

CALIFORNIA WORKERS' COMPENSATION SPORTS LAW CASES

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INTRODUCTION

It is irrefutable that over the last several years, the number of Applications filed for California workers' compensation benefits by professional athletes has increased exponentially. Predictably with the dramatic increase in the number of cases filed, litigation has increased as manifested in Status Conferences, Mandatory Settlement Conferences, Trials and Appeals both to the WCAB and the Appellate Courts.

As a direct consequence there has been a recent rapidly expanding body of sports related case law in the form of WCAB Panel Decisions, writ denied cases and appellate decisions focused on this narrow but complicated area of workers' compensation practice. With the large number of decisions being issued, it is difficult even for the most seasoned and talented members of the bench and bar to track and organize cases in a manner that will not only facilitate analysis but hopefully illustrate and illuminate rapidly developing themes, trends and potential problem areas. This outline is designed to compile and analyze recent California workers' compensation sports law and related cases to hopefully assist everyone in the workers' compensation community who deals with sports related litigation.

It is a work in progress that will be expanded in both scope and detail in the upcoming months to include additional topic areas. The author would invite anyone who is interested, to submit cases for possible inclusion in the outline that may impact on California workers' compensation sports litigation. Cases can be sent to me directly at rhc@4pbw.com.

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1. California WCAB Jurisdictional Issues

1.1 Overview of California Contract Formation Principles and Issues

Contract formation issues and their relationship to subject matter jurisdiction generally focus on Labor Code sections 5305 and 3600.5. Labor Code 5305 may provide the basis for California subject matter jurisdiction “where...the contract of hire was made in this state.” Labor Code section 3600.5(a) also establishes California subject matter jurisdiction in situations where an employee/applicant was hired in California even if the injury or injuries occurs outside of the State of California.

If one approaches contract formation issues in workers’ compensation and the establishment of California WCAB subject matter jurisdiction and attempts to analyze the facts under strict common law principles of contract formation, one will not only become extremely frustrated but the analysis and conclusions will be directly at odds and inapposite with long standing California case law holding that traditional common law contract formation principles do not apply in determining the scope and applicability of the California Workers’ Compensation Act as a whole. This being said, even under what will be described as flexible non-traditional common law contract formation principles, there will still be a determination as to precisely when a contract for hire is formed. One merely has to develop a mindset that strict common law contract formation principles related to issues such as conditions subsequent or precedent and other traditional contract formation concepts do not control or strictly apply in workers’ compensation employment contract formation scenarios.

As stated by the court in Laeng v. WCAB (1972) 6 Cal. 3d 771, 37 Cal. Comp. Cases 185 the WCAB “is not confined...to finding whether or not the [defendant] and [applicant] had entered into a traditional contract of hire. The Laeng court also indicated that “Given the broad statutory contours of the definition of employee,...an ‘employment’ relationship sufficient to bring the California Workers’ Compensation Act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Act.”

The principles set forth in Laeng were affirmed and perhaps expanded in Bowen v. WCAB (1999) 73 Cal. App. 4th 15, 64 Cal. Comp. Cases 745. Bowen involved a California resident who was a professional baseball player. It was undisputed applicant signed his baseball contract while he was in California. However, the specific terms required the contract to be approved and signed by the Commissioner of Baseball in New York and also signed by the employer baseball team who were both outside California. In finding the contract was formed when the applicant signed it in California, the court characterized the signatures of the employer team and even the Commissioner of Baseball as conditions subsequent and the contract was formed when applicant signed the contract in California. The fact Bowen signed his contract in California was sufficient standing alone to establish subject matter jurisdiction even though he suffered his injuries or injury outside California. Again, it is important in analyzing these contract formation cases to engage in some “analytical gymnastics” in re-characterizing what would normally be a condition precedent, as an unnecessary condition subsequent to actual contract formation.

The fact there are contingencies, even ones characterized as important or critical contingencies, such as pre-employment physicals, drug testing, questionnaires, physical agility testing such as a tryout or workout, and the actual signing of a contract outside the State of California may, depending on the facts, be found to be conditions subsequent and the contract will be deemed to have been formed when the applicant/employee signed the contract in California before all of the above significant events or conditions. Numerous cases have also found acceptance of the contract in California even if it was a verbal contract formed over the telephone.

In the Reynolds case, the Court of Appeal indicated the contract for hire was made in California when the applicant accepted the employment offer in California even though he was required after his acceptance, to perform certain significant activities outside of California in Nevada. After accepting his contract in California, applicant was required to go to Nevada and fill out a lengthy questionnaire, obtain a security clearance and the employer retained the exclusive power to reject the applicant when he actually reported to work in Nevada. (Reynolds Electrical & Engineering Co. v. WCAB (Egan) (1966) 65 Cal. 2d 429, 31 Cal. Comp. Cases 415) A similar result is exemplified in the Janzen case. In Janzen the contract for hire was deemed formed in California based on a telephone conversation between a Wyoming employer and the applicant even though it was expressly discussed that employment was contingent upon the applicant performing a crop dusting test run satisfactorily. Applicant traveled to Wyoming and passed the test but unfortunately died a few days later in a crash. California subject matter jurisdiction applied with respect to the death claim. (Janzen v. WCAB (1997) 61 Cal. App. 4th 109, 63 Cal. Comp. Cases 91)

All of the above referenced cases and many more stand for the proposition that non-common law “flexible” principles of contract formation will in many instances serve to establish California workers’ compensation subject matter jurisdiction even in situations where the employer or carrier attempts to characterize actions and conditions to be consummated out of the State of California as conditions precedent. The “flexible” contract formation principles will essentially relegate any attempt to characterize these as condition precedents as futile.

Under California’s “flexible” contract formation principles, every case is fact specific and often dependent on circumstantial evidence. However, the common linking theme appears in many situations to be the applicant was a California resident or a long term California resident at the time the contract was formed. There are also scenarios and situations where the synergistic effect of the applicant(s) being California residents and regular employment activities performed in California will result in California WCAB subject matter jurisdiction even if there is overwhelming evidence that it may appear the contract(s) were otherwise formed outside of California.

1.2 Contract Formation Cases and Impact on California Jurisdiction

Jenkins v. Arizona Cardinals, Dallas Cowboys, Arizona Rattlers, et.al. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 189 (WCAB Panel Decision) (No California subject matter jurisdiction found)

Case Summary: In this case the WCAB found that notwithstanding the fact applicant's contract for hire with the Arizona Rattlers was negotiated by the applicant's agent in California, applicant was not bound by the terms negotiated by his California agent due to the fact he still had the discretion to entirely reject the contract after it was negotiated resulting in the contract being formed and executed in Arizona and not California.

From a procedural standpoint, the Board originally issued a decision in the case on October 19, 2011. Three different co-defendants filed a Petition for Reconsideration of the Board's original decision pointing out applicant's agent signed the employment contracts in California and again renewed their original arguments and contentions that the applicant's employment contract with the Arizona Rattlers was formed in California when the agent negotiated and signed the employment contract on October 19, 2004. There was no dispute that applicant actually signed his Rattlers' contract in Arizona. He was represented by a California agent and at trial applicant testified that in his mind and it was his belief his agent, who was in California, was authorized to negotiate his contracts and to bind him to those contracts by the agent's signature alone. The applicant testified he had no opportunity to reject contract terms negotiated by his agent with the Rattlers and he believed the negotiations were finalized and the contracts were "done deals" when he received them to sign. However, he also testified that "he had the ability to decline the contract negotiated by his agent if he didn't want the job." The WCAB interpreted this to mean the applicant had the ability to *entirely reject* the contract after it was negotiated and therefore his signature could not be properly characterized as a condition subsequent. They also pointed out that every contract requires the actual consent of both parties (Civil Code Sections 1550, 1565).

Discussion: While this is only a WCAB Panel Decision it is essential reading in that there is an extensive scholarly discussion and explanation of basic contract formation principles in the context of a workers' compensation claim and why strict common law contract formation principles do not control in a workers' compensation setting. The WCAB concluded that "where an employee has a right to entirely reject a written contract and does not unequivocally accept the contract until signing it outside of California, then the contract of hire is not made here."

The Board acknowledged there are situations and scenarios where there may be California subject matter jurisdiction even if the injured worker/applicant does not actually sign a written contract in California. The Board cited Luke v. Los Angeles Dodgers (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 125 (Appeals Board Panel Decision) where it was found that a professional baseball player's contract of hire was made in California notwithstanding the fact he actually signed his contract in Indiana because the essential terms of the contract were agreed to by telephone through a California agent while the player was in California with the agent. Therefore, the actual signing of the contract in Indiana was deemed to be a condition subsequent. They also discussed The Travelers Insurance Co. v. W.C.A.B. (Coakley) (1967) 68 Cal. 2d 7, 32

Cal. Comp. Cases 527 involving a California geologist who traveled to Colorado. While in Colorado he contacted an employment agency and then returned to California. He was then contacted by the Colorado employment agency by telephone of the employment opportunity which he accepted in California. However, in that case it was found the contract was formed in Colorado and there was no California jurisdiction due to the fact it was an employment agency that communicated the acceptance to the employer in Colorado. The WCAB also distinguished the instant case from the facts in Reynolds Electrical & Engineering Co. v. WCAB (Egan) (1966) 65 Cal.2d 429 [31 Cal. Comp. Cases 415] where the California Supreme Court determined that a contract of hire was made in California where a union ironworker was dispatched out of a hiring hall in Southern California to work in Nevada. In Egan it was the employer who could reject the employee when he arrived at the out of state job site. However, in the instant case, it was the professional athlete who retained the right to reject the contract and he was not required to travel to a distant worksite before he could exercise the right to reject. Moreover, in Egan, the applicant was paid regular wages for the time expended in traveling to the jobsite in Nevada while in the instant case the professional athlete was not paid wages by the Rattlers to travel to Arizona before he signed the contract there.

Moreover, the Board indicated that applicant's contract for hire was not made in California but instead in Arizona when he signed the contract was consistent with another Appeals Board decision in Ioane v. Oakland Raiders (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 416 (Appeals Board Panel Decision). (The fact applicant had a California based agent who negotiated his contract was not sufficient standing alone to establish jurisdiction when applicant was not in California when he signed the contract.)

In an interesting footnote, the WCAB noted that the WCAB's subject matter jurisdiction statutes appear to be predicated on California's interest in the injured employee. They questioned whether in adopting sections 5305 and 3600.5(a) the Legislature intended or contemplated it would have a sufficient interest in the alleged injury of a professional athlete if the state's only connection to the employee's claim is that his or her agent negotiated the contract in California, even if the agent had the authority to fully and finally bind the player. They indicated they did not need to reach that question given the facts of this particular case.

In emphasizing why common law rules of contract formation in terms of offer acceptance are not strictly applicable in a workers' compensation scenario the Board stated as follows:

Preliminarily, we do not agree with the Rattlers' assertion that "[t]he place where the contract is made is determined by the law of contracts, not the Labor Code. As stated in Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 776-777 [37 Cal. Comp. cases 185, 188]: "[The WCAB is] not confined...to finding whether or not the [defendant] and [applicant] had entered into a traditional contract of hire...[P] Given the broad statutory contours [of the definition of 'employee'],...an 'employment' relationship sufficient to bring the [California Workers' Compensation] [A]ct into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the ...Act." (Accord: Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal. App.4th 15, 25 [64 Cal. Comp. Cases 745, 753] (Bowen).)

Johnson v. San Diego Chargers (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 354 (WCAB Panel Decision) (No California subject matter jurisdiction found)

Case Summary: Applicant played for three different NFL teams. Following Trial the WCJ found applicant had sustained a cumulative trauma injury from June 15, 1986, through September 12, 1995, resulting in 64% permanent partial disability. The WCJ also found applicant's employment contracts were made in California and this provided a basis for the WCAB to exercise jurisdiction over applicant's claim against all three NFL teams he played for. The WCJ also concluded applicant was "regularly employed" in California by two of the teams but not the Kansas City Chiefs. The sole basis for finding California jurisdiction over the Chiefs was the WCJ's finding that applicant's employment contract was formed and accepted in the State of California by virtue of the applicant having a California based agent who negotiated the applicant's contract via telephone from California.

Two of the defendants filed a Petition for Reconsideration. The Kansas City Chiefs argued applicant's contract of employment was formed in Missouri. The WCAB granted reconsideration and rescinded the Findings & Award and Orders and determined the WCAB lacked subject matter jurisdiction over applicant's claim against the Kansas City Chiefs and returned the matter to the trial level for further proceedings and a decision by the WCJ.

Discussion: A number of facts were not disputed. Applicant never resided in California. He performed no work in California while employed by the Kansas City Chiefs. He was only employed by the Kansas City Chiefs for a little over two months from June 13, 1995, to August 21, 1995. Moreover, applicant signed his employment contract with the Kansas City Chiefs in the State of Missouri. It was also undisputed his agent had an office and operated out of California. It was from this office applicant's agent negotiated applicant's multiple NFL contracts including his contract of employment with the Kansas City Chiefs.

During the course of his deposition, applicant's agent gave conflicting and what was described by the Board as "mixed testimony." The agent confirmed applicant was not in California during the time he negotiated the Kansas City Chiefs' contract but had authorized the agent to enter into the contract on his behalf. The agent also acknowledged he could negotiate with several teams on behalf of one player and if he reached an agreement with multiple teams it would be up to the player to pick among the various teams. The agent also testified the applicant himself had the sole authority to determine which team's contract he wished to accept. Moreover, no player was obligated to play for a team even after negotiations were completed until the player actually signed a contract. The player could refuse any negotiated contract. He also stated that after he negotiated the applicant's contract with the Kansas City Chiefs from his office in California he discussed the negotiations with the applicant and if the applicant agreed then the agent would sign off. However, the agent also stated he believed the contract between the Kansas City Chiefs and the applicant was binding once the agent signed the contract, even before the applicant traveled to Kansas City, Missouri to sign the actual contract. In conflicting or mixed testimony, he also stated the written contract was not binding unless it contained the signatures of both the applicant and the agent.

Much of the Board's discussion and analysis focused on the Player Representative Agreement between the applicant and the agent as opposed to the actual NFL Employment Contract. Quoting from a pertinent part of the contract between the applicant and his agent the Board stated:

The Member Contract Advisor shall be the exclusive representative for the purpose of negotiating player contracts for Player. However, the Member Contract Advisor shall not have the authority to bind or commit Player to enter into any contract without actual execution thereby by the Player.

During the course of the Trial, applicant's testimony in many respects contradicted the deposition testimony of his agent. He testified his agent had the full authority not only to negotiate but to accept his employment contracts with any NFL team.

The Board discussed Labor Code section 5305 which extends the jurisdiction of the WCAB over injuries suffered outside California in cases where the injured employee is a resident of the state at the time of the injury and the contract of hire was made in the State of California. "If an employee who has been hired or is regularly employed in this state" sustained an industrial injury outside of California, the employee "shall be entitled compensation according to the law of this state." (Labor Code section 3600.5(a)) The Board also noted that generally, cases finding jurisdiction over out of state injuries based on California contracts of hire have been premised on the employee's acceptance of employment while present in California.

The WCAB noted the WCJ, in erroneously finding California jurisdiction over the Kansas City Chiefs, determined the contract was formed in California relying on the general concept of agency that an agent may bind a principal to a contractual agreement. However, the Board emphasized that in workers' compensation cases the WCAB is not bound, by or constrained in interpreting the provisions of the Workers' Compensation Act by the common law contractual doctrine of offer and acceptance, but must instead be guided by the purposes of the legislation at issue.

The critical question as articulated by the WCAB was to determine whether applicant's contract for hire and acceptance took place in California. The WCAB concluded the evidence in this case showed the contract between the applicant and the Kansas City Chiefs was not accepted by the agent in California but rather when the applicant signed his contract in Missouri. The Board focused on the contract between the applicant and his agent which they characterized as stating unequivocally the agent did not have the authority to bind or commit the player to enter into any contract without actual execution by the player. Therefore, applicant was not hired within California under Labor Code section 5305 and the WCAB cannot properly exercise jurisdiction over applicant's claim against the Kansas City Chiefs for any injuries sustained outside of the State of California.

Practice Pointer: For other cases dealing with the role of an agent in the contract formation process see Barrow v. WCAB (2012) 77 Cal. Comp. Cases 988 (writ denied) where applicant's California based agent negotiated the contract but then testified he did not believe he had the actual authority to accept or reject an offer from the potential team/employer. Based on these

facts, applicant failed to meet his burden of proof that he was hired in California under Labor Code section 5305. See also, Allen v. Milwaukie Bucks (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 138 (WCAB Panel Decision). In Allen the WCJ found applicant's California agent accepted the contract even though applicant signed the contract in Wisconsin and never played any games in California. The WCAB granted defendant's Petition for Reconsideration and remanded for further development of the record on whether there was substantial evidence that employment was actually accepted in California as opposed to merely being discussed or negotiated by the California based agent.

Douglas v. New York Giants; World League of American Football, et. al. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 510 (WCAB Panel Decision) (California subject matter jurisdiction found)

Issue: Were applicant's multiple employment contracts formed or made in California during the course of telephone negotiations before applicant actually signed his contracts in Florida.

Case Summary: Applicant appears to have been a long term or lifelong California resident. Following trial, the WCJ found he suffered injury to multiple orthopedic body parts and other body parts and conditions causing 84% permanent partial disability. Defendant, NFL Europe (World League of American Football), filed a Petition for Reconsideration alleging the WCAB has no jurisdiction over applicant's claim against NFL Europe based on the argument applicant was never employed or worked for NFL Europe in California and was not hired in California. The WCAB denied defendant's Petition for Reconsideration finding applicant's contracts were formed in California.

Analysis/Discussion: It should be emphasized that based on the facts set forth in the case summary, applicant appears at the time of entering into his contracts to have been a permanent and/or lifelong resident of California. Applicant had two periods of employment with NFL Europe. In terms of contract formation issues, he was contacted on two separate occasions at his home in Pasadena, California by coaches for two NFL Europe teams. Applicant testified he accepted what he characterized as offers from both coaches to take part in a training camp in Florida, orally agreeing to all terms of his employment contract including how much money he would make if he made the team, all of which took place during telephone conversations. NFL Europe paid for applicant to fly from Pasadena to Florida where they provided room and board during training camp. Applicant signed two separate employment contracts with NFL Europe, one on March 13, 2000, the other on March 22, 2001. Both contracts were signed in Florida. Defense witnesses confirmed and testified that airfare to NFL Europe's training camp in Florida including room and board and medical care were all provided by NFL Europe. Defense witnesses also testified the written contracts that were signed in Florida were non-negotiable and were generally signed on the first day of training camp. The contracts were signed before the players took to the field. All NFL Europe players basically had the same contract with the only difference being quarterbacks made a different salary. The defense witness also testified applicant could walk away from any job offer and there was no guaranteed spot on any roster until a player signed a contract. All potential NFL Europe players received a physical exam in

Florida. No one was allowed to play football before passing the physical. A defense witness also testified players would be sent home without a contract if they did not pass a physical or did not play with sufficient skill. Also all NFL Europe potential players had to have a passport and pass a drug test.

Both the WCJ and WCAB focused their analysis on Labor Code section 5305 which extends the WCAB's jurisdiction "over all controversies arising out of injuries suffered outside the territorial limits of California and in those states where the injured employee is a resident of the state at the time of the injury and the contract of hire was made in this state." Clearly the focal issue in this case was whether or not applicant's contracts of hire were made in California. Pursuant to Labor Code section 3600.5(a) "if an employee who has been hired...in this state" sustains an industrial injury outside of California, the employee "shall be entitled to compensation according to the law of this state".

The Board then went on to note that an employment contract can be formed over the telephone and is deemed a California contract of hire if it is accepted in California. The WCAB provided numerous case citations to support this principle.

The WCAB distilled the issue down to the fact applicant asserted he was offered employment by telephone while he was in California, whereas defendant claims no employment contract was made until the applicant actually signed a written agreement in Florida. The WCAB emphasized numerous previous cases have found that a contract formed over the phone is sufficient for the purposes of Labor Code sections 5305 and 3600.5(a) to establish subject matter jurisdiction even if the applicant must prove his or her abilities in another state before beginning work. The WCAB regarded these post telephone acceptance requirements as conditions subsequent or subsequent contingencies. "Thus, the fact that training camp did not necessarily lead to a position on a team is not dispositive, and we must consider whether employment agreements were formed during applicant's phone conversations with the two coaches." In concluding applicant's multiple contracts with NFL Europe were formed and made in the multiple telephone conversations while he was still in California before he went to Florida to sign his contracts, the WCAB stated:

Applicant accepted employment when he was invited by phone to attend NFL Europe training camp. The terms of the players' written contracts were non-negotiable, and they were usually signed on the very first day of training camp. In other words, the players arrived for training with nothing more to negotiate, having already agreed to the essential terms of the contract, even if they were not yet aware of every contractual detail. This accords with applicant's uncontested testimony that he knew all the terms of his employment, including his salary, before he agreed to travel to Florida.

The WCAB indicated the WCJ, based on the particular facts and circumstances of this case, correctly concluded that during multiple telephone conversations with the applicant, the NFL Europe coaches extended offers of employment to applicant which he accepted over the telephone in California. In conclusion, the WCAB indicated applicant was hired in California and therefore the WCAB had subject matter jurisdiction over his claim against NFL Europe and its carrier.

Cash v. Detroit Lions, Atlanta Falcons (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 567 (WCAB Panel Decision) (California subject matter jurisdiction found)

Case Summary: Following Trial the WCJ issued a Findings and Award and Order indicating applicant sustained 63% permanent disability with need for further medical treatment and there was California jurisdiction over both the Atlanta Falcons and Great Divide Insurance Company. Defendant filed a Petition for Reconsideration essentially arguing there was no California jurisdiction since applicant physically signed his contract in Georgia after he went there for a tryout.

Discussion: The first critical fact in this case is that applicant was characterized as a lifelong resident of California. He returned to California every off season during his NFL career. He had a California residence, California driver's license and filed income tax returns and was registered to vote in California. Also during the course of his NFL career, applicant was represented by an agent whose office was located in California.

Both applicant and his agent were in California when telephone contact was initiated by the Atlanta Falcons and after which applicant traveled to Georgia for a tryout. It is significant to note his transportation costs to the tryout were paid by the Falcons. After his tryout in Georgia, he physically signed his employment contract with the Falcons. Applicant also participated in off season conditioning in California and also returned to California to workout following an arm injury in September of 2006, during the course of his contract with the Falcons.

The WCAB indicated it was undisputed applicant signed his written contract while he was physically in Georgia and not in California. However, this begs the question and it is not determinative as to when his contract was actually accepted and formed. The WCAB pointed out there are a number of cases that hold the act of an employer or potential employer in providing transportation costs is a pivotal factor in determining where the contract was executed. They also noted there is case law indicating an employment tryout is for the benefit of the employer and injuries from the resulting risk are compensable industrial injuries.

The WCAB found there was a verbal acceptance of employment with the Falcons when he accepted the travel to Georgia for the tryout during which he participated in physical activities reflective of those during the term of the written contract. Applicant then suffered a cumulative trauma injury during the tryout which was subsequent to the verbal acceptance of employment and preceded the contract signature which the WCAB indicated "is not controlling as to the date of hire".

Defendant also argued the mere representation by a California agent is insufficient to confer California jurisdiction. However, the Board distinguished the facts of this case from a previous case which found representation by a California agent without more, is insufficient to confer California jurisdiction. They also noted in that case, Ioane v. Oakland Raiders (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 416, applicant was not a California resident and there was insufficient evidence in the record to determine the role of the California agent in the communication of the employment offer.

The WCAB also distinguished between personal jurisdiction over the employer as opposed to subject matter jurisdiction pursuant to Labor Code § 5305. There was clearly personal jurisdiction over the Falcons.

Therefore, based on a multiplicity of factors including California residency, California agent, and the fact the employer provided transportation for an out of state tryout, all established California subject matter jurisdiction.

Perez v. WCAB (2013) 2013 Cal. Wrk. Comp. LEXIS 91 (writ denied)

Holding: In this non-sports case, no California subject matter jurisdiction found notwithstanding applicant's primary residence was in California and the employer was based in California where the contract for hire was formed in Arizona and applicant performed no work or job duties in California.

Factual Background: Applicant's primary residence was in California. Defendant was a California based employer. It was undisputed the job offer and acceptance were both made in Arizona. No work was performed in California. Applicant suffered an injury while he was in Arizona and received initial treatment while he was in Arizona. At some point after the injury, he moved back to California which was the state of his primary residence. Applicant did receive some medical treatment in Arizona for a short period of time. When applicant moved back to California, defendant also authorized further medical treatment in California.

Following a period of medical treatment, applicant was offered a light work position and returned to Arizona to work. The injury was initially accepted by defendant. However, they later disputed and contested liability on the basis there was no California subject matter jurisdiction.

Following trial the WCJ determined there was no California subject matter jurisdiction. Applicant filed a Petition for Reconsideration which was denied and then subsequently filed a Petition for Writ of Review which was also denied.

Discussion: Although this is not a sports case, it is an excellent example of the fundamental principles of contract formation and California subject matter jurisdiction. Although the applicant's primary residence was in California and there was a California based employer, the job offer and acceptance was finalized while the applicant was physically present in Arizona and not in California. He was then injured outside California having never been employed in California let alone regularly employed or temporarily employed in California.

It also appears that at trial applicant's attorney raised the Labor Code section 5402 rebuttable presumption of compensability in that there was no denial of the injury within 90 days of knowledge by the employer. However, the WCAB noted Labor Code section 5402 "merely creates a presumption that a compensable industrial injury was sustained" and does not establish subject matter jurisdiction. The Board then cited a number of cases indicating subject matter jurisdiction may be raised at any time and that jurisdiction cannot be conferred by consent,

waiver, or estoppel. (Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, and Summers v. Superior Court (1959) 53 Cal. 2d 295)

In essence, applicant failed to meet his burden of proof showing there was a basis for California subject matter jurisdiction since he failed to establish that his contract of hire was made in California or that he was regularly employed in California and was injured outside of California.

1.3 Exemption/Exclusion from California Jurisdiction and Labor Code Section 3600.5(b)

Carroll v. Cincinnati Bengals, PSI, et.al. (2013) 2013 Cal. Wrk. Comp. LEXIS 102 (WCAB en banc decision)

Issue/Holding: Both an employer and employee (applicant) are exempt from California subject matter jurisdiction and California workers' compensation laws when all of the enumerated statutory conditions of Labor Code section 3600.5(b) are established.

Factual/Procedural Background

Facts: Applicant's NFL career spanned the period from 1991 through 1995. He initially signed a three year contract with the New Orleans Saints and played for them for two seasons from July 14, 1991, to August 30, 1993, when he was released and his contract was assigned to the Cincinnati Bengals. While applicant was employed with the New Orleans Saints he played five of his thirty two football games in California. While employed by the Cincinnati Bengals, for approximately seven months from September 1, 1993, to April 12, 1994, the Bengals played one of sixteen games in California, specifically on December 5, 1993, versus the San Francisco 49ers.

After being released by the Bengals on April 12, 1994, applicant was employed briefly by the Indianapolis Colts and the Kansas City Chiefs in 1994 and 1995, but did not make the final teams and played no games. Subsequent to his NFL career, he played briefly in the Canadian Football League and in 1996 decided to end his professional football career and return to his home state of Florida.

It was undisputed applicant was hired outside of California and was never a resident of California.

Procedural Background: The initial Findings, Award and Order issued on March 17, 2009, finding applicant suffered a cumulative trauma injury while employed by the Saints from July 14, 1991, to August 30, 1993, and by the Bengals from September 1, 1993, to April 12, 1994. In the original Findings, Award and Order, the WCJ specifically found the Bengals were not exempt from California workers' compensation laws and there was California subject matter jurisdiction. The Bengals filed a Petition for Reconsideration which was granted by the WCAB. The WCAB rescinded the WCJ's decision and remanded the case for development of the record specifically for further evidence as to whether or not the statutory conditions specified in Labor Code section 3600.5(b) were satisfied.

Further proceedings were conducted with respect to the potential application of section 3600.5(b) to the Bengals and applicant. The Bengals submitted additional documentary evidence.

The WCJ then issued his second Findings, Award and Order on January 24, 2011, again finding the Bengals were not exempted by section 3600.5(b) under the provisions of California workers'

compensation law and that the WCAB has subject matter jurisdiction to award benefits against both the Bengals and the Saints. Once again, the Bengals' Petition for Reconsideration was granted leading to the Board's en banc decision in this case.

Discussion/Analysis: The WCAB held that when an employee is hired outside of California and all of the following statutory conditions are met, both the employee and his or her employer are exempt from California jurisdiction by the express provisions of Labor Code section 3600.5(b), the Board identified and articulated those conditions as follows:

- (1) The employee is temporarily within California doing work for the employer,
- (2) The employer furnished coverage under the workers' compensation or similar laws of another state that covers the employee's employment while in California,
- (3) The other state recognizes California's extraterritorial provisions, and
- (4) The other state likewise exempts California employers and employees covered by California's workers' compensation laws from the application of its workers' compensation or similar laws.

Temporary Versus Regular Employment in California

The WCJ in his Findings, Award and Order and Report and Recommendation on Petition for Reconsideration acknowledged the section 3600.5(b) exemption applies only to an injured worker who is deemed to have been temporarily employed in California. However, the WCJ then indicated that, in his opinion, the statute did not apply since his analysis indicated the applicant was "regularly employed" in California. The WCJ's analysis of "regular employment" was premised on the reasoning that both the Saints and Bengals played football games in California as part of their regular season NFL schedule and also because California income tax was deducted from a portion of the applicant's salary attributed to the games he played in California. The WCAB found neither argument nor rationale precluded the application of the section 3600.5(b) exemption from California subject matter jurisdiction.

The WCAB also noted the WCJ's reliance on section 3600.5(a) was misplaced since that particular subdivision only addresses employees who are hired or regularly employed in California and who are injured while outside the State of California. Since it was undisputed applicant was not hired in California, section 3600.5(a) does not apply.

The Board, in applying a common sense and practical definition of temporary and temporary employment in California, relied on fundamental rules of statutory construction and the plain meaning of the word "temporary". They referred to the dictionary definition of temporary and applied it to the particular facts in the case. They noted a substantial majority of applicant's work duties while he was with the Bengals were performed in Ohio as well as other states outside of California. Moreover, when applicant traveled to California with the Bengals for two days when they played against the San Francisco 49ers on December 5, 1993, "He knew and intended that it be for a temporary period of about two days to work in a football game." It was

both the applicant's and Bengals' expectation and intent to leave the State of California when the game against the San Francisco 49ers was completed.

The WCAB noted that applicant's counsel argued and presented cases that there was California subject matter jurisdiction and no exemption since a portion of the applicant's injurious exposure, i.e., a portion of an alleged cumulative trauma claim occurred within the state. However, the WCAB noted none of the cases cited involve evidence that supported application of the section 3600.5(b) exemption as in the instant case. The WCAB ruled the Bengals consistently argued that section 3600.5(b) exempts both it and applicant from the provisions of California workers' compensation laws and presented more than sufficient evidence establishing the conditions required for the statutory exemption to apply.

The Payment of California Income Tax Argument

As indicated hereinabove, the WCJ in issuing his Findings, Award and Order as well as his Report on Reconsideration, indicated the 3600.5(b) exemption did not apply because applicant paid California income tax on the earnings attributable to his one game with the Bengals in California. In dealing with this argument, the WCAB cited language from their previous en banc decision in *McKinley*:

Applicant is correct that nonresident *professional athletes* pay California income taxes on income earned in the state, based on a 'duty day' formula established by the Franchise Tax Board. *However, the Legislature has established the basis for the WCAB's jurisdiction, and it has not seen fit to include payment of California income taxes as a ground for jurisdiction.* Moreover, no authority holds that payment of state income tax requires the WCAB to adjudicate an employee's claim for workers' compensation, and tax law does not control how California's system of workers' compensation is administered, given the very different purposes of those laws. *The fact that applicant paid income tax on earnings attributable to the game he played in California does not change our finding that he was only temporarily within California doing work for his employer when he played in that game. (McKinley, supra. 78 Cal. Comp. Cases at 31-32, emphasis added, citations deleted.)*

The Other Statutory Conditions and Elements of Labor Code Section 3600.5(b)

The WCAB then went on in detail discussing all of the required conditions and elements necessary to establish the exemption from California subject matter jurisdiction and California workers' compensation law provided by section 3600.5(b).

In addition to applicant not being regularly employed in the State of California by the Bengals, the Board indicated the evidence established the following:

1. The Bengals furnished workers' compensation under the laws of Ohio that covered applicant's employment while in California.
2. Ohio recognized the extraterritorial provisions of other states including California.

3. Ohio exempts California employers and employees covered by California workers' compensation laws from application of its workers' compensation laws.

In dealing with applicant's argument regarding the application of the Ohio statute of limitations would render applicant's claimed injury non-compensable in Ohio, the WCAB noted it really did not matter if the Ohio statute of limitations had run and prevented applicant from bringing his workers' compensation case in Ohio. The real issue was that the Bengals provided workers' compensation coverage under the laws of Ohio that did cover applicant's work while he was temporarily in California in 1993 in the game against the San Francisco 49ers. Simply put, applicant failed to timely file a claim in Ohio when had the right to do so.

Practice Pointer: It is of critical importance analytically to distinguish between the Board's holding in the en banc decision in McKinley and the en banc decision in Carroll. In McKinley, the Board emphatically stated there was California subject matter jurisdiction but they chose not to exercise it based on what they deemed to be valid and enforceable choice of law/forum clauses in the applicable employment contract or contracts applicant had with the Arizona Cardinals. Also there was no significant California public policy that was implicated in McKinley that prevented the enforcement of the contractual choice of law/forum provisions in the applicant's contract.

In contrast, Carroll deals with Labor Code section 3600.5(b) which is an express exemption from California subject matter jurisdiction and the workers' compensation laws of California if all of the statutory conditions are met. It does not involve Labor Code 3600.5(a) directly and did not involve the issue of the validity of any contractual choice of law/forum clauses or provisions.

See also Fike v. Baltimore Ravens/Cleveland Browns (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 363 (WCAB panel decision) post Carroll case finding applicant and the Ravens and Browns were exempt from California jurisdiction since applicant was not "regularly" employed in California. (3600.5(a)). Moreover, defendant established all of the required conditions and elements of Labor Code section 3600.5(b); Liberty v. International Basketball League (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 382 (WCAB panel decision) International Basketball League and Las Vegas Silver Bandits exempt from California jurisdiction based on Labor Code section 3600.5(b) and Nevada reciprocity statute; Rucker v. Cincinnati Bengals (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 394 (WCAB panel decision) WCAB reverses WCJ who found subject matter jurisdiction based on assertion he was not a "temporary employee" within meaning of Labor Code section 3600.5(b). WCAB in reversing WCJ noted applicant only played one game in California and defendant also met all the requirements per the Carroll en banc decision to establish the employer and applicant were exempt from California jurisdiction; Sadowski v. Cincinnati Bengals (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 395 (post-Carroll no jurisdiction); Young v. Baltimore Ravens/Cleveland Browns (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 404 (WCAB panel decision) (Browns post-Carroll exemption from California jurisdiction); Sanford v. Baltimore Ravens/Cleveland Browns (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 397 (WCAB panel decision) (Browns exempt from California jurisdiction under Carroll avoiding a potential 81% permanent disability award).

Booker v. Cincinnati Bengals (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 114 (WCAB Panel Decision)

Procedural Overview: This is the second of two successive cases issued by the WCAB. This case, issued on May 1, 2012, is commonly referred to as Booker II. Booker I was decided by the Board on February 8, 2012. Both are WCAB Panel Decisions.

Applicant filed a Petition for Reconsideration of the WCAB's decision in Booker I. In Booker II, as will be discussed hereinafter, the Board acknowledged in Booker I they made a mistake/misstatement which they were correcting in Booker II. In Booker I the WCAB indicated that 3600.5(b) requires that the workers' compensation laws of another state must be "similar" to those in California. The Board noted the correct interpretation is as follows:

Section 3600.5(b) does not provide that the workers' compensation laws of the other State must be "similar" to those of California. Instead, section 3600.5(b) requires that the employer has furnished workers' compensation insurance coverage "under the workers' compensation insurance or similar laws" of *the other State*. This language merely recognizes that not all states regulate workers' compensation through a Workers' Compensation Act per se.

Case Summary: Applicant's Petition for Reconsideration of the Board's decision in Booker I basically dealt with some of the same arguments and issues that were made in Booker I related to whether or not defendant had satisfied all of the elements and criteria that are required/mandated by section 3600.5(b) and the nature and sufficiency of the evidence to prove the elements. Applicant also argued he paid California taxes on the one game he played in California was sufficient to vest California WCAB jurisdiction and he was without a remedy in the State of Ohio.

Certain basic facts in the case are undisputed. Applicant was born in Cincinnati and also went to high school and college in Cincinnati. He was never a resident of the State of California and he was hired outside of California in terms of any employment contract with the Cincinnati Bengals. Applicant played in the NFL for nine seasons, three of those seasons were with the Bengals encompassing the NFL seasons of 2000, 2001 and 2002. Also, in his initial contract with the Bengals entered into on approximately February 16, 2000, for five years, his NFL Player Contract contained a forum selection clause indicating any workers' compensation claim, dispute, or cause of action arising out of the applicant's employment with the Bengals would be subject to the workers' compensation laws of the State of Ohio and any action would be brought within the courts of Ohio or the Industrial Commission of Ohio or such other Ohio tribunal that has jurisdiction over the matter.

During the three seasons the applicant played for the Bengals, applicant only played one game in California on September 30, 2001.

The WCAB denied applicant's Petition for Reconsideration finding defendant had satisfied all of the elements and conditions required under section 3600.5(b) as an exception/exemption to California WCAB jurisdiction. Moreover, the mere fact applicant paid California taxes for the one game he played in California does not result in California subject matter jurisdiction.

Discussion:

The Labor Code Section 3600.5 Condition/Criteria and the Sufficiency of Proof

The WCAB indicated preliminarily that it had subject matter jurisdiction over all injuries sustained in California pursuant to Labor Code sections 5300 and 5301 with one exception as provided in Labor Code section 3600.5(b). In order for a non-California employer to take advantage or to utilize the 3600.5(b) exception for conditions or criteria have to be met. The Board also emphasized all of the conditions and criteria must be satisfied. The Board outlined those conditions as follows:

(1) The employee is working only "temporarily" in California; (2) the employer has workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than California; (3) this insurance covers the employee's work in California, and (4) the other state recognizes California's extraterritorial provisions and likewise exempts California employers and employees covered by California's workers' compensation laws from application of the laws of the other state. The certificate described in the last paragraph of section 3500.5(b) provides prima facie evidence that condition numbers two and three have been satisfied.

Applicant's primary argument with respect to Labor Code section 3600.5(b) was defendant had to produce an actual "certificate" showing the out of state employer's workers' compensation insurance provides extraterritorial coverage. The WCAB held that the actual production of a certificate was not required in every case but only provides prima facie evidence that conditions numbers two and three have been satisfied. A defendant can produce other evidence to satisfy conditions two and three.

In this case, defendant did not offer into evidence a 3600.5(b) certificate. However, defendant did introduce un rebutted and unimpeached documentary evidence in the form of separate letters and testimonial evidence that established the Bengals had the requisite extraterritorial workers' compensation insurance coverage for the single game the applicant played in California on September 30, 2001. One letter was from the director of the self-insured Department of the Ohio Bureau of Workers' Compensation and another letter from the Chief Legal Officer and General Counsel of the Ohio Bureau of Workers' Compensation. This documentary evidence was augmented by the trial testimony of an Executive Vice President with the Bengals.

The Lack of Notice Argument

Applicant also argued the WCAB had California subject matter jurisdiction because the Bengals allegedly failed to comply with the Ohio statutory requirements that it give notice to an Ohio administrative agency of this extraterritorial coverage. The Board summarily rejected this

argument noting section 3600.5(b) only requires the out of state employer have valid extraterritorial insurance and does not encompass, from a jurisdictional standpoint, any alleged failure to comply with insurance notice requirements of the other state.

The No Cumulative Trauma In the Other State Argument

Applicant argued that there was no evidence that Ohio recognizes cumulative trauma injuries for professional athletes and also Ohio does not have the same statute of limitation requirements California has with respect to the employer failing to give notice to the employee of his workers' compensation rights. In essence the WCAB indicated 3600.5(b) basically requires an employer to have extraterritorial coverage that would pay benefits for a workers' compensation injury under the other state's workers' compensation laws which may not encompass in every situation an injury as defined by California Workers' Compensation Law. The WCAB also pointed out, contrary to applicant's argument, that Ohio workers' compensation laws do cover professional athletes and also cover cumulative trauma injuries.

The Board in several instances commented on the fact a number of applicant's arguments were spurious and lacked merit. The Board also indicated a number of the authorities cited by applicant in support of their arguments were "inapposite".

Payment of California Taxes for the One Game Applicant Played in California Does Not Invoke California Subject Matter Jurisdiction

The WCAB acknowledged non-resident professional athletes pay California income taxes based on what is described as a "duty day" formula. Applicant argued and raised various legal and public policy arguments as to why payment of such taxes should furnish the basis for California subject matter jurisdiction.

While the WCAB acknowledged the payment of taxes and other contacts with California might satisfy personal jurisdiction it does not establish California WCAB subject matter jurisdiction. The WCAB stated:

The nature and extent of the WCAB's subject matter jurisdiction is established by the Legislature by statute. Section 3600.5(b) sets out the criteria for subject matter jurisdiction over an employee injured while temporarily employed in California. The employee's payment of California income taxes is not one of them. Applicant's public policy argument must be made to the Legislature.

Based on the Parties Forum Selection Clause, the WCAB Indicated That Even if it Was Assumed There Was Subject Matter Jurisdiction Under Labor Code Section 3600.5(b) the WCAB Would Not Exercise Jurisdiction

In Booker II the WCAB provided a detailed discussion as to various reasons why, if they were called upon to rule on the validity of the parties' contractual choice of forum clause, they would most likely find it valid and therefore choose not to exercise California subject matter jurisdiction.

The WCAB also discussed in detail and at length the distinction between the WCAB declining to exercise jurisdiction under a forum non conveniens argument as opposed to the exercise of subject matter jurisdiction pursuant to a forum selection clause. The WCAB noted an alleged statute of limitation bar is a relevant consideration when considering whether to decline jurisdiction under a forum non conveniens clause, but is not relevant in terms of determining the validity of the parties' forum selection clause in an employment contract.

The Board also noted enforcement of a valid forum selection clause does not necessarily implicate Labor Code section 5000 related to the waiver of an injured worker's right to a California workers' compensation benefits. The Board in that regard stated:

We are, of course, mindful that an injured employee cannot, by contract, waive his or her right to workers' compensation benefits or exempt the employer from liability for them. (Lab. Code §§ 5000, 2804.) However, a forum selection clause neither waives the right to California benefits nor exempts the employer from liability for them. (Cf. *Intershop Communications v. Superior Court* (2002) 104 Cal. App. 4th 191, 200-201 (holding that Lab. Code § 219, which provides that "no provision of this article [regarding the payment of wages] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied," was not violated by enforcement of a forum selection clause).)

Therefore, in light of the forum selection clause in applicant's Contract with the Bengals, we would decline to exercise jurisdiction under section 3600.5(b), even if arguably we would otherwise have jurisdiction.

Jameson v. Cleveland Browns (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 137 (WCAB Panel Decision)

Case Summary: Following Trial the WCJ found applicant suffered a cumulative trauma injury from April 2001, to December 31, 2003, to multiple parts of his body while employed as a professional football player. The WCJ found the injuries caused 62% permanent disability and need for further medical treatment and applicant's claim was not barred by the statute of limitations. Defendant filed a Petition for Reconsideration focusing on their assertion there was a lack of California subject matter jurisdiction over the cumulative trauma injury pursuant to Labor Code section 3600.5(b) and also applicant was not regularly employed in California as required by Labor Code section 3600.5(a). The WCAB granted reconsideration and rescinded the WCJ's Amended Findings and Award and Order and returned the matter to the trial level for further proceedings and a new final decision.

Discussion: It was undisputed in his NFL career applicant played in forty two regular season games, one playoff game, and numerous pre-season games during a career that spanned the years 2001 to 2004. However, he only played one game in California. The parties stipulated to the fact defendant, the Cleveland Browns, were self-insured at the time of injury. The WCJ also indicated applicant was hired outside of California and he was only a temporary employee in California based on the fact he only played one game in California.

The real issue in this case is the sufficiency or insufficiency of the evidence to establish the elements under Labor Code section 3600.5(b). The WCJ erroneously concluded defendant had not provided sufficient admissible evidence with respect to the relevant Ohio laws and statutes.

The WCAB then discussed the specific provisions of Labor Code section 3600.5(b) which basically provides that if certain specific enumerated conditions are met, the laws of a state other than California will provide the exclusive remedy for an employee hired outside of California but injured while working in California. In essence Labor Code section 3600.5(b) is an exception to California jurisdiction as opposed to a jurisdictional statute itself.

The WCAB noted the defense trial brief provided a citation to Ohio Workers' Compensation Law including statutory and case law to establish that Ohio's insurance coverage met the coverage and reciprocity requirements mandated by Labor Code section 3600.5(b). They also made reference to their recent decision in Booker v. Cincinnati Bengals wherein a panel determined, based on an analysis of relevant insurance coverage and reciprocity provisions of Ohio law, that the employer's insurance and Ohio workers' compensation law met the requirements of section 3600.5(b).

In terms of the sufficiency or necessary evidence to prove up Ohio's statutes and case law, the WCAB provided an important practice pointer for WCJs and practitioners with respect to the scope and nature of judicial notice. The WCAB indicated in Footnote 4 as follows:

There should no issue as to whether the WCJ should take judicial notice of Ohio statutes and case law, given that these matters are essential to a determination of our subject matter jurisdiction. Evidence Code section 452(a) provides that judicial notice *may* be taken of "the decisional, constitutional, and statutory law of any state of the United States..." Though a party may request judicial notice, Evidence Code section 454(a)(1) indicates that a court "in determining the propriety of taking judicial notice" may take notice of "any source of pertinent information...whether or not furnished by a party." The WCJ should ascertain whether the cited statutes and case law are the relevant and applicable law of Ohio. Given the informality of workers' compensation proceedings in California, the citations should be considered without more.

The WCAB concluded the WCJ's findings of fact failed to address various issues and also failed to consider applicable Ohio case law and statutes. The WCAB rescinded the Amended Findings and Award and Order and returned the matter to the trial court whereupon the WCJ should permit defendant to submit relevant evidence to establish that its self-insurance covers applicant's out of state claim of injury, review of the relevant law and make a determination as to whether the Workers' Compensation Appeals Board may exercise subject matter jurisdiction.

1.4 Personal Versus Subject Matter Jurisdiction

Thompson v. Seattle Supersonics, Washington State Department of Labor & Industry (2009) Cal. Wrk. P.D. LEXIS 245 (WCAB Panel Decision)

Holding: California personal jurisdiction must be established by personal service or its equivalent or a voluntary appearance in the action.

Case Summary: Following trial, the WCJ found applicant incurred a cumulative trauma injury while playing professional basketball games in California for the Seattle Supersonics. Applicant was awarded 67% permanent disability and future medical treatment. The actual Award issued not only against the Seattle Supersonics as the employer, but also against the Washington State Department of Labor & Industry as the purported insurer for the Seattle Supersonics. Applicant and both defendants filed Petitions for Reconsideration. With respect to the Petition for Reconsideration filed by Washington State Department of Labor & Industry, the WCAB granted the Petition for Reconsideration and reversed the WCJ's determination there was personal jurisdiction over the Washington State Department of Labor & Industry (Washington L&I).

Discussion: It is interesting to note it was not the applicant but rather the Seattle Supersonics who petitioned for Washington L&I to be joined as a defendant. They were claiming Washington L&I provided coverage for the Supersonics from June 1984, to July 1986. In order to accomplish that end, the Supersonics filed a Petition for Order Joining Washington L&I and the Petition for Joinder was served on Washington L&I as well as a Notice of Trial. When there was no appearance at Trial the WCJ formally joined Washington L&I as a defendant and proceeded with the Trial even in their absence. It was undisputed Washington L&I had service of the applicant's claim, the Petition for Joinder and the Notice of Trial.

In its discussion, the Board was careful to distinguish the basis for California subject matter jurisdiction as opposed to California personal jurisdiction. The WCAB noted personal jurisdiction must be established by personal service or its equivalent. There is no basis for personal jurisdiction if the party does not appear when notified by mail citing Yant v. Snyder & Dickenson (1982) 47 Cal. Comp. Cases 245 (WCAB en banc). The WCAB noted there was no evidence in the record Washington L&I was ever personally served or it voluntarily appeared in the action and as a consequence personal jurisdiction was never established over and contrary to the findings of the WCJ.

As an aside, the WCAB noted the issue of personal jurisdiction might be moot given the fact there was no evidence or proof Washington L&I was ever authorized to write workers' compensation insurance in California as required by Labor Code section 3700. In the absence of such a showing, the Board indicated the Supersonics should and could be found to be illegally uninsured.

The WCAB determined it was undisputed the WCAB did have subject matter jurisdiction as opposed to personal jurisdiction.

Practice Pointer: With respect to the issue of personal jurisdiction and special appearances, there is a companion case that was decided in the following year, Johnson v. New Jersey Nets, Seattle Supersonics, Washington State Department of Labor & Industry (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 233 (WCAB Panel Decision). Washington L&I filed a Petition for Reconsideration again arguing California did not have personal jurisdiction over it and also argued they did not have subject matter jurisdiction. The WCAB determined California did have subject matter jurisdiction to determine whether applicant suffered an alleged cumulative trauma injury while allegedly regularly employed within the State of California pursuant to Labor Code sections 3600.5, 5300, 5301 and 5500.5.

However, with respect to the issue of personal jurisdiction, the Board noted while Washington L&I did make appearances, each appearance was indicated on the record to be a “special appearance” by which they were contesting both personal and subject matter jurisdiction. The Board noted special appearances to contest jurisdiction are allowed in workers’ compensation proceedings (Janzen v. WCAB (1997) 61 Cal. App. 4th 109, 63 Cal. Comp. Cases 9). Given the fact Washington L&I made a special appearance and were never personally served, California personal jurisdiction was never established over them.

Comment: Both of the above cases are excellent examples of the critical distinction between personal jurisdiction versus subject matter jurisdiction. As a general rule “personal jurisdiction” is usually quite simple to establish. Stated another way, establishing personal jurisdiction over an out of state employer will not automatically establish “subject matter” jurisdiction.

1.5 Validity of Contractual Choice of Forum/Law Provisions

McKinley v. Arizona Cardinals (2013) 2013 78 Cal. Comp. Cases 23; 2013 Cal. Wrk. Comp. LEXIS 2 (WCAB en banc decision) *(writ denied 7/11/13)

Case Summary: Applicant played for the Arizona Cardinals from 1999 through June 24, 2003, a period of four years. During the period of his employment, the Cardinals played a total of 80 games. Of those 80 games, 40 were played in Arizona and 40 in other states including 7 games in California. In addition, he participated in a 5 day training camp for the Cardinals in La Jolla, California.

There was no evidence applicant was a resident of California. All of his employment contracts with the Arizona Cardinals were signed and formed in the State of Arizona. Applicant resided in Arizona during the period of time he played for the Cardinals. Arizona was also the location where he performed the majority of his employment duties including practices, training and playing in games.

Each of the employment contracts applicant signed or entered into with the Cardinals contained identical forum selection clauses mandating any claim for workers' compensation benefits shall be filed with the Industrial Commission of Arizona and would be subject to the workers' compensation laws of the State of Arizona and "no other state". He was represented by an agent in negotiating his employment contracts with the Cardinals.

Following trial, the WCJ found that while the WCAB has jurisdiction over applicant's claim, his contacts with California were insufficient to warrant the exercise of subject matter jurisdiction, especially in light of the forum selection clauses in his multiple employment contracts. The WCJ ordered that applicant "take nothing". Applicant filed a Petition for Reconsideration. The essence of applicant's contention and arguments on reconsideration were that the WCAB had jurisdiction to adjudicate his claim. He also alleged his connection with California was sufficient and strong enough to support a claim for workers' compensation benefits within the State of California and more importantly the forum selection clauses in his multiple employment contracts were not enforceable under California law.

Discussion: In its en banc decision, the WCAB discussed and analyzed a number of critical issues and contentions. First, from a due process standpoint, California had personal jurisdiction over the Arizona Cardinals.

Moreover, California had jurisdiction to determine if California and in particular the WCAB was the proper forum to adjudicate applicant's workers' compensation claim. The Board indicated they would not address the question of whether applicant's claimed cumulative trauma itself was sufficiently connected with California to support the exercise of jurisdiction because they were going to focus on the choice of forum/law clauses in the applicant's multiple employment contracts with the Cardinals. However, the fact applicant may have suffered a portion or portions of his alleged cumulative trauma in California as a matter of California law, meant he would fall in the category of employees to whom California extends workers' compensation coverage.

The WCAB then basically articulated an overview of basic California jurisdictional principles and tenets. They articulated the basic jurisdictional principles as follows:

1. California workers' compensation benefits are to be provided for industrial injuries sustained in the State of California so long as statutory conditions of compensation are met.
2. The California Workers' Compensation Act applies to all injuries whether occurring within the State of California or occurring outside of the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California.
3. The jurisdictional reach of the WCAB extends to both specific injuries that are the result of one incident or exposure that causes disability or need for medical treatment, but also to "cumulative injuries that occur as a result of physically traumatic activities extending over a period of time the combined effect which causes disability or the need for medical treatment".
4. The WCAB may also exercise jurisdiction over specific industrial injuries occurring outside of California's territorial boundaries in cases where the injured worker had more than a limited connection with the state. Most of the cases cited by the WCAB in support of this principle involved California residents where the contract for employment was made in California or a significant portion of applicant's employment was performed within the State of California.

The WCAB also acknowledged and distinguished a line of earlier cases that did not involve or have at issue forum selection clauses. In these earlier cases the WCAB chose to exercise jurisdiction over claims of cumulative trauma and industrial injuries where only a portion of the injurious exposure caused in the cumulative injury occurred within the state. The Board cited five cases as examples of where the Board had exercised jurisdiction where only a portion of the cumulative trauma injury occurred within the state including Ransom, Carpenter, Whatley, Roundfield, and Crosby. However, none of these cases involved contractual forum selection clauses.

The Labor Code Section 3600.5(b) Exemption Distinction and Its Relationship to Labor Code Section 3600.5(a)

The WCAB then clarified that Labor Code section 3600.5(b) was inapplicable to the facts of this case since that section operates as an exemption statute and basically exempts certain employers and employees from coverage under California workers' compensation, but in and of itself does not establish jurisdiction over applicant's claim based on the particular facts of this case. The focal point instead should be Labor Code section 5300, where the WCAB may have jurisdiction and adjudicate a claim of industrial injury when there is sufficient connection to California and the statutory conditions of compensation are met.

Applicant's Limited Connection to California with Respect to Both the Aspects of Employment and Claimed Cumulative Injury

The WCAB noted that notwithstanding the fact applicant participated in 7 football games in California during his four years of employment with the Cardinals and also participated in a 5 day training camp in La Jolla, California, these were insufficient and inadequate connections to California in a jurisdictional sense when viewed in the perspective of the choice of forum/law clauses in the employment contracts.

Instead applicant's "**primary**" connection during his four years of employment with the Cardinals was with the State of Arizona as opposed to California. The Cardinals were headquartered in Arizona. Applicant regularly trained and practiced at the team facility in Tempe, Arizona. He also spent a substantial majority of his work time in Arizona. In terms of the applicant's limited connection to California, the WCAB focused on the fact he was not a resident of California when he contracted to play for the Cardinals. The actual employment contracts were formed and entered into in Arizona. They also noted that with respect to the 40 games applicant did not play in Arizona, 33 of those games were played in states other than California. Based on the applicant's limited connection to California, the WCAB indicated this was for purposes of jurisdiction, insufficient for the WCAB to elect to exercise jurisdiction over his workers' compensation claim as opposed to Arizona.

The California Income Tax Argument

Applicant argued he paid California income tax based on games he played in the state and he had a due process right to have his workers' compensation claim adjudicated in California. The WCAB acknowledged non-resident professional athletes pay California income taxes on income earned in the state based on what is characterized as a "duty day" formula established by the Franchise Tax Board. However, the basis for the WCAB's jurisdiction is statutory and the Board indicated the legislature did not include payment of California income taxes as a ground or condition for WCAB jurisdiction. Also the workers' compensation system and the state tax system have fundamentally different purposes.

Applicant's Attempted Reliance on Alaska Packers (Palma)

Applicant argued that the forum selection clause in his multiple employment agreements with the Arizona Cardinals was unenforceable citing Alaska Packers Assoc. v. I.A.C. (Palma) (1935) 294 U.S. 532 (affirming the California Supreme Court's decision at (1934) 1 Cal. 2d 250). The WCAB made short shrift of that argument, noting the applicant in Palma was a non-resident alien who entered into his contract of employment in California with an Alaska employer. In contrast, Mr. McKinley did not enter into his contract in California. The undisputed evidence indicated he entered into all of his employment contracts in Arizona.

Forum Selection Clauses are Presumed Valid and are Generally Enforced Under Straight Contract Principles Unless They are Unreasonable or Contrary to a Fundamental Public Policy

From a historical perspective, the WCAB noted that for a period of approximately 38 years, from 1934 until 1972, when the United States Supreme Court issued their decision in M/S Bremen v. Zapata Offshore Co. (1972) 407 U.S. 1 that forum selection clauses were not favored. However, based on the Bremen decision, forum selection clauses in a variety of contracts, including employment contracts, were cloaked with a presumption of validity. Based on Bremen the WCAB articulated a number of key/core principles as follows:

1. There is a presumption in favor of enforcement of a forum selection clause which has been regularly applied by California courts in the years following the Bremen decision. A forum selection clause should control absent a strong showing that it should be set aside and only upon particular grounds.
2. Enforcement of a forum selection clause is based upon principles of contract not equity. Therefore the principles of forum non conveniens are generally inapplicable.
3. When a defendant seeks to defend a forum selection clause, the burden of proof is upon the applicant to show the clause and selected forum are unreasonable and the factors involved in a traditional forum non conveniens analysis do not control. A forum selection clause is presumed valid and the courts have placed a substantial and heavy burden on the plaintiff to show that application of the forum selection clause would be unreasonable. Generally forum selection agreements should be honored and enforced by the courts absent some compelling and countervailing reason for not enforcing them.

Application of These Principles to the Facts of this Case

The forum selection clauses in McKinley's contracts were not the product of fraud or overreaching based on the facts of this case. It did not matter he did not read the specific forum selection clause in his contract. The particular forum selection clauses in his contracts with the Cardinals were unambiguous. Applicant was represented by an agent during the contract negotiation process and his trial testimony demonstrated he was free to accept or reject the contracts and he accepted them without undue influence. The WCAB also indicated there was adequate consideration looking at the specific monetary amounts provided in each of the employment contracts.

The Selection of Arizona as the Proper Workers' Compensation Forum for the Applicant to Adjudicate any Workers' Compensation Claim was Reasonable

The Board indicated it was manifestly evident that Arizona had a substantial and material connection to applicant's employment and his related claim for workers' compensation. Moreover, the majority of the activities claimed to have caused applicant's cumulative trauma injury primarily occurred in Arizona. It was also objectively reasonable to identify Arizona as the proper forum to adjudicate his workers' compensation claims especially in light of the

number of other states where the Cardinals played games and the potential for jurisdictional conflicts.

Applicant argued it would be unreasonable for the WCAB to enforce the forum selection clause because allegedly the statute of limitations had run on any workers' compensation claim he may have filed in Arizona. The WCAB indicated, however, this is more of an equitable argument under the forum non conveniens line of cases as opposed to the contract enforcement principles applicable to contract forum selection clauses. "In determining whether a contract forum selection clause should be enforced, it ordinarily does not matter if the statute of limitations has run in the selected forum." "Consideration of a statute of limitations would create a large loophole for the parties seeking to avoid enforcement of the forum selection clause. That party could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum. The unreasonableness exception to the enforcement to a forum selection clause refers to the inconvenience of the chosen forum as a place for trial, not to the effect of applying the law of the chosen forum."

The Board also posed an interesting question as to whether or not the reason the Arizona statute of limitations may have run was perhaps attributable to a delayed knowledge of injury but due to applicant's lack of diligence, or more importantly, whether applicant made a conscious decision not to file his claim in Arizona and instead made a deliberate and conscious decision based on advise that he could receive better benefits in California than in Arizona.

There was no Evidence or Showing that Arizona was not a Convenient Forum for the Applicant

Applying the Bremen analysis, the Board noted there was no evidence it would have been gravely difficult or inconvenient for applicant to have filed a workers' compensation claim in Arizona. Again, the WCAB astutely recognized it appeared to them applicant had perhaps filed his claim in California solely in order to have it adjudicated under California law and perhaps for no other reason than to obtain greater benefits. Therefore, there was a choice of remedy and forum for the applicant which he, perhaps on the advice of counsel, made a decision not to exercise.

Applicant's desire to adjudicate his claim under California law does not provide good reason for the WCAB to exercise jurisdiction over his claim because there was limited connection with California with regard to his employment and claimed cumulative injury, and he expressly and reasonably agreed with the Cardinals that any claim for workers' compensation would be filed in Arizona and adjudicated under Arizona law. Enforcing the forum selection agreement provides certainty as to the forum where the claim should be adjudicated.

The Forum Selection Clause and Applicant's Multiple Employment Contracts with the Cardinals were not Contrary to California Fundamental Public Policy

Again the WCAB noted applicant's argument about a violation of public policy based on Labor Code section 5000 and the Alaska Packers/Palma case were not well taken since his employment contract was not formed or executed in California. They noted the policy arguments that were readily apparent in Palma were completely absent in the instant case.

The Board concluded their assessment of the public policy aspects and considerations by stating as follows:

It is immediately apparent that the fundamental public policy considerations identified in *Palma* are not present in this case. In *Palma*, unsophisticated seasonal employees were hired in California to work for a period of short duration in Alaska before being returned to California. In this case, applicant was hired in Arizona pursuant to an employment contract made in that state and he worked primarily in Arizona for a period of several years. Applicant was represented in the negotiation of his employment agreements by a professional agent, and those agreements were supported by substantial monetary compensation. In addition, none of the barriers to filing a workers' compensation claim in the designated forum that are described in *Palma* are present in this case.

California's Public Policy to not Allow Forum Shopping or Burdening Its Courts also Impacted this Case

The WCAB indicated that California courts and every court recognized and should recognize the decisions involving enforcement of forum selection clauses have an impact upon the delivery of justice in the forum state. California has an interest in the avoidance of overburdening local courts with congested calendars in cases in which the local community has little concern. Citing the California Supreme Court's decision in Price v. Atchison, T. & S. F. Ry. Co. (1954) 42 Cal. 2d 577, 583-584, the Board stated:

[W]e are of the view that the injustices and the burdens on local courts and taxpayers...which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state...require that our courts...exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.

Basically the Board concluded Arizona clearly has a materially greater interest than California in determining the applicant's workers' compensation benefits since he was an Arizona resident who contracted for employment in Arizona and who was employed by an employer based in Arizona and performed most of his work duties in Arizona. The Board indicated "We have identified no California fundamental public policy that requires the WCAB to devote its limited resources to the claim in this case."

Comment: For Federal precursor/parallel decisions dealing with the validity of contractual choice of forum/law in N.F.L. employment contracts in the context of the N.F.L. Collective Bargaining Agreement (CBA) and related arbitration decisions see:

- Matthews v. National Football League Management Council (2012) 608 F. 3d 1107; (9th Circuit) 77 Cal. Comp. Cases 711;
- Miami Dolphins Ltd. v. Newson (2011) 783 F. Supp. 2d 769 (W.D. Pa.);
- Chicago Bears Football Club, Inc. v. Haynes (2011) 816 F. Supp. 534 (N.D. Ill.);
- Cincinnati Bengals v. Abdullah (2013) 2013 WL 154077 (S.D. Ohio);
- Kansas City Chiefs Football Club, Inc. v. Allen (2013) U.S. Dist. LEXIS 46424 (W.D. Mo.);
- Atlanta Falcons Football Club v. Nat'l Football League Players Assoc. (2012) ____ F. Supp. ____, 2012 WL 5392185 (N.D. Ga);
- New Orleans Saints v. Cleeland (2012) No. 11-CV-02093, ECF No. 55 (E.D. La)

Williams v. Jacksonville Jaguars (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 88 (WCAB Panel Decision) (Post McKinley)

Holding: With respect to determining potential liability under Labor Code section 5500.5, contracts with a valid choice of forum clause/provision impacting on jurisdiction must be analyzed to determine if they fall within a defendant's period of liability pursuant to Labor Code section 5500.5(b).

Case Summary: The WCJ in a Findings & Order found applicant suffered a cumulative trauma injury for the period of January 1, 2001, through December 5, 2009, to various body parts and conditions. However, the WCJ found the contracts between the applicant and the Jacksonville Jaguars for the three year period from 2008 to 2011, included forum selection clauses that were determined to be reasonable and enforceable and therefore the WCJ declined to exercise jurisdiction.

Applicant filed a Petition for Reconsideration arguing the WCJ applied the forum non conveniens doctrine and also that all of the applicant's contracts for the entire CT period did not contain choice of forum/choice of law clauses for all of his employment, but only for the three year period of 2008 to 2011.

The parties stipulated at Trial that while the applicant played for the Jacksonville Jaguars he was always a resident of Florida and never a resident of the State of California. There was also a stipulation there was no California agent involved and he did not sign his contracts within the State of California. Applicant practiced in one game in San Francisco in 2009, but did not play in the game. He did not play any games in California from 2005 to 2009 and played two games in California in 2004.

The employment contracts he signed with the Jacksonville Jaguars for the three years between 2008 and 2011, had a specific addendum indicating "the exclusive jurisdiction for resolving injury related claims shall be the Division of Workers' Compensation of Florida, and in the case of a Workers' Compensation claim the Florida Workers' Compensation Act shall govern."

On reconsideration the WCAB acknowledged that “on occasion” it has exercised jurisdiction over cumulative injury claims when a portion of the injurious exposure occurred in California. Applicant’s counsel relied on Injured Workers’ Ins. Fund of Maryland v. WCAB (Crosby) (2001) 66 Cal. Comp. Cases 923 (writ denied). However, the WCAB pointed out that Crosby did not involve a contractual choice of forum provision or provisions.

The WCAB also noted that:

The Appeals Board will decline to exercise jurisdiction over a claim of cumulative industrial injury when 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 regard to the employment and the claimed cumulative injury. (citing *McKinley v. Arizona Cardinals* (2013) 78 Cal. Comp. Cases 23, 24) (Appeals Board en banc)

The WCAB then provided a general discussion and analysis that in general forum selection clauses are presumed valid unless the party challenging the validity of the forum selection clause is able to prove a number of factors as outlined by the WCAB in its McKinley en banc decision relying on the Bremen case.

The WCAB found no evidence of fraud or overreaching and more importantly in terms of whether the contractual forum would be gravely difficult and inconvenient for the party challenging the forum selection clause the Board stated:

On the contrary, it appears from applicant’s petition that he filed in California because California’s laws were more favorable to his claim, particularly the statute of limitations. But “[a]pplicant’s desire to adjudicate his claim under California law does not provide good reason for the WCAB to exercise jurisdiction” when “there was limited connection with California with regard to his employment and claimed cumulative injury, and he expressly and reasonably agreed” to bring workers’ compensation claims elsewhere.

With respect to applicant’s forum non conveniens argument the WCAB indicated the WCJ was not using a forum non conveniens analysis but rather a straight jurisdictional argument based on forum selection clauses. With respect to the forum non conveniens argument the Board stated:

Florida’s statute of limitations would be relevant to an analysis under the doctrine of forum non conveniens, but “[t]he factors that apply generally to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause.” (*Berg v. MTC Electronics Technologies Co., Ltd.* (1970) 61 Cal. App. 4th 349, 358)

The WCAB also acknowledged that while there was an eight year cumulative trauma period and in only three of those eight years the applicant signed contracts with forum selection clauses under Labor Code section 5500.5(b) the contracts in question with the forum selection clauses fell under and in defendant's period of liability and therefore were covered by the contracts containing the forum selection clauses resulting in no California WCAB jurisdiction over the Jaguars.

***Knight v. New Orleans Saints* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 58 (WCAB Panel Decision) (Post McKinley)**

Case Summary: By way of a Findings and Order, the WCJ found a cumulative trauma injury from December 4, 2001, through August 25, 2005, causing 78% permanent disability and need for further medical care and treatment. Parts of body, date of injury and permanent disability were stipulated to by the parties. The primary issue was the validity of the choice of forum/law clauses in the applicant's multiple employment contracts with the New Orleans Saints. For a variety of reasons based on the WCAB's *en banc* decision in McKinley, the judge ordered applicant take nothing finding the choice of forum/law clauses in applicant's contracts to be valid and enforceable.

Discussion: Applicant was employed by the New Orleans Saints from September 6, 2001, through August 26, 2005. During this period of time he signed five one year contracts. All of the contracts contained the clause that with respect to any workers' compensation claim dispute or injury the workers' compensation laws of Louisiana would apply and any action would be brought and determined exclusively with the Louisiana courts.

During his employment with the Saints, applicant was never a resident of California. Also the parties stipulated applicant never signed or accepted any of his NFL employment contracts in California and was never represented by a California agent during his employment with the New Orleans Saints.

However, the parties also stipulated applicant played two games in California during his five years of employment with the New Orleans Saints. One of the games applicant played in California was on November 7, 2004, after which applicant had his knee drained. There was also a stipulation applicant sustained a knee injury before November 7, 2004, on August 7, 2004, and again another knee injury on December 12, 2004, and had knee surgery at the end of the season. It is important to note applicant never made a claim for a specific injury in California.

The WCAB basically ran these facts through the McKinley analysis. The Board indicated that while the WCAB has in the past in certain cases exercised jurisdiction over cumulative injury claims where a portion of the injurious exposure occurred in California, many of those cases did not involve or deal with choice of law/forum clauses in the employment contract. Where there is a reasonable mandatory forum selection clause, the Board may decline to exercise jurisdiction over a cumulative trauma injury. This is especially true when there is a limited connection to California with regard to employment and the claimed cumulative injury. The Board noted a party challenging the validity of a mandatory selection clause has the burden of showing the

clause is unreasonable. They noted that applicant, a non-resident who was hired outside of California, had a very limited connection to California by virtue of two games played in the state while employed by the Saints. The Board noted that choice of forum/law clauses are presumed valid unless the challenging party can establish the clause was unreasonable basically pointing to four factors as follows:

(1) the clause was the product of ‘fraud or overreaching,’ (2) ‘enforcement would be unreasonable and unjust,’ (3) proceeding ‘in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will for all practical purposes be deprived of his day in court,’ and (4) ‘enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.’

The Board noted there was absolutely no evidence of fraud or overreaching in this case since the applicant was represented by his agent during each contract year. Also it would be neither unreasonable or unjust to enforce an agreement between an athlete and a sports team in which both selected as the forum for workers’ compensation litigation the state where the team (employer) was located and where the applicant/player resided when he began his employment and for several years thereafter. On an interesting note, the WCAB indicated nothing in the record demonstrated applicant by proceeding in the selected state, Louisiana, would be “gravely difficult”. It pointed out the reason he voluntarily chose or designated to file his workers’ compensation claim in California was that California laws were more favorable to his claim particularly the statute of limitations. California was not a last recourse but a reasoned selection by applicant and applicant’s California attorney. “Applicant’s desire to adjudicate his claim under California law does not provide good reason for the WCAB to exercise jurisdiction” when “there was limited connection with California with regard to his employment and claimed cumulative injury, and he expressly and reasonably agreed to bring workers’ compensation claims elsewhere.

In an interesting footnote with respect to a discussion of the statute of limitations and its relevancy as to whether or not applicant’s remedy in Louisiana may be precluded, the Board noted that “although the statute of limitations might be relevant to an analysis under the doctrine of forum non conveniens, “[t]he factors that apply generally to a forum non conveniens motion do not control a case involving a mandatory forum selection clause.” (*Berg v. MTC Electronics Technologies Co., Ltd* (1970) 61 Cal. App. 4th 349, 358.)

The Board in discussing the statute of limitations and also Alaska Packers in dealing with the public policy argument raised by applicant pursuant to Labor Code section 5000, noted that unlike the injured worker in Alaska Packers, the professional athlete in this case made a reasoned and calculated decision by voluntarily choosing and selecting California to file his workers’ compensation claim when he had every right to avail himself of workers’ compensation benefits in Louisiana.

Applicant’s counsel cited the Crosby case at 66 Cal. Comp. Cases 932 (writ denied), a 2001 case for the argument or proposition that all that is necessary for California to validly assert subject matter jurisdiction is the applicant play a single game in California. First, the WCAB indicated

that Crosby was not binding authority since it was a writ denied case, and more importantly was distinguishable. Crosby did not involve a contractual choice of law provision. The Board also noted they could consider the validity and enforcement of the forum selection clauses without reaching the question of whether there was jurisdiction to decide the case.

Kenlaw v. Houston Comets (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 159 (WCAB Panel Decision)

Holding: Where there is no contractual choice of law/forum clause in the applicant's contract and if there is substantial medical evidence that a portion of the applicant's cumulative trauma injury was sustained in California, there is a basis for California subject matter jurisdiction.

Factual and Procedural Background: Following trial, the WCJ determined the applicant, a coach with the Houston Comets, suffered a cumulative trauma injury to multiple body parts over the period of January 1, 1978, to July 1, 2008. Defendant filed a Petition for Reconsideration arguing there was no valid basis for California subject matter jurisdiction since mere injurious exposure in California is insufficient to invoke California jurisdiction. Defendant also argued there were additional grounds to deny California subject matter jurisdiction, including applicant was not a resident of California and was employed by a Texas employer under a contract entered into outside of California and her injury did not occur in California. The WCAB denied defendant's Petition for Reconsideration and adopted and incorporated the WCJ's Report on Reconsideration.

Facts: The parties agreed to use an AME in orthopedics who opined that applicant's coaching activities, including the time she worked for the Houston Comets, contributed to her cumulative trauma injury. Applicant was employed by the Houston Comets for approximately six months from April 1, 2007, to October 1, 2007. During that period of time, in her capacity as an assistant coach, she came to California on three occasions with the Comets, both coaching and practicing during those three games on June 13, 2007, June 16, 2007, and August 19, 2007. Applicant testified, and it appears it was undisputed, that part of her coaching duties while in California involved body to body contact and other arduous activities.

It was also undisputed applicant's contract or contracts with the Houston Comets did not include a choice of law/forum provision as found by the WCAB in the McKinley case.

Both the WCJ and WCAB indicated there was no issue with respect to an exemption from California jurisdiction under Labor Code section 3600.5(b) and therefore the issue came under Labor Code section 3600.5(a) in which the WCAB's jurisdiction extends to injuries sustained in California by employees hired outside of the state but temporarily within California doing work for the employer. Defendant's primary argument was that applicant's work related activities in California were de minimis and therefore did not constitute injurious exposure or injury AOE/COE. However, the AME's opinion in orthopedics indicated otherwise.

Practice Pointer: Given the AME's opinion that a portion of applicant's cumulative trauma injury was suffered in California, supported the WCJ's and WCAB's finding her work activities in California were a contributing cause of her overall industrial cumulative trauma injury. In the absence of a valid contractual choice of law/forum provision it appears this case follows a long line of cases indicating that so long as there is substantial medical evidence indicating a portion of applicant's cumulative trauma injury was suffered in California, there is a valid basis for the WCAB to exercise California subject matter jurisdiction.

2. Stays and Consolidations

Bladischwiler v. Detroit Lions, CNA Claims Plus, Inc. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 225 (WCAB Panel Decision)

Case Summary: The Presiding Judge of the Santa Ana WCAB District Office denied defendant's Petition/Request for Consolidation of fourteen separate cases. The Presiding Workers' Compensation Judge denied the Petition/Request and defendant filed a Petition for Removal. The removal was denied by the WCAB for a variety of reasons.

Discussion: The basis for defendant's Petition/Request for Consolidation of fourteen different cases all involving professional football players with the Detroit Lions who played from 1960 through the 1980s, was that a single proceeding would consider and adjudicate issues related to the statute of limitations, laches, California jurisdiction, and date of notice by the employer of the applicants' claimed injuries. Defendant argued there were common issues of law in fact in all of the cases with respect to all issues.

The WCAB in denying defendant's Petition for Removal, noted with respect to each and every issue raised by defendant there were no common issues of law or facts. Instead all of the cases reflected a unique set of facts and issues that varied as to each claim or case. With respect to California jurisdiction, each player may have played schedules that were different from the other players. The number of games in California would also vary with respect to each individual player. The issue of whether any of the players were ever California residents is unique to each case. Until such time as the facts in each individual case were developed, there would be no way of knowing applicant's place of residence at the time of employment with the Lions, and where each player entered into his employment contract with the Lions. Basically the same variables, as opposed to a common set of facts, applied with respect to the issue of statute of limitations. Moreover, the WCAB noted that due to the variable facts as opposed to common issues would not result in judicial economy but rather a "judicial quagmire." This would place an undue burden on the court's resources and time.

Moreover, defendant failed to show it would be unduly prejudiced or irreparably harmed by litigating all fourteen cases individually.

Moore v. Detroit Lions, Florida Tuskers, et.al. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 426 (WCAB Panel Decision)

Case Summary: Defendant initially filed a Petition to Stay the proceedings basically alleging the WCAB lacked subject matter jurisdiction over the claim and attached a copy of the applicant's employment contract that contained a choice of forum/choice of law provision requiring the applicant's workers' compensation claim be litigated in Michigan and not California. The WCJ denied defendant's Petition based on a number of grounds. Defendant then filed a Petition for Removal which was denied by the WCAB.

Discussion: There were a number of procedural flaws in defendant's Petition to Stay and Petition for Removal. With respect to the Petition to Stay, it was not submitted to the Presiding Judge as required by CCR Section 10281. Moreover, defendant's Petition for Removal was not verified as required by CCR Section 10843(b).

In terms of substantive issues, while acknowledging that California will ordinarily give effect to a forum selection clause unless the opposing party meets the heavy burden of proving the clause is unreasonable, the WCJ in her Report on Removal and the WCAB which adopted the WCJ's Report basically indicated "here, the parties should be given the opportunity at the trial level to present evidence or argument that: (1) there was no valid contract between applicant and defendant or, if there was, it did not contain a forum selection clause; and (2) if there was a valid contract with a forum selection clause, that clause should not be enforced because it violates California's public policy."

In essence defendants failed to demonstrate substantial prejudice and irreparable harm.

3. Validity and Scope of Releases and Settlements

Dupard v. Washington Redskins, The Hartford Insurance Company (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 279 (WCAB Panel Decision)

Case Summary: Applicant was a player for the Washington Redskins. While with the Redskins he suffered a specific right hip injury in December of 1989. During the course of his career with the Redskins he played one game in California against the San Francisco 49ers. With respect to the December 23, 1989, specific right hip injury that he suffered outside of California, he filed a workers' compensation claim against the Redskins and their insurance carrier Hartford in the District of Columbia. Applicant was represented by counsel. In 2004 applicant settled his 1989 specific right hip injury against the Redskins for \$30,000.00 and signed what was characterized later by the WCAB as a full and complete general indemnity release. A pertinent part of that general liability release provided as follows:

It is intended by the parties that this agreement constitutes a full and complete general indemnity release satisfying any and all claims heretofore listed in the caption and any claims which could have been filed against the Employer [the Washington Redskins] and Hartford.

In August of 2007, over three years after he settled his 1989 right hip specific injury against the Redskins, applicant filed a cumulative trauma injury claim in California. The WCJ found the provisions of the full and complete general indemnity release the applicant signed in conjunction with the settlement of his specific right hip injury in the District of Columbia precluded him and found that applicant's claim was barred based on the terms of the full and complete general indemnity release.

Applicant filed a Petition for Reconsideration.

Discussion: The WCAB reviewed and analyzed a number of cases and in reviewing the express language of the general indemnity release contained in the settlement of the applicant's 1989 right hip specific injury that was settled in 2004 in the District of Columbia. The WCAB held it barred the applicant's California CT claim and stated as follows:

In this matter, we find that the scope of the Maryland settlement agreement encompassed all of applicant's claims against the employer and Hartford and that his case is barred by the General Release provision of the Maryland settlement. Applicant acknowledged at trial that he read the settlement agreement and reviewed it with his attorney before he signed it. The settlement agreement was approved by a Judge. The General Release clause is unambiguous and clear on its face that it released the Washington Redskins and their workers' compensation insurer, the Hartford, from any claims that could be filed against them while applicant played for the Washington Redskins. The settlement agreement is a "full and complete general indemnity release" that is not limited in any manner.

It releases defendant from any and all workers' compensation claims that involve applicant and both the Washington Redskins and the Hartford Insurance Company. Applicant's argument that the General Release only applied to his injury to his right hip and shoulder would be correct if the General Release only applied to the allegations in the Application filed in Maryland. However, that is not the language of the General Release, which specifies that it applies to all claims that could be filed against those two entities.

Comment/Practice Pointer: See also Ford v. Houston Oilers (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 179 (WCAB Panel Decision)

Parties entered into Stipulations with Request for Award that did not expressly list either neurological or dental injuries as parts of body or conditions injured. Post Award, applicant sought dental and neurological medical treatment. Treatment was denied by defendant. Applicant argued it was the parties' intent to include these body parts in the Stipulations. Both the WCJ and the WCAB on reconsideration found no mutual mistake, fraud, duress, undue influence, inadvertence, excusable neglect, or mistake of law or fact. Also the failure of one party to exercise due diligence does not establish good cause to set aside the Stipulated Award. "Stipulations once accepted and acted upon become an executed contract, from which a party cannot be released without good cause." (Huston v. WCAB (Coast Rock) (1979) 44 Cal. Comp. Cases 798) Another case dealing with the binding force and effect of stipulations on the parties and the difficulty in establishing good cause to set them aside is County of Sacramento v. WCAB (Weatherall) (2000) 77 Cal. App. 4th 1114; 65 Cal. Comp. Cases 1.

4. Venue

Alexander v. New York Giants, Berkley Specialty, Pittsburg Steelers, Arizona Cardinals and Carolina Panthers (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 399 (WCAB Panel Decision)

Issue: If an applicant is not a resident of California at the time the Application for Adjudication is filed and there is a timely objection by a defendant, pursuant to Labor Code section 5501.5(c) and CCR Section 10410, venue must be transferred to the WCAB District Office where the last California injurious exposure occurred.

Procedural Background and Discussion: Applicant filed an Application for Adjudication alleging a cumulative trauma injury. In the Application, choice of venue was designated at the Santa Ana WCAB District Office based on the fact this was the county where applicant's attorney had his principal place of business. Defendant, the New York Giants Football Club, and their workers' compensation insurance carrier, Great Divide Insurance Company/Berkley, filed a timely objection pursuant to Labor Code sections 5501.5(a)(3); 5501.5(c) and CCR Section 10410.

Notwithstanding defendant's timely objection, the Presiding Workers' Compensation Administrative Law Judge (PWCJ) denied defendant's Petition for Transfer of Venue to the Oakland WCAB District Office. Defendant filed a Petition for Removal which was granted by the WCAB. The WCAB rescinded the PWCJ's Order Denying Venue and returned the case to the trial level for a determination as to whether the location of the last California injurious exposure was in Alameda County and if that was the location of the last California injurious exposure then proper venue would be the Oakland WCAB District Office.

Practice Pointer: It is important to note that if a defendant makes a timely objection, i.e., within thirty days after notice of the adjudication case number and venue is received by the employer or insurance carrier, then it is mandatory that venue be changed or transferred to the county of applicant's residence or if applicant was not a resident of California at the time the Application was filed, in the California county of his last injurious exposure. There is no requirement that defendant show or establish good cause. All that is required under sections 5501.5(a)(3), 5501.5 (c) and section 10410 is a timely objection. See also, Hobbs v. New England Patriots, Philadelphia Eagles, Great Divide Ins. Co. (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 416 (WCAB Panel Decision)

5. Statute of Limitations

McCardell v. Chargers Football, Co. et. al. (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 65 (WCAB Panel Decision)

Holding: Applicant's claim was not barred by the statute of limitations set forth in Labor Code section 5405(a) and defendant failed in its burden of proving by a preponderance of the evidence the affirmative defense that applicant's date of injury occurred more than a year before he filed for benefits (Labor Code sections 5405, 5705).

Case Summary: The WCJ following Trial found that applicant, a professional athlete and former NFL player, suffered a cumulative trauma injury from January 1, 2007, through January 5, 2008, causing 66% permanent disability after apportionment to a variety of orthopedic body parts and conditions but did not sustain an industrial injury to his neurological system or in the form of hypertension or hernia. The WCJ also found applicant's claim was not barred by the statute of limitations. Defendant filed a Petition for Reconsideration arguing applicant's claim was barred by the statute of limitations.

Discussion: The record reflected applicant was a player representative during the 1997 – 2004 seasons and served on the executive committee of the NFL Players' Association during the period of 2004 – 2008. Applicant's final game in the NFL was played in January of 2008. Applicant also had an independent medical evaluation for "line of duty" disability benefits in 2009, however, there was no reference to a repetitive cumulative trauma injury anywhere in the medical reporting related to that evaluation. Applicant testified he did not know the difference between a specific or cumulative trauma injury and was never advised or informed by his employers of how and when to file a claim and he allegedly learned of his right to file a workers' compensation claim in California in November of 2008.

Applicant acknowledged he advised other players about the existence of workers' compensation benefits in his role as a player representative. However, he again stressed he did not know the difference between cumulative and specific injuries and testified he learned of his right to file his own claim during a conversation with a friend and a similar conversation with his agent.

The WCAB acknowledged applicant was required to commence his workers' compensation claim within one year of the date of injury pursuant to Labor Code section 5405(a). However, that section also references Labor Code section 5412 defining the date of a cumulative injury as the date upon which the applicant first suffered disability from the cumulative trauma and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

The WCAB indicated that section 5412 was not satisfied just because an employee is aware of his or her symptoms and those symptoms are related to work.

Although both applicant and defendant in their pleadings concentrated on the knowledge prong of section 5412, the Board emphasized the disability prong also has to be met. The WCJ

indicated the evidence supported a conclusion the applicant was only aware he suffered specific incidents or injuries. The WCJ and the WCAB concluded that because the period of disability began with the end of applicant's employment on February 28, 2008, and the requisite knowledge under Labor Code section 5412 was not gained until sometime in November of 2008, the date of injury for purposes of Labor Code sections 5412 and 5405 was an unspecified date in November of 2008. Hence the Application for Adjudication was timely filed within one year of the date of injury.

In terms of the disability prong of Labor Code section 5412, the WCAB emphasized that disability means either temporary or permanent disability. Temporary disability requires wage loss. It was undisputed, and applicant acknowledged, he missed games as a result of a specific injury but there was nothing in the record to suggest he lost work as a result of a cumulative trauma injury.

The other remaining issue is whether or not the applicant suffered permanent disability as a result of any alleged cumulative trauma injury that would have triggered the statute of limitations. The applicant testified he did receive daily medical care during his football career but the WCAB emphasized citing the Rodarte case, that medical treatment alone does not prove disability. Applicant stated and testified he was ready and willing to continue working as a football player after January of 2008, and there was no evidence he was medically incapable of doing so.

There was nothing in the evidentiary record that indicated applicant's earning capacity had been diminished by his cumulative injury at the time his employment ended on February 28, 2008. Although the Board noted work modification or modified work maybe evidence of disability under 5412 if it indicates impairment of earning capacity.

On the record in this case, the first evidence of disability did not appear in the record until applicant sought line of duty benefits in July of 2009. Therefore, regardless of when applicant first had knowledge his disability was employment related to his date of injury under section 5412 occurred less than a year before he filed his workers' compensation claim.

Comment: See also: Weibl v. St. Louis Cardinals (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 107 (WCAB Panel Decision) Applicant's cumulative trauma claim not barred by the statute of limitations since prior symptomology and even a prior specific injury insufficient to establish the requisite knowledge requirement of Labor Code section 5412. No evidence applicant received any medical advice that he suffered an industrial cumulative trauma one year before he filed his application. This case has a good discussion of the legal principles and cases related to cumulative trauma cases and the application of the statute of limitations.

Also in a non-sports case, see Northrop Grumman v. WCAB (Elachlar) (2012) 72 Cal. Comp. Cases 187; 2012 Cal. Wrk. Comp LEXIS 7 (writ denied) for an excellent discussion of the methodology for determining the date of injury under Labor Code section 5412 and the one year statute of limitations pursuant to section 5405. The WCAB and the Court of Appeal found applicant's claim was not barred by the statute of limitations.

Swinton v. Arizona Cardinals (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 182 (WCAB Panel Decision)

Holding: The voluntary furnishing of medical treatment beyond first aid effectively extends the statute of limitations for five years pursuant to Labor Code sections 5405(a) and 5410.

Factual and Procedural Background: This case involves a bifurcated trial on the issues of injury AOE/COE and the application of the statute of limitations. Following trial, the WCJ found a cumulative trauma injury from February 24, 2000, to March 11, 2006, against the elected defendant, the Arizona Cardinals. In doing so, the WCJ found the one year statute of limitations under section 5405(a) was tolled and the five year statute of limitations under Labor Code section 5410 was triggered. Defendant filed a Petition for Reconsideration claiming the statute of limitations effectively barred applicant's claim.

Applicant was employed by the Arizona Cardinals from September 5, 2005, to March 11, 2006, a period of approximately six months. During the course of applicant's employment he received medical treatment beyond first aid during the period of September 18, 2005, to December 11, 2005, consisting of medication in the form of prescription medication, the use of a lowboy or short boot/cam walker, orthotics, med-x laser therapy, hot-whirlpool, ice, ultrasound, Iontophoresis, microcurrent, massage, H.V. Galvanic, hydromassage, inferential unit and MRI diagnostic scanning. Applicant was also prescribed pain medication and muscle relaxers.

The critical chronology in the case, as indicated hereinabove, applicant received treatment from approximately September 18, 2005, until December 29, 2005. The WCJ determined the date of injury under Labor Code section 5412 was May of 2007. The Application for Adjudication of Claim was filed on November 30, 2009, approximately 30 months after the date of injury under section 5412, i.e., May 2007. Defendant denied the claim on January 8, 2010.

In denying defendant's Petition for Reconsideration, the WCAB adopted and incorporated the WCJ's Report on Reconsideration.

Discussion: Based on the medical records in this case, it appears to be undisputed applicant received medical treatment beyond first aid which effectively tolled the one year statute of limitations under Labor Code section 5405(a) and triggered the five year statute of limitations under Labor Code section 5410.

Since the last effective date of medical treatment was approximately December 11, 2005, or December 29, 2005, applicant had five years from either date to file the Application for Adjudication. Given the fact the Application for Adjudication was filed on November 30, 2009, applicant was well within the effective extended statute of limitations. Alternatively, it appears applicant also had an additional period of time to file the Application for Adjudication which would have been one year after the claim was denied on January 8, 2010.

Geran v. WCAB (2012) 2012 Cal. Wrk. Comp. LEXIS 147 (writ denied)

Holding: Applicant's cumulative trauma claim was barred by the one year statute of limitations ("SOL") in Labor Code section 5405(a). It was factually undisputed applicant had been told by an examining physician in 2006 that her disability was work related by failed to file an Application until November 4, 2010. Although this is not a sports case, it is instructive in understanding SOL basic principles.

Procedural and Factual Summary: The applicant was a long term employee of Warner Brothers Studio. She was employed as a driver. She filed a cumulative trauma claim alleging injuries to her neck, back and psyche as well as lower extremities from May 6, 2004, to May 6, 2005. Her last day of work was May 6, 2005. During the course of applicant's deposition, she testified that while working in one department she realized her job was causing injury to her back and neck. She also testified in her deposition that in 2006 she was told by a specific physician that her physical problems were work related. At trial, applicant testified that while she knew her work was causing her physical pain, she did not know she could file a workers' compensation claim until she saw a television commercial discussing the concept of cumulative injury shortly before consulting with an attorney and filing her Application for Adjudication of Claim on November 4, 2010.

Following trial, the WCJ determined applicant's claim was not barred by the statute of limitations. Defendant filed a Petition for Reconsideration.

Discussion: The WCAB granted defendant's Petition for Reconsideration and in a split panel decision reversed the WCJ and determined applicant's claim was barred by the statute of limitations. First, the WCAB noted applicant's date of disability was May 6, 2005, the last day she worked due to her injuries. Also based on applicant's deposition testimony, the WCAB found applicant undisputedly became aware her injuries were work related no later than 2006, when she was advised by a physician. It was on that date in 2006, when applicant was advised by a physician that her injuries were work related, that applicant knew she was disabled and knew her disability was work related. Therefore, applicant had one year pursuant to Labor Code section 5405(a) to file an Application for Adjudication of Claim which should have been filed sometime in 2006 in order to avoid her claim being barred by the statute of limitations. However, applicant did not file her Application for Adjudication of Claim until November 4, 2010, well outside the one year time frame mandated by Labor Code section 5405(a).

On reconsideration, applicant also argued the statute of limitations should be tolled because defendant failed to inform her of her compensation rights pursuant to the holding in the Reynolds case. (Reynolds v. WCAB (1974) 12 Cal. 3d 726, 39 Cal. Comp. Cases 768) However, the WCAB indicated that applicant's Reynolds argument did not apply since there was no evidence defendant had knowledge or notice of applicant's work related injury sufficient to trigger defendant's duty to provide applicant notice of her workers' compensation rights. Therefore, the lack of the Reynolds notice did not toll the statute of limitations.

The panel majority rendered a very detailed discussion analyzing a number of cases in the statute of limitations area specifically indicating that in this case they were declining to follow the cases of Zenith Insurance Company v. WCAB (Yanos) (2010) 75 Cal. Wrk. Comp. Cases 1303 (writ denied) and Kaiser Foundation Hospitals v. WCAB (Ochs) (2000) 65 Cal. Comp. Cases 933 (writ denied) for the sweeping proposition that the statute of limitations on a cumulative injury claim never begins to run until an applicant has his or her full legal rights explained in detail by an attorney.

Given facts in this case were undisputed where applicant testified under oath at her deposition that she was advised by a doctor not only that her injuries were work related but that she knew her disability was also work related.

Rudd v. Oakland Raiders/ACE/USA (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 243 (WCAB Panel Decision)

Holding: Failure by a defendant to give an applicant the required notice of his workers' compensation rights will not automatically toll the statute of limitations if defendant proves applicant was not prejudiced by the lack of notice and there was evidence applicant had actual knowledge of his workers' compensation rights.

Factual and Procedural Overview: Following trial, the WCJ found applicant suffered a cumulative trauma injury while employed and playing for a number of teams. The WCJ also found applicant's claim was not barred by the one year statute of limitations and defendants were estopped to assert the defense of the statute of limitations because they failed to comply with the notice requirements under Labor Code section 5401. (Often referred to as the Reynolds notice.)

Applicant filed three successive separate Applications for Adjudication dated January 4, 2007, December 9, 2008, and January 28, 2010. With respect to each Application that was filed, he was represented by a separate law firm or attorney. The first two Applications were dismissed without prejudice based on applicant's failure to prosecute his claim. In addition to filing his first Application for Adjudication on January 4, 2007, applicant also completed and signed a DWC-1 Claim Form dated January 4, 2007, which contained a detailed notice of potential eligibility for workers' compensation benefits.

Both co-defendants, the Oakland Raiders and the Tampa Bay Buccaneers, filed Petitions for Reconsideration arguing the WCJ should have found applicant's claim was barred by the one year statute of limitations. The WCAB granted defendants' Petition for Reconsideration and reversed the WCJ finding applicant's claim was barred by the statute of limitations.

In reversing the WCJ and finding applicant's claim was barred by the statute of limitations, the WCAB provided an extensive discussion of the applicable case law and focused on the case of Reynolds v. WCAB (1974) 12 Cal. 3d 726, 1, 39 Cal. Comp. Cases 768.

The WCAB noted the mere fact a defendant fails to provide an applicant with the required notice of his workers' compensation rights will not in every case toll the statute of limitations. If a defendant proves applicant gained the requisite actual knowledge of his workers' compensation rights from any source there is no prejudice to the applicant from not receiving notice by the defendant of his workers' compensation rights.

In finding that applicant did gain the requisite knowledge of his workers' compensation rights the Board noted as follows:

Though applicant here testified that he received no notices from defendant about his rights, and was apparently completely in the dark about any of the work performed on his behalf by the attorneys he retained, it is readily apparent that he had sufficient knowledge of his right to workers' compensation benefits to seek out multiple law firms to obtain benefits on his behalf.

The WCAB noted it was undisputed applicant signed a DWC-1 Claim Form on January 4, 2007, that included the mandatory pre-printed notice of potential eligibility. Moreover, he retained three separate law firms who obtained his signature on Applications for workers' compensation benefits. The fact applicant chose not to participate in prosecuting his prior claims is not proof of lack of knowledge of his potential right to workers' compensation benefits.

The Board noted "It stretches credulity to believe that applicant retained a law firm to obtain workers' compensation benefits but was unaware of the reasons for this representation. There is no reason to toll the statute of limitations after applicant had filed two prior claims for workers' compensation benefits." The Board stated "The failure to provide the requisite notices alone does not support the application of estoppel. There must be prejudice to applicant from this failure. In the face of evidence that applicant had actual knowledge of his rights, there is no prejudice."

See also, Nairne v. W.C.A.B. (2013) 2013 Cal. Wrk. Comp. LEXIS 127 (writ denied). A non-sports case where WCAB reversed WCJ who found defendant was estopped from asserting the statute of limitations defense. The WCAB in reversing the WCJ found applicant had actual knowledge of his workers' compensation rights when he consulted with a civil attorney after receiving a denial. Since defendant paid no benefits and provided no medical treatment, applicant had only one year under Labor Code section 5405 to file a claim for benefits. Since neither applicant nor his civil attorney did so, the statute of limitations barred his claim and defendant was not estopped to assert this affirmative defense.

6. Injury AOE/COE

Hyder v. St. Louis Rams (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 56 (WCAB Panel Decision)

Case Summary: This is another post McKinley jurisdictional case but one that does not involve a choice of forum/law clause. Following trial, the WCJ determined applicant suffered a one year cumulative trauma from March 1, 2000, to March 1, 20001, and sustained industrial injury to a variety of orthopedic body parts resulting in 44% permanent disability without apportionment. However, the WCJ found he did not suffer injuries to any other body parts and conditions except for orthopedic.

Applicant filed a Petition for Reconsideration claiming or alleging the WCJ should have found industrial injury to the applicant's kidneys and cardiac system. Defendant filed their own Petition for Reconsideration arguing that California did not have subject matter jurisdiction but acknowledging the basis for their contention there was no California subject matter jurisdiction was not premised on a choice of law or forum issue. Basically defendant's argument was based on the medical evidence of the case there being no substantial medical evidence to establish applicant had ever suffered an industrial injury in California.

Discussion: The WCAB rescinded the WCJ's Findings of Fact, Award and Orders and determined the WCAB had no jurisdiction over applicant's claim because applicant failed to show he had sustained an industrial injury of any kind in California.

In its Summary of Facts, the Board pointed out that in the original Application for Adjudication, applicant alleged a cumulative injury sustained in St. Louis, Missouri but the Pre-Trial Conference Statement indicated the location of the injury was "various".

Applicant played for the St. Louis Rams from August 2, 1999, through July 5, 2001. Although he played for a number of NFL teams and other professional teams the only named defendant was the St. Louis Rams. The record reflected applicant came to California while employed and playing for the Rams only one time on October 29, 2000. He testified at trial that he participated in a pre-game warm-up that consisted of stretching, running, jumping, tackling other players, diving and rolling for between thirty minutes and an hour. There was no dispute he participated in the pre-game warm-up against the San Francisco 49ers but was deactivated before game time and did not actually play in the game. It was also found applicant injured his right knee three weeks before he came out to California with the Rams while playing against the Atlanta Falcons and again reaffirmed he was deactivated before the October 29, 2000, game in California began.

Both parties used respective QMEs. The QME reporting on behalf of defendant basically indicated applicant had given a history to him that he practiced in a warm-up in San Francisco on October 29, 2000, performing drills with some contact hitting and was on the field for approximately thirty five to forty minutes prior to the start of the game. He also advised the defense QME that he did not recall if any symptoms increased during the warm-up. The defense

QME determined applicant did not sustain an injury to his right knee during the warm-up exercises in San Francisco with the St. Louis Rams on October 29, 2009.

Applicant's QME in orthopedics, although noting a number of specific injuries, concluded all of the applicant's symptoms and disability were secondary to one continuous trauma over the course of his career as a professional football player and apportionment was impossible. The WCAB in their analysis indicated the facts of this case did not involve Labor Code section 3600.5(b) dealing with employees hired outside of the state that are injured while temporarily working in California if specific conditions are met. Their analysis focused on Labor Code section 3600.5(a). The Board also acknowledged under McKinley that in some cases the WCAB has exercised jurisdiction over claims of cumulative industrial injury where only a portion of the injurious exposure occurred within the State of California. The Board again acknowledged that in certain circumstances although one day of work may contribute to a cumulative trauma injury, applicant still has the burden of showing, by a preponderance of the evidence, he sustained an industrial injury within California during the limited time he was employed in the state. The WCAB distinguished the facts in this case from the Crosby case, indicating there was a basis for California jurisdiction in Crosby, based on the fact that while applicant only played a single game in California a particular incident occurred during the game which contributed to the alleged cumulative trauma. Based on the facts in the present case, there was no substantial medical evidence that applicant's participation in the October 29, 2000, pre-game warm-up caused any portion of his alleged cumulative trauma injury.

The WCAB also distinguished Crosby as not being applicable, since Crosby dealt with Labor Code section 3600.5(b) which concerns an exception to the exercise of jurisdiction over California injuries but never dealt with Labor Code section 3600.5(a) or the concept of "regular employment" within the State of California. The Board went on to state:

We emphasize that there is no strict rule that an athlete who has played one game in California is regularly employed in the state-on the contrary, cases finding regular employment under 3600.5(a) have usually involved applicants who spent a significant amount of time working in California, often combined with applicants' California residency. (See, e.g., *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd.* (1999) 64 Cal. Comp. Cases 98 (writ den.); *John Christer Trucking, Inc. v. Workers' Comp. Appeals Bd.* (Carpenter) (1997) 62 Cal. Comp. Cases 979 (writ den.).) Evidence of a single day's work in the state, without more, does not constitute regular employment.

The WCAB concluded they always have jurisdiction to initially determine whether it has jurisdiction in a given case and in this particular case emphasized there was insufficient evidence applicant sustained an industrial injury in California and he has not shown the basis for the WCAB to adjudicate in a jurisdictional sense, his out of state injury based on regular employment within the state.

Johnson v. Pittsburgh Steelers (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 112 (WCAB Panel Decision)

Holding: In order to constitute substantial medical evidence on injury AOE/COE for an applicant who was hired outside of California, but temporarily employed in California, a medical opinion must determine whether the applicant suffered a specific or cumulative trauma injury during the time of temporary employment in California.

Factual and Procedural Overview: In a January 2, 2013, decision following trial, the WCJ found applicant suffered a cumulative trauma injury for the period of April 15, 1999, to November 14, 2000, finding 39% permanent disability with the 15% bump up, a period of temporary total disability and need for further medical treatment. Defendant filed a Petition for Reconsideration raising a number of issues including lack of jurisdiction based on Labor Code section 3600.5(b) and that applicant's medical reporting did not constitute substantial medical evidence AOE/COE.

Facts: Applicant was employed by the Pittsburgh Steelers. He was hired outside of the State of California. His connection with California, from a jurisdictional perspective, was based on his traveling to California with the Steelers to play a game against the San Francisco 49ers that was scheduled for November 7, 1999. On Saturday, November 6, 1999, applicant's work activities in California consisted of riding a bus, walking through the San Francisco 49ers facilities and attending a 10 to 25 minute meeting in a locker room. It appears there were no physical activities performed or required on Saturday, November 6, 1999, the day before the scheduled game against the San Francisco 49ers on November 7, 1999.

On Sunday, November 7, 1999, applicant went to the stadium wearing sweats, cleats, helmet and gloves. He was engaged in a pre-game practice for approximately 45 minutes to an hour that consisted of warm-ups including stretching, sprinting, some light running and route running. Applicant testified he performed all of his route running and running at approximately 75% to full speed. He was occasionally but typically not tackled during practice. However, he could not specifically recall having been tackled in practice on November 7, 1999. Applicant did not play in the game. Following the pre-game warm-up and practice, he showered and changed into street clothes and watched the game from the sidelines. More importantly at trial applicant testified he did not have any injury, physical complaints or need for treatment as a result of his activities on November 7, 1999.

The Medical Reporting: Applicant's QME in orthopedics found and opined applicant sustained a continuous trauma during the entire course of his career as a professional football player. However, applicant's QME did not discuss, let alone find, that applicant suffered or sustained a specific or cumulative injury while he was in California on November 6 and 7, 1999. In fact applicant's QME report did not even contain a history regarding applicant's work activities in California.

The defense QME's opinion suffered essentially the same defects as applicant's QME's report in that the defense QME opined applicant sustained a cumulative trauma injury throughout the course of his professional football career but did not render an opinion as to whether or not applicant suffered a specific or cumulative trauma injury during his temporary employment in California.

Discussion/Analysis:

Defendant's 3600.5(b) Argument with Respect to Exemption from California Jurisdiction

The WCAB summarily noted defendant basically failed to prove the essential and required statutory elements under Labor Code section 3600.5(b) to establish that applicant and the Steelers were exempt from California subject matter jurisdiction. Defendant failed to introduce key documentary evidence and also failed to request judicial notice of essential Pennsylvania statutes. As a consequence, defendant failed to establish that applicant and the Steelers were exempt from California subject matter jurisdiction.

Lack of Substantial Medical Evidence

As indicated hereinabove, neither applicant's QME or the defense QME rendered an opinion on the critical injury AOE/COE issue whether applicant, during his temporary employment in California with the Steelers in the pre-game practice on November 7, 1999, suffered either a specific or cumulative trauma injury that would establish his work activities were in fact a contributing cause of any alleged injury AOE/COE. The mere fact a physician renders an opinion a professional athlete temporarily employed in the State of California has suffered a cumulative trauma injury over the course of his entire employment does not constitute substantial medical evidence. As a consequence, the WCAB rescinded the WCJ's decision and remanded the case back to the trial level for development of the record for the parties either through deposition or supplemental medical reports to obtain opinions from the respective QMEs as to whether or not applicant suffered either a specific or cumulative trauma injury while temporarily employed in California.

3600.5(a) and the Issue of "Regular" vs. "Temporary" Employment

For purposes of clarification, the WCAB discussed and elaborated on the issue of California's extraterritorial jurisdiction under Labor Code section 3600.5(a) and how it relates to the issues of "regular" versus "temporary" employment. The Board wanted to make sure there was no confusion when the case was remanded back to the trial level as to whether or not California jurisdiction extended to any injuries the applicant may have allegedly suffered while employed outside of California. In that regard the Board stated as follows:

We briefly observe that the WCAB also has extraterritorial jurisdiction over injuries sustained *outside* of California by employees *regularly* employed here. (Lab. Code, 3600.5(a).) However, we conclude as a matter of law that applicant's single trip to California with the Steelers in November 1999 did *not* constitute "regular" employment here. Indeed, if a single business trip of one or two days

were to be deemed “regular” employment under section 3600.5(a), this would mean that virtually any work in California, no matter how abbreviated, would constitute “regular employment.” Such an interpretation would render “regular” meaningless. (See *People v. Lara* (2010) 48 Cal.4th 216, 227 [“we must follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless”].) Moreover, there is nothing in section 3600.5(a) which suggests that the Legislature intended to have California’s extraterritorial jurisdiction to be almost boundless, i.e., limited only if an employee essentially *never* worked in California. The statutes establishing the scope of the WCAB’s subject matter jurisdiction reflect a legislative determination regarding California’s legitimate interest in protecting industrially-injured employees. (See 9-142 *Larson’s Workers’ Compensation Law*, § 142.03 (LexisNexis 2012); *Alaska Packers Ass’n v. Industrial Acc. Com. (Palma)* (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L.Ed. 1044, 20 IAC 326]; *King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355 [24 Cal. Comp. Cases 244], cert den., 362 U.S. 928 [80 S. Ct. 753, 4 L.Ed.2d 746](1960).) Therefore, we conclude that California does not have jurisdiction with respect to any injury or injuries applicant might have sustained while playing football *outside* of California.

7. Labor Code 5500.5

Introduction

One of the most frequently disputed and perplexing issues in sports cases is defining a date or dates of injury for purposes of the statute of limitations defense and also imposition of liability pursuant to Labor Code section 5500.5. Defining dates of injury is also important in cases where there is established California jurisdiction with possible application of the reduction of liability principles set forth in the Benson case.

Statutory Definitions:

In many sports cases, reporting physicians take the path of least resistance and find one cumulative trauma injury spanning the applicant's entire career notwithstanding there is medical and factual evidence establishing numerous specific injuries and possibly multiple cumulative trauma injuries. The two key Labor Code sections defining specific and cumulative injuries are Labor Code section 3208.1, and the general prohibition of combining injuries as set forth in Labor Code section 3208.2.

Labor Code section 3208.1 provides as follows:

An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activity extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of cumulative injury shall be the date determined under section 5412.

Labor Code section 3208.2 provides as follows:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

As can be seen by the definition of a specific injury as set forth in Labor Code section 3208.1, it is not much of a medical or analytical challenge to determine whether an injured worker/applicant has suffered a specific injury. However, what is complex both medically and factually in many sports cases, is to determine whether or not an applicant has suffered one cumulative trauma or multiple cumulative traumas during the course of their employment for one or more sports teams. In a recent case Guerrero v. Wellpoint Health Network (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 129 (WCAB Panel Decision) the WCAB rendered an opinion that provides an extraordinarily helpful analytical framework for determining in a particular case whether an applicant has suffered one cumulative trauma or multiple cumulative traumas. In

Guerrero the WCJ, as often is the case, found one cumulative trauma injury. On reconsideration, the WCAB indicated it appeared there were two cumulative trauma injuries instead of one cumulative trauma and remanded the case back to the trial level for the WCJ to make additional findings. The WCAB provided a comprehensive analysis and discussion of the key cases in this area in a 13 page decision. Basically the WCAB provided an analytical template consistent with Labor Code sections 3208.1, 3208.2 and Labor Code section 5303 and applicable case law, to assist in determining whether there is one cumulative trauma injury or multiple cumulative trauma injuries. The WCAB's analysis was as follows:

Labor Code section 3208.1 provides that a cumulative industrial injury occurs whenever the repetitive physically traumatic activities of an employee's occupation cause any disability or a need for medical treatment. The date of injury for an industrial cumulative trauma injury is defined by Labor Code section 5412, as follows: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." As used in Labor Code section 5412, "disability" means either compensable temporary disability or permanent disability. (*Ckavira v. Worker's Comp. Appeals Bd.* (1991) 235 Cal. App. 3d 463 [56 Cal. Comp. Cases 631]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App. 4th 998 [69 Cal. Comp. Cases 579].)

Here, the issue presented is whether there were two cumulative trauma injuries with different dates of injury per *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal. App. 3d 329 [38 Cal. Comp. Cases 720] and *Ferguson v. City of Oxnard* (1970) 35 Cal. Comp. Cases 452 (Appeals Board en banc) (separate cumulative injuries occur where "periods of disability and/or need for medical treatment are interspersed within the alleged course of the repetitive activities); or there was a single cumulative trauma with one date of injury (i.e., the first period of compensable temporary disability) because the periods of temporary disability were linked by a continued need for medical treatment under *Western Growers Ins. Co. v. W.C.A.B. (Austin)* (1993) 16 Cal. App. 4th 227 [58 Cal. Comp. Cases 323].) Of course, the number and nature of the injuries suffered are questions of fact for the WCJ or the Appeals Board. (*Western Growers Ins. Co. (Austin)*, 16 Cal. App. 4th at pp. 234-235; *Aetna Cas. & Surety Co. (Coltharp)* 35 Cal. App. 3d at p. 341.)

When *Western Growers (Austin)* is read in conjunction with the Labor Code section 3208.1 definition of "cumulative injury," the anti-merger provisions of Labor Code sections 3208.2 and 5303, and the holding of *Aetna Casualty (Coltharp)*, the following principles apply: (1) if, after returning to work from a period of temporary disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma (i.e., if the occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level

of permanent disability, or to a new or increased need for medical treatment), then there are two separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code §§ 3208.1, 3208.2, 3208.3; Aetna Casualty (Coltharp), supra, 35 Cal. App. 3d at p. 342); and (2) if, however, the employee's occupational activities after returning to work from a period of industrial temporary disability are *not* injurious (i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an *exacerbation* of the *original* injury), then there is only a *single* cumulative injury and no impermissible merger occurs. (Lab. Code §§ 3208.1, 3208.2, 5303; *Western Growers (Austin)*, supra, 16 Cal. App.4th at p. 235.)

Applying the analytical template hereinabove to the particular facts of any given case, should assist counsel and the reporting physicians in correctly determining whether a particular applicant has suffered one or more cumulative trauma injuries along with any specific injuries that meet the definition set forth in Labor Code section 3208.1.

As expressly required by Labor Code section 3208.2, any disability, need for medical treatment or death that results from the combined effects of two or more injuries, either specific or cumulative, or both, all questions of fact and law shall be separately determined with respect to each injury. As can be readily seen by reading cases in this area, each case is very fact specific with the applicable medical history being filtered through the Austin, Coltharp, and Rodarte cases. See also, Alea Work Comp Project v. WCAB (2012) 77 Cal. Comp. Cases 681; 2012 Cal. Wrk. Comp. LEXIS 87 (writ denied) finding of one cumulative trauma injury and not two as asserted by one of two employers/carriers.

Rawley v. Boston Red Sox and Philadelphia Phillies (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 184 (WCAB Panel Decision)

Holding: Under Labor Code section 5500.5 in a situation or scenario where applicant's employment involves injurious exposure but there is no California subject matter jurisdiction over one or more terminal employers, then the Labor Code section 5500.5 liability period will be determined by relating back to a liability period where there was both injurious exposure and California subject matter jurisdiction over the employer or employers.

Procedural and Factual Background: Applicant's professional baseball career spanned a period from 1984 to 1990. During this period of time, applicant played for three professional baseball teams including the Philadelphia Phillies, the Minnesota Twins and the Boston Red Sox. Applicant was employed by the Phillies from January 30, 1985, to October 24, 1988, the Twins from October 24, 1988, to October 30, 1989, and finally the Red Sox from January 9, 1990, to April 2, 1990.

Applicant's last employment with the Boston Red Sox from January 9, 1990, to April 2, 1990, essentially involved spring training. Although it appears there was injurious exposure during the period of time applicant was employed by the Red Sox, there was no California subject matter jurisdiction over the Boston Red Sox.

Following trial, the WCJ found a date of injury over the course of the applicant's entire employment, i.e., 1984 through 1990. However, the WCJ indicated that for purposes of the Labor Code section 5500.5 liability period, the correct date was October 2, 1988, to October 1, 1989, given the fact there was "other insurance" during the Labor Code section 5500.5 liability period. The WCJ found the Philadelphia Phillies were liable for the entire award.

The Philadelphia Phillies filed a timely Petition for Reconsideration asserting and arguing that the correct Labor Code section 5500.5 liability period should be April 2, 1989, to April 2, 1990. The WCAB denied the Phillies' Petition for Reconsideration and adopted and incorporated the WCJ's Report on Reconsideration.

Discussion: Although this is a panel decision it is a significant case since it illustrates the Labor Code section 5500.5 "relation back" imposition of liability in situations where an applicant, while employed and suffering injurious exposure by one or more employers, there is no basis to assert California subject matter jurisdiction over the terminal/last employer or employers.

In this case it was undisputed the terminal employer was the Boston Red Sox from January 9, 1990, to April 2, 1990. During his employment with the Red Sox, the applicant participated in spring training and there is little doubt there was injurious exposure. However, there was no California subject matter jurisdiction over the Boston Red Sox.

In relating back to the last employer or employers over which there was California subject matter jurisdiction, i.e., the Philadelphia Phillies and the Minnesota Twins. The WCJ in relating back and imposing the Labor Code section 5500.5 liability period over only those employers where there was an established California subject matter jurisdiction relied on Portland Trailblazers, et. al. v. WCAB (Whatley) (2007) 72 Cal. Comp. Cases 154 (writ denied) and Tampa Bay Buccaneers v. WCAB (Curry) (2008) 73 Cal. Comp. Cases 944 (writ denied).

In the Whatley case, applicant was employed by two professional basketball teams, one in Europe and one in the United States where there was injurious exposure but there was no California jurisdiction over either team. Therefore, the trial judge in Whatley had to go all the way back to 1995 in order to find an employer over which there was California subject matter jurisdiction even though the applicant played professional basketball until 1998. In the Curry case, there was no California subject matter jurisdiction over the professional football team the applicant played for in the last three or four years of his professional career. Therefore, Labor Code section 5500.5 liability had to relate back and was imposed over the previous employer or employers where there was established California subject matter jurisdiction.

Practice Pointer: This case as, well as the Whatley and Curry cases, illustrate the interaction between Labor Code section 5500.5 liability and California subject matter jurisdiction. If the Labor Code section 5500.5 liability period is determined based merely on the last employment

and last injurious exposure this would in many cases lead to a result where the applicant would be without a remedy since there would be no California subject matter jurisdiction. Hence, the practical necessity of relating back in time to find an employer where there is California subject matter jurisdiction and injurious exposure and then determining the correct Labor Code section 5500.5 liability period.

8. Contribution

Gordon v. Oakland Raiders; Atlanta Falcons (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 163 (WCAB Panel Decision)

Holding: In contribution proceedings, allocation/apportionment of liability for reimbursement among multiple employers is limited to employers and periods of employment during the Labor Code section 5500.5 liability period only.

Procedural and Factual Overview: Contribution proceedings were initiated by the Oakland Raiders. Following the arbitration proceedings, the Workers' Compensation Arbitrator (WCA) found that the Oakland Raiders were entitled to reimbursement from co-defendant Atlanta Falcons for 39% of all sums paid to the applicant. The Falcons filed a Petition for Reconsideration asserting/arguing their liability for reimbursement to the Raiders should be limited to 4% as opposed to the 39%. The WCAB granted reconsideration and rescinded the WCA's decision finding the Oakland Raiders were entitled to only 4% reimbursement from the Falcons as opposed to 39%.

Discussion: This case is significant since it deals with the interaction/interplay of Labor Code section 5500.5(a) and Labor Code section 5412. It was undisputed that pursuant to Labor Code section 5412 and Labor Code section 5500.5(a), the Labor Code section 5500.5 liability period was from February 28, 2002, to February 28, 2003. The erroneous formula the arbitrator used in allocating/apportioning liability for reimbursement to the Raiders was based on total periods of employment the applicant had with each of three teams, the Falcons, the Packers, and the Raiders excluding those periods where the applicant was not engaged in any injurious exposure during his entire period of employment.

In reversing the arbitrator's use of this formula, the WCAB indicated that Labor Code section 5500.5(a) does not permit or allow for apportionment of liability between employers in contribution proceedings to contract dates or employment outside the last year of employment. Under the facts in this case, liability is properly assessed according to the proportionate periods of employment during which each team employed the applicant only during the Labor Code section 5500.5(a) period from February 28, 2002, to February 28, 2003, not counting time within the year during which the applicant was unemployed.

The arbitrator erroneously went outside of the Labor Code section 5500.5 period and looked at all periods of employment which included 141 days for the Falcons, 147 days for the Packers, and 77 days for the Raiders, much of which was outside the Labor Code section 5500.5(a) liability period.

The WCAB indicated that focusing exclusively on the Labor Code section 5500.5 period the Falcons employed applicant for only 2 days as opposed 141 days, if one were to include periods outside the Labor Code section 5500.5 period. Therefore, the WCAB reversed the WCA's decision and found the Atlanta Falcons liable for only 4% reimbursement to the Raiders as opposed to 39%. Also of note is the fact that it was improper to include the Green Bay Packers

in the Labor Code section 5500.5 analysis since there appears to have been no California subject matter jurisdiction over the Green Bay Packers and the Packers were not involved in the case in chief before the arbitration proceedings commenced again based on a lack of California subject matter jurisdiction.

9. Permanent Disability

***Parker v. The Georgia Force* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 250 (WCAB Panel Decision)**

Holding: For dates of injury before January 1, 2013, every employer with more than 50 employees is obligated, pursuant to Labor Code section 4658(d)(2), to offer regular, modified, or alternative work within 60 days, plus 5 days for mailing, of receipt/knowledge of a medical report indicating the applicant's MMI/permanent and stationary status. Moreover, the obligation to send the required notice applies and is required even if the employer is no longer in business, and if in business, does not conduct its primary business in the State of California.

Factual and Procedural Background: Following trial, the WCJ found applicant suffered a cumulative trauma injury resulting in 59% permanent disability. The WCJ also indicated the applicant was entitled to the 15% increase (bump up) as set forth in Labor Code section 4658(d). The WCJ indicated that the 15% increase was payable and retroactive to 60 days from when the applicant was deemed to have been permanent and stationary on August 1, 2007.

Defendant filed a Petition for Reconsideration arguing that the WCJ had erroneously calculated the start date for payment of the 15% increase and applicant's employer, The Georgia Force, was no longer in business and had conducted business outside of the State of California and therefore should be exempt from providing the required notice and payment of the 15% increase. The WCAB granted defendant's Petition for Reconsideration finding applicant was still entitled to the 15% increase/bump up but the WCJ had erroneously calculated the start date. Therefore, the WCAB issued an amended Findings of Fact that the correct start date for the 15% increase was November 21, 2010, and not August 1, 2007.

Discussion: In recalculating when an employer/defendant is obligated to send out the 60 day notice related to an offer of regular work, modified work or alternative work, the WCAB noted a literal interpretation of Labor Code section 4658(d) was "nonsensical". They cited the case of Ornelaz v. Albertsons, Inc. (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 724 (WCAB Panel Decision) in which they held that "common sense dictates that defendant's duty cannot arise or begin before it knows the time period is running."

The WCAB also indicated Labor Code section 5316 and CCP 1013 extends the 60 day notice 5 additional days for mailing.

Applying this reasoning to this case, the WCAB noted it was undisputed that defendant had not received the AME report from Dr. Wilson until September 17, 2010. Therefore, adding 60 plus 5 days for mailing the Labor Code section 4658(d) notice was due on or before November 21, 2010, and not August 1, 2007.

Even with the recalculated date, defendant failed to send the required notice and they were still liable and obligated to pay the 15% increase. Moreover, the WCAB indicated there was no authority to exempt an employer from its obligation to provide the Labor Code section

4658(d)(2) notice if they were no longer in business or that its primary business was not conducted in the State of California.

Practice Pointer: The 15% bump up or down provisions of Labor Code section 4658(d)(2) do not apply to dates of injury after January 1, 2013. This case is a pre SB 863 decision and it is still good case law for all dates of injury prior to January 1, 2013, for all employers who have more than 50 employees.

Nittel v. San Jose Sharks, Chubb Group (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 596 (WCAB Panel Decision)

Issue/Holding: The 2005 Permanent Disability Rating Schedule applied as opposed to the 1997 Permanent Disability Rating Schedule when defendant had no obligation to send out a Labor Code section 4061(a) notice since applicant failed to prove he was paid full salary while he was on injured reserve status.

Discussion: Applicant suffered a pre-1/1/2005 injury while employed by the San Jose Sharks. For the 2001/2002 season applicant's National Hockey League Standard Player's Contract showed that his full salary was supposed to be \$400,000.00. However, applicant was transferred or assigned to a minor league club and the evidence showed he earned a little over \$40,000.00 in the minor leagues for the 2001/2002 season. It was undisputed he was on injured reserve, but the issue was whether or not he received TTD benefits based on his "full" salary or salary continuation of his "full salary".

The WCAB held there was no evidence that when applicant was on injured reserve he received his full salary pursuant to his Standard Player's Contract. As a consequence, the WCAB held that the employer/defendant had no obligation to provide a section 4061(a) notice and therefore there was no exception under Labor Code section 4660(d) which would require the application of the 1997 Permanent Disability Rating Schedule.

Practice Pointer: The WCAB was careful to distinguish the facts of this case from an earlier case, Barlow v. Oakland Raiders, (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 483 (WCAB Panel Decision), where it was established that applicant was paid full salary while on injured reserve. If it can be shown that the applicant/player, as in Barlow, received his full salary while on injured reserve or TTD then defendant would, under Barlow, be obligated to provide the Labor Code section 4061(a) notice and if they did not, then the 1997 Permanent Disability Rating Schedule would apply in a pre-1/1/2005 injury case.

11. Liability for Medical-Legal Costs

Ransom v. Jacksonville Jaguars (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB Panel Decision)

Holding: A defendant is not liable and cannot be ordered to pay medical-legal expenses including diagnostic testing until there is a determination of whether there is California subject matter jurisdiction over the particular defendant.

Factual and Procedural Background: During the course of litigation, defendant the Jaguars were named by applicant on a request for a selection of a SPQME evaluator in orthopedics. The SPQME in his initial report indicated that in order for him to complete his evaluation certain diagnostic testing was required. The applicant lived in Ohio and some of the recommended diagnostic testing was to be done in Ohio. However, the Ohio facility that was to perform the diagnostic testing indicated by the SPQME in orthopedics, refused to proceed with the diagnostic testing unless payment was assured and guaranteed before diagnostic testing was initiated. The Jaguars refused to pre-authorize the diagnostic tests recommended by the SPQME. Applicant in turn filed a Declaration of Readiness to Proceed seeking an order to compel the Jaguars to pre-authorize the diagnostic tests recommended by the SPQME. Following trial, the WCJ issued an order requiring the Jaguars to pay for medical-legal expenses including the recommended diagnostic testing pending a determination on the issue of whether there was California subject matter jurisdiction. Predictably, the Jaguars filed a Petition for Reconsideration which was granted by the WCAB who in turn rescinded the WCJ's order. The WCAB indicated the Jaguars were entitled to a hearing on the issue of California subject matter jurisdiction before they could be ordered or compelled to pay for or authorize medical-legal expenses including diagnostic testing.

Discussion: From a procedural standpoint, the WCAB indicated the proper remedy for defendant was to file a Petition for Reconsideration, as opposed to removal, since the finding that a party is liable for payment of certain expenses, including expenses not yet incurred, constitutes a final order since the consequence of the failure of a defendant to seek reconsideration would preclude them from contesting its liability for the expense in future proceedings.

In this case the Jaguars argued on reconsideration that California subject matter jurisdiction was seriously in doubt since applicant did not play a single game in California while playing for the Jaguars. Therefore, they argued they should not be liable for payment of any medical-legal costs, including diagnostic testing, before a determination of the threshold issue as to whether or not applicant had any injurious exposure in California that contributed to his alleged cumulative trauma injury.

The Board held that in a situation where defendant from the outset of the case has raised the issue of subject matter jurisdiction they should not be held liable to pay lien claims including medical-legal costs in advance. "The issue of jurisdiction should be determined prior to concluding defendant is liable for payment."

Practice Pointer: This is a significant case post McKinley in which the WCAB indicated that in a number of situations, including the scenario in this case, a defendant should be entitled to a bifurcated hearing/trial on the issue of California subject matter jurisdiction. While the Board indicated that if the case could not proceed without payment of medical-legal expenses the judge may issue an award against another defendant which would then be subject to contribution in later proceedings. However, it is assumed the WCAB meant that in a situation where none of the multiple co-defendants were arguably subject to California subject matter jurisdiction then there should be a bifurcated/expedited hearing on the threshold issue of subject matter jurisdiction.

Williams v. San Francisco 49ers, Miami Dolphins, and Green Bay Packers
(2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 323 (WCAB Panel Decision)

Issue: The affirmative defenses of statute of limitations and lack of subject matter jurisdiction may not shield defendants from liability for medical-legal expenses reasonably and necessarily incurred to prove a contested claim.

Case Summary: Applicant was employed by three professional NFL teams, the San Francisco 49ers, the Miami Dolphins and the Green Bay Packers. He filed an Application for Adjudication alleging a cumulative trauma injury and thirteen specific injuries. Applicant filed a Declaration of Readiness to Proceed seeking a Mandatory Settlement Conference on the issue of unpaid medical-legal expenses. At the trial on this issue all three teams asserted the affirmative defense of statute of limitations and the Green Bay Packers and the Miami Dolphins also asserted the affirmative defense of lack of California subject matter jurisdiction. Following trial, the WCJ declined to order payment of medical-legal expenses by any defendant. Applicant filed a Petition for Removal which was granted by the WCAB who in turn rescinded the WCJ's order denying payment of any outstanding medical-legal costs.

Discussion: In reversing the WCJ, the WCAB focused on Labor Code section 4621(a) and numerous cases in interpreting and applying that section. The WCAB also noted there was no dispute the applicant was an employee of all three NFL teams. In essence, the WCAB indicated that Labor Code section 4621(a) and a long line of cases hold that a claimant, whether successful or not, is entitled to be reimbursed for medical-legal expenses reasonably and necessarily incurred. They noted the only general exception is where employee fraud is established, and in such a case an award of medical-legal costs may be denied. The WCAB noted that even if one or more of the defendants established an affirmative defense of statute of limitations, applicant would be entitled to reimbursement of medical-legal expenses reasonably, actually and necessarily incurred provided the WCAB has subject matter jurisdiction against the various individual defendants. As a consequence, the 49ers were ordered to pay the outstanding medical-legal costs since there was undisputed California subject matter jurisdiction over them.

Practice Pointer: This case appears to make a distinction between the affirmative defense of statute of limitations as opposed to subject matter jurisdiction and whether medical-legal costs are reimbursable. The Board indicated that even if one or more of the defendants was successful in establishing the affirmative defense of statute of limitations there would still be liability for reimbursement of medical-legal expenses reasonably and necessarily incurred. However, the

WCAB implied the same would not be true if there was a lack of WCAB subject matter jurisdiction. (See, Ransom v. Jacksonville Jaguars (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB panel decision) California subject matter jurisdiction must be determined first before subjecting a defendant to payment of medical-legal costs.) The WCAB ordered defendant the San Francisco 49ers, over which there was no dispute as to California subject matter jurisdiction, to immediately reimburse applicant for medical-legal expenses reasonably, actually, and necessarily incurred to be later adjusted by the parties with jurisdiction reserved. However, the question remains as to whether the 49ers could ever be successful in recovering medical-legal costs in any contribution proceedings absent California subject matter jurisdiction over the Packers and Dolphins.

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CALIFORNIA WORKERS' COMPENSATION SPORTS LAW CASES

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Jurisdictional Constitutional Due Process Issues

Federal Insurance Company v. WCAB (Johnson) (2013) 221 Cal. App. 4th 1116

Issues: Whether California based on a constitutional due process analysis has the power to adjudicate applicant's claim and whether California has a sufficient interest in the matter to apply California workers' compensation law in order to retain jurisdiction over the case.

Factual and Procedural Background: Applicant Adrienne Johnson was a professional basketball player who played for a number of years in the WNBA. The last team she played for was the Connecticut Sun. During her last full professional basketball season, she played one game in California on July 20, 2013 out of a total of 34 games played in the 2003 season. Applicant was never employed by a California team. She never resided in California, nor did she have a California based agent. She did not suffer a specific injury in California. The last employment contract she entered into with the Connecticut Sun was signed in New Jersey. Thus Applicant's only contact with California was one game she played in Los Angeles on July 20, 2003.

Applicant also had a history of significant injuries. She had a 1999 right knee injury which resulted in right knee surgery in the year 2000. In May of 2001 she had an Achilles tendon injury and missed the entire 2001 season. In 2003 she reinjured her right knee. She also had knee surgery in 2004 and did not play at all in the 2004 season.

Prior to filing her workers' compensation cumulative trauma claim in California, applicant filed a workers' compensation claim in Connecticut in 2003 for an injury to her right knee which was resolved by a settlement for \$30,000.00.

Trial Level Proceedings: Following trial the WCJ found applicant suffered a cumulative trauma injury from August 1, 1997 to August 7, 2003 to various orthopedic body parts and other systems resulting in 59% permanent disability without apportionment. Defendant filed a Petition for Reconsideration raising a number of issues including the lack of subject matter jurisdiction and apportionment. The WCAB granted defendant's petition for reconsideration and rescinded the Award and returned the matter to the WCJ for further proceedings related to the apportionment issue, but not on the issue of California subject matter jurisdiction.

While on remand, defendant filed a Petition for Writ of Review even though there was no final order. The Court of Appeal noted that generally review may be sought only from a final order. However, there are certain critical threshold issues which are reviewable by way of Writ of Review before any final order issues. The territorial jurisdiction of the WCAB is one of those threshold issues. Since subject matter jurisdiction is potentially dispositive of the entire case, review of such an issue may resolve the case without the time, effort, and expense of fully litigating the case.

Discussion: Initially the Court of Appeal indicated the issue in this case is which states workers' compensation law applies, not which state has personal jurisdiction. However, the court immediately noted the question of subject matter jurisdiction ordinarily precedes the conflict of laws question. "...For only after the workers' compensation commissioner determines that he has authority to entertain the action does he proceed to the "choice" of whether to award benefits under our Workers' Compensation Act or, rather, to defer to the earlier grant of benefits under the laws of another state". The court then restated the issue characterizing it as not one of personal jurisdiction but rather one of whether one or more state compensation laws apply and whether in this case California may provide a forum for the claim. The Court of Appeal went on to discuss general principles extensively but focused primarily on the constitutional due process issue. "As we discuss, whether California workers' compensation law governs depends on the application of the due process clause of the United States Constitution. If an employer or the insurer are subject to workers' compensation law of a state that does not have a sufficient connection to the matter, they are deprived of due process." The Court of Appeal also indicated there was a full faith and credit dimension. "That is if the workers' compensation law of another state exclusively should apply and California does not have a sufficient contact with the matter, California must, under the full faith and credit clause accede to the other state to provide a forum."

The Court of Appeal in refining its analysis noted the focus of many cases is on whether a particular state has a "legitimate interest" in the injury and its consequences. So the question is whether or not in this particular case California has a legitimate interest in the injury and its consequences which also then in turn depends on some substantial connection between California and the particular employee-employer relationship. The Court of Appeal cited a number of United States Supreme Court cases summarizing their holdings as follows:

As stated by an authority, the cases make clear "that the test is not whether the interest of the forum state is relatively greater, but only whether it is legitimate and substantial in itself." Thus, the forum state does not weigh interests as is done in a traditional choice of law consideration. Rather, it determines whether to grant relief under its own workers' compensation law or to deny relief altogether. The forum state can grant relief if it has some substantial interest in the matter. None of the Supreme Court cases suggests that a forum state must apply its law. The Supreme Court authority has treated the determination of whether a forum state should apply its workers' compensation law or decline to hear the matter in deference to laws of other states as an issue of constitutional law.

The Court of Appeal noted that California law is consistent with United States Supreme Court authority on this issue. Labor Code § 5305 provides "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 the state at the time of injury and the contract of hire was made in this state". However, the court of Appeal made no reference to Labor Code §3600.5 (a). The Court of Appeal then analyzed and cited a number of California decisions applying the legitimate interest-substantial connection analysis. In determining whether there is a legitimate and significant interest, the Court of Appeal noted that "Thus, 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 worker'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."

The Court of Appeal stated that even if an employee is able to obtain benefits under another state's compensation laws, California still retains a significant interest in insuring the maximum application of this protection afforded by the California Legislature.

California courts historically "...have long focused on the contacts of the employment relationship with California in determining which state's workers' compensation law applies". The creation of an employment contract in California even if an injury is suffered by an individual outside of California is a legitimate and significant California interest. Referencing *Alaska Packers Assn. v. Indus. Acc. Com.* (1934) 1 Cal.2d 250, the Court of Appeal noted that "...[T]he court held that the creation of the employment relationship in California, which came about when he signed the contract in San Francisco, was a sufficient contact with California to warrant the application of California workers' compensation law." The Court of Appeal also referenced and discussed the recent case of *Matthews v. National Football League Management Council* (9th Cir. 2012) 688 F.3d 1107. In *Matthews*, although the applicant over his almost 20 year career in the NFL played 13 games in California, he was unable to show that he sustained any specific injury in California or that he ever received medical treatment in California for an injury. In *Matthews* as in the instant case, applicant contended he sustained part of his cumulative trauma injury in California, and thus the California Workers' Compensation Act should apply.

Due Process and Section 181 of the Restatement (Second) of the Conflict of Laws: The Court of Appeal engaged in an extensive analysis and discussion of Section 181 of the Restatement of the Conflict of Laws.

The most significant impact of Section 181 of the Restatement (Second) is that it is a rule "of constitutional law." The court in summarizing the due process constitutional dimension stated:

Under the due process clause of the Fourteenth Amendment, a State of the United States may apply its local law to affect legal interests if its relationship to a person, thing or occurrence is sufficient to make such application reasonable. Section 9 of the Restatement (Second) of Conflicts of Law states that a state may not apply its local law unless such application would be reasonable in light of the relationship of the state and of other states to the person, thing or occurrence involved.

The court characterized this as the sufficient relationship test. The lynch pin of the courts due process analysis and holding was articulated as follows:

We are not, therefore, faced with an issue of which law to apply, but only with whether California workers' compensation law applies in this case. That issue has been framed as one of due process under the 14th amendment of the United States Constitution (See Res.2d. Conflicts of Law, *supra*, § 181, p. 537.) If this state lacks a sufficient relationship with Johnson'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. (See *Carslon v. Eassa* (1997) 54 Cal.App.4th 684, 691 ["subject matter jurisdiction 'relates to the inherent authority of the court involved to deal with the case of matter before it'"]).

The Court of Appeal once again referenced *Alaska Packers*, where "... [t]he Court suggested that the interest of the forum state is to be weighted against that of another state in determining the full faith and credit issue. As case law evolved, the only test is whether the forum state has a legitimate interest. If it does, that state will grant relief. If it does not, it will deny relief. Thus, if the forum state lacks a sufficient connection to the matter, it will, in effect, give full faith and credit to workers' compensation law of another state that has such sufficient connection to the matter."

The Nature of Applicant's Alleged Injury and its Impact on Subject Matter Jurisdiction:

The essence of applicant's argument was that since she was alleging a cumulative injury over the course of her entire professional career and not a specific injury, the one game she played in Los Angeles for the Connecticut Sun on July 20, 2003, contributed to her injuries and ultimate disability.

The Court of Appeal discussed and analyzed Labor Code §3208.1(b) which defines a cumulative trauma injury and also its relationship with Labor Code §5412 which further refines and defines the date of injury in cumulative trauma cases. Perhaps the most important aspect of the court's discussion was "[a] number of cases have held that where disability results from continuous cumulative traumas or exposures, the injury occurs not at the time of each distinct, fragmented exposure or trauma, but at the time the cumulative effect of the injuries has ripened into disability." (*Fruehauf v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 569, 579.) The Court of Appeal concluded that the date of applicant's disability was August 7, 2003 the day of her retirement as opposed to the date of the one game she played for the Connecticut Sun in Los Angeles on July 20, 2003.

In terms of the "legitimate substantial interest" analysis, the court stated "[t]he 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."

More importantly the Court of Appeal stated the site of applicant's employment relationship is often the most realistic basis for invoking a state workers' compensation law. In this case the applicant's employment relationship was exclusively in Connecticut. Moreover, she had availed

herself of the Connecticut workers' compensation system and received an Award. Thus the places of Johnson's injuries, employment relationship, employment contract and residence, all possible connections for the application of the state workers' compensation law, do not have any relationship to California.

The court concluded that from a constitutional standpoint, as a matter of due process, California does not have the power to entertain Johnson's claim.

Comment: For a number of reasons this case was a challenge to analyze. The Court of Appeal moved between references to choice of law, personal jurisdiction, subject matter jurisdiction, as well as constitutional due process and full faith and credit issues.

What is clear is that the Court articulated the need not just for a California "legitimate" interest but rather a "legitimate and substantial interest or connection" in the alleged injury and its' consequences.

What does seem crystal clear is the court's holding that mere participation in one game in California alone or the effects of participating in one game in California does not automatically amount to a cumulative trauma injury or create a legitimate and substantial California interest in the alleged injury. The author believes the previous line of writ denied cases finding participation in one game in California as constituting a portion of a cumulative trauma sufficient to establish California jurisdiction are no longer persuasive authority. Those cases are: *Injured Workers' Ins. Fund of Maryland v. WCAB (Crosby)* (2001) 66 Cal. Comp. Cases 923 (writ denied); *John Christner Trucking v. WCAB (Carpenter)* (1997) 62 Cal. Comp. Cases 979 (writ denied); *Rocor Transportation v. WCAB (Ransom)* (2001) 66 Cal. Comp. Cases 1136 (writ denied); *Portland Trailblazers v. WCAB (Whatley)* (2007) 72 Cal. Comp. Cases 154 (writ denied); *Washington Wizards v. WCAB (Roundfield)* (2006) 71 Cal. Comp. Cases 897 (writ denied).

Constitutional Due Process Issues

Jackson v. Denver Broncos and Cleveland Browns (2013) 2013 Cal. Wrk. Comp. LEXIS 427 (WCAB Panel Decision)

Issues: 1.) Alleged denial of opportunity to cross examine applicant; 2.) Whether a defendant waived their objection to California Jurisdiction even when there were contractual choice of law/forum provisions in applicant's contract by filing an application on behalf of applicant against a co-defendant.

Procedural and Factual Background: Following Trial, the WCJ found applicant suffered a cumulative trauma injury while employed by the Cleveland Browns to multiple body parts and conditions resulting in 83% Permanent Disability. However, in a companion case involving a different CT date against the Broncos, the WCJ dismissed the Broncos. The companion case against the Broncos arose when the Cleveland Browns filed an Application on behalf of applicant against the Broncos.

The Browns filed a Petition for Reconsideration alleging they were not allowed to finish cross examining the applicant and also an issue of liability under Labor Code §5500.5. The Browns alleged the §5500.5 liability should be against the Broncos and they also argued there was no California Jurisdiction and a 2008 settlement against the Broncos barred applicant's claim against the Browns.

Applicant was a non California resident and never signed any of his contracts in California but did have a California based agent. Applicant filed a CT application against the Browns. Initially the Browns attempted to join the Broncos as a co-defendant but their Petition for Joinder was denied. Alternatively, the Browns strategically filed an Application of behalf of applicant against the Broncos alleging a different CT. This was assigned a different case number.

Applicant while playing for the Browns (the terminal employer), traveled to California one time on September 21, 2013, as a member of the practice team and played a contact game against his own team mates. The contract applicant signed with the Browns contained a choice of law/forum provision.

While applicant was playing for the Broncos from September 2, 2005 to September 1, 2006 he came to California on December 31, 2005, for a game but did not practice or play in the game. His contract with the Broncos also had choice of law/forum provisions.

Applicant settled a specific 2006 injury he suffered while playing for the Broncos in 2008.

With respect to the contract of employment with both the Browns and the Broncos, applicant testified his California based agent negotiated the contracts with both teams and he authorized his agent to accept and bind him to the contracts even though he actually signed the contracts outside of California.

Cross Examination Issue: The WCJ during trial on September 26, 2011, advised the parties that she was unavailable for the afternoon trial session. Initially it appeared the parties agreed to have the afternoon trial session before a different judge. However, once they appeared before the other WCJ, there was a dispute and the afternoon trial session did not take place. The trial was continued to November 14, 2011. Applicant did not appear for trial and the case was submitted over defendant's objection since they did not complete cross examination of the applicant. On reconsideration the WCAB found there was a denial of due process related to defendants not being able to finish cross examining the applicant. On this basis alone, the WCAB rescinded the Findings and Award and returned the matter for further proceedings.

The Jurisdiction Issue: The WCAB on remand indicated the WCJ must determine whether applicant was hired in California based on his California based agent accepting the contracts on applicant's behalf. If applicant was not hired in California then the McKinley jurisdictional issue related to the effect of the contract choice of law/forum clauses in applicant's contracts must be determined.

However, the WCAB noted the choice of law/forum clauses alone do not deprive the WCAB of jurisdiction but rather the WCAB may decline to exercise jurisdiction in certain limited circumstances. Moreover, the WCAB indicated the Browns may have waived and also possibly estopped to contest California subject matter jurisdiction on the basis they filed an Application on behalf of the applicant against the Denver Broncos therefore invoking California Jurisdiction.

Personal Versus Subject Matter Jurisdiction

Copeland v. Denver Nuggets, Pinnacol Assurance (2013) 2013 Cal. Wrk. Comp. PD LEXIS 356 (WCAB Panel Decision)

Issue: Where a party as in this case, a defendant insurance company made all appearances by “special” appearance contesting both personal jurisdiction and subject matter jurisdiction it was improper for the WCJ to refer any of the consolidated cases out to mandatory arbitration on an alleged “insurance coverage” issue under Labor Code § 5275 without first holding a hearing and determining whether the WCAB could exercise both personal and subject matter jurisdiction over defendant.

Factual and Procedural Background: Pinnacol Assurance (Pinnacol) was the insurance carrier for the Denver Nuggets, but argued and asserted their coverage of the nuggets based on their policy and Colorado statutes limited their liability only for claims filed in the state of Colorado, which was the domicile of both the Nuggets and Pinnacol.

Several former Nuggets players filed Applications for Adjudication in California, which were consolidated based on a Motion of the Denver Nuggets.

On January 9, 2013, the WCJ indicated he would conduct a January 31, 2013, hearing only on the issue of whether one or more of the seven consolidated cases should be referred to arbitration pursuant to Labor Code § 5275 based on the issue of “insurance coverage.” Pinnacol immediately filed a Petition for Removal of each of the seven cases to the Appeals Board contending that Colorado law barred it from defending or covering Workers’ Compensation Claims filed in California. While the seven Petitions for Removal were pending before the WCAB, the WCJ proceeded with the January 31, 2013, hearing. Following that hearing, the WCJ issued an Order that three of the seven cases proceed to arbitration pursuant to Labor Code § 5275. Pinnacol once again filed a Petition for Removal in these three cases.

It is important to note that Pinnacol always appeared by “special appearance” in all proceedings. On removal, Pinnacol argued that the WCAB had no personal jurisdiction over it and that the Denver Nuggets and their seven employees were exempted from the provisions of California Workers’ Compensation laws by Labor Code section 3600.5(b). In essence, Pinnacol contends there was no insurance coverage issue to be sent out to arbitration and it was an abuse of discretion to order three of the seven cases to arbitration.

The WCAB granted removal rescinding the WCJ's arbitration Order and ordered the WCJ to conduct further proceedings related to whether or not the WCAB had personal jurisdiction over Pinnacol. The WCAB ruled that the threshold issue was not "insurance coverage" but rather, "instead, the threshold issue that must be first determined at a hearing is whether the WCAB has personal jurisdiction over Pinnacol." As to that issue, the WCAB has jurisdiction to conduct hearings to determine if it has personal jurisdiction over a named party as well as determine if it has jurisdiction over an injury claim.

Comment: In many sports cases personal jurisdiction as opposed to subject matter jurisdiction is not contested due to the fact that the minimum contacts of most employers and their carriers meets the test set forth in *International Shoe Co. v. Washington* (1945) 326 U.S. 310. However, there are situations where a defendant should in all pleadings and all appearances before the WCAB on the Minutes of Hearing indicate they are making a "special appearance."

Validity and Scope of Releases and Settlements

Dorsett v. Denver Broncos and Dallas Cowboys (2013) Cal. Wrk. Comp. PD LEXIS 359 (WCAB Panel Decision)

Issues/Holding: Where a prior Compromise and Release and Order Approving issued in 1991, included "head" and also language settling "all claims" of injuries to applicant's head effectively barred any new claim of injury related to psychological or neuropsychological injuries including post-concussion syndrome. Moreover, based on Labor Code Section 5804, there was no basis to set aside the previous 1991 Compromise and Release since the five year jurisdictional limit had expired and there was no showing of extrinsic fraud or mistake.

Factual Background: Applicant, Anthony Dorsett played for two professional football teams in his NFL career: the Dallas Cowboys and the Denver Broncos in the years 1977 through 1989. Two years after he retired, he filed a cumulative trauma claim involving multiple body parts including neck, back, both lower extremities, both upper extremities, head, spine, internal, and other parts of body referred to medicals on file. Applicant's claim against the Cowboys and Broncos was settled via Compromise and Release and Order Approving issued on September 24, 1991. Applicant received a lump sum payment of \$85,000.00.

On April 11, 2011 applicant filed another cumulative trauma claim in case number ADJ7763837 against the same employers related to the same cumulative trauma period that was alleged in the first Application for Adjudication. He essentially listed the same body parts.

At Trial, the WCJ took judicial notice of the 1991 Compromise and Release agreement and Order Approving. Also during the course of the hearing applicant testified he did not recall his earlier settlement by way of a Compromise and Release, but did recognize and acknowledge his signature on the Application and Compromise and Release in the first case. Applicant also testified he experienced numerous hits to his head and concussions during his years of employment as a football player. The WCJ and the WCAB noted that "head" was specifically identified as an injured body part in the first application and that "head" was specifically listed in

the Compromise and Release agreement. The WCJ found the 1991 Compromise and Release and Order Approving was res judicata and barred applicant from proceeding further in alleging a new claim. Applicant filed a Petition for Reconsideration. In denying applicant's Petition for Reconsideration, the Board emphasized that in addition to listing "head" as an injured body part, there was an express release, which released defendants of "all" claims of injury concerning his head based on language that indicating applicant was releasing and forever discharging the employer and carrier from "all claims" and causes of actions, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury.

The WCAB also noted that applicant's reliance on old asbestosis case was misplaced and distinguishable based on the progressive and latent nature of asbestos. In this case, it was undisputed applicant acknowledged that he suffered concussions and headaches as a result of his head injuries while playing football when he filed and settled his first claim.

Discussion: Given the current focus on concussion, dementia, and CTE, this case is significant in that defendants, in drafting settlement documents, should be extremely careful in making sure that all known body parts and conditions are included in the Compromise and Release settlement with as much specificity and elaboration as necessary. Moreover, there should also be similar language, as in this case, related to a release of all claims and causes of action whether now known or ascertained or which may hereafter arise or develop as a result of any injury.

Subject Matter Jurisdiction Contract Formation (Non-Sports Case)

Mora v. Trident Seafoods Corp (2013) 2013 Cal. Wrk. Comp. PD LEXIS 388 (WCAB Panel Decision)

Holding: In this non-sports case, the WCAB found California subject matter jurisdiction reversing the decision of the WCJ on the basis that, although applicant suffered an injury in Alaska, her contract of hire was made in California and she was a resident of California.

Factual and Procedural Background: Applicant suffered a specific admitted wrist injury on August 25, 2011, while employed as a seafood processor in Alaska. Following Trial, the WCJ found there was no California subject matter jurisdiction. Applicant filed a Petition for Reconsideration, which was granted. The WCAB reversed the WCJ and found a basis for California subject matter jurisdiction.

Contract Formation Facts: Applicant worked for defendant as a seasonal seafood processor. Including the season where she was injured on, August 25, 2011, it was her third seasonal employment with Trident. While applicant, a resident of California, was in California, she received an email from defendant entitled, "Conditional Offer Extended" and then received a second email stating, "Congratulations, you have been hired to work at the Sand Point shoreplant...You must report to Trident Seafoods Human Resources office in Seattle to sign your contract on January 24, 2011 at 7:00 A.M. PLEASE BE PROMPT! If you do not arrive at your appointed time, your job may be filled by other applicants."

In addition, applicant testified she received other documents at her home in California providing the details of her employment including her wages and work location. She admitted that required employment documents were actually signed in Seattle, but everyone who showed up in Seattle with proper identification and a completed I-9 Form were then sent to Alaska for employment. The actual employment agreement was mailed to the applicant's home in Oxnard, California, but she could not recall where she was when she physically signed the documents.

Discussion: In reversing the WCJ and finding California subject matter jurisdiction, the WCAB focused on Labor Code § 5305. Labor Code § 5305 extends California subject matter jurisdiction where contracts of hire are actually made in California, even in situations where the contract is accepted telephonically, and where all the essential terms of the contract are transmitted and accepted in California even though there may be an actual signing of an employment contract or agreement outside of California. "Furthermore, a person who accepts employment in California is hired in California, even if paperwork or other personnel requirements must be completed outside the state." Reference was also made to Labor Code § 3600.5(a). The Board, in citing a number of cases noted that, "A contract of hire may be formed in California even if employment is contingent on conditions which must be satisfied elsewhere." Applying these principles to the facts of the case, the WCAB noted that defendant offered applicant a position by sending information about the job including proposed wages to her home in California. The Board found that applicant actually accepted defendant's offer when she departed for Seattle from California in order to complete required employment documents. The Board stated:

"Although applicant filled out some forms at the corporate headquarters, she was still hired in California for the purposes of sections 5305 and 3600.5(a). Trident Seafoods employees were hired before they visited the Seattle headquarters, since every person who showed up there with adequate identification was sent to Alaska. Furthermore, a person who accepts employment in California is hired in California, even if paperwork or other personnel requirements must be completed outside the state."

The WCAB also noted it appeared the WCJ confused personal jurisdiction principles with subject matter jurisdiction principles. The WCAB concluded by stating, "Applicant's contract of hire was made in California, so the WCAB has jurisdiction over her claim for industrial injury sustained in Alaska under sections 5305 and 3600.5(a).

Comment: While this is not a sports case, it is still instructive with respect to California's "flexible" contract formation principles in Workers' Compensation cases, especially when the case involves a California resident.

Bifurcation of Dispositive Issues for Trial

Ortega v. Hinas Mercy Southwest Pharmacy, State Farm & Casualty Company (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 335 (WCAB Panel decision)

Issues: Whether a party upon a showing of good cause may obtain a bifurcated trial on dispositive/threshold issues such as subject matter jurisdiction and statute of limitations.

Procedural and Factual Overview: Three separate cases were set before the WCJ. State Farm one of the defendants, requested a bifurcated hearing/trial on the sole issue of whether applicant's application/claim for a specific injury of April 17, 2007 was barred by the statute of limitations.

Applicant suffered an admitted April 17, 2007, psychiatric injury related to a robbery. Defendant provided treatment and then approximately 2 ½ years later notified applicant they were closing her file. Applicant first filed an Application for Adjudication of Claim related to the April 17, 2007, injury on August 29, 2012, which was more than one year from the date of the notice from defendant they were closing their file and more than five years from the date of injury.

Based on these facts State Farm requested a bifurcated trial on their case related to the statute of limitations issue. This request was denied by the WCJ and the matter taken off calendar. Defendant then filed a timely Petition for Removal which was granted by the WCAB.

Discussion: The WCAB granted defendant's Petition for Removal ordering the case to be set for a Mandatory Settlement Conference followed by a bifurcated trial on the issue of statute of limitations.

The WCAB noted that WCAB rule 10560 provides that generally parties are expected to submit all matters at a single trial including multiple cases. "However a Workers' Compensation Judge may order that the issues in a case be bifurcated and tried separately upon a showing of good cause." The WCAB without addressing whether or not the statute of limitations is a "threshold issue" held State Farm had shown good cause to bifurcate this issue due to the fact the disposition of the statute of limitations defense would avoid litigation expenses and the parties in the other two cases would not be required to prepare for litigation of this case in conjunction with the remaining cases.

Comment: WCAB rule 10560 does provide that a party upon a showing of good cause is entitled to a bifurcated hearing or trial. This is especially true with respect to any critical threshold or dispositive issue such as the statute of limitations or subject matter jurisdiction. Without the ability for a party to obtain a bifurcated hearing on a critical threshold issue such as subject matter jurisdiction or statute of limitations, they would be exposed unreasonably and unnecessarily to litigation costs and medical/legal costs which they would otherwise, be able to avoid altogether if they prevailed at a bifurcated hearing. It is incumbent upon any party seeking, a bifurcated trial to file a detailed petition or points and authorities establishing a good cause for a bifurcated hearing. (See also: *Ransom v. Jacksonville Jaguars* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB Panel Decision) and also supporting language in *Federal Insurance Company v. WCAB (Johnson)*).