA
LEVITON, DIAZ & GINOCCHIO
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant filed an Application for Adjudication of Claim alleging injury to his head, upper extremities, lower extremities, musculo-skeletal system, and multiple parts while playing professional hockey from 4/2/2012 through 4/20/2016. An Amended Application was filed on 5/22/2017 to add the body parts of eye and ear. The matter proceeded to trial, at which time the parties stipulated Applicant did not play any games in California and the only issue present was jurisdiction. Applicant filed a timely and verified Petition for Reconsideration under *Labor Code* §5903 following the court's Findings and Order dated 2/4/2019 finding the court did not have jurisdiction over Applicant's claim under *Labor Code* §3600.5.

Applicant contends the court has jurisdiction over Applicant's claim because Applicant was hired in California. At the time of this report, Defendants had not filed an answer to the Petition for Reconsideration.

II. STATEMENT OF FACTS

On or about 2/1/2018, Applicant filed a Declaration of Readiness for a status conference. The hearing was held on 3/20/2018 at which time Defendant requested the matter be continued to a priority conference. At the priority conference on 5/15/2018, parties again requested a continuance. The matter was continued to another priority conference on 6/19/2018, at which time the parties set the matter for trial on the issue of jurisdiction.

At trial, parties provided various exhibits, and Applicant and Mr. King testified on Applicant's behalf. All parties provided trial briefs on the issue. The undersigned judge found the court did not have jurisdiction over Applicant's claim under *Labor Code* §3600.5, as Applicant failed to meet his burden to demonstrate the employment contract was accepted in the state of California.

It is from this Finding and Order that Applicant Petitions for Reconsideration under *Labor Code* §5903.

III.

DISCUSSION

As to Applicant's assertion that the WCAB has jurisdiction over Applicant's claim because he was hired in California, the court offers the following:

1. **Applicant assert the Tripplett case is not applicable because there is a finding that Applicant's agent had authority to bind the Applicant to an employment agreement and that a contract of hire was formed in California when accepted by Applicant's agent.**

The court respectfully disagrees with the Applicant and finds that *Tripplett* does apply to this case. In *Tripplett v. WCAB, Indianapolis Colts et al.* (2018) 25 Cal. App. 5th 556, 83 CCC 1175, 2018 Cal. App. LEXIS 652, the Court of Appeals held Applicant's employment contract was not accepted and formed until both the applicant and his agent signed the written agreement when both of them were outside of California. The fact that the agent was in California when he entered preliminary negotiations with the employer was insufficient to establish that an oral employment contract was actually formed. This conclusion is supported by the fact that there was no evidence the applicant's agent had the authority to bind the player to an employment agreement or accept such an agreement on his behalf.

The facts in this case are distinguishable but that does not mean that the holding in Tripplett does not apply. Both Applicant and his agent were in California when they agreed to the preliminary terms of the negotiations. **MOH/SOE dated 10/17/2018 pg. 7, lines 1-3**. However, Applicant also testified "…he could not play professional hockey without a written contract." **Id. at pg. 8, lines 3- 5**. Similar to that in Tripplett, "Applicant's employment agreement was in writing and specified that it became effective only after execution." Moreover, pursuant to the PHPA Collective Bargaining Agreement in effect at the time, "The SPC must be signed by the Player and, on behalf of the Member, the Coach or General Manager, and Governor, Alternate Governor, or designee. The SPC will be valid and binding upon the Player and the Member immediately upon execution." **Defendant's Joint Exhibit C, pg. 9, Sect. 3 (G)**. The SPC was not executed by the Applicant and the coach until 10/5/2015, in Tulsa, Oklahoma. **Applicant's Exhibit 4 and MOH/SOE dated 10/17/2018 pg. 9, lines 12-13.** Therefore, the employment agreement became effective on 10/5/2015 in Oklahoma and not in California.

Furthermore, the Court of Appeal in Tripplett stated "…the outcome here remains the same even if we assume that Tripplett's agent had some authority to bind him to an oral employment agreement at the conclusion of the agent's negotiation with Indianapolis. Tripplett's written employment agreement includes an integration clause that specifies it supersedes any prior oral agreement entered into between the parties." The same is true in this case. Applicant had an integration clause that superseded any prior oral agreement entered into. **Applicant Exhibit's 4**. The head coach of the Tulsa Oilers also provided an affidavit stating "No contract for employment existed prior to the Applicant signing his ECHL Standard Player Contract with the organization." **Defendant's Exhibit CCC**.

2. **Applicant asserts any language and any attempts to avoid California jurisdiction through contract language is illegal, pursuant to Labor Code §5000, §2804 and California Code of Civil Procedure §3513.**

Labor Code §5000 states "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division…" Labor Code §2804 states "Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State." The court does not believe Defendant is attempting to evade California law. Applicant did not play a single game in California nor have a practice in California. The court agrees with Applicant that the California courts have a strong policy to provide workers' compensation benefits to those hired within the state, but Applicant was not hired within California and therefore the court does not have jurisdiction.

The Collective Bargaining Agreement made a provision, specifically for workers' compensation, stating "If the State in which the Home Territory is located does not have Workers' Compensation for Players, the Member must provide similar insurance as is required by the State for other employees." Defendant wasn't contracting away Applicant's workers' compensation protection. Applicant must seek his workers' compensation rights under the correct jurisdiction, which in this case is the State of Oklahoma and/or Pennsylvania.

3. **The Court of Appeal in Tripplett is in direct opposition to controlling case law from the WCAB, Court of Appeal, California Supreme Court and the United State Supreme Court.**

Applicant asserts the court cannot ignore the holdings in *Arriaga v. County of Alameda (1995)* 9 Cal.4th 1055 and *Laeng v. Workmen's Comp. Appeals Bd. (1972)* 6 Cal.3d 771. The Court of Appeal in Tripplett did not ignore these two cases nor did the court in this matter. Furthermore, the court does not believe the Court of Appeal attempted to overrule the decisions of the California Supreme Court.

In *The Travelers Insurance Company v. Workmen's Compensation Appeals Board* (1967) 68 Cal.2d 7, the California Supreme Court concluded "California has adopted the rule that an oral contract consummated over the telephone is deemed made where the offeree utters the words of acceptance." Id. at pg. 14. As in *Tripplett*, the contract was not consummated over the phone when Mr. King accepted the preliminary terms. The contract was consummated when the Applicant arrived in Oklahoma and the Tulsa Oilers coach and Applicant signed the binding employment agreement, which specified it only became effective after execution.

Tripplett specifically addressed and distinguished itself from *Arriaga* and *Laeng*. In *Arriaga v. County of Alamenda* (1995) 9 Cal.4th 1055, Applicant was performing community service as part of a criminal infraction. The Supreme Court held even though the Applicant had no direct employment contract with the Department of Transportation, she still was an "employee" under workers' compensation law. In *Laeng v. Workmen's Comp. Appeal Bd*. (1972) 6 Cal.3d 771, Applicant was injured during a "'tryout' competition." The Supreme Court found that even though Applicant was not yet "employed", the Applicant was still protected under the workers' compensation law because the tryout had exposed the Applicant "to the same 'special risks' of employment". Id. at pg. 777. Neither of those cases, however, discuss where the Applicant was hired. The focus of *Arriaga* and *Laeng* was on employment and whether the Applicant was an employee at the time of injury. In this matter, like in *Tripplett*, the issue is where was the Applicant hired. The court is not in opposition of those cases; those cases are not on point to the issue at hand.

Applicant further cites *Bowen v. Workers' Comp. Appeals Bd.*, (1999) 73 Cal. App.4th 15 and asserts the Court of Appeal ignored the holding in the case. Again, the facts are distinguishable from those in *Bowen*. In *Bowen*, the team sent the written contract to the Applicant and the Applicant signed the contract in California. The court found the employment contract had been formed in California. In this matter, Applicant signed his contract with the Flyers in Canada (**MOH/SOE dated 10/17/2018 pg. 8, lines 12-13**) and signed his contract with the Oilers in Tulsa,

Oklahoma. **Id. at pg. 9, line 12**. Applicant argues that the court in Bowen held that it is not the contract language that dictates where the employee enters into the agreement but the location of the actual conveyance. What Applicant fails to mention is Applicant was made aware of the target points and not the entire contract. **Id. at pg. 11, lines 24-25**. How can one argue that a contract was entered into when neither the agent nor the Applicant were made aware of all the details of the contract? Mr. King testified he was not aware the Oilers were requesting a try-out. "It was not part of their discussion." **Id. at lines 17-18**. If there was not meeting of the minds, then no contract for employment was consummated until Applicant signed the contract in Tulsa. **Applicant's Exhibit 4**.

4. **The court erred in dismissing the oral contract for hire reached in California without legal basis as the Parol Evidence rule does not apply in this case.**

Applicant failed to provide sufficient evidence that the preliminary oral agreement reached by Mr. King, the teams and Applicant was the contract for hire. As stated above, the Oilers had Applicant participate in a Try-Out. **Applicant's Exhibit 4**. Mr. King testified he was not aware of this and it was not part of their preliminary discussion. **MOH/SOE dated 10/17/2018 pg. 11, lines 17-18**. If Mr. King was not aware of all the terms of the contract, he did not have the authority to bind the Applicant to the contract for hire. Therefore, it would seem the Parol Evidence Rule does apply in this matter. The oral agreement between the Tulsa Oilers, Mr. King and Mr. Konan were only preliminary negotiations.

IV.

RECOMMENDATION

It is the undersigned's recommendation that Applicant's Petition for Reconsideration be denied and the WCAB uphold and affirm the Findings and Order of the undersigned judge dated 2/4/2019.

DATE: March 7, 2019

Katharine Holmes
WORKERS' COMPENSATION JUDGE