WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAZIO ROYSTER, *Applicant,* **vs.** **NFL EUROPE; TIG SPECIALTY INSURANCE COMPANY, administered by ZENITH INSURANCE,** *Defendants.*	**Case No. ADJ7597520** **(Van Nuys District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration to further study the facts and the applicable law. This is our Decision After Reconsideration.

Defendant, NFL Europe, by and through its workers' compensation insurance carrier, TIG Specialty Insurance Company, filed a timely petition seeking reconsideration of the Partial Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) on February 18, 2014. In that decision, the WCJ found among other things that: (1) applicant sustained industrial injury to various body parts while employed as a professional athlete by the Tampa Bay Buccaneers (the Buccaneers) from April 15, 1992 through February 1995 and by NFL Europe from February 1997 through June 11, 1997; (2) applicant's contract with NFL Europe was formed while he was in California; and (3) the forum selection clause in applicant's NFL Europe employment contract neither deprives the WCAB of jurisdiction over applicant's claim nor provides a basis for declining to exercise jurisdiction over it.

In its petition, defendant contends: (1) the WCAB lacks jurisdiction over applicant's workers' compensation claim because his injury was not sustained in California and his contract of hire was not made here; and (2) even if applicant's employment contract was made in California, the WCAB should not exercise jurisdiction because the contract had a forum selection clause requiring that any workers' compensation claims be brought in Georgia.

An answer to the petition was filed by co-defendant, the Buccaneers. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's petition be denied.

For the following reasons, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we affirm the WCJ's February 18, 2014 decision. The WCJ correctly found that applicant's contract of hire was made in California. Further, even if we assume that applicant's contract contained a forum selection clause,[1] the fact that his contract was made in California means that, as a matter of public policy, any such forum selection clause ordinarily should not be enforced.

I. Background

The WCJ's Report sets forth the relevant facts and, therefore, we will not reiterate them here.

II. Applicant's Contract of Hire Was Made in California

As observed by the WCJ's Report, the WCAB has jurisdiction over a claim for an out-of-state injury if the contract of hire was made in California. (Lab. Code, §§ 5305, 3600.5(a).)[2] Section 5305 provides that "the appeals board ha[s] jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where ... *the contract of hire was made in this state*" and further provides that "[a]ny employee described by this section ... *shall be entitled to the compensation ... provided by this division.*" (Italics added.) Section 3600.5(a) provides that "[i]f an employee who *has been hired ... in the state* receives personal injury by accident arising out of and in the course of employment outside of this state, he [or] she ... *shall be entitled to compensation according to the law of this state.*" (Italics added.)

In determining whether a contract of hire was made in California:

> "[the WCAB is] not confined ... to finding whether or not the [defendant] and [applicant] had entered into a traditional contract of hire. ... [¶] 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

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[1] As will be discussed later, applicant's actual contract was never offered in evidence.

[2] All further statutory references are to the Labor Code unless otherwise indicated.

> purposes underlying the ... Act."
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> (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 776-777 [37 Cal.Comp.Cases 185] (*Laeng*); accord: *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1061 [60 Cal.Comp.Cases 316]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 25 [64 Cal.Comp.Cases 745] (*Bowen*).)

Therefore, for a workers' compensation claim, a contract of hire may be deemed to have been made in California even if application of general statutory or common law contract principles might otherwise have called for a contrary conclusion.

Furthermore, in determining whether a contract was made in California, the critical question is whether *acceptance* took place here. (*Bowen, supra*, 73 Cal.App.4th at p. 26.) "California has adopted the rule that an oral contract consummated over the telephone is deemed made where the offeree utters the words of acceptance." (*Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Coakley*) (1967) 68 Cal.2d 7, 14 [32 Cal.Comp.Cases 527] (*Coakley*) (California resident was hired by telephone in California to work in Utah, even though contract not signed and specific duties were not designated until applicant arrived at the Utah job site).)[3] Where an offer of employment is accepted in California, a contract of hire will be deemed to have been made here even if the actual contract is signed out-of-state. (*Coakley, supra*, 68 Cal.2d at pp. 10, 11; *Commercial Cas. Ins. Co. v. Industrial Acc. Com.* (*Porter*) (1952) 110 Cal.App.2d 83, 90 [17 Cal.Comp.Cases 84].)

Also, a contract of hire will be deemed made in California even though certain out-of-state contingencies must be met before the applicant can assume his or her work duties, i.e., these factors are deemed conditions subsequent not preventing the formation of a contract. For example, in *Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd.* (*Egan*) (1966) 65 Cal.2d 429 [31 Cal.Comp.Cases 415], the Supreme Court found that a contract of hire was made in California where the applicant accepted offer of employment while in California, even though: (1) he had to fill out lengthy questionnaire in Nevada; (2) he was required to obtain security clearance in Nevada before he could commence work; and (3) the employer could reject him when he appeared at job site in Nevada.

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[3] Disapproved on another point in *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16].

Similarly, in *Bowen, supra*, 73 Cal.App.4th 15, the Court of Appeal found that a professional baseball contract of hire was made in California where the applicant signed it here, even though contract subsequently had to be signed by the team outside of California and be approved by the Commissioner of Baseball in New York. Additionally, in *Janzen v. Workers' Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109 [63 Cal.Comp.Cases 9] (*Janzen*), the Court of Appeal deemed a contract of hire to have been made in California where the employee phoned his Wyoming employer from California and it was agreed the employer would formally hire him as a crop-duster if he performed satisfactorily on a crop-dusting test run. Thereafter, the employee went to Wyoming, passed the test and was formally hired, but died in a crash a few days into the job.[4]

Here, applicant testified to a February 1997 phone conversation with Jim Criner, the head coach of the Scottish Claymores of NFL Europe. Applicant said he was at home *in California* at the time of the call. He further said that, during the conversation: (1) Mr. Criner stated that the Claymores had the right to hire him based on the previous year's NFL Europe draft; (2) Mr. Criner stated that all NFL Europe players (except quarterbacks) received a standard one-year contract for a fixed amount of money, and there was no negotiation regarding the amount of money or the length of the contract; and (3) Mr. Criner asked him to come to training camp in Georgia. Applicant testified that he accepted Mr. Criner's offer by phone, and that the NFL Europe paid for his airfare to Georgia and his room and board while there.

The WCJ accepted as credible applicant's testimony regarding his February 1997 phone conversation with Mr. Criner. We shall give the WCJ's credibility determination the great weight to which it is entitled because he had the opportunity to deserve applicant's demeanor while he testified. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) Furthermore, a WCJ's credibility determination may be disturbed only where there is contrary evidence of considerable substantiality. (*Id.*) There is no such evidence of considerable substantiality here. To the

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[4] On the other hand, in *Ledbetter Erection Corp. v. Workers' Comp. Appeals Bd.* (*Salvaggio*) (1984) 156 Cal.App.3d 1097 [49 Cal.Comp.Cases 447], a Nevada resident, who picked up his work orders from a local union hall in California, was injured while working in Nevada. The Court of Appeal found that the contract of hire was *not* made in California because the applicant was in Nevada when he uttered his words of acceptance over the telephone to a union representative in California.

contrary, the only evidence to rebut applicant's recollection of his conversation with Mr. Criner came from defendant's two witnesses, neither of whom were parties to that conversation. Instead, the two defense witnesses merely related what Mr. Criner told them about that conversation. Of course, hearsay is admissible in WCAB proceedings. (Lab. Code, § 5708; *Bland v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 330 [35 Cal.Comp.Cases 513].) Nevertheless, although the WCJ had the ability to assess the credibility of the two defense witnesses *regarding what Mr. Criner told them*, the WCJ obviously could not assess the credibility of Mr. Criner himself.

It is true that applicant and the defense witnesses all agreed that: (1) applicant's conversation with Mr. Criner was not a guarantee he would be on the team; (2) he did not actually sign a contract until he arrived at the training camp in Georgia; and (3) the training camp in Georgia was merely a tryout and his contract would be terminated if he failed to pass a physical examination and certain other tests (including drug testing and questionnaires) or failed demonstrate sufficient football skills in training camp.

As discussed above, however, applicant's utterance of words in California that he would come to Georgia constituted the making of a contract here, and this is true even though his going to Georgia constituted a tryout and was not a guarantee he would make the team. (Cf. *Laeng*, *supra*, 6 Cal.3d at pp.776-777 [an employment relationship was found when a candidate for the position of city refuse crew worker was injured while participating in the physical agility phase of a tryout competition because the tryout was of benefit to the employer as well as the job applicant].)

Furthermore, the fact that applicant's invitation to training camp did not necessarily guarantee that he would play for the Claymores is not dispositive. That is, although applicant had to pass a physical examination upon his arrival at training camp in Georgia, so did the applicant in *Coakley*. (68 Cal.2d at p. 11.) Furthermore, although applicant had to prove he had sufficient skills to perform the job, so did the applicant in *Janzen*. (61 Cal.App.3d at p. 112.)[5] Finally, the actual contract was not signed by applicant in California, this was also true with the applicant in *Coakley*. (68 Cal.2d at pp. 10, 11.)

[5] The converse was true for the applicant in *Salvaggio*, where the fact that applicant had to demonstrate his qualifications at the job site in California did not negate the formation of a contract by phone in Nevada. (156 Cal.App.3d at p. 1099.)

Accordingly, the WCJ correctly concluded that applicant's contract of hire was made in California.

III. As a Matter of Public Policy, Where a Contract of Hire Is Made in California, Then a Forum Selection Clause Ordinarily Should Not Be Enforced

We turn now to the forum selection clause issue.

Preliminarily, we observe that applicant's actual contract with NFL Europe was not offered in evidence. Defendant's witnesses testified that this was because of NFL Europe's policy to destroy all contracts after seven years. Instead, defendant offered in evidence the contract of a different player playing a different position (i.e., quarterback) that was executed a year or more after applicant's contract. (See Exhibit E7.) Paragraph 18 of this other player's contract stated:

> "As a further condition of acceptance of this contract Player elects to choose the State of Georgia, and to grant such forum exclusive jurisdiction, as and for the filing and litigation of any claims for workmen's compensation benefits or services, pursuant to his League employment herein."

Defendant's witnesses both testified that this was a standard NFL Europe contract and that it did not change from year to year. Yet, applicant did not play quarterback and the uniform testimony was that the contractual provisions for NFL Europe quarterbacks were different than those for other NFL Europe players because quarterbacks received more money. (See Minutes of Hearing/Summary of Evidence (MOH/SOE), 6/24/13 trial, at 10:20-10:22; 16:10-16:12; MOH/SOE, 11/13/13 trial, at 8:1-8:3.) Moreover, when applicant was shown the other player's contract, he testified that the contract did not look familiar and he could not recall ever having read the forum selection clause. (MOH/SOE, 6/24/13, at 16:19-16:22.) Accordingly, there is some question of whether the contract offered in evidence sufficiently establishes that there was a forum selection clause in *applicant's* contract.

Even assuming that applicant's contract had the same forum selection clause, however, the WCJ properly found California jurisdiction.

In asserting that the presumed forum selection clause deprives the WCAB of jurisdiction over applicant's workers' compensation claim, defendant relies on the Appeals Board's en banc decision in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, writ den. sub nom. *McKinley v. Workers'*

Comp. Appeals Bd. (2013) 78 Cal.Comp.Cases 872). In *McKinley*, the Appeals Board held that the WCAB "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." (78 Cal.Comp.Cases at p. 24.) This conclusion is consistent with the Court of Appeal applicant's subsequent decision in *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257]. *Johnson* held that the due process and full faith and credit clauses of the federal Constitution require California to cede jurisdiction to another State where California does not have a sufficient connection to the employee's workers' compensation claim.

However, as discussed above, sections 5305 and 3500.5(a) give the WCAB jurisdiction over a workers' compensation claim where the contract of hire was made in California and they both further provide that, if the contract was made here, the employee "shall be entitled to compensation" as provided by law. Yet, in *McKinley* and *Johnson*, the employment contracts were *not* made in California. (*McKinley*, *supra*, 78 Cal.Comp.Cases at p. 25 [contracts provided that they were "entered into in the State of Arizona and in no other State"]; *Johnson, supra*, 221 Cal.App.4th at p. 1120 [contract signed in New Jersey].) Furthermore, as demonstrated by *Alaska Packers Assn. v. Industrial Acc. Com.* (*Palma*) (1934) 1 Cal.2d 250 [20 I.A.C. 319], aff'd (1935) 294 U.S. 532 [55 S.Ct. 518, 79 L.Ed. 1044, 20 I.A.C. 326], the absence of California employment contracts in *McKinley* and *Johnson* make applicant's case here entirely distinguishable.

In *Palma*, the *only* connection to California was that the contract of hire was signed while aboard a ship in San Francisco harbor. (*Palma*, *supra*, 1 Cal.2d at p. 252.) In all other respects, there was no connection of the employment to California. The employee was a nonresident alien, the employer was in Alaska (i.e., the Alaska Packers Association), and all of the work was to be performed in Alaska during the salmon canning season. (*Id.*) Furthermore, the injury was sustained in Alaska and the applicant received treatment there, including surgery at an Alaskan hospital. (*Id.* at p. 253.) Finally, the contract included a choice of law provision stating that Alaska's workers' compensation statutes would be the

employee's "exclusive remedy" for any industrial injury claim resulting from his temporary work in Alaska. (*Id.* at pp. 252-253.)

Nevertheless, at the time of the contract in *Palma*, section 58 of the California Workmen's Compensation, Insurance and Safety Act of 1917 provided in relevant part: "The Industrial Accident Commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where ... *the contract of hire was made in this state*, and any such employee ... *shall be entitled to the compensation ... provided by this act.*" (*Palma, supra*, 1 Cal.2d at p. 254 (italics added).) This language of section 58 of the 1917 Act is for all practical purposes the same as current section 5305, which provides that "the appeals board ha[s] jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where ... *the contract of hire was made in this state*" and "[a]ny employee described by this section ... *shall be entitled to the compensation ... provided by this division.*") The language of section 58 is also substantially similar to current section 3600.5(a), which provides that"[i]f an employee who *has been hired ... in the state* receives personal injury by accident arising out of and in the course of employment outside of this state, he [or] she ... *shall be entitled to compensation according to the law of this state.*"

Furthermore, at the time of the contract in *Palma*, section 27(a) of the 1917 Act provided: "*No contract*, rule or regulation *shall exempt the employer from liability for the compensation fixed by this act.*" (*Palma, supra*, 1 Cal.2d at p. 254 (italics added).) This language is for all practical purposes the same as current section 5000, which provides that "*No contract*, rule, or regulation *shall exempt the employer from liability for the compensation fixed by this division.*"

Based on the provisions of section 58 and 27(a) of the 1917 Act, the California Supreme Court found that California had jurisdiction over the employee's workers' compensation claim *because the contract of hire was made here*, notwithstanding the contract clause providing that Alaska's workers' compensation law would be the "exclusive remedy" for any industrial injury. (*Palma, supra*, 1 Cal.2d at pp. 256-258.) Furthermore, the California Supreme Court held that the full faith and credit clause did not require that Alaska law be applied (*id.* at p. 262), a conclusion subsequently affirmed by the United States Supreme Court (249 U.S. at pp. 547-550).

Indeed, both *McKinley* and *Johnson* specifically recognized that the lack of California employment contracts made their cases distinguishable from *Palma*. In *McKinley*, the Appeals Board stated: "In this case, unlike in *Palma*, the employment contracts were not made in California and that jurisdictional basis for legislating the terms of the employment agreement and hearing the workers' compensation claim is not present." (*McKinley*, *supra*, 78 Cal.Comp.Cases at pp. 32-33.) Similarly, in *Johnson*, the Court of Appeal observed that the employee in *Palma* had "entered into a contract in San Francisco with the Alaska Packers Association to perform work in Alaska." (*Johnson, supra*, 221 Cal.App.4th at p. 1125.) Indeed, the *Johnson* court characterized the holding of *Palma* as being that "the creation of the employment relationship in California, which came about when [the applicant] signed the contract in San Francisco, was *a sufficient contact with California to warrant the application of California workers' compensation law*." (*Id.* at p. 1126 (italics added).) This is consistent with *Bowen*, in which the Court of Appeal cited to *Palma* in concluding that the WCAB had jurisdiction over the claim of a professional baseball player solely because his series of annual minor league contracts were all made in California, even though he never played a single game here and his employer was a major league baseball team in Florida (the Florida Marlins). (*Bowen*, *supra*, 73 Cal.App.4th at pp. 17-18, 26-27 & fn. 14.)[6]

Therefore, *Palma*, *Bowen*, and *Johnson* all stand for the principle that the fact that a contract is made in California is, *by itself*, a sufficient California connection to the claimed injury. And, where a contract of hire is made in California, the employee "*shall be entitled to the compensation ... provided by this division*" (§ 5305) and "*shall be entitled to compensation according to the law of this state.*" (3600.5(a).) Of course, as used in the Labor Code, "shall" is mandatory language. (§ 15; *Smith v. Rae-Venter Law Group* (2003) 29 Cal. 4th 345, 357.)

Furthermore, while *McKinley* correctly states the general rule that a forum selection clause is presumed to be valid and will be enforced unless the contesting party meets a heavy burden of proving that enforcement would be unreasonable under the circumstances (78 Cal.Comp.Cases at pp. 24-25, 33-

[6] The Florida Marlins initially assigned the employee to play for the Erie Sailors of the New York Penn League and later assigned him to play for the Brevard County Manatees (apparently a Florida team). (*Id.*)

34, 36-37), *McKinley* did not address a major exception to this general rule. That is, if the forum selection clause in question contravenes California public policy as embodied by a statute prohibiting waiver of state law, the burden of proof will shift to the party seeking to enforce the clause. (See, e.g., *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11; *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.* (1995) 32 Cal.App.4th 1511, 1522; accord, *Doe 1 v. AOL LLC* (9th Cir. 2009) 552 F.3d 1077, 1083-1085.)

Here, as discussed above, section 5000 provides that "[n]o contract ... shall exempt the employer from liability for ... compensation" and sections 5305 and 3600.5(a) provide that, where the contract of hire was made in California, the employee "shall be entitled" to the compensation provided by law.[7] Furthermore, section 5000 expressly provides: "No contract ... shall exempt the employer from liability for the compensation fixed by this division." Based on virtually identical provisions of the 1917 Act (i.e., §§ 27(a), 58), the California Supreme Court's decision in *Palma* held in effect that the public policy embodied in these statutory provisions trumped the language in the employee's contract that Alaska's workers' compensation statutes would be his "exclusive remedy" for any industrial injury. (*Palma*, *supra*, 1 Cal.2d at pp. 256-258.) Thus, the public policy provisions of sections 5000, 5305, and 3600.5(a) preclude the enforcement of the forum selection clause in applicant's contract absent a

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[7] Again, "shall" is mandatory language. (§ 15; *Smith v. Rae-Venter Law Group*, *supra*, 29 Cal. 4th at p. 357.)

showing, not made here, that the clause outweighs the public policy they reflect.[8]

This conclusion is consistent with more recent cases addressing different statutes.

For example, in *America Online, Inc., supra*, the Court of Appeal declined to enforce a forum selection clause between an internet service provider and its customers because enforcement of the forum selection clause would have been the functional equivalent of a contractual waiver of the consumer protections under the California Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 et seq., which contains a provision voiding any purported waiver of rights under the CLRA as contrary to California public policy.

Similarly, in *Wimsatt, supra,* the Court of Appeal declined to enforce a forum selection clause in a contract between a franchisee and a franchisor because a critical feature of the California's Franchise Investment Law is an anti-waiver provision voiding any franchise agreement that forces a franchisee to give up any of the protections afforded by the law (Corp. Code, § 31512).

Also, in *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, the Court of Appeal held that a forum selection clause in a contract to sell securities violated California's public policy of protecting securities investors under the Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.), where Corporations Code section 25701 provided that the parties could not waive or evade application of state law by private agreement.[9]

As a final point, we observe that the Legislature recently amended section 3600.5 to add

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[8] The Appeals Board's en banc decision in *McKinley* does not call for a different result because, again, the contract in that case was not made in California. Indeed, *McKinley* expressly stated that no section 5000 issue was presented because of this fact:

> "Applicant asserts that the forum selection clause in his employment agreements violates a fundamental public policy of California, citing the decision in *Palma, supra*, and section 5000, which provides in pertinent part that "No contract ... shall exempt the employer from liability for the compensation fixed by this division." [Fn. omitted.] As discussed above, the basis for California jurisdiction over the contract in *Palma* is not present in this case because the employment agreement in *Palma* was made in California whereas the employment contracts in this case were all made in Arizona. ..."
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> (78 Cal.Comp.Cases at pp. 37-38.)

[9] See also *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286 (California's public policy underlying the Fair Employment and Housing Act's prohibition against age discrimination in employment overrides a forum selection/choice-of-law clause in an employment agreement).

subdivisions (c) through (i), which place significant limitations on workers' compensation claims by professional athletes. (Stats. 2013, ch. 653, § 1 (AB 1309).) These amendments are not directly relevant here because they apply only to claims filed on or after September 15, 2013. (§ 3600.5(h).) It is worth noting, however, that these amendments apply only to "a professional athlete *who has been hired outside of this State*." (§ 3600.5(c)(1) (italics added).) Therefore, the amendments lend support to the principle that a contract of hire made in California is by itself sufficient to establish California jurisdiction, even for a professional athlete. Furthermore, in enacting these changes, the Legislature specifically stated: "It is the intent of the Legislature that the changes made to law by this act shall have no impact or alter in any way the decision of the court in *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15." (Stats. 2013, ch. 653, § 3.) As just stated above, *Bowen* involved a claim where, as here, the employee was a California resident whose contract of hire was made here, but who otherwise had no connection to California. This again supports a conclusion that a California contract, by itself, is sufficient to establish jurisdiction.

Accordingly, even if we were to assume that applicant actually signed a contract containing the same forum selection clause found in the contract of a different player who played a different position in a different year, the WCJ correctly concluded that the forum selection clause does not call for California to decline jurisdiction.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Partial Findings of Fact and Award issued by the workers' compensation administrative law judge on February 18, 2014 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

MARGUERITE SWEENEY

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 09 2014

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

LAW OFFICES OF MARK SLIPOCK
MAZIO ROYSTER
PETERSON, COLANTONI, COLLINS & DAVIS
SHAW, JACOBSMEYER, CRAIN & CLAFFEY

NPS/bea

CASE NUMBER ADJ7597520

MAZIO ROYSTER, VS 1-TAMPA BAY BUCCANEERS; PERMISSIBLY SELF-INSURED, 2-NFL EUROPE TIG, admin by TRISTAR INS. CO.,

WORKERS' COMPENSATION JUDGE: S. MICHAEL COLE
TRIAL DATES: 6/24/13 & 11/13/13

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

The undersigned issued his Opinion on Decision and Findings & Award on February 18, 2014. Defendant, NFL Europe, has filed a timely, verified, Petition for Reconsideration on March 11, 2014.

Defendant contends that:

1. The evidence does not justify the Findings of Fact,
3. The Findings of Fact do not support the Order, Decision or Award.

Defendant NFL Europe contends that the undersigned committed err by (1) finding that applicant's contract with NFL Europe was accepted by applicant while he was a resident of, and located in, California, and that as a result, there was jurisdiction over NFL Europe, and (2) finding that a purported forum/venue clause, in applicant's contract with NFL Europe did not mandate the undersigned to decline to exercise jurisdiction over applicant's claim.

The undersigned disagrees with defendant's analysis.

FACTS

Applicant, Mazio Royster, born [redacted], played football at the junior, high school, and college level in Southern California. In the spring of 1992, applicant chose to forego his senior year at the University of Southern California, where he played tailback, and made himself available for the National Football League (NFL) draft. He participated in the NFL players' combine which included the top 300 prospects nationwide. At the combine, applicant was extensively evaluated on his ability to play professional football, including medical, physical, and mental evaluations. He was not informed that he had any limitations or restrictions as a result of that testing.

Following the NFL combine, applicant was drafted by the Tampa Bay Buccaneers. On June 3, 1992 he signed his initial professional football player contract with Tampa Bay in California where he was residing at the time (Defendant Exhibit T3). That contract, as well as two other player contracts were negotiated by his player agent whose office was in California.

Applicant played for Tampa Bay through the 1994 season, while continuing to reside in the off season in California. In February 1995, applicant was selected by the Jacksonville Jaguars in the NFL expansion draft. He played with Jacksonville until his contract was terminated on September 4, 1995. Jacksonville and Reliance Insurance Company in liquidation by C.I.G.A. were dismissed prior to trial as parties' defendant without prejudice and without objection to their dismissal.

Following the termination of his employment with Jacksonville, applicant returned to his home in Highland, California. He also ended his contract with his player agent. A few months later, in approximately February 1996, applicant received a telephone call at his home from Jim Criner, who identified himself as the head coach of the Scottish Claymores, a team in the NFL Europe League. Coach Criner informed the applicant that he had been drafted by the Scottish

Claymores in the NFL Europe draft. Applicant was told that there would be a training camp held in the state of Georgia, if applicant was interested. Applicant declined the opportunity at that time, as he was hoping to re-sign with a regular NFL team.

Sometime in 1996, the San Francisco 49ers flew the applicant to San Francisco for a one day try out. Following that tryout, applicant was not offered a contract by the 49ers.

The following year, in February 1997, applicant received another call from Coach Criner. According to the applicant's trial testimony, Coach Criner told him that the Scottish Claymores still retained the rights to sign him to play in NFL Europe. According to applicant, Coach Criner told him at that time that all the players received the same one year contract and that the pay was not negotiable. Applicant agreed to go to the training camp in Georgia and in fact did so. Training camp lasted four to five weeks. During camp, applicant's airfare, hotel, food, ground transportation, and medical treatment was paid for by NFL Europe. He did not receive any other salary during training camp.

At the conclusion of training camp, applicant and the rest of the team were flown to Scotland, where applicant played in approximately one-half of that year's games. During the latter half of the season, applicant fractured four ribs, which ended his playing for that season. He subsequently returned to his home in California. He has not played professional football since.

At trial the parties were litigating a number of issues including jurisdiction, contractual choice of law provisions, and nature and extent to any permanent disability.

Following trial, the undersigned issued a Partial Opinion on Decision, and Partial Findings of Fact and Award and Notice of Status Conference, finding in relevant part that: (1) applicant sustained injury to his head, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, toes, feet, jaw, psyche and sleep, and did not sustain injury to his arms (with the exception of

injury to his elbows, wrists, hands and fingers), groin, or jaw, arising out of and occurring in the course of employment during the period from April 15, 1992 to and including June 11, 1997, while employed by the Tampa Bay Buccaneers and NFL Europe, (2) applicant's claim was not barred by either the statute of limitations or laches, (3) that the post January 1, 2005 rating schedule was applicable to rate applicant's impairment, (4) applicant was not entitled to temporary disability benefits, (5) findings relating to applicant's average weekly wage, (6) that applicant was entitled to future medical treatment benefits, (7) that applicant's contract with NFL Europe was formed while applicant was in California and as a result, the court had jurisdiction over NFL Europe, (8) that the forum/venue clause purportedly in applicant's contract with NFL Europe did not require the court to decline to exercise jurisdiction in this case, (9) and that the record required further development on the issues of permanent disability and apportionment.

Defendant NFL Europe filed a timely Petition for Reconsideration contending that the undersigned committed err by (1) finding that applicant's contract with NFL Europe was accepted by applicant while he was in California, and by (2) failing to decline to exercise jurisdiction due to a purported forum/venue clause, in applicant's contract with NFL Europe.

The undersigned disagrees with defendant's analysis.

DISCUSSION

A. DID THE UNDERSIGNED COMMIT ERR BY FINDING THAT APPLICANT'S CONTRACT WITH NFL EUROPE WAS FORMED AND ACCEPTED IN CALIFORNIA?

As a preliminary observation, the undersigned notes that in its summary of the evidence/facts in its Petition for Reconsideration, defendant, NFL Europe has presented a zealous, but one-sided, and at times inaccurate, summary of the testimony/evidence in this case. As one example, defendant at page 5, lines 20-

22 of its Petition, states: "Here the NFL Europe's intent was clear with regard to formation of a Contract by having all potential signees travel to Georgia for a tryout to see if the player has the requisite skill and was in proper physical condition prior to formally offering a Contract and entering into a Contract". Both the applicant and employer witnesses testified that upon arriving in Georgia, all the players were taken to a hotel where they were rotated through a number of stations, including physical exams, and contract signing. There is no evidence in the record that any player did a tryout or engaged in any football related activities until after the contract was signed. If a player subsequently failed a more detailed physical, or was cut by the team in order for the team to get down to its maximum player limit, then the player's contract could be terminated.

L.C. §5305 extends the jurisdiction of the WCAB "...over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state."

L.C. §3600.5(a) in effect at the time applicant filed his claim herein, states: "If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents, in the case of his death, shall be entitled to compensation according to the law of this state."

In other words, if an employee is hired in California, the WCAB has jurisdiction over his or her claim for cumulative trauma sustained outside the state, regardless of whether that employee ever worked in California.

With respect to NFL Europe, prior to arriving at training camp in Georgia, the only person in a supervisory or managerial position that applicant had spoken with was Coach Criner. Applicant credibly testified that Coach Criner told him that every player (except some quarterbacks) made the same non-negotiable amount of money, and that all the contracts were for one year only. Applicant was asked if he wanted to come to training camp and try and make the

team. Applicant told him "yes" (Minutes of Hearing/Summary of Evidence from June 24, 2013, page 10, lines 14-22). Applicant testified that he thought he had a deal or contract at that time, although he did not sign the non-negotiable contract until the day he arrived in Georgia.

Coach Criner did not testify at trial to rebut applicant's testimony. No reason for his non-appearance was provided. A written statement from Coach Criner was offered into evidence at trial, but was ruled inadmissible by the undersigned. Defendant refers to the inadmissible statement in its Petition for Reconsideration, contrary to Board rules. Hearsay testimony from employer witnesses relating to what Coach Criner had said on the issue to the witnesses was allowed, but was given little weight due to the second-hand/hearsay quality of the testimony. In addition testimony by defense witnesses that Coach Criner did not have authority to offer applicant a contract was not found to be determinative, as he was clearly in a supervisory/management position for NFL Europe and was clearly acting as its agent in initiating the telephone call that led to applicant accepting the offer to attend training camp. Defendant argues in its Petition that Coach Criner didn't know the specifics of the player contracts. How defendant can argue this when Coach Criner didn't testify is problematic, but it appears from the employer testimony at trial that everyone knew that the standard player contracts were not negotiable (except some quarterbacks), and that everyone received the same pay per game.

On arrival in Georgia, all the prospective players were taken to a central hotel where they signed in and began a rotation between various stations including: physician exams, tax/ID/passport, and contract signing. As noted above, contrary to defendant's representation in its Petition, the contracts were signed prior to any evaluation of the players' ability. If a player failed a physical exam, their contract was terminated by the team. If a player was cut from the training camp roster, their contract was also terminated.

NFL Europe paid for applicant's airfare to Georgia, all transportation while there, his room and board for the 4-5 week preseason training camp, and all his

medical treatment. He did not receive any actual monetary compensation until after he made the final cut in training camp, and played his first game in Scotland.

In its Petition, defendant emphasizes that applicant subsequently contradicted himself during cross-examination regarding when he believed that a contract was formed. He agreed that he wasn't guaranteed a spot on the Scottish Claymore's roster when he talked to Coach Criner on the phone. He also testified that he believed that his contract was not "solidified" until he got to Georgia (Minutes of Hearing & Summary of Evidence from June 24, 2013, page 16, lines 1-17). At the next hearing herein, applicant attempted to clarify the apparent discrepancy in his testimony. The undersigned found the applicant to be a credible witness, attempting to testify truthfully about a relatively complex legal concept (Minutes of Hearing & Summary of Evidence from November 13, 2013, page 5, line 18 to page 6, line 6). In this case there is clearly a distinction between having an employment contract and "making the team". Sixty plus players had contracts in training camp, but only about forty "made the team" and traveled to Scotland.

Based on the foregoing, the undersigned found that applicant, who was in California and residing in California at the time, accepted Coach Criner's offer of a chance to make the Scottish Claymore team, during his phone conversation with Coach Criner in February 2007. There was no dispute that the contract terms were non-negotiable. Applicant knew that he wasn't guaranteed a spot on the team unless he made the final cut. He had to pass the physical and show sufficient skills or his contract would be terminated. He also had to sign the actual contract after NFL Europe provided him transportation to Georgia. These additional considerations were merely conditions subsequent to the formation of the contract. Applicant had a contract with NFL Europe at the time he accepted the offer and agreed to go to Georgia for training camp. This event occurred when applicant was still in California where he resided.

Based on the foregoing, and a fair review of the entire evidentiary record, the undersigned does not believe that he committed err in finding that applicant's contract with NFL Europe was formed while applicant was located in, and resided in, California, and as a result, that there was jurisdiction over NFL Europe herein.

B. DID THE UNDERSIGNED COMMIT ERR BY FINDING THAT THE PURPORTED FORUM/VENUE CLAUSE IN APPLICANT'S CONTRACT WITH NFL EUROPE DID NOT REQUIRE THE COURT TO DECLINE TO EXERCISE JURISDICTION?

NFL Europe contends that its contract with the applicant contains a venue/forum clause that requires applicant's workers' compensation claim to be brought in or Georgia. Applicant contends that the contract provisions are not applicable or binding.

As a preliminary note, applicant's actual contract with NFL Europe was not offered into evidence at trial, although Tampa Bay was able to supply its own contract with the applicant that was four years older. As an "example", NFL Europe offered a contract from another year, i.e. 1998 rather than 1997, and from another player, Kurt Warner, who was a quarterback. As noted above, even the employer acknowledged that all the player contracts were the same except some quarterbacks. Kurt Warner was a quarterback.

As noted above, L.C. §5305 extends the jurisdiction of the WCAB "...over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state," and L.C. §3600.5(a) in effect at the time applicant filed his claim herein, states: "If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents, in the case of his death, shall be entitled to compensation according to the law of this state."

L.C. §5000 states that "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division."

Pursuant to the holding in Alaska Packers Association v. IAC (1935) 294 U.S. 532; Alaska Packers Association v. IAC (1934) 1 Cal. 2d 250, parties cannot contract to have another state's workers' compensation laws apply to California injuries. As a result, the undersigned found, that even if applicant's contract (which was never produced) contained a forum/venue clause it would not deprive this court of jurisdiction over applicant's claim, or provide a basis for this court to decline to exercise its jurisdiction over applicant's claim herein.

Defendant cites McKinley v. Arizona Cardinals (en banc, January 15, 2013), in support of its position that the undersigned committed err by failing to decline to exercise jurisdiction over applicant's claim herein. The main factual difference in this case, is that applicant's contract was formed in California. In McKinley, the contract was formed in Arizona, where the applicant resided, and only seven games over four years of employment were played in California. A finding of "limited contracts" with California was appropriate in McKinley. It isn't this case where the applicant was a California resident, and his contract for employment was formed in California. Under defendant's analysis, Georgia would arguably have limited contacts as well, as none of the games applicant played for NFL Europe were played in Georgia..

Based on the foregoing, the undersigned does not believe that he committed err in finding that the purported venue/forum clause in applicant's contract did not deprive the undersigned of exercising jurisdiction over applicant's claim.

RECOMMENDATION

It is respectfully recommended that defendant, NFL Europe's Petition for Reconsideration be denied.

S. MICHAEL COLE
Workers' Compensation Judge

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By E. Havan