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Citation: **2014 Cal. Wrk. Comp. P.D. LEXIS 107**

*2014 Cal. Wrk. Comp. P.D. LEXIS 107, **

Tarek Saleh, Applicant v. Cleveland Browns, Carolina Panthers, Legion Insurance in liquidation by CIGA, Defendants

W.C.A.B. No. ADJ1406871 (ANA 0409307)—WCAB Panel: Commissioners Moresi, Brass, Sweeney

Workers' Compensation Appeals Board (Panel Decision)

2014 Cal. Wrk. Comp. P.D. LEXIS 107

Opinion Filed February 27, 2014

NOTICE: [*1] CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing **[*2]** rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

DISPOSITION: Reconsideration is *granted*, the February 1, 2013 Findings, Award and Order is *rescinded*, and new Findings are *substituted*. The matter is *returned* to the trial level for further proceedings and a new decision on all outstanding issues.

CORE TERMS: workers' compensation, forum selection clause, reconsideration, exemption, player, cumulative, applicant's claim, cumulative injury, self-insurance, applicant's employment, exercise jurisdiction, settlement conference, pre-trial, coverage, trauma, compensation laws, compensation insurance, employment contracts, trial level, writ den, temporarily, workmen's, prong, addendum, objected, industrial injury, professional football, present matter, extraterritorial, self-insured

HEADNOTES

WCAB Jurisdiction—Professional Athletes—WCAB rescinded WCJ's finding that applicant suffered cumulative industrial injury to various body parts while playing professional football from 5/15/97 through 1/6/2002, and remanded matter for [*3] further proceedings on issue of California jurisdiction over Cleveland Browns, when WCJ attempted to exercise jurisdiction pursuant to Labor Code § 3600.5(a) (which gives WCAB jurisdiction over injuries sustained outside state where employee was "regularly employed" within state) and did not reach question of jurisdiction based on injury in California, and WCAB, without making final determinations on unresolved issue, held that (1) because applicant claimed injury within California, WCJ must determine issue of jurisdiction on that basis, with consideration as to whether any portion of injurious exposure causing applicant's cumulative trauma occurred during games within state, (2) employment contract assumed by Cleveland Browns from Carolina Panthers covering applicant's first year of employment with Cleveland Browns contained no forum selection clause, and there was no legal basis to conclude that forum selection clauses in applicant's later employment contracts with Cleveland Browns applied to applicant's first year of employment, and (3) Cleveland Browns was not entitled to Labor Code § 3600.5(b) exemption [*4] from California jurisdiction because there was no evidence in record indicating that Cleveland Browns' self-insurance covered applicant's employment in California, as evidence regarding coverage was properly excluded by WCJ, and, therefore, elements set forth in *Carroll v. Cincinnati Bengals* (2013) 78 Cal. Comp. Cases 655 (Appeals Board en banc opinion), were not satisfied. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [3], 21.02, 21.06, 21.07[5], 24.03[6], 31.13[2][a].]

COUNSEL: For applicant—Law Offices of Namanny, Byrne & Owens

For defendant Cleveland Browns—Peterson, Colantoni, Collins & Davis

For CIGA—Guilford, Sarvas & Carbonara

OPINION BY: Commissioner Alfonso J. Moresi

OPINION

OPINION AND DECISION AFTER RECONSIDERATION

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

In the Findings, Award and Order of February 1, 2013, the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a football player from May 15, 1997 through January 6, 2002, sustained **[*5]** industrial injury to his head, neck, back, spine, shoulders, elbows, left hip, right wrist, hands, knees, left ankle, feet, and internal and

neurological systems, and in the form of post-traumatic head syndrome, post-traumatic headaches, sleep disturbance, and chronic pain, causing 58% permanent disability after apportionment. The WCJ also found, among other things, that the only liable employer during the Labor Code section 5500.5[1] period of liability, April 12, 1999 through April 11, 2000, was the Cleveland Browns, an employer which was uninsured in California.

FOOTNOTES

1 All further statutory references are to the Labor Code unless otherwise specified.

Defendant, the Cleveland Browns (petitioner), filed a timely petition for reconsideration of the WCJ's decision. Petitioner contended that the Workers' Compensation Appeals Board (WCAB) should not have exercised jurisdiction over applicant's claim because applicant signed employment contracts in 2000 and 2001 which included **[*6]** a provision selecting Ohio as the forum for all workers' compensation claims against the Cleveland Browns. Petitioner also contended that the section 3600.5(b) exemption applies, and that the WCJ improperly excluded evidence that petitioner was permissibly self-insured under the law of Ohio and provided extraterritorial coverage. Finally, petitioner contended that the WCAB lacks jurisdiction over applicant's claim because no employer is liable for the last year of injurious exposure under section 5500.5.

We have considered the Petition for Reconsideration and applicant's Answer, and we have reviewed the record in this matter. We have also received and considered an answer from the California Guarantee Association (CIGA). The WCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we affirm her decision.

For the reasons set forth below, we will rescind the February 1, 2013 Findings, Award and Order, issue our own finding that the Cleveland Browns are not entitled to the section 3600.5(b) exemption, and return the matter to the trial level for further proceedings and new decision by the WCJ on the remaining issues, consistent with **[*7]** this opinion.

BACKGROUND

Applicant Tarek Saleh alleged that he sustained industrial injury while employed as a football player by the Carolina Panthers from May 15, 1997 through February 8, 1999 and the Cleveland Browns from February 9, 1999 through January 6, 2002. (April 18, 2012 Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 2:20–24.) According to his trial testimony, his professional football career ended when he left the Cleveland Browns. (*Id.* at p. 11:8–10.)

Applicant testified that the Cleveland Browns assumed his contract with the Carolina Panthers when he changed teams in 1999. (*Id.* at p. 10:8–10.) Applicant later signed a new contract with the Cleveland Browns covering the period March 1, 2000 through "February 28 or 29, 2001." (Defendant Brown's Exh. A, bates no. 2–4.) A contract addendum signed by applicant on April 12, 2000 contained the following language:

> *WORKERS COMPENSATION.* Club Promises and agrees to provide workers' compensation benefits directly to player or player's health care providers. Player promises and agrees that any workers' compensation claim, dispute, or cause of action arising out of Player's employment with **[*8]** the club shall be subject to the workers' compensation laws of Ohio exclusively and not the workers' compensation laws of any other state and that any claim, filing, petition, or cause of action in any way relating to workers' compensation rights or benefits arising out of Player's employment with the Club, including without limitation the applicability or enforceability of this addendum, shall be brought solely and exclusively with the courts of Ohio, the Industrial Commission of Ohio, or such other Ohio tribunal that has jurisdiction over the matter. (Defendant Brown's Exh. A, bates nos. 5.)

Identical language was included in an addendum to a contract between applicant and petitioner for the period March 1, 2001 through "February 28 or 29, 2002." (Defendant Brown's Exh. A, bates nos. 6–12.) The addendum was signed by applicant on March 5, 2001. (*Ibid.*)

Applicant testified he has never lived in California, and there is no evidence in the record that he was hired in the state. (April 18, 2012 MOH/SOE, p. 20:21–22.) Applicant stated that he worked in California for the Cleveland Browns on at least two occasions, once in 1999 and once in 2000, and he said that he recalled **[*9]** being injured in games in California. (April 18, 2012 MOH/SOE, p. 10:16–18; September 17, 2012 MOH/SOE, p. 8:20–25.) Applicant testified that the injuries involved his whole body, and he recalled receiving medical treatment in California in the form of ice, stimulation, and medications including Toradol, Naprosyn, Vioxx and Lorcet. (April 18, 2012 MOH/SOE at pp. 10:19–20, 15:10–11.) Applicant testified that he would arrive in California one or two days before each game. (*Id. at* pp. 15:24–16:9.) He said he remembered performing drills and practicing before the two games in California. (September 17, 2012 MOH/SOE, p. 8:20–25.)

At trial, applicant objected to all exhibits not served by the date of the pre-trial conference, with the exception of one medical report; applicant also made other evidentiary objections. (April 18, 2012 MOH/SOE p. 6:6–7.) The WCJ subsequently excluded petitioner's Exhibits J through O. (Opinion on Decision, p. 5.) Those exhibits included documents related to the question of whether petitioner furnished workers' compensation insurance that covered applicant's work in California. The parties stipulated that petitioner was "permissibly self-insured in the **[*10]** state of Ohio as to this case." (*Id.* at p. 7:20–24.)

As she explained in the Report, the WCJ concluded that the WCAB has jurisdiction under section 3600.5(a). (Report, p. 2.) The WCJ determined that petitioner had not met its burden of proof as to section 3600.5(b) and found that petitioner was uninsured in California. The WCJ awarded benefits exclusively against the Cleveland Browns.

DISCUSSION

1. *McKinley* and Labor Code Section 3600.5(a) are not dispositive.

We begin by noting that the first year (1999) applicant played for petitioner, the Browns had assumed the contract that applicant had signed with the Carolina Panthers, and there is no evidence of a forum selection clause in the Panthers contract. (Opinion on Decision, p. 7.) Although petitioner contends that "the WCAB must not exercise jurisdiction over applicant's claim against the Browns as his employment contracts with the team contained a valid choice of law and forum selection clause[,]" petitioner fails to explain how the forum selection clauses in the later contracts control the preceding Panthers contract, which had no forum selection clause. Without **[*11]** expressing a final opinion, we see no legal basis to conclude, as asserted by petitioner, that the forum selection clauses in the Browns contracts apply to the entire period of employment with the Browns, from 1999–2001. Nor does petitioner explain how, under these circumstances, the forum selection clauses in the Browns contracts operate to preclude WCAB jurisdiction over applicant's alleged cumulative trauma injury from May 15, 1997 through January 6, 2002.

In *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 (Appeals Board en banc) (*"McKinley"*), the Board held that it 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.

In *McKinley,* however, the professional football contracts had mandatory forum selection clauses that covered the entire period of the claim of cumulative trauma at issue. That is not **[*12]** the

case here, so *McKinley* does not immediately resolve all the issues.

In fact, this case includes an unresolved issue as to whether there is a limited connection to California with regard to the employment and the claimed cumulative injury. In *Federal Insurance Co. v. Workers' Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 116 [78 Cal.Comp.Cases 1257], the Court of Appeal concluded that the effects of a professional basketball player's participation in one of 34 games did not amount to a cumulative injury warranting the invocation of California law, because "a state must have a legitimate interest in the injury."

In this case, the alleged cumulative trauma occurred over a period of more than four years, during which applicant played two games in California. Although we express no final opinion on the effect of *Johnson's* holding in this case, we conclude that the WCJ must at least consider it in revisiting the other outstanding issues discussed herein.

We further note that the WCJ attempted to exercise jurisdiction over applicant's claim pursuant to Labor Code section 3600.5(a) **[*13]** , which gives the WCAB jurisdiction over injuries sustained outside of California when the employee was "regularly employed" within the state. (Cf. *Carroll v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 655, 659 (Appeals Board en banc) (*"Carroll"*) [professional football player was temporarily in California during the single game he played in the state for the Cincinnati Bengals].)

It is unclear, however, whether this applicant was "regularly employed" in California, and he is claiming injury in California, not outside this state, as contemplated by section 3600.5(a).

The more salient concern is that the WCAB will exercise jurisdiction "over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurred within the state." (*McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 27 (Appeals Board en banc) (*McKinley*).)

In previous decisions, the WCAB has exercised jurisdiction over the claims of professional athletes that have sustained a portion of their cumulative injuries within California. (See, e.g., *New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Williams*) (2013) 78 Cal.Comp.Cases 1178 **[*14]** (writ den.); *Milwaukee Bucks v. Workers' Comp. Appeals Bd.* (*Mason*) (2013) 78 Cal.Comp.Cases 1173 (writ den.); *Portland Trailblazers v. Workers' Comp. Appeals Bd.* (*Whatley*) (2007) 72 Cal. Comp. Cases 154 (writ den.); *Washington Wizards v. Workers'Comp. Appeals Bd.* (*Roundfield*) (2006) 71 Cal. Comp. Cases 897 (writ den.).) To sustain such a claim, applicant must demonstrate, by a preponderance of the evidence, that he sustained an industrial injury within California. (Lab. Code, § 5705.) This may require evidence in the form of medical reports or physicians' deposition testimony explaining how applicant's work in California contributed to his alleged cumulative injury. (See *Peter Kiewit Sons v. Industrial Acci.Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188, 191] ["Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential..."].)

Since the WCJ found jurisdiction based section 3600.5(a), she did not reach the question of jurisdiction **[*15]** based on injury within the state. This is an issue that should be considered by the WCJ in the first instance. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584].) Therefore, we will return this matter to the WCJ for further proceedings and new decision on this issue, along with the others. Upon return to the trial level, the WCJ should address *Federal Insurance Co. v. Workers' Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 116 [78 Cal.Comp.Cases 1257], as discussed above.

At the outset, we discussed the WCJ's consideration of the effect of the forum selection clause in applicant's two employment contracts with petitioner. (Report, pp. 4–9.) The WCJ indicated that the present matter was different from the facts discussed in the en banc decision *McKinley v. Arizona Cardinals, supra,* 78 Cal.Comp.Cases 23, because petitioner assumed applicant's employment contract with the Carolina Panthers, a contract which covered the period through

"February 28 or 29, 2000" and which did not include a forum **[*16]** selection clause. (Report, pp. 4–9; Applicant's Exh. 3.)

To reiterate, the question of whether to enforce a contractual forum selection provision is a related but separate issue from jurisdiction over applicant's claim. (*McKinley* at p. 26.) Because we are returning the matter to the trial level on the question of jurisdiction, we need not finally address the forum selection issue at this time. We note, however, that in addition to the differences between the present matter and *McKinley* discussed in the Report, this case also involves CIGA, whose now defunct insurer was on the risk during part of the alleged cumulative trauma period.[2] The WCJ should address any issue resulting from CIGA's participation **[*17]** in this case as necessary or appropriate, in conjunction with the other unresolved issues.

FOOTNOTES

2 Even if the forum selection clause were otherwise enforceable under *McKinley,* we express no opinion about whether petitioner's self-insurance would nevertheless constitute "other insurance" for purposes of Insurance Code section 1063.I(c)(9)(ii).

2. The Labor Code section 3600.5(b) Exemption

Pursuant to the following discussion, we deny petitioner's contention that Labor Code section 3600.5(b) precludes a finding of subject matter jurisdiction over the Cleveland Browns. (Petition for Reconsideration, pp. 5–10.)

The former version of Labor Code section 3600.5(b)[3]contains an exemption from California's workers' compensation laws:

> "Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing **[*18]** work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state ...."

FOOTNOTES

3 This section has since been amended, but the amendments apply only to claims filed on or after September 15, 2013. (Stats. 2013 ch. 653 § 1 (AB 1309); Lab. Code, § 3600.5(h).)

As explained in *Carroll v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 655, 659 (Appeals Board en banc) (*Carroll*), although the WCAB has jurisdiction to hear all claims for workers' compensation based upon work-related injuries occurring in California, that jurisdiction is subject to the **[*19]** exemption contained in the former section 3600.5(b). The WCAB does not have jurisdiction over applicant's claim if (1) he was 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. (*Id.* at p. 657.)

In reference to prong (1), it appears this applicant was not regularly employed in California but apparently was temporarily employed in the state while working for **[*20]** petitioner.[4]

FOOTNOTES

4 We need not and do not offer any opinion on how the issue of 'temporary' or 'regular' employment relates to whether California has a "legitimate interest" in this applicant's alleged cumulative trauma injury, in connection with the Court of Appeal's analysis in *Johnson.* (See 78 Cal.Comp.Cases at 1268.)

Turning to the second prong of the exemption, petitioner attempted to demonstrate that it had self-insurance covering applicant's employment in California by introducing Exhibit G, a letter from Tom Sico dated September 26, 2011. Mr. Sico identified himself as the Assistant General Counsel of the Ohio Bureau of Workers' Compensation Legal Division. Petitioner's prior counsel then withdrew Exhibit G on the first day of trial in exchange for a stipulation from applicant that petitioner was permissibly self-insured in the State of Ohio. (April 18, 2012 MOH/SOE, p. 7:18–25.) The stipulation said nothing about whether petitioner's self-insurance furnished coverage under the workers' compensation or similar laws of Ohio that covered this applicant's employment while in California. (*Ibid.*)

On the second day of trial, represented by new counsel, petitioner again attempted to introduce the letter from Mr. Sico, this time as Exhibit J. Applicant objected based on petitioner's previous agreement to withdraw that exhibit. (September 17, 2012 MOH/SOE, p. 3:7–11.) Applicant also objected to petitioner's Exhibits J through O because they were neither timely served nor listed in the Pre-Trial **[*21]** Conference Statement. (*Id.* at p. 3:3–6.) Those documents included certificates of self-insurance.

Discovery is closed on the date of the mandatory settlement conference, and "[e]vidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Lab. Code, § 5502(d)(3).) Petitioner conceded that the contested documents had not been served on the other parties until June 11, 2012, after the first day of trial. (September 17, 2012 MOH/SOE, p. 4:2–5.) The November 28, 2011 Pre-Trial Settlement Conference Statement made no reference to any documents from Mr. Sico or the Ohio Bureau of Workers' Compensation.[5] **[*22]** It was therefore correct for the WCJ to exclude the letter from Mr. Sico and the other documents.

FOOTNOTES

5 The Pre-Trial Settlement Conference Statement stated that the parties agreed to keep discovery open, for the limited purpose of obtaining a supplemental report from agreed medical evaluator Dr. Lawrence M. Richman. The Pre-Trial Settlement Conference Statement specifically stated that applicant objected to any defense exhibits not served by the date of the conference, with the exception of that report.

Without those exhibits, there is nothing in the record indicating that petitioner's self-insurance covered applicant's employment in California. We recognized in *Carroll, supra* at p. 666 that Ohio law requires self-insurance to cover an employee "who is injured or who contracts an occupational disease...*wherever* such injury has occurred or occupational disease has been

contracted...[emphasis added]." (Ohio Rev. Code, § 4123.54(A); see Ohio Rev. Code, § 4123.46 (B).) However, petitioner must still demonstrate that it has complied with that requirement. In *Carroll,* for instance, the Cincinnati Bengals introduced a letter from the Chief Legal Officer of the Ohio Bureau of Workers' Compensation confirming that "the Cincinnati Bengals will cover, pursuant to the Ohio Workers' Compensation Act, injuries which occur in games located outside of the state of Ohio." (*Carroll, supra,* at p. 666.) In the present matter, petitioner presented **[*23]** no such admissible evidence. In fact, there is no reference to evidence, at pp. 7–10 of the petition for reconsideration where this point is argued, specifically establishing that the Browns furnished coverage under the workers' compensation or similar laws of Ohio that covered this applicant's employment while in California. Eligibility for the section 3600.5(b) exemption requires satisfaction of all four prongs set forth in *Carroll.* Here, the second prong *of Carroll* has not been satisfied. Therefore, we will issue a finding that the Cleveland Browns are not entitled to the exemption of section 3600.5(b).

3. Labor Code section 5500.5

Petitioner finally argues that applicant is not entitled to recovery pursuant to Labor Code section 5500.5. Without expressing a final opinion, we do not find this argument persuasive. The statute does not set forth conditions of compensability, as compared with sections 3600 *et seq.* Rather, section 5500.5 is concerned with apportioning liability amongst employers and carriers. Accordingly, "[r]esolution of a worker's rights to compensation is not to **[*24]** be delayed by disputes among employers and insurance companies as to who will pay the compensation." (2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, June 2013 Update) Supplemental Proceedings, § 23.54, p. 1876.) Moreover, petitioner's argument depends in part upon the premise that "the WCAB has declined to exercise jurisdiction over the Browns for [applicant's] last two years of employment based on the existence of valid choice of law and choice of forum selection clauses [,]" but with this decision we are making no such final finding. (See Petition for Reconsideration, p. 11:23–26.)

Finally, it should be noted that with the exception of our finding that the Cleveland Browns are not entitled to the exemption of section 3600.5(b), we express no final opinion on any issue in this case. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as set forth in Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 1, 2013 Findings, Award and Order is **RESCINDED** and the following Findings **[*25]** are **SUBSTITUTED** in its place:

FINDINGS

1. The Cleveland Browns are not exempted from the provisions of Division 4 of the California Labor Code pursuant to Labor Code section 3600.5(b).

2. All other issues are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

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

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Alfonso J. Moresi

I concur,

Commissioner Frank M. Brass

Commissioner Marguerite Sweeney

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Citation: **2014 Cal. Wrk. Comp. LEXIS 87**

*79 Cal. Comp. Cases 941, *; 2014 Cal. Wrk. Comp. LEXIS 87, **

Cleveland Browns, PSI, Petitioner v. Workers' Compensation Appeals Board, Carolina Panthers, California Insurance Guarantee Association, on behalf of Legion Insurance, in liquidation, **Tarek Saleh**, Respondents

Civil No. G049943

Court of Appeal, Fourth Appellate District, Division Three

79 Cal. Comp. Cases 941; 2014 Cal. Wrk. Comp. LEXIS 87

June 12, 2014 Writ of Review Denied

PRIOR HISTORY: [1]**
W.C.A.B. Nos. ADJ1406871 [ANA 0409307]—WCJ Agnes T. Barling (ANA); WCAB Panel: Commissioners Moresi, Brass, Sweeney [see Saleh v. Cleveland Browns, 2014 Cal. Wrk. Comp. P.D. LEXIS 107 (Appeals Board noteworthy panel decision)]

DISPOSITION: Petition for writ of review denied (no reasonable basis for petition)

CALIFORNIA COMPENSATION CASES HEADNOTES / SUMMARY Hide

CALIFORNIA COMPENSATION CASES HEADNOTES

WCAB Jurisdiction—Professional Athletes—WCAB rescinded WCJ's finding that applicant suffered cumulative industrial injury to various body parts while playing professional football from 5/15/97 through 1/6/2002 and remanded matter for further proceedings on issue of California jurisdiction over Cleveland Browns, when WCJ attempted to exercise jurisdiction pursuant to Labor Code § 3600.5(a), which gives WCAB jurisdiction over injuries sustained outside state when employee was "regularly employed" within state, and did not reach question of jurisdiction based on injury in California, and WCAB, without making final determinations on unresolved issues, held that [*942] (1) because applicant claimed injury within California, WCJ must determine issue of jurisdiction on that basis, with consideration as to whether any portion of injurious exposure causing applicant's cumulative trauma occurred during games within state, (2) employment contract

assumed by Cleveland Browns from Carolina Panthers covering applicant's first year of employment with Cleveland Browns contained no forum selection clause, and there was no legal basis to conclude that forum selection clauses in applicant's later employment contracts with Cleveland Browns applied to applicant's first year of employment, and (3) Cleveland Browns was not entitled to Labor Code § 3600.5 (b) exemption from California jurisdiction because there was no evidence in record indicating that Cleveland Browns' self-insurance covered applicant's employment in California, since evidence regarding coverage was properly excluded by WCJ, and, therefore, elements set forth in *Carroll v. Cincinnati Bengals* (2013) 78 Cal. Comp. Cases 655 (Appeals Board en banc opinion) were not satisfied.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [3], 21.02, 21.06, 21.07[5], 24.03[6], 31.13[2][a].]

CALIFORNIA COMPENSATION CASES SUMMARY

Applicant alleged that he sustained industrial injury to various body parts and systems while employed as a professional football player by the Carolina Panthers from 5/15/97 through 2/8/99 and the Cleveland Browns from 2/9/99 through 1/6/2002.

Applicant contended in relevant part that the Cleveland Browns assumed his contract with the Carolina Panthers when he changed teams in 1999, that Applicant later signed a new contract with the Cleveland Browns covering the period 3/1/2000 through 2/28/2001 and an additional contract with the Cleveland Browns covering the period 3/1/2001 through 2/28/2002.

Both Cleveland Browns contracts contained a forum selection clause indicating that the Cleveland Browns would be subject to the workers' compensation laws of Ohio exclusively and not those of any other state and that any workers' compensation claim would be brought within Ohio or any other Ohio tribunal that had jurisdiction. The contract with the Carolina Panthers had no such forum selection clause. Applicant and the Cleveland Browns stipulated that the latter was "permissibly self-insured in the state of Ohio as to this case."

At a hearing, Applicant testified that he had never lived in California, that he worked in California for the Cleveland Browns on at least two occasions, once in 1999 and once in 2000, that he recalled being injured in both games that took place in California, that the injuries involved his whole body, that he received medical treatment in California, and that he practiced in California prior to each of the two California games.

Following the hearing, the WCJ issued an F&A, finding that Applicant sustained injury AOE/COE to his head (including post-traumatic head syndrome and post-traumatic headaches), neck, back, spine, shoulders, elbows, left hip, right wrist, hands, left ankle, fee, internal, sleep disturbance, neurological, and chronic pain while employed as a professional football player during the period 5/15/97 **[*943]** through 1/6/2002, at various locations, including California, by the Carolina Panthers for the period of 5/15/97 to 2/8/99 and by the Cleveland Browns from 2/9/99 through 1/6/2002.

The WCJ also found that Applicant was entitled to TTD for the period of 1/3/2002 through 2/2/2002, that Applicant was entitled to PD of 58 percent, that there was a basis for apportionment as to the cervical spine and left ankle, that Applicant was in need of further medical treatment to cure or relieve from the effects of the injury, that there was no liability for the Carolina Panthers during the Labor Code § 5500.5 period of 4/12/99 through 4/11/2000, and that, accordingly, all liability for Applicant's injuries was with the Cleveland Browns.

Cleveland Browns sought reconsideration, contending in relevant part that the WCAB should not exercise jurisdiction over Applicant's claim against the Cleveland Browns since his employment contract with the team contained a valid choice of law and forum selection clause, that Labor Code § 3600.5(b) precluded a finding of subject matter jurisdiction over the Cleveland Browns, that Applicant was only temporarily in California during the relevant periods of time, and that, pursuant to Labor Code § 5500.5, Applicant was not entitled to recovery.

The WCJ recommended that reconsideration be denied. The WCJ indicated in relevant part that, while there was indeed a choice of forum clause in the two contracts Applicant signed with the Cleveland Browns, there was no such clause in Applicant's contract with the Carolina Panthers, which was assumed by the Cleveland Browns when Applicant moved from the Panthers to the Browns, that, while Applicant stipulated that the Cleveland Browns provided coverage to its professional football players employed temporarily outside Ohio, Applicant had not stipulated as to any such temporary status and did not stipulate to extraterritorial coverage in California, that the WCJ believed that Applicant was "regularly employed" in California because he had been a regular member of both the Panthers and the Browns when he came to California, that case law in California supported the finding that an employee could be regularly employed in California despite only limited presence within the state, and that the Cleveland Browns failed to meet the burden of proof under Labor Code § 3600.5(a).

The WCAB rescinded the WCJ's F&A and, substituting its own findings for those of the WCJ, found that the Cleveland Browns were not exempted from the provisions of Division 4 of the California Labor Code pursuant to Labor Code § 3600.5(b) and deferred all other issues pending further proceedings and determination by the WCJ.

The WCAB indicated that, while the Cleveland Browns contended that the WCAB must not exercise jurisdiction over Applicant's claim against the Browns since his employment contracts with the team contained a valid choice of law and forum selection clause, the Browns had failed to explain how the forum selection clauses in the later contracts controlled the preceding Panthers contract, which had no forum selection clause. Without expressing a final opinion, the WCAB indicated that it could see no legal basis to conclude, as contended by the Browns, that the forum selection clauses in the Browns contracts applied to Applicant's **[*944]** entire period of employment with the Browns, 1999–2001. The WCAB further indicated that, under these circumstances, the Cleveland Browns had failed to explain how the forum selection clauses operated to preclude WCAB jurisdiction over Applicant alleged cumulative trauma injury from 5/15/97 through 1/6/2002.

The WCAB also observed that the WCJ attempted to exercise jurisdiction pursuant to Labor Code § 3600.5(a), which gives the WCAB jurisdiction over injuries sustained outside the state when the employee was "regularly employed" within the state, but that it was unclear whether Applicant was ever "regularly employed" in California. Moreover, the WCAB noted that Applicant was claiming injury in California, not outside the state, as contemplated by Labor Code § 3600.5(a). Instead of concentrating on Labor Code § 3600.5(a), the WCAB stated that the WCJ's examination should be refocused:

> The more salient concern is that the WCAB will exercise jurisdiction "over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurred within the state." (*McKinley v. Arizona Cardinals* (2013) 78 Cal. Comp. Cases 23, 27 (Appeals Board en banc) (*McKinley*).)

The WCAB continued by stating that, since the WCJ found jurisdiction based on Labor Code § 3600.5(a), she did not reach the question of jurisdiction based on injury within the state. That issue, accordingly, should subsequently be considered by the WCJ. The WCAB added

that, without making a final determination on the unresolved issue, because Applicant claimed injury within California, the WCJ must determine the issue of jurisdiction on that basis, with consideration as to whether any portion of the injurious exposure causing Applicant's cumulative trauma injury occurred during games within the state.

The WCAB disagreed with the Cleveland Browns' contention that Labor Code § 3600.5(b) precluded a finding of subject matter jurisdiction over the Browns. Explaining what was required in order to meet the requirements of Labor Code § 3600.5(b), the WCAB stated:

> As explained in *Carroll v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 655, 659 (Appeals Board en banc) (*Carroll*), although the WCAB has jurisdiction to hear all claims for workers' compensation based upon work-related injuries occurring in California, that jurisdiction is subject to the exemption contained in the former section 3600.5(b). The WCAB does not have jurisdiction over applicant's claim if (1) he was 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. [*citation omitted*]

[*945]

The WCAB continued that, regarding the first prong described by *Carroll*, it appeared that Applicant was not regularly employed in California, but rather temporarily employed in the state while working for the Cleveland Browns. As to the second prong of the exemption, the WCAB stated that, because various bits of evidence had been properly excluded by the WCJ, there was no evidence in the record indicating that the Cleveland Browns' self-insurance covered Applicant's employment in California, as required by Labor Code 3600.5(b) and detailed in *Carroll*.

The WCAB concluded that, with the exception of its finding that the Cleveland Browns were not entitled to the exemption of Labor Code § 3600.5(b), it had expressed no final opinion on any issue in this case.

The Cleveland Browns filed a Petition for Writ of Review, contending in relevant respects that the record supported a finding of lack of subject matter jurisdiction pursuant to Labor Code § 3600.5(b) and that the WCAB erred by failing to remand the matter for further development of the record regarding the Cleveland Browns' extraterritorial coverage.

Applicant filed an Answer supporting the WCAB's decision. Applicant also requested that the Court of Appeal find that there was no reasonable basis for the Petition and that Applicant be awarded reasonable attorney's fees in connection with answering the Cleveland Browns' Petition for Writ of Review.

WRIT DENIED and Applicant's request for attorney's fees GRANTED June 12, 2014.

By the Court:

"The petition for writ of review is DENIED.

The court finds that "there is no reasonable basis for the petition." (Lab. Code, § 5801.) Accordingly, the cause is remanded to the Workers' Compensation Appeals Board for the purpose of making a supplemental award of reasonable attorney's fees to respondent Tarek

Saleh's attorney based upon services rendered in connection with the petition for writ of review. Such fees shall be in addition to the amount of compensation otherwise recoverable and shall be paid as part of the award by petitioners. (Lab. Code, § 5801; *Employers Mut. Liab. Ins. Co. v. Workmen's Comp. Appeals Bd.* (1975) 46 Cal. App. 3d 104, 120 Cal. Rptr. 48.)"

Rylaarsdam, Acting P.J.

COUNSEL: For petitioner—Peterson, Colantoni, Collins & Davis, by Melissa S. DuChene

For respondent employee—Namanny, Byrne & Owens, by Brittany E. Hayes

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