CASE ID: ADJ4661829
{E127E6FB-969B-454B-80C1-8004E977DC55}

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VAUGHN BOOKER, *Applicant,* vs. CINCINNATI BENGALS, Permissibly Self-Insured; KANSAS CITY CHIEFS; TRAVELERS INSURANCE CO.; TIG INSURANCE CO.; GREEN BAY PACKERS; ZURICH AMERICAN INSURANCE CO. administered by RISK ENTERPRISE MANAGEMENT, LTD., *Defendants.*	Case No. ADJ4661829 (ANA 0401410) OPINION AND DECISION AFTER RECONSIDERATION

On December 12, 2011, we granted reconsideration to allow us to further study the legal and factual issues raised by the petition for reconsideration of defendant, the Cincinnati Bengals. Having completed our review, we now issue our Decision After Reconsideration.

The Bengals' petition sought reconsideration of the Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) on September 26, 2011. In that decision, the WCJ found that applicant, Vaughn Booker, sustained a cumulative industrial injury to various body parts while employed as a professional football player by the Cincinnati Bengals, the Kansas City Chiefs, and the Green Bay Packers from February 16, 2000 to April 1, 2003 at various locations, including within California. The WCJ further found, in relevant part: (1) the Cincinnati Bengals were properly self-insured for industrial injuries sustained in California; (2) applicant was "regularly employed" as a football player in California, within the meaning of Labor Code section 3600.5(a),[1] and, therefore, the Workers' Compensation Appeals Board (WCAB) has subject matter jurisdiction

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

over his workers' compensation claim against the Bengals; and (3) in accordance with section 5500.5, the Bengals are liable for all benefits awarded.[2]

In its petition for reconsideration, the Cincinnati Bengals contends in substance that applicant was not "regularly employed" in California within the meaning of section 3600.5(a) and that California does not have subject matter jurisdiction under the "temporarily" employed provisions of section 3600.5(b).

For the following reasons, we conclude the WCAB does not have subject matter jurisdiction over applicant's injury claim against the Cincinnati Bengals. Accordingly, we will rescind the WCJ's decision and return the matter to him to determine whether there is a basis for jurisdiction over any of the other named defendants and, if so, whether there is any basis to issue a Findings and Award against any one or more of them.

I. BACKGROUND

Applicant played in the National Football League (NFL) for nine seasons: four seasons with the Kansas City Chiefs (1994, 1995, 1996, and 1997); two seasons with the Green Bay Packers (1998 and 1999); and three seasons with the Cincinnati Bengals (2000, 2001, and 2002).

The evidence establishes that in his three seasons with the Bengals, applicant: (1) played 12 regular season games in 2000, none of which were in California; (2) played 16 regular season games in 2001, including one game in California at San Diego on September 30, 2001 (i.e., "@ SD");[3] and (3) played four preseason games and 16 regular season games in 2002, none of which were in California. (Defendant's Exhibit P.)

///

///

///

[2] Among other things, applicant was found to have permanent disability of 82% and a need for further medical treatment.

[3] Applicant initially testified that he played one game in San Diego in either 2000 or 2001, but he ultimately agreed that this game was in September 2001. (See Reporter's Transcript of 4/14/09 trial, at 32:2-32:11; 33:2-33:6; 84:11-84 21; 96:5-97 1.)

The WCJ's finding of jurisdiction was based largely on his conclusion that, under section 3600.5(a), applicant was "regularly employed" in California.[4] The WCJ said that each NFL team typically plays one-half of its regularly scheduled games in other states and cities, including in California. The WCJ cited writ denied case law for the proposition that an employee need not spend the majority or any other specific portion of his or her work time within California for section 3600.5(a) jurisdiction to apply.

The WCJ further noted that the evidence was unrefuted that California collected personal income tax based on applicant's earnings from his games in California. The WCJ said: "To now deny him access to the California [WCAB] to adjudicate a claim for benefits arising out of injuries occurring while he was so employed is ... contrary to sound public policy."

The Cincinnati Bengals filed a timely petition for reconsideration. Applicant and co-defendant, the Green Bay Packers/Zurich America (Green Bay), each filed answers.

II. DISCUSSION

A. The Cincinnati Bengals Have Not Waived the Issue of Subject Matter Jurisdiction

Preliminarily, Green Bay's answer contends that the Cincinnati Bengals waived the issue of subject matter jurisdiction by failing to timely deny applicant's claim within 90 days under section 5402. We reject this argument for three reasons.

First, the record contains copies of applicant's application and his claim form, both naming the Cincinnati Bengals and dated April 24, 2007, with a proof of service showing that they were mailed from San Juan Capistrano, California, to Cincinnati Ohio, on April 25, 2007. Under the law in effect at the time of this mailing, where a document was served by mail on an address outside of California but within the United States, the time for the party receiving service to act was extended by 10 days. (Lab. Code, § 5316; Code Civ. Proc., § 1013(a).) Therefore, the Cincinnati Bengals had 100 days within

---

[4] At trial, there was also an issue of whether applicant's contract with the Cincinnati Bengals restricted his ability to receive workers' compensation benefits under California law. In essence, the WCJ concluded that, under sections 5000 and 2804, an injured worker may not waive rights to receive California workers' compensation benefits by contract or agreement, express or implied. The petition for reconsideration, however, does not raise this issue.

which to issue a denial under section 5402. The record shows that the Cincinnati Bengals issued a denial dated and served on July 26, 2007, i.e., 92 days after April 25, 2007. Moreover, the answer expressly raised the issue of "jurisdiction."

Second, section 5402 provides that "[i]f liability is not rejected within 90 days after the date the claim form is filed under Section 5401, *the injury* shall be presumed compensable" (emphasis added). Thus, even if section 5402 could be deemed to apply, it merely creates a presumption that a compensable industrial injury was sustained. It does not establish that the WCAB has jurisdiction to award benefits for that compensable injury.

Third, even assuming that section 5402 applies, it is well established that objections to subject matter jurisdiction cannot be waived and can be raised at any time up until the finality of a decision, and that a party cannot be estopped from challenging subject matter jurisdiction. (*Sullivan v. Delta Air Lines, Inc* (1997) 15 Cal.4th 288, 307, fn. 9; *Summers v. Superior Court* (1959) 53 Cal.2d 295, 298.) In fact, if there is a question of subject matter jurisdiction a court must raise it on its own motion. (*Goodwine v Superior Court* (1965) 63 Cal.2d 481, 484, 485.)

B. Territorial and Extra-Territorial Subject Matter Jurisdiction

There are two basic classes of statutes vesting the WCAB with subject matter jurisdiction: (1) the territorial jurisdictional statutes (injuries sustained in California); and (2) the extra-territorial jurisdictional statutes (injuries sustained outside of California).

The statutes establishing the scope of the WCAB's subject matter jurisdiction reflect a legislative determination regarding California's legitimate interests in protecting industrially-injured employees. (See 9-142 *Larson's Workers' Compensation Law*, § 142.03 (LexisNexis 2011); *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];[5] *King*

[5] In *Palma*, the employee entered into contract for work in Alaska during salmon canning season. The contract stated that parties would be bound by Alaska workers' compensation law. However, although the work was entirely in Alaska, the contract was made in California, the employer's base of operations was here, transportation to and from Alaska was provided, and the employee expected to return to California on completion of the work. The U.S. Supreme Court held that California had a legitimate public interest in regulating the employer-employee relationship, observing that the claimant, if not compensated in California, might well become a public charge here, since he probably could not go back to Alaska at his own expense to seek compensation under Alaska's act.

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);[6] cf., e.g., *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1202-1203 [California has expressed a strong interest in governing overtime compensation for work performed in California and, therefore, California Labor Code applied to overtime work performed in California by out-of-state employees who worked both in California and other states for a California-based employer].)[7]

1. Territorial Jurisdiction (Injuries Sustained in California)

With respect to *in-state* injuries, the WCAB has jurisdiction over *all* injuries sustained in California (see Lab. Code, §§ 5300, 5301), with one exception. That is, section 3600.5(b) provides:

> "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 work for his employer if such employer has furnished workers' compensation insurance coverage under the workers' 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 workers' compensation insurance or similar laws of such other state. The benefits under the Workers' 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.
>
> "A certificate from the duly authorized officer of the appeals board or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carries such workers' compensation insurance."

---

[6] *King* states: "The [California Workmen's Compensation] Act applies to all injuries whether occurring within the State of California, or occurring outside the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California. ... Such extra-territorial jurisdiction has been sustained on the basis of a state's legitimate interest in protecting employees regularly employed within their state and their families from the consequences of industrial injuries."

[7] *Sullivan v Oracle Corp* also observes: "The Legislature has ... exempted certain out-of-state employers who temporarily send employees into California from the obligation to comply with the workers' compensation law (Lab. Code, § 3200 et seq.), on the conditions of compliance with the home state's compensation laws and interstate reciprocity (see *id.*, § 3600.5, subd (b))." (51 Cal 4th at p. 1197.)

Thus, under section 3600.5(b), the laws of a state other than California provide the exclusive remedy for an employee hired outside of California[8] but injured while working here, if the following conditions are satisfied: (1) the employee is only working "temporarily" in California; (2) the employer furnishes workers' compensation insurance under the "similar" laws of another state; (3) the other state's workers' compensation laws cover 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 number two has been satisfied.[9]

Here, we conclude that California does *not* have subject matter jurisdiction based on section 3600.5(b) because all four of its foregoing conditions have been met.

As to the first condition, applicant was "temporarily" employed in California by the Cincinnati Bengals because he played one game here in three seasons. (See *Injured Workers' Ins. Fund of Maryland v. Workers' Comp. Appeals Bd* (*Crosby*) (2001) 66 Cal.Comp.Cases 923 (writ den) [California jurisdiction found under § 3600.5(b) despite fact that, during the alleged cumulative trauma period, applicant played only one NFL game in California while employed by the Baltimore Colts, a Maryland employer].)[10]

As to the second condition, the Bengals offered in evidence an October 22, 2009 letter from John Woodruff, the Director of the Self-Insured Department of the Ohio Bureau of Workers' Compensation

---

[8] It is undisputed that applicant was hired outside of California. His NFL Player Contract (Defendant's Exhibit F) reflects that both applicant's agent and the Bengals signed it in Ohio on February 16, 2000. Moreover, although the contract does not show where applicant signed it, the contract and its addenda do show that he also signed on February 16, 2000, so the most reasonable inference to draw was that he signed in Ohio too.

[9] Section 3600.5(b) requires that an employee "temporarily" employed in California must have sustained injury "while working for such employer in this state." Therefore, for employees "temporarily" employed in California, either: (1) the employee's specific injury must have been sustained here; or (2) the employee's work activities here must have contributed to a cumulative injury. However, if subject matter jurisdiction is found, these questions are properly part of the issue of injury arising out of and occurring in the course of the employment. (See Lab Code, §§ 3600, 3208.1.)

[10] In *Crosby*, the WCAB also found that the defendant had failed to prove Maryland reciprocity or extraterritorial compensation or prior settlement of the claims. The WCAB observed that, in Maryland, the injuries claimed by applicant would not be considered compensable.

(OBWC), which "provide[s] verification that ... Cincinnati Bengals, Inc., has been authorized to operate as a self insuring employer, for Ohio workers' compensation purposes, since July 1, 1968." (Defendant's Exhibit L.)[11] Under the second paragraph of section 3600.5(b), this certification constitutes prima facie evidence of insurance coverage.

Also, as to the second condition, Ohio's workers' compensation coverage is "similar" to that of California. Of course, section 3600.5(b) does not indicate what scope of coverage is required for another state's workers' compensation laws to be "similar" to those of California. However, we do not need to probe the outer limits of similarity here for two reasons. First, Ohio's workers' compensation laws cover professional athletes. (Ohio Rev. Code, § 4123.56(C); *Farren v. Baltimore Ravens, Inc.* (1998) 130 Ohio App.3d 533, 720 N.E.2d 590.)[12] Second, Ohio's workers' compensation laws cover "occupational disease" (Ohio Rev. Code, §§ 4123.01(C) & (F), 4123.54(A)), which includes cumulative "wear-and-tear" activities at work, even if they aggravate a pre-existing nonindustrial condition, if "the ... cumulative work place exertions are greater than those encountered in ordinary non-employment life." (*Brody v. Mihm* (1995) 72 Ohio St.3d 81, 84, 647 N.E.2d 778; see also Ohio Rev. Code, § 4123.01(F).) Here, even assuming that applicant had some pre-existing nonindustrial condition(s), we conclude as a matter of law that the work activities of a professional football player in the NFL place him at a risk of injury in greater degree and in a different manner than the risks encountered by the general public in ordinary non-employment life. Therefore, it appears that Ohio's workers' compensation laws would cover, at least in part, a cumulative injury sustained by an NFL player.

///

///

---

[11] The Cincinnati Bengals also introduced in evidence two certificates from the OBWC showing that they were self-insured for the periods of August 1, 2000 to August 1, 2001 (Defendant's Exhibit I) and August 1, 2002 to August 1, 2003 (Defendant's Exhibit J) However, the Cincinnati Bengals did not offer a self-insurance certificate for the period of August 1, 2001 through August 1, 2002, which would have been the certificate relevant to applicant's September 2001 game in San Diego.

[12] However, the total amount of payments made under a contract of hire or collective bargaining agreement to the professional athlete during a period of disability is deemed an advanced payment of compensation. (Ohio Rev. Code, § 4123.56(C).)

As to the third condition, the Bengals offered in evidence a November 4, 2009 letter from James A. Barnes, Chief Legal Officer and General Counsel of OBWC, stating:

> "As a self-insured employer in the state of Ohio, the Cincinnati Bengals will cover, pursuant to the Ohio Workers' Compensation Act, injuries to players which occur in games located outside of the state of Ohio. Such workers' compensation coverage would be pursuant to the Ohio Workers' Compensation Act. Additionally, [OBWC] provides such coverage for state fund employers with employees working temporarily outside of Ohio. As a self-insured employer, the Cincinnati Bengals are required to provide the same coverage in those circumstances under [Ohio Revised Code] 4123.46(B)."[13]

This statement is supported by the provisions of Ohio Revised Code section 4123.54(H)(1), which provides that where a contract of employment contemplates that some portion of the work is to be performed in a state or states other than Ohio, "then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted," unless under the contract the employer and employee agree to be bound by the workers' compensation laws of another state.[14]

The statement is also supported by case law establishing that the Ohio Workers' Compensation Act provides for jurisdiction over out-of-state injuries, at least where the employment relationship has sufficient contacts with the state of Ohio to permit application of that Act. (*Prendergast v. Industrial Comm. of Ohio* (1940) 136 Ohio St. 535, 27 N.E.2d 235; *Dotson v. Com Trans, Inc.* (1991) 76 Ohio App.3d 98, 601 N.E.2d 126.) In determining whether there are sufficient contacts, consideration is given to: the locus of the employee's contract for hire; where the employee's name is included on payroll reports; the locus of control and supervision of the employee's job-related duties; the employee's residence; where the employee works; where the job-related injury occurred; whether the worker was employed in Ohio or at a branch facility of a company which also happened to do business in Ohio; and the state in which workers' compensation premiums are paid. (*State ex rel, Stanadyne,*

---

[13] Ohio Revised Code, § 4123.46(B), provides: "All self-insuring employers ... shall pay the compensation to injured employees ... as would have been paid and furnished by virtue of this chapter under a similar state of facts by the bureau out of the state insurance fund if the employer had paid the premium into the fund."

[14] Here, Addendum 2 to applicant's NFL Player Contract provides that applicant's exclusive workers' compensation rights are under the Ohio Act. (Defendant's Exhibit F.)

Inc.. v. Indus. Com. of Ohio (1984) 12 Ohio St.3d 199, 466 N.E.2d 171; *Dotson v. Com Trans.*, supra; *Lynch v. Mayfield* (1990) 69 Ohio App.3d 229.)

As to the fourth and final condition, it appears that Ohio recognizes California's extraterritorial provisions and that Ohio exempts California employers and employees covered by California's workers' compensation laws from application of Ohio's workers' compensation laws. In fact, at least one Appeals Board panel has so concluded. (*Carroll v. New Orleans Saints, Cincinnati Bengals, et al.* (2010) 2010 Cal. Wrk Comp. P.D. LEXIS 176, *13 ["... Ohio Revised Code section 4123.54 satisfies the requirement that the other state recognize California's extraterritorial provisions and exempt California employers and employees covered by the laws of California from application of the other state's laws"]; see also *Wartman v. Anchor Motor Freight Co.* (1991) 75 Ohio App.3d 177, 181, 598 N.E.2d 1297, 1300 ["an employee is not entitled to receive compensation or benefits for an injury when that employee (1) is a resident of a state other than Ohio, (2) is insured in a state other than Ohio, and (3) is only temporarily in Ohio."].)

This conclusion is supported both by Ohio statute and regulation. Ohio Revised Code section 4123.54(H)(3) provides:

> "Except as otherwise stipulated in division (H)(4) of this section, if an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death."

Also, subdivision (H)(4) provides:

> "Division (H)(3) of this section does not apply to an employee described in that division, or the employee's dependents, unless both of the following apply:
>
> "(a) The laws of the other state limit the ability of an employee who is a resident of this state and is covered by this chapter and Chapter 4123 of the Revised Code, or the employee's dependents, to receive compensation or benefits under the other state's workers' compensation law on account of injury, disease, or death incurred by the

> employee that arises out of or in the course of the employee's employment while temporarily within that state in the same manner as specified in division (H)(3) of this section for an employee who is a resident of a state other than this state, or the employee's dependents;
>
> "(b) The laws of the other state limit the liability of the employer of the employee who is a resident of this state and who is described in division (H)(4)(a) of this section for that injury, disease, or death, in the same manner specified in division (H)(3) of this section for the employer of an employee who is a resident of the other state."

Further, Ohio Administrative Code section 4123-17-23(C) states:

> "The bureau of workers' compensation respects the extraterritorial right of the workers' compensation insurance coverage of an out-of-state employer for its regular employees who are residents of a state other than Ohio while performing work in the state of Ohio for a temporary period not to exceed ninety days. However, if the laws of the state of coverage do not provide this same exemption to Ohio employers and their employees working temporarily in that state. the out of state employer must obtain Ohio coverage and report to the bureau the remuneration of its employees for work performed in Ohio."

Therefore, we find no basis for territorial jurisdiction under section 3600.5(b) because all four conditions of section 3600.5(b) have been met.

2. Extra-Territorial Jurisdiction (Injuries Sustained Outside of California)

With respect to *out-of-state* injuries, sections 3600.5(a) and 5305 vest the WCAB with subject matter jurisdiction if the employee's contract of hire was made in this state.[15] However, as noted above (fn. 9, *supra*), it is undisputed that applicant's contract was not made in California.

Additionally, section 3600.5(a) vests the WCAB with extra-territorial jurisdiction where "an employee who ... is regularly employed in the state receives personal injury by accident arising out of and in the course of such employment outside of this state." This language suggests that if an employee "regularly employed" in California sustains a cumulative injury the WCAB will have subject matter jurisdiction even if all or most of the trauma occurred outside of California.

---

[15] Section 5305 still provides that California has jurisdiction over an out-of-state injury "where the injured employee is a resident of this state at the time of the injury." However, that provision was long ago held to be unconstitutional because it denies equal protection to nonresidents. (*Quong Ham Wah v. Industrial Acc Com. (Ming)* (1920) 184 Cal. 26, 36 [7 IAC 163], cert. dism., 255 U.S. 445 [41 S.Ct. 373, 65 L.Ed. 723] (1921).)

Nevertheless, we find that applicant was not "regularly employed" in this State. Section 3600.5(a) does not define "regularly employed" in California and the cases establish no clear standard.[16] However, the language of the statute suggests that the applicant's entire "employ[ment]" must be considered, which in the case of a professional football player would include preseason training camps, preseason games, regular season games, and postseason games (if any), as well as meetings and workouts at the team's facility or facilities during the course of the preseason, regular season, and postseason.[17] Here, as discussed above, applicant played only one game in California in his three seasons with the Cincinnati Bengals. In our view, one day of California employment in three years cannot constitute "regular[] employ[ment]" as a matter of law.[18] To conclude otherwise 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"].)

Also, interpreting section 3600.5(a) in light of the "state interest" cases discussed earlier, we conclude that California has no significant interest in the workers' compensation claim of an employee

---

[16] See, e.g., *Koleaseco, Inc. v. Workers' Comp. Appeals Bd* (*Morgan*) (2007) 72 Cal.Comp.Cases 1302 (writ den.) (husband and wife truck drivers did 90 to 95 percent of their runs to the west coast and 80 to 85 percent of these west coast runs were to California); *Rocor Transportation v Workers' Comp Appeals Bd.* (*Ransom*) (2001) 66 Cal.Comp Cases 1136 (writ den.) (truck driver was "regularly employed" in California even though he only did 9.2% of his total driving here); *Rocor Transportation v. Workers' Comp Appeals Bd.* (*Hogan*) (1999) 64 Cal.Comp.Cases 1117 (writ den.) (truck driver was "regularly employed" in California where 43 to 46% of his total workdays were in California); *Dick Simon Trucking Co v. Workers' Comp Appeals Bd.* (*Patti*) (1999) 64 Cal.Comp.Cases 98 (writ den.) (truck driver was "regularly employed" in California where his home terminal was in California and 10% of his total miles and 15% of his total days of work were in California); *Dick Simon Trucking Co v Workers' Comp. Appeals Bd* (*Keller*) (1998) 63 Cal Comp.Cases 1527 (writ den.) (truck driver was "regularly employed" in California where his home facility was in California, he picked up and returned loads to that facility, and 15% of his driving time was in California); *John Christner Trucking v. Workers' Comp Appeals Bd.* (*Carpenter*) (1997) 62 Cal.Comp.Cases 979 (writ den.) (truck driver was "regularly employed" in California where he resided in California and he spent at least 32% of his time working in California); *CNA Ins. Co. v Workers' Comp Appeals Bd* (*Foote & Huckins*) (1987) 52 Cal.Comp.Cases 439 (writ den.) (truck drivers were "regularly employed" in California where, although they resided in Oregon, they covered many states and made regular runs to California.)

[17] We take judicial notice that the duties of a professional football player's employment are not limited simply to scheduled games. (Evid. Code, § 452(g) & (h).)

[18] Our view would not change even if we were to assume that applicant and the Bengals arrived in California a day or so before the game and/or left here a day or so after.

whose contract was not made here, who worked in California for one day in three years, and who otherwise had no significant connection to California.

3. No Jurisdiction Based on Paying Income Tax in California

The WCJ found that California has jurisdiction over his workers' compensation claim because applicant testified that, as a professional athlete, he paid California income tax. (See Reporter's Transcript, 4/19/11 trial, at 40:14-40:21.) The WCJ said, "To now deny him access to the California [WCAB] to adjudicate a claim for benefits arising out of injuries occurring while he was so employed is ... contrary to sound public policy."

It is true that, in California, nonresident professional athletes pay income taxes based on a "duty day" formula. (See *Wilson v. Franchise Tax Bd.* (1993) 20 Cal.App.4th 1441, 1447.) However, the scope of the WCAB's subject matter jurisdiction is established by the Legislature by statute. Although, arguably, the payment of California income taxes might be an appropriate "public policy" ground for the Legislature to adopt a statute giving the WCAB subject matter jurisdiction over industrial injuries sustained by professional athletes while playing here, this is a determination for the Legislature to make, not the WCAB. To date the Legislature has not adopted any such provision.

III. CONCLUSION

For all the reasons above, we reverse the WCJ and find that the WCAB does not have subject matter jurisdiction over applicant's claim of cumulative injury against the Cincinnati Bengals. Therefore, we rescind the WCJ's entire Findings of Fact and Award and return the case to the trial level for a determination in the first instance of whether there is a basis for jurisdiction over any of the other named defendants and, if so, whether there is any basis to issue a Findings and Award against any one or more of them.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Appeals Board, that Findings of Fact and Award issued by the workers' compensation administrative law judge on September 26, 2011 is **RESCINDED**.

///

IT IS FURTHER ORDERED that this matter is **RETURNED** to the workers' compensation administrative law judge for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
FEB 08 2012

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

CINCINNATI BENGALS
LISTER MARTIN
NAMANNY BYRNE & OWENS
PETERSON COLANTONI COLLINS & DAVIS
RISK ENTERPRISE
SEYFARTH & SHAW
SHAW JACOBSMEYER CRAIN & CLAFFEY
TOBIN LUCKS
TRAVELERS
VAUGHN BOOKER

NPS/bea