WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PRIEST HOLMES, *Applicant*

vs.

KANSAS CITY CHIEFS, BALTIMORE RAVENS; TRAVELERS INDEMNITY COMPANY, *Defendants*

Adjudication Number: ADJ6966914
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings of Fact and Order of December 26, 2019, the Workers' Compensation Judge ("WCJ") found that applicant Priest Holmes, while employed during the period June 1, 1997 through December 31, 2007 as a professional football player, at various locations by the Baltimore Ravens for the period June 1, 1997 through January 14, 2001, and by the Kansas City Chiefs for the period April 23, 2001 through December 31, 2007, claims to have sustained injury to various parts of his body, that based on the medical opinions of Dr. Luciano and Dr. Glatstein as well as the testimony of the applicant, the date of injury is 2006 through 2007 pursuant to Labor Code section 5500.5, that the WCAB has jurisdiction over this case and controversy, that the State of California has a legitimate interest in this case, that the WCAB is bound by a forum selection clause for the period 2006 through 2007 but not for the period 2001 through 2003, that the relation back doctrine does not apply, that the WCAB declines to exercise jurisdiction over this claim because there is a forum selection clause in effect during the last year of cumulative trauma pursuant to Labor Code section 5500.5, that the Baltimore Ravens have no liability on this

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated March 6, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

cumulative trauma claim, that all other issues concerning the Ravens are deemed moot by virtue of the finding of a date of injury from 2006 through 2007, and that applicant's claim is not barred by the statute of limitations.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that to avoid inequity, liability should be "rolled back" to Travelers Indemnity Company ("Travelers") for the years 2001 through 2003, pursuant to Labor Code section 5500.5. Applicant further contends that the WCJ erred in applying *Williams v. Jacksonville Jaguars* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 88 to prevent "slicing" of the cumulative trauma injury, that Travelers obtained an unjust windfall by disputing a foreseeable consequence of its contract with the Kansas City Chiefs, that the WCJ's refusal to a "roll back" of liability under section 5500.5 produces a harsh result, that application of a "roll back" in this case is akin to a "roll back" in cases in which terminal employers and insurers have reciprocity, and that justice is not served if applicant is not afforded a "roll back."

Travelers filed two answers, one as insurer of the Baltimore Ravens and one as insurer of the Kansas City Chiefs.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate sections I (Introduction) and II (Factual Background) of the Report as set forth in the attachment to this opinion. We do not adopt or incorporate the remainder of the Report.

Based on our review of the record and applicable law, we are persuaded that the WCJ must revisit the issues of the date of the cumulative trauma injury, the division of liability under Labor Code section 5500.5, and whether there is a legal basis for "rolling back" liability, as distinct from "rolling back" the date of injury. Therefore, we will affirm the undisputed findings, amend the findings that require further consideration by the WCJ, and return this matter to the trial level for further proceedings and new findings on the outstanding issues by the WCJ.

In her Report, the WCJ states that "she would be exceeding her authority under the law to change the date of a cumulative trauma and *roll liability back* to 2000 - 2003 because there was no valid forum selection clause." However, the WCJ also states that "[i]t is from the finding by this Court that she would be exceeding her authority if she were to *roll back the cumulative trauma date of injury* that applicant has petitioned for reconsideration."

The above statements seem to indicate that the WCJ is confusing the issues of apportionment of liability under Labor Code section 5500.5 and the date of cumulative trauma

injury under Labor Code section 5412. The date of a cumulative trauma injury is determined pursuant to the latter statute, whereas Labor Code section 5500.5 pertains to the apportionment of liability for a cumulative trauma injury amongst employers. (See *Tanzman v. Warner Pac. Ins.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 398, citing *County of Riverside v. Workers' Comp. Appeals Bd. (Sylves)* (2017) 10 Cal.App.5th 119, 126–127 [82 Cal.Comp.Cases 301].)

As for the date of cumulative trauma in this matter, it appears to be undisputed that the date of applicant's alleged cumulative trauma injury under Labor Code section 5412 is June 1, 1997 through December 31, 2007; this is the date of the alleged injury stipulated at trial on September 18, 2019. We also observe that applicant concedes, "the cumulative trauma as stated by Dr. Luciano runs through 2007 [.]" (Petition for Reconsideration, 6:20-22.)

Concerning the claimed cumulative trauma from June 1, 1997 through December 31, 2007, we further note that there is an inconsistency between the WCJ's Opinion on Decision and her Report. In her Opinion on Decision at pp. 7-9, the WCJ distinguished *Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson)* (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257] ("*Johnson*") and explained that applicant's contacts with California during the period June 1, 1997 through December 31, 2007 were more than minimum and thus sufficient to give the WCAB jurisdiction over the entire cumulative trauma.[2]

In her Report, however, the WCJ suggests that California lacked a sufficient relationship with applicant's cumulative trauma from 2001 to 2003. Responding to applicant's claim that he played eight games in California from 2001 to 2003, the WCJ states that the claim is misleading because "the alleged injuries in California testified to at trial occurred after September 3, 2003 which is the date when the forum selection clause came into effect [.]" The WCJ goes on to state, "[a]pplying the logic of [applicant] it does not appear there were sufficient California contacts to roll back in the instant case."

The WCJ's analysis raises several questions. The WCJ responded to applicant's claim that injurious exposure included the time he played from 2001 to 2003 by referring to the injurious exposure in terms of specific injuries, whereas there is one cumulative trauma at issue in this case.

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[2] In *Johnson*, the Court defined the jurisdictional issues before it as "whether one or more state compensation laws apply and whether…California may provide a forum for the claim." (221 Cal.App.4th at 1122.) The Court went on to explain that the test is whether California "lacks a sufficient relationship with [the injured employee's] injuries, to require the petitioner—the employer—to defend the case here would be a denial of due process such that the courts of this state do not have authority to act. This might be referred to as a lack of subject matter jurisdiction." (Id. at 1128.)

Contrary to her Opinion on Decision, the WCJ implies in her Report that California had insufficient contacts with applicant's claimed injury for the time 2001 to 2003 for the WCAB to assert jurisdiction. In her Report, the WCJ also confuses the issues of liability under section 5500.5 and "minimum contacts," referring to the latter as something that can be "rolled back."

We conclude that the unresolved legal issues mentioned above also require the WCJ to revisit the factual issue of whether applicant had injurious exposure from 2001 to 2003. Based on applicant's trial testimony, it appears he played one game for the Baltimore Ravens in California in 2001 and four games for the Kansas City Chiefs from 2001-2002, the latter of which required applicant to obtain medical treatment in California. On the other hand, it appears the Kansas City Chiefs admit in their answer (9:19-22) that applicant played *eight* games for them in California from 2001-2003. The Baltimore Ravens fail to address this issue in their answer, and as noted above the WCJ's Report is unclear about it. Upon further proceedings at the trial level, the WCJ must revisit and clarify this factual issue.

Turning to the issue of forum selection clauses, we note the WCJ concludes her Report by stating, "to change the date of injury to find liability for [2001 to 2003] when there was no valid selection clause would circumvent the intent behind forum selection clauses and would be contrary to the holding in [*McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 (Appeals Board en banc).]"[3]

We have already noted above that apportioning liability under section 5500.5 by "rolling it back" to an employer's earlier period of coverage does not necessarily "change the date of injury," which in this case was stipulated to be June 1, 1997 through December 31, 2007. We further note that under the circumstances of this case, there are competing claims on public policy. The WCJ points out that it would be against public policy to circumvent a valid forum selection clause by "rolling back" liability to 2001-2003, a period of coverage by the Kansas City Chiefs during which there was no forum selection clause.

In addition, we note the weight of cases suggests that where California declines to apply its workers' compensation law against out-of-state teams, liability does "roll back" to the first team

[3] In *McKinley*, the Board held that the WCAB will exercise jurisdiction over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurs within the state, unless there is a reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation shall be filed in a forum other than California, and there is limited connection to California with the employment and the claimed cumulative injury.

over which California elects to exercise jurisdiction. (*Allen v. Minn. Vikings* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 543; *Langdon v. N.J. Devils* (2017) 82 Cal.Comp.Cases 928 (writ den.), citing *Milwaukee Bucks v. Workers' Comp. Appeals Bd. (Mason)* (2013) 78 Cal.Comp.Cases 1173 (writ den.) and *Toronto Raptors v. Workers' Comp. Appeals Bd. (Foster)* (2013) 78 Cal.Comp.Cases 1188 (writ den.); *Tampa Bay Buccaneers v. Workers' Comp. Appeals Bd. (Harper)* (2014) 79 Cal.Comp.Cases 595 (writ den.), citing *Portland Trailblazers v. Workers' Comp. Appeals Bd. (Whatley)* (2007) 72 Cal.Comp.Cases 154 (writ den.); *Washington Wizards v. Workers' Comp. Appeals Bd. (Roundfield)* (2006) 71 Cal.Comp.Cases 897 (writ den.); *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 301 (writ den.), citing *Employers Mutual Liability Insurance Company v. Workers' Comp. Appeals Bd. (Patterson)* 52 Cal.Comp.Cases 284 (writ den.).

Finally, we observe that in *New York Knickerbockers v. Workers' Comp. Appeals Bd. (Macklin)* (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141], the Court of Appeal held that California has a legitimate interest in an industrial injury where the applicant was employed by a California corporation and participated in other games and practices in California for non-California NBA teams (including the out-of-state Knickerbockers), during the period of exposure causing cumulative injury. Accordingly, the Court determined that subjecting the New York Knickerbockers to California workers' compensation law was reasonable and was not a denial of due process.

Of further interest is the final sentence of the *Macklin* opinion, in which the Court stated, "[t]he allocation of liability in cumulative injury cases under Labor Code section 5500.5, subdivision (a) is not the same as determining whether California can apply its workers' compensation law to Macklin's injuries. As he admittedly was [the New York Knickerbockers'] employee for part of the critical year, Labor Code section 5500.5, subdivision (a) applies." (*Macklin*, 240 Cal.App.4th at 1239-1240.) It bears further noting that in *Macklin*, the claimed period of cumulative trauma was August 17, 1981 to October 15, 1985 but liability under section 5500.5 evidently was apportioned to the New York Knickerbockers earlier in time, from June 29, 1983 to December 20, 1983 – the time when they employed the applicant. In this case, the WCJ should consider whether *Macklin* has any bearing, the cumulative trauma period here being June 1, 1997 through December 31, 2007 and the forum selection clauses being of no avail to the out-of-state teams from 2001 to 2003.

In summary, we conclude that the WCJ must revisit the date of cumulative trauma injury under section 5412 versus apportionment of liability under section 5500.5, the extent to which applicant's cumulative trauma injury had sufficient contacts to California from 2001-2003, and whether or not liability for the cumulative trauma from June 1, 1997 through December 31, 2007 may be "rolled back" to applicant's employment by the out-of-state teams from 2001-2003. We emphasize that no final opinion is expressed as to whether such "roll back" is legally permissible in this complex matter. When the WCJ issues a new decision on the outstanding issues, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order of December 26, 2019 is **RESCINDED,** and the following Findings are **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Priest Holmes, while employed during the period June 1, 1997 through December 31, 2007 as a professional football player, at various locations by the Baltimore Ravens for the period June 1, 1997 through January 14, 2001, and by the Kansas City Chiefs for the period April 23, 2001 through December 31, 2007, claims to have sustained injury to various parts of his body.

2. The Court finds that she has jurisdiction over this case and controversy and that the State of California has a legitimate interest in this case.

3. The Court finds that she is bound by a forum selection clause for the period 2006 through 2007 but not for the period 2001 through 2003.

4. The Court finds applicant's claim is not barred by the statute of limitations.

5. All other issues are deferred.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new determination of the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
December 30, 2022

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

PRIEST HOLMES
ALL SPORTS LAW
WALL, MCCORMICK, BAROLDI & DUGAN
DIMACULANGAN & ASSOCIATES
PEARLMAN, BROWN & WAX
SEYFARTH SHAW

JTL/ara

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

REPORT AND RECOMMENDATION OF CALIFORNIA WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant has filed a timely verified Petition for Reconsideration. For the reasons set forth below, this Petition should be denied. The Findings and Order was served on December 26, 2019 and therefore the filing of the Petition on the January 17, 2020 is timely.

II. STATEMENT OF FACTS

Applicant, Priest Holmes, a professional football player, alleged a cumulative trauma injury during the period June 1, 1997 through January 14, 2007 against the Baltimore Ravens (June 1, 1997 - January 14, 2001) and Kansas City Chiefs (April 23, 2001 – December 31, 2007).

The matter proceeded to trial on issues of date of injury, jurisdiction, choice of law/choice of forum, and the statute of limitations.

Prior to this Trial, the Kansas City Chiefs had prevailed at arbitration before Arbitrator Das on the issue of the choice of law/choice for forum clause in applicant's contracts with the Kansas City Chiefs for the period September 3, 2003 through 2007. As a result of the favorable ruling for Kansas City Chiefs, a cease and desist order issued against the applicant for the years he played for the Kansas City Chiefs during the period September 3, 2003 - 2007.

Arbitrator Das found that the applicant and Kansas City Chiefs had entered into a valid voluntary forum selection clause in each of the applicant's contracts during the period commencing September 3, 2003 - 2007.

This finding by Arbitrator Das resulted in the applicant's request to dismiss with prejudice from the cumulative trauma Great Divide Insurance Company on behalf of the Kansas City Chiefs for the period 2005 - 2007 and Travelers Insurance Company for the Kansas City Chiefs for the period September 3, 2003 – June 30, 2005 (Defendant Exhibit I).

Arbitrator Das left it to the Workers' Compensation Judge to determine the issue of the cumulative trauma injury for the period 2000 to 2003. This is the period of time when the applicant played for the Kansas City Chiefs when there was no valid forum selection clause in place.

This Court found based on the times played in California, the injuries sustained in California, and treatment received in California that the Appeals Board had subject matter jurisdiction over this case and that the applicant's contacts within the State were more than di minimis.

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The Court found that she would be exceeding her authority under the law to change the date of a cumulative trauma and roll liability back to 2000 - 2003 because there was no valid forum selection clause. The Court found to do so would be against public policy and would circumvent a valid forum selection clause.

The evidence at trial demonstrated that the Kansas City Chiefs had valid insurance policies in place during the entire cumulative trauma injury claimed. The Court noted that the insurance companies that provided coverage to the Kansas City Chiefs during the period September 3, 2003 - 2007 were dismissed with prejudice pursuant to applicant's request due to the valid forum selection clause.

It is from the finding by this Court that she would be exceeding her authority if she were to roll back the cumulative trauma date of injury that applicant has petitioned for reconsideration.

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