CALIFORNIA WORKERS' COMPENSATION SPORTS LAW CASES

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Table of Contents

Page

Introduction..... 4

1. California WCAB Jurisdictional Issues....…….. 5

   1.1 Overview of California Contract Formation…… 5
   Principles and Issues

   1.2 Contract Formation Cases and Impact on……. 8
   California Jurisdiction

   1.3 Exemption/Exclusion from California Jurisdiction……. 43
   and Labor Code Section 3600.5(b)

   1.4 Personal Versus Subject Matter Jurisdiction…… 66

   1.5 Validity of Contractual Choice of...……. 70
   Forum/Law Provisions

   1.6 Jurisdictional Constitutional Due Process Issues……. 88

2. AB 1309 Issues……..116

3. Stays and Consolidations..…….117

4. Validity and Scope of Releases and Settlements...……119

5. Venue…….124

6. Statute of Limitations…….125

7. Injury AOE/COE…….....142

8. Labor Code 5500.5……..…….. 147

9. Contribution …….…… 163

10. Permanent Disability..……168

11. Apportionment…….. 175

12. Medical-Legal (Admissibility and Costs) ……177

Table of Contents (Continued)

13. Bifurcated Trials for Dispositive Issues…….. 180

14. Dismissals…… 181

15. Legislative Developments…… 186

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INTRODUCTION

It is irrefutable that over the last several years, the number of Applications filed for California workers' compensation benefits by professional athletes has increased exponentially. Predictably with the dramatic increase in the number of cases filed, litigation has increased as manifested in Status Conferences, Mandatory Settlement Conferences, Trials and Appeals both to the WCAB and the Appellate Courts. The enactment of AB1309 and the related intricate and complex exemption provisions of Labor Code section 3600.5 also added another dimension to litigating workers' compensation sports cases.

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

This outline is designed to compile and analyze recent California workers' compensation sports law and related cases to provide a resource that will hopefully benefit everyone in the workers' compensation community who deals with sports related litigation.

This case law outline is a work in progress. The author would invite anyone to submit any cases for possible inclusion in the outline that may impact on California workers' compensation sports litigation. Cases can be sent to me directly at rfc@4pbw.com.

California WCAB Jurisdictional Issues

1.1 Overview of California Contract Formation Principles and Issues

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

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

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

However, it is important to note the Court of Appeal's decision in the recent case of *Tripplett v. WCAB* (2018) 25 Cal. App. 5th 556, 83 Cal. Comp. Cases 1175, review denied 10/24/18) In *Tripplett*, applicant also argued that two California Supreme Court cases, *Laeng v. Workmen's Comp. Appeals Bd. (*1972) 6 Cal.3d 771 as well as *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, supported his contention that he was "hired" when his agent completed negotiation of the terms of his applicant's employment contract on the telephone from California.

In *Tripplett*, the Court of Appeal also distinguished both *Laeng* and *Arriaga* by indicating that neither of the cases "addressed the purposes or policies underlying section 3600.5(a) or 5305, explained how courts should construe the meaning of the word "hired" as used in those statutes." The Court of Appeal indicated that both of these cases were focused on a much broader issue which was establishing the scope of an "employment" relationship under workers' compensation law in assessing whether an injured worker could be potentially eligible for compensation even

though the worker had not entered into any contract with the employer for which he was performing services.

The Court of Appeal in *Tripplett* further stated that:

> While *Laeng* and *Arriaga* explain in some detail why the specific definition of "employee" contained within the workers' compensation law, combined with the policies underlying that law, support a broader interpretation of the "employment" relationship than exists in the general common law, their rationale does not automatically support a similar departure from contract law in determining whether an employee was "hired" in California or was hired elsewhere.

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

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

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

applied with respect to the death claim. (*Janzen v. WCAB* (1997) 61 Cal. App. 4th 109, 63 Cal. Comp. Cases 9)

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

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

1.2 Contract Formation Cases and Impact on California Jurisdiction

Tripplett v. Workers' Comp. Appeals Board, Indianapolis Colts et al. (2018) **25 Cal. App. 5th 556, 83 Cal. Comp. Cases 1175, 2018 Cal. App. LEXIS 652 (review denied 10/24/18)**

Issue: Whether the fact applicant's agent/contract advisor initially negotiated contract terms with the Colts telephonically while the agent was in California and the applicant was physically located outside California during negotiations constituted an actual acceptance necessary for an employment contract or agreement to be formed in California in the absence of evidence the agent was authorized to both negotiate and to accept an offer of employment by the Colts on behalf of the applicant.

Holding: Applicant's employment contract was not accepted and formed until both the applicant and his agent/contract advisor signed the written employment agreement when both of them were outside of California. The Court of Appeal held the mere fact applicant's agent/contract advisor was in California when he entered into preliminary negotiations with the employer was insufficient to establish that an oral employment contract was actually formed when there was no evidence the applicant's agent/contract advisor had the authority to bind the player to an employment agreement or to accept on his behalf.

Procedural & Factual Overview: Applicant's NFL career spanned approximately six years. He played for three different teams. He played for the Indianapolis Colts from 2002 to 2006, the Buffalo Bills from 2006 to 2008, and then briefly for the Seattle Seahawks in 2008. During his NFL career he played in approximately 110 games, but played only two games in California.

There were two trials. The first was in January 2012 and the second on September 14, 2015. At the first trial the only issue was whether or not there was California subject matter jurisdiction over the Buffalo Bills and Seattle Seahawks.

At the first trial, applicant testified that his agent was located in California and negotiated all of his contracts. Applicant also testified that when he signed his Player Contract with the Indianapolis Colts, he was in his agent's Newport Beach office in California. Following applicant's testimony applicant's counsel moved to elect against the Indianapolis Colts on the basis that, "jurisdiction was not contested by the Colts." Counsel for the Colts objected to applicant's election of the Indianapolis Colts, which was allowed by the Trial Judge.

Applicant's written employment agreement with the Indianapolis Colts was signed by the applicant, a Colts' team representative, and applicant's agent/contract advisor. All three signatories to the employment agreement signed the agreement on July 26, 2002. Applicant and the Colts' representative both signed on the same page on July 26, 2002. However, applicant's agent/contract advisor signed a different copy of the signature page on July 26, 2002, faxed from a telephone number located in Buffalo, New York.

At the second trial in September of 2015, applicant testified he was a California resident when he was hired by the Colts. He also testified that to the best of his knowledge he had signed his Colts employment agreement at his agent's office in California.
However, on cross-examination applicant was shown an actual copy of the written employment agreement indicating that both he and his agent signed separate copies of the signature page. The applicant then acknowledged for the first time that he could not remember where he signed the Colts' employment agreement. Applicant also testified that although he put a lot of trust in his agent to negotiate his employment agreements, that with respect to actual acceptance of any contract, he "had the final say."

The Colts' witness testified he negotiated the terms of the employment agreement over the phone with applicant's agent whose principal place of business was in California. He also testified that applicant likely signed the contract in Indianapolis while attending the team's minicamp. More importantly, he testified that applicant's agent had transmitted his signature of the employment agreement from a facsimile machine located in Buffalo, New York. The Colts' witness also testified applicant was not eligible to play for the Colts until he signed the agreement, and that the NFL requires that any who is an unsigned player on a team's reserve list cannot report, play, or be in training camp until they sign a written NFL Player Contract.

Following the second trial, the WCJ held that the WCAB had subject matter jurisdiction over the applicant's cumulative trauma claim. The WCJ also found that applicant's agent negotiated the employment contract in California and there were no changes with respect to the negotiated terms and the terms of the final written employment agreement based on the testimony of the defense witness. The WCJ also characterized that the signing of the actual written employment contract as a "condition subsequent" to the acceptance by the agent who the WCJ assumed to be in California. Applicant was awarded 67% permanent disability related to a cumulative trauma to multiple body parts.

The WCAB's Decision: The Colts filed a Petition for Reconsideration which was granted by the WCAB. The Board reversed the WCJ and found there was no California subject matter jurisdiction since applicant's contract was formed outside of California. In reversing the WCJ on the jurisdictional issue, the Board stated that the evidence established "that neither [Tripplett] nor his agent was in California when the employment was accepted and the contract was signed."

The Board acknowledged that while it is not necessary that all the terms of an employment agreement be finalized within California in order for the WCAB to obtain subject matter jurisdiction pursuant to §§3600.5(a) and 5305, there still "must nevertheless be evidence sufficient to support a finding that a hiring occurred in California by the acceptance of employment within the state and in order for that jurisdictional basis to apply." In essence, the WCAB said that negotiation by applicant's agent while he was located in California is insufficient to establish an oral employment contract or agreement when there is no evidence that the agent was authorized to accept a contract on applicant's behalf. Applicant filed a writ with the Court of Appeal.

The Court of Appeal's Decision: Applicant argued to the Court of Appeal that he had been hired in California based on the fact his agent had completed the negotiation of his contract

terms, which presumptively occurred in California at the agent's principal place of business. Applicant characterized the actual signing of the written employment agreement as a condition subsequent to the prior oral acceptance of the contract by the agent.
The Court of Appeal rejected this argument on the basis that, "Tripplett's employment agreement was in writing and specified that it became effective only after execution. Moreover, there was no evidence any party agreed that a binding agreement had been formed prior to execution of the written document."

Applicant also argued that two California Supreme Court cases *Laeng v. Workmen's Comp. Appeals Bd. (*1972) 6 Cal.3d 771 as well as *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, supported his contention that he was "hired" when his agent completed negotiation of the terms of his applicant's employment contract on the telephone from California.

However, the Court of Appeal distinguished both *Laeng* and *Arriaga* by indicating that neither of the cases "addressed the purposes or policies underlying section 3600.5(a) or 5305, explained how courts should construe the meaning of the word "hired" as used in those statutes." The Court of Appeal indicated that both of these cases were focused on a much broader issue which was establishing the scope of an "employment" relationship under workers' compensation law in assessing whether an injured worker could be potentially eligible for compensation even though the worker had not entered into any contract with the employer for which he was performing services.

The Court of Appeal further stated that:

> While *Laeng* and *Arriaga* explain in some detail why the specific definition of "employee" contained within the workers' compensation law, combined with the policies underlying that law, support a broader interpretation of the "employment" relationship than exists in the general common law, their rationale does not automatically support a similar departure from contract law in determining whether an employee was "hired" in California or was hired elsewhere.

The Court of Appeal was also careful in distinguishing preliminary contract negotiations from an actual offer and acceptance of a contract offer.

The Court of Appeal cited another California Supreme Court case, *Reynolds Elec. etc. Co. v. Workmen's Comp. App. Bd.* (1966) 65 Cal.2d 429 *(Egan),* which dealt with an oral employment agreement. In *Reynolds,* the employee accepted an offer of Nevada employment conveyed by a representative of his Union who had the authority to accept on his behalf while the Union representative was physically located in the Union Hiring Hall in California. "The Supreme Court explained that the case was "governed by the same rules applicable to other types of contracts, including the requirements of offer and acceptance." In *Reynolds,* the Supreme Court concluded that the contract had been formed in California because "the Union was the agent of the employer for the purpose of transmitting offers of employment to its members and the employee accepted the employer's offer when he received his dispatch referral slip and departed for the jobsite."

The Court of Appeal also cited *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, for the premise that in *Bowen* the Court of Appeal relied on traditional principals of offer and acceptance to conclude the contract had been formed in California.
In *Bowen*, the team sent a written contract to Bowen while he was in California making him an offer of employment, which was signed by the player in California and then mailed back, and as a consequence the written offer was accepted in California and the contract formed at that point.

However, the Colts' never sent a proposed written employment agreement to Tripplett in California. He did not sign any written employment contract in California. "Indeed, no parties signed the agreement in California." The Court of Appeal indicated that the mere fact that Tripplett's agent negotiated the contract terms in California does not establish that Tripplett was hired in California absent proof that the agent had the actual authority to both negotiate and accept an offer of employment from the Colts on applicant's behalf.

Applicant's Agent lack of Authority to Accept an Offer of Employment on Applicant's Behalf: One of applicant major arguments was that the mere fact his agent negotiated the contract terms while the agent was physically in California established that he was hired in California. The WCAB and the Court of Appeal both rejected this argument. Applicant's trial testimony was extremely significant on the issue or question of whether his agent had the authority to both negotiate an employment contract with the Colts and to accept an offer of employment from the Colts while the agent was physically in California during telephone negotiations and the applicant was physically located outside of California. "Tripplett also testified that although he "put a lot of trust in [his] agent" to negotiate his employment agreements, and "whatever he advised me to do, that's what I signed," **It was Tripplett himself who "had the final say." (**Emphasis added**).**

In support of their analysis and holding on this issue, the Court of Appeal discussed and distinguished *Jenkins v. Arizona Cardinals* 2012 Cal.Wrk.Comp. P.D. Lexis 189 (WCAB panel decision). In *Jenkins*, the agent both negotiated and signed the employment agreement in California. However, the WCAB held that no contract could be formed even in this situation unless the "agent was authorized to bind his client." "Given that Jenkins had the ability to *entirely reject* the contract after it was negotiated, we conclude that his signature on the contract was *not* a mere condition subsequent that did not prevent the formation of a contract. Every contract requires the actual consent of both parties." (Original emphasis and citations omitted). The Court emphasized that "[T]here must be "evidence to show that the contract was actually accepted, and thus became binding, within California's borders."

As with the player in *Jenkins*, "Triplett retained the ability to reject any contract his agent negotiated." Moreover, the Court stated, "…Tripplett's agent's negotiation of terms to be included in a written employment contract was not sufficient to bind Tripplett to anything. And because those negotiations were the only contract related activity that took place in California there is no basis to conclude the contract was formed in this state."

Applicant's NFL Player Status: The Court of Appeal indicated that the evidence offered by the Colts witness supported the requirement of a written employment agreement in part based applicant's NFL player status. "The NFL constitutes (sic) that anybody that is an unsigned player

on your reserve list cannot report, play or be in training camp until they sign the NFL Player Contract." The Court indicated this "testimony was consistent with the written contract itself, which specified it "will begin on the date of execution, or March 1, 2002, whichever is later." The Court also rejected Tripplett's reliance on *Paula Insurance Co. v. Workers' Comp. Appeal Bd.* (2000) 65 Cal.Comp.Cases 426. "But *Paula* is distinguishable because the agreement in that case was an oral rather than written. While a binding oral agreement could be formed over the telephone, Tripplett's written agreement with Indianapolis which specified it was effective only when executed could not."

The Significance of the Contract Integration Clause: With respect to the significance of the integration clause in the Colt's contract superseding any prior oral agreement the Court stated, "Moreover, the outcome here remains the same even if we assume that Tripplett's agent had some authority to bind him to an oral employment agreement at the conclusion of the agent's negotiation with Indianapolis. Tripplett's written employment agreement includes an integration clause that specifies it supersedes any prior oral agreement entered into between the parties. **Thus, the written agreement Tripplett signed while attending the team's minicamp in Indianapolis was the only agreement governing his employment relationship with the team."** (Emphasis added).

With Respect to Contract Formation the Fact Applicant was a California Resident was irrelevant under the facts of this case: Applicant argued that his contract should be deemed to have been formed in California because he was a resident of California. Mere residency alone cannot determine where a contract is formed. What is determinative is where the applicant was when he accepted the offer of employment. It was undisputed that applicant was not in California at the time he signed the written NFL Player Contract and was not in California during the negotiations conducted by his agent. "WCAB jurisdiction cannot be conferred or withheld on the basis of residency within the state." (*Quong Ham Wah Co. v. Industrial Accident Com*. (1939) 36 Cal.App.2d 158.

Editor's Comments and Practice Pointers:

1. The Court of Appeal in *Tripplett* illuminated and clarified existing longstanding case law dealing with contract formation principles as to when a contract is formed for "purposes of workers' compensation."

2. *Tripplett* does not change the fact that all contract formation cases are fact intensive and fact specific. The credibility of witnesses and the nature of supporting documentary evidence will still be outcome determinative in many cases.

3. Documentary evidence especially in the form of a copy of any contract between a player and their agent is essential since it deals with the pivotal issue of what authority if any the agent has to bind a player to a contract that the agent is negotiating on behalf of a player. In NFL cases this is especially true, since the applicable NFLPA regulations governing contract advisors/agents expressly prohibits the agent from binding the player to a contract. This is further reinforced by the actual express language of the contract that the NFLPA regulation mandates all agents to use between the player and the agent.

4. In *Tripplett*, based on a combination of testimony, documentary evidence, and skillful advocacy by defense counsel, the evidence supported a finding that the agent who was physically located in California during the contract negotiations did not have the authority to bind the player to any oral or written contract offered by the Colts since the player was outside of California during the negotiations and had the final say as to whether to accept the Colt's offer of employment.

5. The integration clause as well as Tripplett's NFL player status during the contract negotiations was also important. The language of the integration clause in the Colt's written employment agreement specified the written employment agreement superseded any prior oral agreement entered into by the parties. The inclusion of a similar integration clause in every proposed employment agreement is strongly recommended even though standing alone it may not be controlling in all cases depending on the specific facts and evidence that develops during the course of litigation

Penrose v. Denver Gold, North River Insurance Company, et al. **2018 Cal.Wrk.Comp.P.D. Lexis 290 (WCAB Panel Decision)**

Issue and holding: WCAB held there was California subject matter jurisdiction over applicant's entire cumulative trauma claim for the period of 1976 to the beginning of 1985. During the cumulative trauma period, applicant signed two of his employment contracts with two different teams in California. Applicant's hiring in California was a sufficient connection standing alone to support WCAB subject matter jurisdiction pursuant to Labor Code sections 3600.5(a) and 5305. This allowed allocation of liability in accordance with Labor Code section 5500.5(a) to different employers for which applicant played for during his entire period of cumulative trauma injurious exposure including the Denver Gold even though his contract with the Denver Gold was not signed in California.

Factual and procedural overview: The WCJ found California subject matter jurisdiction and awarded application 83.25% permanent disability after apportionment and a need for future medical treatment. Applicant played for several teams during the cumulative trauma period from April 8, 1976 to February 1985. Applicant signed his contracts with the Denver Broncos and the Arizona Wranglers while he was in California. None of his other employment contracts were signed in California. While applicant was with the Broncos he came to California eight times. When he played for the Jets he came to California once. While he was playing in the USFL for the Denver Gold he played four games in California, two in 1983 and two in 1984. His last game for the Denver Gold was played in Oakland California in May 1984. On reconsideration, the carrier for the Denver Gold raised a number of issues, including statute of limitations and also there were two separate cumulative traumas. Defendant's main issue on appeal was their contention that there was no liability on their part since its contacts with California were insufficient to support the adjudication of applicant's claim in California consistent with due process and based on the Court of Appeals decision in *Johnson.*

Applicant also filed for reconsideration alleging the WCJ had committed error with respect to determining the correct date of injury under Labor Code 5412. Applicant argued that the correct

date of injury should be August 2011 when applicant filed his claim for workers' compensation benefits. Applicant also claimed that the rate an effect on that date should apply to any permanent disability. Applicant also contended that the COLA was applicable to applicant's life pension.

Subject matter jurisdiction: The WCJ relied on the decision by the Court of Appeal in *Macklin* and also a WCAB panel decision in *Pierce* as the basis for finding there was California WCAB subject matter jurisdiction over applicants entire cumulative trauma claim. "With regard to the defendants, Denver Gold and New York Jets whose contracts were not signed in California as per the finding in the case of *New York Knickerbockers v. Workers' Compensation Appeals Board (Macklin)* 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] *(Macklin)* insofar as jurisdiction is established over applicant's 'claim,' based upon the hiring in California during the period of injurious exposure, this allows allocation of liability to a different employer during the period of injuries exposure in accordance with Labor Code 5500.5(a) without violating and due process.

The WCAB also reinforced the WCJ's subject matter jurisdiction analysis and ruling by holding that "[T]he WCJ correctly determined that the WCAB has subject matter jurisdiction over applicant's claim because he was hired in California as shown by the record and sections 3600.5 and 5305 support jurisdiction when the hiring and contract of hire is made in this state. In that the WCAB has subject matter jurisdiction over applicant's claim of cumulative trauma injury, the Denver Gold are properly identified as a party defendant based upon the liability allocation provisions of section 5500.5, and notwithstanding that employer's limited contacts with this state, consistent with the holding of the Court of Appeal in *Macklin* as discussed by the WCJ in the Defendant's report."

Only one cumulative trauma: Based on substantial medical evidence, the WCAB also affirmed the WCJ's decision that there was only one cumulative trauma injury sustained by the applicant and not two separate cumulative trauma injuries as argued by one of the defendants. In doing so, the WCAB relied on the *Coltharp* and *Austin* cases from the Court of Appeal. The WCAB also held the WCJ correctly concluded that applicant's claim was not barred by the statute of limitations.

The Labor Code section 5412 issue: With respect to the correct date of injury under Labor Code section 5412, the WCAB remanded the case in order for the WCJ to make an express determination and finding of the date of injury pursuant to section 5412. The WCAB noted that while the WCJ discussed the date of injury, the WCJ erroneously equated applicant's knowledge that he suffered two specific injuries to his knees and they were "caused by his work as a football player with knowledge that he had sustained a cumulative trauma injury." The WCAB stated "[t]he question of the period of injurious exposure is relevant to the issue of liability under section 5500.5, but knowledge of a specific industrial injury is not equivalent to knowledge of the right to file a claim of cumulative trauma industrial injury."

The COLA issue: The WCAB also remanded the case on the COLA issue. The Board stated it was "necessary for the WCJ to determine if the injury occurred on or after January 1, 2003, and

whether any award a permanent disability indemnity is to include a COLA in conformity with section 4659(c)."

Hafkey v. American Airlines, Inc., National Fire Insurance Company of Pittsburgh **2018 Cal.Wrk.Comp P.D. Lexis 283 (WCAB panel decision)**

Issues and Holding: In this non-sports case, both the WCJ and the WCAB found California subject matter jurisdiction over applicant's specific injury claim based on the fact applicant's employment contract with the defendant was formed in California when he accepted an oral offer of employment made over the telephone with an American Airlines representative even though the employment contract and other documents were signed in Arizona. The fact that applicant suffered a specific injury outside of California and initially filed a claim for Workers' Compensation benefits in Arizona before filing for Worker's Compensation benefits in California, did not negate California WCAB subject matter jurisdiction over his claim.

Factual and Procedural Overview: Applicant suffered a specific injury to his neck and back on December 26, 2014, when he was flying for defendant American Airlines on a route over the Midwest on the way to San Diego and encountered turbulence. Applicant was a resident of California and received surgery and medical treatment in California. Although defendant admitted the injury occurred, they denied the claim based on an alleged lack of subject matter jurisdiction based on the fact applicant signed his employment contract outside of California in Arizona and that his injury occurred outside of California. They also argued that since applicant initially filed his claim for Worker's Compensation benefits in Arizona, there was a lack of California subject matter jurisdiction over his claim.

Contract Formation: Applicant's credible and unrebutted testimony established that when he was hired by defendant he was living in California. He testified he was interviewed at length over the telephone by defendant's representative and offered a job which he accepted. It was his understanding he was hired by the defendant. He was then brought to Arizona by defendant to complete the hiring process including signing an employment contract in Arizona. With respect to applicant being a resident of California, the WCAB indicated that residency was not a relevant factor in determining subject matter jurisdiction notwithstanding the language in Labor Code section 5305. The WCAB cited numerous appellate decisions holding that "[i]t has long been held that basing WCAB jurisdiction on residency is a denial of the equal protection of the law to non-residents." (citations omitted).

The applicant's presence in California at the time he accepted employment with defendant as opposed to his residency is a relevant factor in determining whether he accepted employment with defendant. "Section 3600.5(a) extends the coverage of California workers' compensation laws to "an employee who has been hired" in the state but is injured outside the state. Section 5305 provides for WCAB jurisdiction over a claim of industrial injury when the "contract of hire" is made in California." The WCAB emphasized that "there is no requirement in the law that an employment agreement be signed or that all the terms of employment be finalized in California in order for a hiring to occur in this state as described in sections 3600.5(a) and 5305." (citations omitted). The WCAB stated that the *Palmer*, *Bowen* and *Johnson* decisions

collectively stand for the proposition that "applicants hiring in this state is sufficient connection with California to support WCAB jurisdiction over a claim for workers' compensation benefits.

Applicant's initial filing of his workers compensation case in Arizona: The WCAB held that the fact applicant filed his initial injury claim in Arizona does not change or alter whether the WCAB has subject matter jurisdiction due to the fact the applicant was hired in California. "It does not matter where a claim is first filed or in which state workers' compensation benefits are first provided." (*Thomas v. Washington Gas Light Co.*, (1980) 448 US 261 [65 L.Ed.2d 757; 100 S.Ct. 2647].). Based on applicable case law, an employee hired in California is entitled to pursue a claim in California, notwithstanding the existence of a claim in another state. (*Accordia Penn Gen v. WCAB (Myers)* (1997) 62 Cal.Comp.Cases 1128 (writ denied). The Board also noted that Worker's Compensation proceedings in Arizona have not been shown to be truly adversarial and judicial in nature. (citations omitted). The WCAB stated Defendant's remedy was to claim a credit for any workers' compensation benefits applicant may have received in Arizona.

Pierce v. Washington Redskins, ACE American Insurance and Travelers **2017 Cal.Wrk.Comp. P. D. LEXIS 244 (WCAB panel decision)**

Issues: Whether applicant's employment contract was deemed formed in California when both the applicant and his agent were physically in California during the contract negotiations and if the contract was deemed formed in California whether that constitutes a sufficient connection to California to support WCAB jurisdiction pursuant to §§3600.5 and 5305, notwithstanding the number of games the applicant may have played in this state. Also, whether applicant's hiring in California establishes more than a "limited connection" with California for purposes of whether or not a forum selection clause in an employment contract should be enforced.

Holding: Both the WCJ and the WCAB determined applicant was hired in California for purposes of jurisdiction since both the applicant and his agent were physically present in California at the time applicant accepted employment. Moreover, since applicant's hiring was in California, it establishes a sufficient connection to support WCAB jurisdiction, notwithstanding the number of games applicant may have played in California, and it also establishes more than a "limited connection" with California for purposes of not enforcing a forum selection clause in applicant's contract. Moreover, applicant's hiring in California during the period of injurious exposure may allow allocation of liability to a different employer during the period of injurious exposure in accordance with Labor Code §5500.5(a). (*Withrow v. St. Louis Rams* 2017 Cal.Wrk.Comp. P.D. LEXIS 249 (WCAB panel decision) (subject matter jurisdiction over the injury and claim found where applicant accepted employment offered over the telephone while he was in California) see also, *Paddio v. Cleveland Cavaliers, et al.* 2017 Cal.Wrk.Comp. P.D. LEXIS 242, see also 2017 Cal.Wrk.Comp. P.D. Lexis 375 (WCAB panel decision). (WCAB reversed WCJ and found applicant's contract was formed in California where both the applicant and his agent were in California during contract negotiations with the Cavaliers and applicant authorized his agent to accept an employment offer on his behalf. The fact applicant subsequently signed the written contract in Nevada was regarded as a condition subsequent).

Discussion: Applicant was employed by the Washington Redskins and New York Football Giants, Inc., from April 27, 2001 to February 10, 2010. Although the WCJ determined applicant

was a former and current resident of California, the WCAB indicated this fact is relevant only to applicant's testimony that he was in California when he accepted employment with Washington and New York.
The WCAB noted that applicant's residence is not a basis for WCAB jurisdiction, since basing WCAB jurisdiction upon residency is a denial of equal protection of the law to non-residents. (citations omitted).

The WCJ found applicant to be credible in that he testified that both he and his agent were in California when he accepted Washington's offer of employment. Applicant's credible testimony was unrebutted. There were three contracts. The applicant was first employed by the Washington Redskins even though he apparently signed the contracts outside of California.

Given applicant's hiring in California the number of games he may have played or not played in California is irrelevant since the Board has jurisdiction over injuries and injurious exposure occurring even outside the state. Under *Federal Insurance Company v. WCAB (Johnson)* (2013) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257] (*Johnson*), applicant's hiring in California is a sufficient connection to support WCAB jurisdiction pursuant to §§3600.5 and 5305, irrespective of the number of games applicant may have played in this state. The court in *Johnson* wrote as follows:

> "[T]he creation of the employment relationship in California, which came about when [Mr. Palma] signed the contract in San Francisco, was a sufficient contact with California to warrant the application of California workers' compensation law." (*Id*, 221 Cal.App.4th at p. 1126, italics added.)

Moreover, applicant's being hired in California is in itself a sufficient contact with this state for the WCAB to legitimately exercise jurisdiction over the applicant's workers' compensation claim, and at the same time it renders unreasonable for California to enforce a choice of law/forum selection clause in applicant's employment contract.

With respect to defendant's argument regarding allocation of liability to a different employer, the WCAB indicated that based on the hiring in California during the period of injurious exposure may allow allocation of liability to a different employer during the period of injurious exposure in accordance with §5500.5(a) without violating due process as described in *Johnson*. (*New York Knickerbockers v. WCAB (Macklin)* (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] (Macklin). (see also, *Paddio v. Cleveland Cavaliers et al.* 2017 Cal.Wrk.Comp. P.D. LEXIS 242, see also 2017 Cal.Wrk.Comp. P.D. LEXIS 375 (WCAB panel decision). (WCAB subject matter jurisdiction established over applicant's "claim" based upon a hiring in California during the period of injurious exposure then allows allocation of liability to a different employer during the period of injurious exposure in accordance with §5500.5(a) without violating due process, citing *Macklin*); see also, *Withrow v. St. Louis Rams* (2017 Cal.Wrk.Comp. P.D. LEXIS 249(WCAB panel decision).

Clemons v. Indianapolis Colts **2017 Cal.Wrk.Comp. P. D. LEXIS 187 (WCAB panel decision); (writ denied 8/31/17).**

Issues: Whether for purposes of Labor Code §§3600.5(a) and 5305 applicant was deemed "hired" in California based on the fact his agent's office was located in Beverly Hills, California and the agent negotiated with the employer and orally accepted an offer of employment on behalf of applicant who was not in California at the time the offer was made and who later signed the written employment contract in Texas.

Holding: The WCAB in reversing the WCJ found that applicant was hired in California for purposes of Labor Code §§3600.5(a) and 5305 since applicant's credible testimony indicated he had authorized his California-based agent to bind him to an employment agreement with defendant. Since applicant was hired in California there is WCAB jurisdiction over applicant's claim even though he played no games in this state.

Discussion: After playing briefly for one NFL team and then a Canadian football league team, applicant entered into an agreement with a California based sports agent whose office was located in Beverly Hills in the hopes of returning to play in the NFL. Applicant testified he gave his agent "authority to bind him to an employment agreement with the Indianapolis Colts." The agent then negotiated with the Colts on applicant's behalf. In December of 2003, applicant participated in a tryout in Indianapolis with the Colts. After the tryout applicant returned to his residence in Texas when he was contacted by his agent who told him, "Congratulations, you are a Colt." Applicant then signed his Player Contract with the Colts in Texas on January 5, 2004. There were conflicting provisions in the NFL Player Contract and a separate document entitled "Players Negotiation Location" as to where employment was actually accepted by either the applicant or applicant's agent. Applicant did not participate in any games or practices in California during his professional football career.

The WCJ found applicant's testimony credible that he gave his agent authority to bind him to an employment agreement. However, the WCJ also indicated that in his opinion the applicant's subjective belief as to contract formation was not determinative as to whether there was an actual acceptance of employment in California. Moreover, the judge felt the documentary evidence merely showed that negotiations were conducted to some extent in California, but did not indicate applicant's agent actually accepted the contract on applicant's behalf in California. Moreover, applicant testified he could not recall the terms of the player/agent agreement that he signed with his California agent. Based on all of these factors the WCJ found that applicant was not hired in California. Applicant filed a Petition for Reconsideration which was granted by the WCAB. The WCAB reversed the WCJ and found that applicant was hired in California.

The WCAB focused on the judge's finding applicant to be a credible witness and that the applicant testified credibly he gave his California agent authority to bind him to an employment contract with the Colts. The WCAB reviewed numerous cases, indicating that an acceptance of employment in California under §§3600.5 and 5305 can occur even without a written employment contract being executed in California.

The WCAB distinguished the *Barrow* case which the WCJ mistakenly relied upon. In that regard, the WCAB stated:

> In addition, the facts in this case are different than in *Barrow*. In this case, the record supports findings that applicant's agent was authorized to accept employment on applicant's behalf, and that the agent was in California when he conveyed applicant's acceptance of the employment terms offered by Indianapolis. This is unlike what occurred in *Barrow*, where the record showed that the agent did not have authority to accept an employment offer on behalf of his client.

Since applicant was hired in California, it constituted a sufficient connection with California to support WCAB jurisdiction pursuant to Labor Code §§3600.5 and 5305, notwithstanding the fact applicant played no games and did not practice in California.

Editor's Comment: The results in this case can be attributed to a defense failure of proof. The National Football League Players Association (NFLPA), which governs agents/contract advisors, has regulations which expressly prohibit all agents certified by the NFLPA from binding players to any employment contract. Moreover, the player/agent contract itself which is uniform and mandatory, has a provision that expressly prohibits any NFL agent or contract advisor from binding a player to a contract. It appears neither the NFLPA regulations nor any provisions of the collective bargaining agreement between the NFL Management Council and the NFLPA, or an actual copy of the contract that was entered into between applicant and his agent or a specimen copy from the NFLPA regulations were introduced into evidence. In the absence of this documentary evidence, the outcome of this case was based on applicant's testimony, which both the WCJ and the WCAB found credible.

Fauria v. Carolina Panthers **2017 Cal.Wrk.Comp. P. D. LEXIS 263 (WCAB panel decision)**

Issues: Whether applicant's contract with the Carolina Panthers was formed in California when there was insufficient evidence that his contract advisor/agent was in California at the time of acceptance of the contract offer from the Panthers. Moreover, given the fact applicant had no injurious exposure in California while employed by the Panthers whether it was reasonable or consistent with due process to apply California workers' compensation law against the Panthers under *Johnson*.

Holding: It was applicant's burden to prove that the employment contract was formed in California. There was insufficient evidence to support a finding that an actual hiring occurred in California by the acceptance of employment within the state. The WCAB also determined there was insufficient evidence applicant's employment contract was formed in California under *Johnson* since applicant played no games in California for the Panthers there was an insufficient connection between the Panthers and California and applicant's injury to make application of California workers' compensation law reasonable and not a denial of due process.

Procedural and Factual Overview: This case has a long and complex procedural history. There were a number of trials. However, as indicated hereinabove, the two primary issues were whether or not applicant's employment contract with the Panthers was formed in California and whether under *Johnson* from a due process standpoint given the fact that applicant suffered no injurious exposure in California while employed by the Panthers, whether it would be reasonable or consistent with due process to apply California's workers' compensation law against the Panthers.

Based on a cumulative trauma claim from July 17, 1995 to February 28, 2000, the WCJ found that applicant was hired in the State of California based on the WCJ's finding that applicant's agent accepted the offer of employment on behalf of applicant. The WCJ awarded applicant 93% permanent disability. Defendant filed a Petition for Reconsideration which was granted by the WCAB who **reversed** the WCJ and found that applicant's employment contract was not formed in California.

The Contract Formation Issue: Applicant played for a number of NFL teams during the course of his career, including the Seattle Seahawks, the New England Patriots, and Washington Redskins as well as the Carolina Panthers. The Carolina Panthers were the terminal employer. The three other codefendants were dismissed prior to trial without any objection.

Applicant testified he was initially contacted about a potential contract with the Panthers when he was in Hermosa Beach, California. His agent advised him he thought the Panthers wanted to sign him. Before the essential terms of any contract were discussed, applicant traveled to Carolina for a physical and a tryout. He then flew back to Massachusetts and was subsequently contacted by his agent by phone in Massachusetts and advised that an agreement had been reached. Applicant also testified he signed the NFL Player Contract with the Panthers in Carolina. Of significance is the fact that applicant testified he did not know where his agent was when the agent signed the contract.

The actual NFL employment contract with the Panthers was offered into evidence. The applicant's address on the contract was listed as Newport Beach, California. Although the contract was faxed by defendant to California, there was also a fax stamp indicating the contract was also faxed to a number in South Carolina. A defense witness testified he had no knowledge of where applicant's agent was located at the time the agent signed the contract on behalf of applicant.

The WCAB in finding there was insufficient evidence to support the determination by the WCJ that applicant's contract was formed in California noted that, "The North Carolina fax number on applicant's employment contract indicates that applicant's agent was in North Carolina when he agreed to the terms of employment on applicant's behalf and signed the contract. No additional evidence was received following the January 14, 2016 decision after reconsideration. Thus, the evidence concerning applicant's hiring by Carolina is still in dispute and it is still insufficient in support of finding a hire in this state."

The WCAB acknowledged that while it is not necessary that all the terms of an employment agreement be finalized in California in order for the WCAB to obtain jurisdiction pursuant to

§§3600.5(a) and 5305, the Board also noted that, "There must nevertheless be evidence sufficient to support of finding that a hiring occurred in California by the acceptance of employment within the state in order for that jurisdictional basis to apply." (citations omitted)

The WCAB also noted that the burden of proof was on the applicant to prove he was hired in California, citing Labor Code §5705. The WCAB also noted applicant had ample opportunity at both trials to present evidence showing he was hired in California, but that a preponderance of the evidence did not support such a finding. It is not enough that there was a "mere possibility" that applicant was hired in California by Carolina.

The Board indicated that if subject matter had been hired in California, there would have been no requirement that he had to suffer injurious exposure within California since a contract formed in California gives the WCAB jurisdiction over any injury or injuries that occurred outside of California based on a number of cases, including *Alaska Packers Assn. v. Industrial Acc. Com. (Palma)* (1934) 1 Cal.2d 250, 252, affd. (1935) 294 U.S. 532, *Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal.App.4th 15, 21-22* [64 Cal.Comp.Cases 745], and (*Laeng v. Workman's Comp. Appeals Bd*. (1972) 6 Cal.3d 771 at p. 777, [37 Cal.Comp.Cases 185].

***Johnson* Due Process Distinguished from Personal Jurisdiction:** On reconsideration the WCAB was careful to distinguish personal jurisdiction i.e., the power to hear and determine the case against a party. In terms of personal jurisdiction the WCAB noted as follows:

> There is no question that Carolina has sufficient contact with California for the WCAB to have "personal jurisdiction" over it in its most fundamental sense. (*International Shoe Co. v. Washington (1945) 326 U.S. 310 [66 S. Ct. 154, 90 L. Ed. 95]; Martin v. Detroit Lions, Inc.* (1973) 32 Cal.App.3d 472 [professional football team contacts with California sufficient for court to have personal jurisdiction over it in suit by former player for breach of contract]; *Ballard v. Savage* (9th Cir. 1995) 65 F.3d 1495.)

In contrast with respect to the *Johnson* due process issue, the WCAB noted that, "The issue in this case is whether the connection between the defendant, this state, and applicant's injury claim is sufficient to make application of California's workers' compensation law reasonable and not a denial of due process." So, in other words, California had the power in terms of personal jurisdiction to hear the case, but with respect to a separate aspect of due process under *Johnson,* since applicant was not hired in California and that during the applicable Labor Code §5500.5 liability period, applicant played no games and had no injurious exposure in California while employed by the Panthers, it would not be reasonable or consistent with due process to apply California workers' compensation law against the Panthers under *Johnson*.

Editor's Comment: With respect to the WCAB's personal jurisdiction analysis it is extremely important to be cognizant of the United Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court of California, et al.* (2017) 582 U.S. _____, 137 S.Ct. 1773. *Bristol-Myers* shifted the analytical focus from a pure "minimum contacts" and "purposeful availment" assessment to one in which specific personal jurisdiction is confined or limited to adjudication of issues derived from or connected with the controversy and the specific claims at issue. Where

there is no such connection "specific" personal jurisdiction is lacking regardless of the extent of defendants unconnected activities in the state."

Langdon v. New Jersey Devils, Montreal Canadiens, Federal Insurance Company **(2017) 82 Cal.Comp.Cases 928, 2017 Cal.Wrk.Comp. P. D. LEXIS 196 (WCAB panel decision)**

Issue: Whether the WCAB had jurisdiction over multiple defendants, many of whom were insured by the same carrier when applicant was hired in California by a California-based roller hockey team, and whether such jurisdiction extends over all of applicant's alleged injuries suffered subsequent to his California employment no matter where injurious exposure occurred.

Holding: With respect to California WCAB jurisdiction versus liability of a particular employer, the WCAB found there was both personal and subject matter jurisdiction over multiple professional hockey teams as well as the carrier since applicant not only played for a California-based team, but was hired in California, which extends jurisdiction and potential liability to later employers during the period of injurious exposure pursuant to Labor Code §5500.5(a).

Procedural and Factual Overview: The following factual and procedural overview should be read in the context that this is both a "roll forward" and "rollback" case.

Applicant was employed by the New York Rangers from 1993 to 2000, the Anaheim Bullfrogs in 1994, the Carolina Hurricanes from 2001 to 2003, and the Vancouver Canucks from 2003 to 2003. He then played for the Montreal Canadiens from October 28, 2003 to April 29, 2004, and the New Jersey Devils from April 29, 2004 to November 8, 2005.

In terms of applicant's employment and hiring in California, during one period of time while the applicant was with the New York Rangers from 1994 to 1995, there was a hockey lockout for half a year. During that summer he played for a professional roller hockey team, the Anaheim Bullfrogs. He was advised to play in this particular league by his agent, and the agent spoke to the Rangers and applicant was advised to do something to stay in shape. He signed his employment contract with the Bullfrogs in Anaheim. He played 21 games for the Bullfrogs. In addition to the 21 games he also participated in practices in California.

In addition to the games and practices he played in California for the Bullfrogs when he played later for other NHL teams, he played at least 16 games in California and some practices. While employed by the Montreal Canadiens from October 28, 2003 to April 29, 2004, he played three games plus practices in California. However, during the period he was employed by the New Jersey Devils from April 29, 2004 to November 8, 2005, he played no games or practices in California.

Following trial, the WCJ awarded applicant 38% permanent disability after apportionment and further medical treatment. The award was made in "favor of applicant against defendant." No particular defendant was indicated or identified with respect to liability.

The Effect of Applicants Hiring in California by a California-Based Team: Notwithstanding the fact applicant's hiring in California occurred in 1994, eleven years before his last injurious exposure playing for the New Jersey Devils, the WCAB noted that when an employee is hired in California, a workers' compensation claim may be brought in California regardless of where any injury occurred. In that regard, the Board stated as follows:

> The WCAB has subject matter jurisdiction over applicant's injury and claim under sections 3600.5(a) and 5305 because he was hired in California by Anaheim, where he sustained cumulative trauma that contributed to his injury, and because he sustained additional cumulative trauma both inside and outside of this state while employed by other teams. It is undisputed that applicant was hired in California by Anaheim and that he regularly worked in this state while employed by that team.

Also, based on applicant's hiring in California it was not disputed that subsequent to his employment in California for Anaheim he sustained injurious exposure resulting in a cumulative industrial injury as a professional hockey player by a number of professional hockey teams he played for subsequent to 1994, including the New Jersey Devils and the Montreal Canadiens.

The "Roll Forward" Liability Issue: Defendant disputed and argued there was no basis to roll liability forward ten or eleven years from the time applicant played for Anaheim in California to when he was employed in 2004 and 2005 by the Canadiens and by the New Jersey Devils. However, with respect to that issue the Board stated:

> Moreover, the existence of WCAB jurisdiction over an injury and claim because the applicant was hired in California by an earlier employer allows allocation of liability to a later employer during the period of injurious exposure in accordance with section 5500.5(a). (*New York Knickerbockers v. Workers' Compensation Appeals Board* (*Macklin*) (2015) 240 Cal.App.4th 1229 [80 Cal.Comp.Cases 1141] (*Macklin*).)

Personal Jurisdiction: Defendant on reconsideration raised the issue that the WCJ's award made "no mention of jurisdiction over particular parties." In response the WCAB noted that it was not necessary for the judge to issue findings of "jurisdiction over particular parties" because all parties consented to personal jurisdiction without objection. In addition to the fact that all parties not only consented and in effect waived any objection to personal jurisdiction, the WCAB indicated that personal jurisdiction also existed because of the defendant's other contacts with the state, citing *International Shoe Co. v. Washington* (1945) 326 U.S. 310; *Calder v. Jones* (1984) 465 U.S. 783; *Martin v. Detroit Lions.* (1973) 32 Cal.App.3d 472 [professional football team contacts with California sufficient for court to have personal jurisdiction over it in suit by former player for breach of contract]; *Ballard v. Savage* (9th Cir. 1995) 65 F.3d 1495.

(**Editor's Comment:** With respect to the WCAB's personal jurisdiction analysis above, it is extremely important to be cognizant of the United Supreme Court's recent decision in *Bristol-Myers Squibb v. Superior Court of California, et al.* (2017) 582 U.S. _____, 137 S.Ct. 1773. *Bristol-Myers* shifted the analytical focus from a pure "minimum contacts" and "purposeful

availment" assessment to one in which specific personal jurisdiction is confined or limited to adjudication of issues derived from or connected with the controversy and the specific claims at issue. Where there is no such connection "specific" personal jurisdiction is lacking regardless of the extent of defendants unconnected activities in the state.").

The Issue of Liability and the Interaction of Labor Code §§5500.5 and 5500.5(e): The carrier, Federal Insurance (Federal) argued that the New Jersey Devils should not be held liable under §5500.5(a) because applicant did not participate in any games or practices in California and did not incur injurious exposure in California while employed by New Jersey.

In a very refined and extensive discussion of the interplay/interaction of Labor Code §5500.5(a) and Labor Code §5500.5(e) (contribution proceedings) the WCAB noted that Federal's argument regarding liability under §5500.5(a) was premature since there had been no finding or determination related to contribution proceedings under Labor Code §5500.5(e). Therefore, Federal as the carrier was not aggrieved by a "final order, decision, or award" concerning liability in order to obtain reconsideration. In clarifying and elucidating the complex relationship between Labor Code §5500.5(a) and Labor Code §5500.5(e), the Board indicated the following significant procedural and substantive guidelines:

The lack of express identification of the liable employer(s) by the judge was not necessary and did not support reconsideration by a defendant. In that regard the Board stated: [injured employee may "obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability"]; *Tidewater Oil Co. v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 950, 957 [42 Cal.Comp.Cases 220] [employers and/or insurers have with a corresponding right to seek apportionment and contribution from earlier employers and/or insurers].)

In that Federal is the insurer of both New Jersey and Montreal, it has liability for the award in the absence of a different determination following a section 5500.5(e) supplemental proceeding.

The Relation Back Aspect of the Case is Dependent on Subsequent Contribution Proceedings under Labor Code §5500.5(e):

The WCAB noted that given the fact that Federal was the insurer for both the New Jersey Devils and the Montreal Canadians it has liability for the award in the absence of and pending a determination following a Labor Code §5500.5(e) supplemental proceeding related to contribution.

The WCAB agreed with the argument made by applicant's counsel that even if New Jersey was not liable under §5500.5, liability would relate back to Montreal because Montreal is the next employer identified in the statute and applicant did participate in hockey games and practices in California while employed by Montreal. The WCAB in support of the relation back analysis cited the following cases: (See, *Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn*) (1997) 53 Cal App 4th 1465 [62 Cal.Comp.Cases 441]; *County of Riverside v. Workers' Comp.*

Appeals Bd. (Sylves) (2017) 10 Cal.App 5th 119, 126-127 [2017 Cal.App. LEXIS 269] [supplemental proceeding in section 5500.5(e) intended to mitigate the delay, expense, and hardship incurred by a disabled employee where multiple employers or insurance carriers are involved].)

The WCAB also indicated Federal's *Johnson* due process argument as it related to the rollback team, the Montreal Canadiens, may not be viable even in subsequent contribution proceedings. In that regard, the WCAB cited both the *Sylves* and *Macklin* cases. The WCAB noted that subjecting Montreal as the rollback team to California workers' compensation law even though applicant only practiced and played three games in California would be reasonable and not a denial of due process:

> This is because Montreal has sufficient connection to this state with regard to applicant's injury and claim to support the application of California law against it consistent with due process. As the Court held in *Macklin*, "California has a legitimate interest in an industrial injury when the applicant was employed by a California corporation and participated in other games and practices in California for non-California NBA teams, during the period of exposure causing cumulative injury." (*Macklin, supra,* 240 Cal.App.4th at p. 1232.)

In addition to referencing *Macklin*, the WCAB also indicated that Federal's reliance on *Johnson,* alleging that the 3 games and practices in California for the Canadiens was de minimis was not persuasive. Of significance to the Board was the fact that applicant was employed by a California-based team. Therefore, under *Macklin* the Court of Appeal's holding in *Johnson* was not strictly applicable. In that regard, the Board stated:

> However, in light of applicant's employment by a California-based team, it is not necessary to determine if the other activities in California are sufficient by themselves to make the application of California workers' compensation law reasonable, although those activities are more than the one game that the Court in *Johnson* concluded was de minimis. (See, *Macklin, supra,* 240 Cal.App. 4th at p. 1239.)

The Date of Injury Argument: Defendant also argued that applicant only sustained "injurious exposure" while working in California and the actual date of injury under §5412 did not occur until applicant was outside of the state and incurred disability. The WCAB found that contention without merit and cited several cases which undermined defendant's argument. The WCAB also pointedly indicated the distinction between the Labor Code §5412 date of injury related to the statute of limitations in contrast to Labor Code §3208.1. Under Labor Code §3201, a cumulative injury occurs over a period of time, not on a specific date, as argued by Federal. More to the point, the WCAB stated:

> Contrary to defendant's assertions, the "date of injury" defined by section 5412 is not when a cumulative injury is caused. Instead, it is a date used for statute of limitation and liability purposes in adjudicating cumulative injury claims because it identifies when the cumulative injury manifested itself through compensable

> temporary disability or permanent disability with the employee's knowledge that the disability was caused by industrial injury. (citations omitted).

The WCAB also noted that based on the record applicant's last date of injurious exposure was *prior* to the date of injury defined by §5412. In that regard, since Federal was the insurer for the employer for more than one-year preceding the last day of injurious exposure, the judge properly concluded that it had the liability for the cumulative injury pursuant to §5500.5.

Editor's Comment: This is a very complex multi-layered, multi-factorial case. Not stressed by the WCAB was the fact applicant's employment contract was formed in California, in itself may have been a basis for finding the holding in *Johnson* inapplicable.

If this case can be distilled down into one important lesson, it is that in cases where you have multiple employers or insurance carriers in order to mitigate the delay, expense, and hardship incurred by an applicant the multiple employers and carrier have a potential remedy for contribution or reimbursement in supplemental proceedings under Labor Code §5500.5(e).

Walker v. WCAB **(2016) 81 Cal.Comp.Cases 461; 2016 Cal.Wrk.Comp. LEXIS 53 (writ denied)**

Issue and Holding: In this non-sports case, applicant was physically present in Georgia when he accepted an offer of employment sent from Utah via email. He never performed any work in California and suffered a specific injury in Utah. The fact that applicant's employer was headquartered in California and deducted California taxes from his wages and he was required to join a California union did not serve as a basis to establish California subject matter jurisdiction.

Factual Overview: It was undisputed the employer was headquartered in California. Applicant received an offer of employment while he was living in Georgia. The offer of employment was sent to applicant in Georgia by email from applicant's supervisor who was located in Utah. The email offer of employment was made via the employer's email account. However, the applicant received the email offer of employment from Utah on his own individual Hotmail.com account and also used that same account to transmit his acceptance of the employment offer back to the employer. Applicant never worked in California, and suffered a specific injury in Utah.

Applicant asserted there was a basis for California subject matter jurisdiction since the employer issued applicant's paychecks from California and deducted California taxes. Applicant was also required to join a union in California and defendant's Human Resources headquarters was located in California. The WCJ and the WCAB found that even if these various factors were true, it was insufficient to justify California's exercise of subject matter jurisdiction since applicant never worked in California and no contract for hire was made in California.

The WCJ determined the time and place of applicant's acceptance of the contract for hire was in Georgia, citing *Ledbetter Erection Corp. v. WCAB* (1984) 156 Cal.App. 3d 1097, 49 Cal.Comp.Cases 47. In *Ledbetter*, applicant's telephonic acceptance of an employment contract in Nevada was sufficient to establish that the contract was formed in Nevada. "The California Court of Appeal in *Ledbetter* observed that the issue was controlled by a "well-established

principle of contract law that a contract is formed at the time and place the offeree accepts and communicates his or her acceptance to the offeror." The WCJ also indicated that, "the fact that a California–based employer is a party to the employment contract is insufficient, in itself, to confer California jurisdiction."

Since applicant never worked in California, the only way for applicant to establish California subject matter jurisdiction pursuant to Labor Code §5305 was to show the contract of hire was made in California.

The WCAB in granting reconsideration affirmed the WCJ's decision that there was a lack of California subject matter jurisdiction. The WCAB stated as follows:

> Labor Code §3600.5(a) extends California worker's compensation laws to "an employee who has been hired" in California but is injured outside the state, and Labor Code §5305 provides for WCAB jurisdiction over a claim of industrial injury when the contract of hire is made in California. Although the location where the employment contract is signed is not always determinative of the place of hiring as described in Labor Code §§3600.5(a) and 5305 because there may be conditions subsequent to the hiring in California that need to be completed before finalization of the contract, the WCAB emphasized that there must be a hiring in California for the WCAB to have jurisdiction, and that, when an employee hired outside of California sustains injury outside of this state, the WCAB does not have jurisdiction over a resulting claim for worker's compensation benefits, even if the employer and the employee's union are based in California and the employee pays California taxes.

Royster v. NFL Europe **2014 Cal. Wrk. Comp. P.D. LEXIS 445 (WCAB panel decision)**

Issues: Whether applicant's contract with an NFL Europe team was formed in California, and if so, whether a contract of employment formed in California as a matter of public policy mandates that any Choice of Forum/Choice of Law in the provisions of the contract should not be enforced.

Holding: Both the WCJ and the WCAB determined applicant's contract was formed in California orally over the telephone. Since applicant's contract was formed in California, the Choice of Law/Choice of Forum provisions in the employment contract were not enforceable as a matter of public policy.

Procedural & Factual Overview: Applicant, a resident of California, was at home in California when he received a telephone call from the head coach for the Scottish Claymores of NFL Europe. During the course of the conversation, applicant was told/advised that the Claymores had a right to hire him based on a prior NFL Europe draft and 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 and the length of the contract.

Applicant was invited to come to training camp in Georgia. He accepted the offer over the telephone. NFL Europe paid for his airfare to Georgia and his room and board. There were also some critical undisputed facts, in that applicant's conversation with the Claymores' coach was not a guarantee that he would be on the team. He did not actually sign his contract with NFL Europe/the Claymores until he was in Georgia at training camp, and that 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, or failed to demonstrate sufficient football skills in training camp.

The WCJ determined applicant was a credible witness. Defendant was unable to actually call the head coach from the Claymores to testify, but instead produced two witnesses, neither of who were parties to the telephone conversation between the applicant and the head coach for the Claymores. These two witnesses testified essentially what the head coach told them about the conversation between the head coach and applicant. In denying defendant's Petition for Reconsideration, the WCAB discussed and analyzed all of the key California contract formation cases. They started with Labor Code §§5305, and 3600.5(a). Basically, these statutes indicate the WCAB has jurisdiction over claims for out-of-state injury if the contract for hire was made in California.

Moreover, the WCAB repeated the frequently cited principle that the WCAB is not confined to finding whether or not there was a traditional contract of hire entered into between the applicant and the employer given the broad statutory contours of the employment relationship sufficient to bring the California Workers' Compensation Act into play. Therefore, the formation of a contract is not determined simply from technical contracts or common law conceptions of employment, but must instead be resolved in reference to the history and fundamental purpose of underlying the act.
The WCAB cited among a number of cases, including *Laeng v. WCAB* (1972) 6 Cal.3d 771; 37 Cal. Comp. Cases 185, as well as *Bowen*.

The WCAB also pointed out that in determining whether a contract was made in California the critical question is whether actual acceptance took place in California. Moreover, the Board pointed to many non-sports cases where California has adopted a rule and found that oral contracts consummated over the telephone are deemed made when the offeree utters the words of acceptance. Most importantly, if the offer of employment is accepted in California, even over the telephone, "a contract of hire will be deemed to have been made here even if the actual contract is signed out of the state." (*Travelers Ins. Co. v. WCAB (Coakley)* (1967) 68 Cal.2d 7, 14 [32 Cal. Comp. Cases 527].

The WCAB also emphasized that even though there are other out-of-state contingencies to be completed after the oral formation and acceptance of the contract for hire in California, these will not prevent the formation of a contract. These conditions subsequent were described, including filling out lengthy questionnaires, obtaining a security clearance, and the actual signing of a contract and taking a physical after the oral acceptance.

The Validity of the Forum Selection Clause: Of interest in this case was applicant's actual contract with NFL Europe was not entered into evidence, but rather a specimen contract since it

appears to have been NFL Europe's policy to destroy all contracts after seven years. The WCAB discussed the *McKinley* case, indicating that in general, a reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation be filed in a forum other than California will be upheld if there is a limited connection to California with regard to the employment and the claimed cumulative trauma injury.

However, based on Labor Code §§5305 and 3500.5(a) the WCAB has jurisdiction over a workers' compensation claim where the contract of hire was formed and made in California. The WCAB noted that in both the *McKinley* and *Johnson* cases, the employment contracts were not made in California. The WCAB conducted an extensive analysis of the applicable cases and indicated that given the fact applicant's contract was formed in California, this is an exception to the general rule under *McKinley* that a reasonable Choice of Law/Choice of Forum clause will be enforced. The WCAB also looked at the newly enacted provisions of AB 1309, and reached the conclusion that the forum selection clause in the NFL Europe contract should not be enforced and would be violative of California public policy since applicant's contract was formed in California.

Editor's Comment: See also *Finn v. New York Football Giants 2017* Cal.Wrk.Comp. P.D. LEXS 132 (WCAB panel decision). (Applicant's contract deemed formed in California based on telephone negotiations and acceptance of essential terms of contract when applicant physically located in California and negotiated directly with team's general manager who was in Hawaii. As a consequence, the forum selection clause in the contract not enforceable under *McKinley*.); *Douglas v. New York Giants; World League of American Football, et al.* 2012 Cal.Wrk.Comp. P.D. LEXIS 510 (WCAB panel decision) (Applicant found to have been hired in California when his multiple employment contracts formed or made in California during the course of telephone negotiations and acceptance before applicant signed his contracts in Florida.)

Soward v. Jacksonville Jaguars **2014 Cal. Wrk. Comp. P.D. LEXIS 140 (WCAB panel decision)**

Issue: In National Football League (NFL) cases whether the parties must sign an enforceable written NFL player contract that is recognized by the NFL within California in order for the WCAB to have subject matter jurisdiction over applicant's claim.

Holding: Under long established California case law and under Labor Codes §§3600.5 (a) and 5305 there is no requirement that an enforceable written contract recognized by the NFL be executed in California to confer WCAB subject matter jurisdiction. An enforceable contract can be formed and accepted in a variety of ways including telephonically. Written employment contracts and other documents following and acceptance and formation of an oral contract in California are construed to be condition subsequent. Moreover, the specific location where a contract is signed is not determinative of the actual place of origin or acceptance of the contract under Labor Code sections 3600.5 (a) and 5305.

Factual and Procedural Background: Applicant was a California resident represented by a California agent. Both were within the State of California during contract negotiations with the Jaguars. Applicant accepted the employment terms offered by the team while he was within

California and both the WCAJ and the Board found the contract was offered and accepted telephonically in California notwithstanding the fact applicant signed the contract subsequently in Florida.

Defendant introduced evidence that "the only binding employment contract recognized in the National Football League [NFL] is the NFL player contract. In a footnote, the WCAB indicated that regardless of what the NFL regards or recognizes as a binding contract "jurisdiction in this case is based upon §§3600.5(a) and 5305, and those sections do not require that an "enforceable written employment contract be signed within the state." The Board went on in addressing defendant's contentions by stating "there is no requirement in either section that the parties must sign an "enforceable" written contract that is "recognized" by the NFL within California in order for the WCAB to have jurisdiction over an injury claim. The WCAB cited *Laeng v. Workers' Comp. Appeals Board* (1972) 6 Cal 3d 771 [37 Cal Comp Cases 185]; *Arriaga v. County of Alameda* (1995) 9 Cal. 4th 1055, 1061 [60 Cal Comp Cases 316].

The WCAB also indicated that "finalizations of written employment contracts and documents following a hiring in California have been construed to be conditions subsequent to the hiring. (Citations)

The defendant in this case argued as many do, that it is the location where the contract is signed that is determinative as to where a contract is actually deemed accepted and formed. However, the WCAB indicated that "it has also been long recognized that the location where a contract is signed is not determinative of the place of hiring or making of the contract of hire as described in sections 3600.5(a) and 5305." (Citations) "Instead, the finalizations of written employment contracts and documents following a hiring in California have been construed to be conditions subsequent to the hiring." (Citations) The Board in citing numerous cases and a critical treatise stated:

> The fact that there are formalities which must be subsequently attended to with respect to such extra territorial employment does not abrogate the contract of hire or California jurisdiction. Such things as filling out formal papers regarding the specific terms of the employment or obtaining a security clearance from the Federal Government are deemed "conditions subsequent" to the contract, not preventing it from initially coming into existence.

Defendant also unsuccessfully relied on and, in the WCAB's opinion, misconstrued the case of *Barrow v. Workers' Comp. Appeals Board* (2012) 76 Cal Comp Cases 988 (writ denied). The WCAB noted the:

> "WCAB in *Barrow* concluded there was no California subject matter jurisdiction because there was insufficient evidence to support applicant's contention that his employment contract was made in California because applicant's agent testified he had no authority to accept an employment offer on the applicant's behalf. More importantly and what was ignored by the defendant in this case was that the WCAB Panel in *Barrow* further indicated that it was not necessary for an employee to sign a written contract in California in order for the WCAB to obtain jurisdiction under §§ 3600.5(a) and 5305."

The WCAB also indicated that in this case not only was applicant and applicant's agent in California when the contract was negotiated and accepted but more importantly, applicant was a California resident. Therefore, the facts in this case were similar to other cases finding California subject matter jurisdiction where both the athlete and the agent were in California, specifically, *Tampa Bay Devil Rays v. WCAB (Luke)* (2008) 73 Cal Comp Cases 550 (writ denied) (Luke). WCAB also cited a number of other cases where valid employment contracts were accepted and formed telephonically in California even though actual employment contracts and other significant events occurred outside of California. (*Janzen v. WCAB* (1997) 61 Cal. App, 4th 109, 115[63 Cal. Comp. Cases 9]; *Bundsen v. WCAB* (1983) 147 Cal. App. 3rd 106 [48 Cal. Comp. Cases 673]).

Comment: This case as indicated, affirms a long line of California cases that have consistently applied Labor Code §§ 3600.5(a) and 5305 in liberally construing and extending benefits under California workers' compensation laws. There is no strict adherence to common law contract formation principles of offer and acceptance. However, in dicta it is interesting to note the WCAB indicates that in the absence of contrary evidence, there is an inference that the employer is the offeror because it has the superior bargaining power that normally dictates the terms of the employment. The author questions the soundness of the reasoning or conclusion in professional sports cases. In professional sports cases the athlete/applicant is usually represented by an agent who in many instances is an attorney, and who is certified, as in this case, by the NFL Players Association. The cases cited by the WCAB in support of an inference that the employer is in a superior bargaining power did not involved scenarios or situations where the applicant was highly compensated and represented by an agent. (see also, *Smith v. St Louis Rams, et al.,* 2016 Cal.Wrk.Comp. P.D. LEXIS 250 (WCAB panel decision).

Randle v. Seattle Seahawks, Permissibly Self-Insured, Administered by CCMSI; Minnesota Vikings **2014 Cal.Wrk.Comp. P.D. LEXIS 106 (WCAB panel decision)**

Holding/Issue: Whether on remand from the WCAB, there is evidence to establish applicant was hired in the State of California pursuant to Labor Code sections 3600.5(a) and 5302 so as to preclude enforcement of a contractual choice of law/forum clause.

Factual and Procedural Background: The WCAB, on November 25, 2013, initially affirmed the WCJ's findings there was California subject matter jurisdiction based on the fact applicant was hired in the State of California and that since he was hired in the State of California, unlike the applicant in the *McKinley* case, the choice of law/choice of forum clause in the applicant's Seattle Seahawks' contract should not be enforced. Moreover, in its original decision the Board found the statute of limitations did not apply and that two out of three AME reports constituted substantial medical evidence. However, in response to the Board's original November 25, 2013 Opinion and Decision after Reconsideration, both applicant and defendant the Seattle Seahawks' filed Petitions for Reconsideration. Applicant's Petition for Reconsideration involved the WCAB's decision that the AME report of Dr. Jay in internal medicine did not constitute substantial medical evidence, and the Board should have ordered further development of the record.

Defendant, the Seattle Seahawks, filed their Petition for Reconsideration of the Board's original November 25, 2013, Opinion and Order on the issue of whether or not applicant was hired in California pursuant to Labor Code sections 5302 and 3600.5(a). Defendant further contended that the Minutes of Hearing and Summary of Evidence in the case from the trial level did not accurately reflect the testimony of the applicant on that issue. Defendant obtained a trial transcript and requested the WCAB reevaluate their analysis in light of the trial transcript. After reviewing a partial transcript, the WCAB was persuaded that the record regarding whether or not the applicant was hired in California should be reconsidered. As a consequence, the WCAB rescinded their previous decision of November 25, 2013, in order to allow the WCJ to re-determine whether the WCAB has jurisdiction over applicant's claim based on his contention that he was hired in California.

The WCAB also directed the trial judge to also consider not only the *McKinley* and *Carroll* en banc decisions, but also the Court of Appeal certified for publication decision in *Federal Insurance Co. v. Workers' Comp. Appeals Bd. (Johnson)* (2013) 221 Cal. App. 4th 1116. Moreover, the WCJ was to determine whether or not the Minnesota Vikings had been dismissed or whether they were still a party to the case.

Allen v. Milwaukee Bucks, et al. **2013 Cal. Wrk. Comp. P.D. LEXIS 138 (WCAB panel decision)**

Issue: Whether there was substantial evidence that an employment contract was actually formed and accepted in California as opposed to mere discussions or negotiation.

Holding: There was a lack of substantial evidence to support a finding that applicant's California agent accepted a contract on applicant's behalf while applicant was physically outside the State of California, as opposed to the agent merely negotiating and discussing terms of the proposed contract.

Factual & Procedural Overview: Following trial, the WCJ found a basis for California jurisdiction in that applicant's contract was formed in California and awarded applicant 85.75% permanent disability with no apportionment. Defendant filed a Petition for Reconsideration.

The facts indicate applicant played for various NBA teams over three seasons, from 1995 through 1999. After his NBA career was over he played in Europe for approximately eleven seasons, from 1999 through 2009. Applicant never resided in California, and he never signed any of his contracts in California. There was evidence that applicant, while negotiating with at least two NBA teams, was represented by two different agents who had offices in California. However, when each of the agents was negotiating applicant's contracts, applicant was physically outside the State of California.

In reversing the WCJ's determination that applicant's contract had been accepted and formed in California, the WCAB indicated the critical/pivotal question to be determined as to whether or not a contract for hire occurred or was formed in California, is whether the actual "acceptance" took place in California, citing numerous cases.

Although applicant testified he had authorized his agents to negotiate on his behalf while he was outside the State of California, the extent of the authorization was in question. With respect to that issue, the Board stated:

> Here, there is some evidence that applicant "authorized" his agent to form a contract with the Milwaukee Bucks, but the extent of that authority is unknown. It is unclear whether the agent actually "accepted," in a contractual sense, before applicant signed a written contract in Milwaukee.

The Board did reaffirm the essential contractual formation principle applicable in California, that the WCAB is "not constrained in interpreting the provisions of the Workers Compensation Act by the common law contractual doctrine." (*Laeng v. WCAB* (1972) 6 Cal. 3d 771, 37 Cal. Comp. Cases 185)

While acknowledging there was no requirement of proof that the agent's words created a contract enforceable in civil court, the Board under the facts of this case indicated, "However, there must be substantial evidence that employment was actually accepted in California, not merely discussed or negotiated."

The basis for the remand back to the WCJ to further develop the record was based on the fact the existing record did not allow the Board to determine whether one of the applicant's agents accepted employment in California on behalf of applicant for the purposes of §§3600.5(a) and 5305.

Perez v. WCAB **(2013) 78 Cal.Comp.Cases 729; 2013 Cal. Wrk. Comp. LEXIS 91 (writ denied)**

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

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

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

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

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

It also appears that at trial applicant's attorney raised the Labor Code section 5402 rebuttable presumption of compensability in that there was no denial of the injury within 90 days of knowledge by the employer. However, the WCAB noted Labor Code section 5402 "merely creates a presumption that a compensable industrial injury was sustained" and does not establish subject matter jurisdiction. The Board then cited a number of cases indicating subject matter jurisdiction may be raised at any time and that jurisdiction cannot be conferred by consent, waiver, or estoppel. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal. 4th 288, and *Summers v. Superior Court* (1959) 53 Cal. 2d 295)

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

Mora v. Trident Seafoods Corp. **2013 Cal. Wrk. Comp. PD LEXIS 388 (WCAB panel decision)**

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

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

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

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

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

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

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

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

ACIG Insurance Company, insurer for KS Industries, L.P. v. WCAB **(Brock) (2013) 79 Cal.Comp.Cases 68; 2013 Cal. Wrk. Comp. LEXIS 192 (writ denied)**

Holding: In this non-sports case, California subject matter jurisdiction was found based on multiple offers and acceptance by a California resident via telephone, even though defendant contended there was no offer or acceptance until applicant underwent mandatory drug screening.

Factual Background: Applicant's primary residence was in Long Beach, California. The primary employer was KS Industries, L.P. located in Bakersfield. Applicant initially applied for employment with KS Industries online and then there was a follow-up telephone call related to employment. His initial job was in Wyoming working for KS Industries. Prior to working in Wyoming he was required to undergo drug testing and agreed to various company policies, and rules. He also signed his employment contingency document in Wyoming. He finished working at the Wyoming job site when the job ended and returned to California where he resided and collected California unemployment benefits.

While still residing in California, he was offered another job by KS Industries, this time in North Dakota as a pipe fitter. He accepted the employment offer telephonically and also acknowledged that he was required to undergo drug screening when he arrived in North Dakota. He executed another employment contingency document and started work in North Dakota on December 6, 2010. After working several hours on his first day of work in North Dakota, he was sent for drug screening. Applicant continued to work in North Dakota until he suffered a work related injury. Defendant argued there was no California subject matter jurisdiction since there was no employment offer or an acceptance until applicant arrived in North Dakota and underwent a drug screening test. The WCJ, as well as the Board, found that contrary to defendant's arguments and contentions, the drug screening applicant was required to undergo in North Dakota was not a condition precedent to applicant's employment because applicant had actually commenced work in North Dakota before he underwent drug testing. Moreover, the applicant was deemed to be an employee when he accepted the offer of employment when offered and accepted over the telephone from his residence in Long Beach, California. The WCJ and the WCAB concluded the offer and acceptance of employment occurred in California not in North Dakota.

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

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

From a procedural standpoint, the Board originally issued a decision in the case on October 19, 2011. Three different co-defendants filed a Petition for Reconsideration of the Board's original

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

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

The Board acknowledged there are situations and scenarios where there may be California subject matter jurisdiction even if the injured worker/applicant does not actually sign a written contract in California. The Board cited *Luke v. Los Angeles Dodgers* 2007 Cal. Wrk. Comp. P.D. LEXIS 125 (WCAB panel decision) where it was found that a professional baseball player's contract of hire was made in California notwithstanding the fact he actually signed his contract in Indiana because the essential terms of the contract were agreed to by telephone through a California agent while the player was in California with the agent. Therefore, the actual signing of the contract in Indiana was deemed to be a condition subsequent.

They also discussed *The Travelers Insurance Co. v. W.C.A.B. (Coakley)* (1967) 68 Cal. 2d 7, 32 Cal. Comp. Cases 527 involving a California geologist who traveled to Colorado. While in Colorado he contacted an employment agency and then returned to California. He was then contacted by the Colorado employment agency by telephone of the employment opportunity which he accepted in California. However, in that case it was found the contract was formed in Colorado and there was no California jurisdiction due to the fact it was an employment agency that communicated the acceptance to the employer in Colorado. The WCAB also distinguished the instant case from the facts in *Reynolds Electrical & Engineering Co. v. WCAB (Egan)* (1966) 65 Cal.2d 429 [31 Cal. Comp. Cases 415] where the California Supreme Court determined that a contract of hire was made in California where a union ironworker was dispatched out of a hiring hall in Southern California to work in Nevada. In *Egan* it was the employer who could reject the employee when he arrived at the out of state job site. However, in the instant case, it was the professional athlete who retained the right to reject the contract and he was not required to travel to a distant worksite before he could exercise the right to reject. Moreover, in Egan, the applicant was paid regular wages for the time expended in traveling to the jobsite in Nevada

while in the instant case the professional athlete was not paid wages by the Rattlers to travel to Arizona before he signed the contract there.

Moreover, the Board indicated that applicant's contract for hire was not made in California but instead in Arizona when he signed the contract was consistent with another Appeals Board decision in *Ioane v. Oakland Raiders* 2010 Cal. Wrk. Comp. P.D. LEXIS 416 (WCAB panel decision). (The fact applicant had a California based agent who negotiated his contract was not sufficient standing alone to establish jurisdiction when applicant was not in California when he signed the contract.) See also, *Barrow v. WCAB* (2012) 77 Cal.Comp.Cases 988 (writ denied); *Banta v. Detroit Lions* 2017 Cal.Wrk.Comp.P.D. LEXIS 232 (WCAB panel decision). (No subject matter jurisdiction where California agent did not have authority to accept employment on applicant's behalf when applicant accepted employment outside of California and agent merely communicated applicant's acceptance of that offer); cf. *Fauria v. Carolina Panthers* 2016 Cal.Wrk.Comp. P.D. LEXIS 17 (WCAB panel decision).

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

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

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

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

Case Summary: Applicant played for three different NFL teams. Following Trial the WCJ found applicant had sustained a cumulative trauma injury from June 15, 1986, through September 12, 1995, resulting in 64% permanent partial disability. The WCJ also found applicant's employment contracts were made in California and this provided a basis for the

WCAB to exercise jurisdiction over applicant's claim against all three NFL teams he played for. The WCJ also concluded applicant was "regularly employed" in California by two of the teams but not the Kansas City Chiefs. The sole basis for finding California jurisdiction over the Chiefs was the WCJ's finding that applicant's employment contract was formed and accepted in the State of California by virtue of the applicant having a California based agent who negotiated the applicant's contract via telephone from California.

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

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

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

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

> The Member Contract Advisor shall be the exclusive representative for the purpose of negotiating player contracts for Player. However, the Member

> Contract Advisor shall not have the authority to bind or commit Player to enter into any contract without actual execution thereby by the Player.

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

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

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

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

Practice Pointer: For other cases dealing with the role of an agent in the contract formation process see *Barrow v. WCAB* (2012) 77 Cal. Comp. Cases 988 (writ denied) where applicant's California based agent negotiated the contract but then testified he did not believe he had the actual authority to accept or reject an offer from the potential team/employer. Based on these facts, applicant failed to meet his burden of proof that he was hired in California under Labor Code section 5305. See also, *Allen v. Milwaukee Bucks* 2013 Cal. Wrk. Comp. P.D. LEXIS 138 (WCAB panel decision). In *Allen* the WCJ found applicant's California agent accepted the contract even though applicant signed the contract in Wisconsin and never played any games in California. The WCAB granted defendant's Petition for Reconsideration and remanded for further development of the record on whether there was substantial evidence that employment

was actually accepted in California as opposed to merely being discussed or negotiated by the California based agent.

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

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

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

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

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

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

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

evidence in the record to determine the role of the California agent in the communication of the employment offer.

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

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

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

***Grahe v. Philadelphia Phillies et al.*, (2018) 84 Cal. Comp. Cases 123, 2018 Cal. Wrk. Comp. P.D. LEXIS 480 (WCAB Panel Decision)**

Issues & Holding: Whether in a situation where an employer establishes an exemption pursuant to Labor Code §3600.5 and that employer is in the Labor Code §5500.5 liability period, are they alone exempt from liability or if the exemption is established, whether the applicant's entire claim is barred by Labor Code §3600.5(d).

The WCAB held there was subject matter jurisdiction over the applicant's entire cumulative trauma claim based on the fact he played for a period of time for a California based team, and it also appeared he signed at least one of his employment contracts in California with the California Angels. The Board also held that the Philadelphia Phillies who employed the applicant during the applicable Labor Code §5500.5 liability period, were exempt from liability based on the fact the Phillies met all of the conditions for an exemption pursuant to Labor Code §3600.5(c). Moreover, since there was no other team other than the Phillies liable under Labor Code §5500.5, the WCAB held that applicant's claim could still advance before the WCAB and while liability could not be assessed against the Phillies, liability could "rollback" and be assessed against the previous employer over whom California could assert jurisdiction, pursuant to the *Patterson* case and establish precedent.

Factual & Procedural Overview: Applicant a professional baseball player filed a cumulative trauma claim for the period of June 1, 1990 through September 1, 2000. The case was set for trial only on the bifurcated issue of whether or not the WCAB could assert jurisdiction over the Philadelphia Phillies. ("Phillies")

The parties stipulated to applicant's dates of employment with the teams he played for during his career. During his career, he played for seven different teams. Six of those were non-California based teams. The only California based team was the California Angels. ("Angels") The Angels were his first employer for a stipulated period from September 10, 1989 to November 26, 1994. While applicant was employed by the Angels he also played for five of the Angels affiliates all located outside of California, four of them in Canada and another out of state affiliate only referred to as the "Midland Angels."

The Phillies were the applicant's last employer for the period of January 25, 1999 to October 15, 2000. The Phillies were the only employer during the Labor Code §5500.5 liability period.

The applicant testified he could not remember signing any of his employment contracts with various professional teams in California aside from the contract with the Angels. While he was employed by the Phillies during the Labor Code §5500.5 he played a four game series in San Francisco.

On July 6, 2015, the workers' compensation judge ("WCJ") issued his first Findings and Order, finding that the WCAB had subject matter jurisdiction over the Phillies. The Phillies filed a Petition for Reconsideration. The WCJ rescinded the original Findings and Order. The parties were then ordered to file supplemental briefs. On November 23, 2015, the WCJ issued Findings of Fact concluding once again that the WCAB had subject matter jurisdiction over the Phillies. In response the Phillies filed their second Petition for Reconsideration which was granted by the WCAB.

The WCAB's Analysis and Decision

The WCAB has subject matter jurisdiction over applicant's alleged cumulative trauma claim

The WCAB ruled there was California WCAB subject matter jurisdiction over applicant's entire alleged cumulative trauma pursuant to Labor Code §5300 and 5301 based on the fact that it was undisputed applicant was an employee of a California employer who allegedly suffered employment-related injuries while working in California. In addition even though the Board expressly found applicant was employed by a California based employer, the facts also appear to establish that applicant signed at least one of his employment contracts with the Angels in California which would have been an independent basis for the WCAB to exert subject matter jurisdiction.

However, the Board indicated that although there was California WCAB subject matter jurisdiction over applicant's entire alleged cumulative trauma claim, the provisions of Labor Code §3600.5 may operate to exempt applicant's claim either in its entirety or against one or more particular employers.

The Application and Interaction of Labor Code Sections 3600.5(d) and 3600.5(c)

The WCAB indicated that Labor Code §3600.5(d)(1) clearly reflects that an essential provision for determining the meaning of section 3600.5(d) is section 3600.5(c). The two sections cannot be understood independently of each other. The Board then set out in full Labor Code §3600.5(c) and characterized it as a statutory provision that applies to a cumulative trauma claim asserted by a professional athlete who is hired in a state other than California, when the athlete is temporarily doing work in California. (citations omitted) The WCAB also noted that section 3600.5 defines terms used in 3600.5(c)(d). There are specific definitions for a "California-based team" (§3600.5(g)(2)), and "season" (§3600.5(g)(4).)

The WCAB noted there was no dispute whatsoever that the Phillies met all of the conditions for an exemption pursuant to subdivision 3600.5(c). The four conditions outlined by the WCAB that qualified the Phillies for the exemption where as follows:

1. Applicant was hired outside of California by the Phillies.

2. The applicant played games in California during his period of employment with the Phillies.

3. Applicant spent less than 20% of his duty days in California during the one-year period preceding his last date of employment in California while employed by the Phillies.

4. The Phillies provided workers' compensation insurance coverage under the laws of a state other than California, and that insurance covered applicant's injuries while temporarily employed within this state.

Scenarios where the applicant's entire claim may become exempt pursuant to 3600.5(d) and applicable exceptions

The WCAB indicated there is an intricate and complex interplay between subdivisions 3600.5(d) and 3600.5(c). The WCAB stated that "subdivision 3600.5(d) ordinarily operates in conjunction with subdivision 3600.5(c) – when all the employers during the athlete's last year of employment are exempt according to subdivision 3600.5(c), the entire claim becomes exempt according to subdivision 3600.5(d) and the entirety of an athlete's case must therefore be brought in an appropriate forum of the other state, not before the California WCAB (§3600.5(d)(1).)"

The WCAB then indicated that there is a built in exception in subdivision 3600.5(d) that in some situations would prevent the dismissal of the applicant's entire claim.

The WCAB indicated that in order to trigger the §3600.5(d) exception two conditions had to be established as follows:

1. The athlete must first have worked two or more seasons for a California-based team, or worked 20% or more of his or her duty days either in California or for California-based team. (3600.5(d)(1)(A).)

2. Additionally, the applicant must have also "worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section." (3600.5(d)(1)(B).)

The Board indicated that only when both of these conditions are met, "liability for the professional athlete's occupational disease or cumulative injury shall be determined in accordance with section 5500.5" (3600.5(d)(2).) The WCAB found that it was undisputed applicant met both of the requirements of subdivision §3600.5(d)(1). "[h]e worked for two or more seasons for a California based team, or that he worked more than 20% of his overall duty days for a California-based team in California. Applicant was employed by the Angels for roughly four years. However, with respect to subdivision §3600.5(d)(2) whether applicant "worked for fewer than seven seasons for any team or teams other than a California-based team or teams as defined in this section" is a more complicated question.

The problem the Board struggled with was that during the four seasons applicant was employed by the Angels he also played for their out-of-state minor league affiliates for significant periods of time. If these periods of employment for the out-of-state minor league affiliates of the Angels, were counted as periods of work for non-California teams, "and added to this six seasons

applicant worked for non-California teams applicant worked for more than seven seasons for non-California teams, the requirements of subdivision §3600.5(d)(2) would not be met and applicant's entire claim would be barred in California."

However, the Board based on combination of statutory construction and prior case law found that it was the legislative intent that for the periods of time a player played for out-of-state affiliates of a California team, and while the athlete remains employed by the California team, subject to recall at any time, that these periods should be counted as time working for a California team for purposes of the seven-season limit. The Board also held that consistent with such legislative intent several periods of work for out-of-state affiliates of California teams could be cobbled together in order to equal one or more whole seasons, even though each individual period is less than one season in length.

The WCAB noted a critical distinction in the statutory language of section 3600.5(d) which refers to "work" for California or non-California teams, which the Board indicated is not synonymous with "playing" for those teams.

> Given that the parties stipulated to applicant's uninterrupted employment with the Angels during the periods he was dispatched to out-of-state minor league affiliates, it is difficult to argue that applicant was no longer "working" for the Angels during those periods, even if he was "playing" for the minor league affiliate. Accordingly, the plain language of the statute favors an interpretation that applicant's seasons employed by the Angels be counted solely as seasons of "work" for a California team, even if they were punctuated by several dispatches to out-of-state minor league affiliates.

To support its statutory interpretation, the Board cited their prior decision in *Neu v. Los Angeles Dodgers* 2015 Cal. Wrk. Comp. P.D. Lexis 603 (WCAB Panel Decision). In *Neu* the Dodgers argued they were exempt from providing the mandatory notice of subdivision 3600.5(e) based on the argument that the employer team was an out-of-state affiliate which they argued was an out-of-state team and therefore no notice was required. The WCAB rejected such an argument in *Neu* based on the fact the Dodgers were applicant's employer for purposes of providing notice, even though the injury might have occurred while playing for the Dodgers Nevada affiliate. The essence of the Board's holding in *Neu* was that applicant's professional baseball activities were subject to the direction and control of the Dodgers and he performed such activities for the Dodgers benefit.

> The same considerations that compelled the finding in *Neu* apply here. Most significantly, the Angels, as applicant's uninterrupted California employer, retained control over applicant during his periods of play for the various out-of-state minor league affiliates, including the power to recall him at any time, as they did on several occasions. Moreover, applicant's time spent with these affiliates was for the Angels' benefit. It would be incongruous to hold that an applicant's work while employed by a California employer, for that employer's benefit, takes applicant's claim outside of the jurisdiction of the California workers' compensation system, simply because that work occurred out of state. When the

> Legislature wrote "fewer than seven seasons for any team or teams other than a California-based team," we do not think it intended that periods of play for out-of-state affiliates of the California team would be counted as time towards the seven season limit.

Also with respect to legislative intent, the WCAB held that it was wholly consistent with the legislative purpose and intent to calculate duty days carefully, but seasons more broadly, based upon an athlete's employer and not the precise location where work is performed at the behest of the employer.

> Therefore, we hold that when an athlete is employed by a California-based team and is dispatched to a minor-league affiliate outside the state of California, such time is counted as time working for a California-based team for purposes of calculating the two seasons of California employment, and the seven seasons of non-California employment that determine whether subdivision 3600.5(d)(1)(B) applies. Here, the parties stipulated that applicant was employed by the Angels for the entirety of the period he played for the minor league affiliates in question; accordingly, such time is counted as time working for a California team. Applicant therefore meets the requirements for application of subdivision 3600.5(d)(1) – he worked for a California-based team for four seasons, and for non-California based teams for six seasons.

The interplay between Labor Code §3600.5(c) and Labor Code §5500.5

Since the WCAB determined the Phillies were exempt pursuant to subdivision 3600.5(c) the critical question was whether the Phillies had any liability under Labor Code §5500.5 and if not, how is liability determined under Labor Code §5500.5.

The Phillies argued that because they were exempt pursuant to subdivision 3600.5(c) that the WCAB has no jurisdiction over any portion of the claim that was asserted against them and that any liability under Labor Code §5500.5 must be assessed against the last employer over whom California may exercise jurisdiction citing *Employers Mutual Liability Ins. Co. v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 284 (writ denied). (*Patterson*). See also *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 301 (writ denied). In contrast, the Angels and the WCJ mistakenly argued that even if the Phillies were exempt under 3600.5(c) that because the applicant met the requirements of subdivision 3600.5(d) it overrides the exemption in subdivision 3600.5(c), and there is still a basis for jurisdiction over the Phillies who would otherwise be exempt according to subdivision 3600.5(c).

The WCAB concluded that the Phillies argument reflects the correct interplay between Labor Code §3600.5(c) and Labor Code §5500.5 since there is no statutory support for the position advocated by the Angels and the WCJ. In that regard the Board stated:

> The text of subdivision 3600.5(c) could not be clearer when it states that "the benefits under the workers' compensation insurance or similar laws *of the other state*, and other remedies under those laws, shall be *the exclusive remedy against the employer* for any occupational disease or cumulative injury[.]" (§3600.5(c)(2), emphasis added.) Similarly, subdivision 3600.5(d)(2) makes no claim to override the exemption of subdivision 3600.5 (c); it merely states that when the applicant meets the requirements, the *claim* may still be brought in California, with liability determined according to section 5500.5. (§3600.5(d)(2).) Pursuant to *Patterson* and the line of cases following it, when the WCAB has no jurisdiction over the party that would normally be liable under section 5500.5, liability is instead assessed against the last employer over whom the WCAB can assert jurisdiction. (*Patterson, supra*, 52 Cal.Comp.Cases 284.)

Therefore the Board concluded that since the Phillies were exempt pursuant to subdivision 3600.5(c) they cannot be found liable by the WCAB and that any remedy against the Phillies must be sought in the workers' compensation system of another state.

However, applicant's workers compensation claim is still viable and may advance before the WCAB and that when liability is determined pursuant to section 5500.5 it may not be assessed against the Phillies but "should be assigned against the next last employer over whom California may assert jurisdiction, pursuant to *Patterson* and established precedent."

Based on the holding and analysis of the Board, liability in all likelihood would "rollback" to the Angels.

Sutton v. San Jose Sharks; Federal Insurance Company c/o Chubb Group of Insurance Companies **2018 Cal.Wrk.Comp. P.D. Lexis 249 (WCAB Panel Decision)**

Issues: Whether the cumulative trauma claim of a professional hockey player is entirely exempt from the California Workers' Compensation system pursuant to Labor Code § 3600.5 and also whether Labor Code § 3600.5(d) is limited to only non-California based professional sports teams, and whether applicant's entire cumulative trauma claim is exempt based on the fact the final employer in the case was allegedly exempt based on either Labor Code § 3600.5(c) or "some other law."

Holding: There was no basis to apply the Labor Code § 3600.5(c) exemption to applicant's employer during the last year of his professional hockey career based on the fact the applicant was not working temporarily in California for them and as a consequence there is no basis to trigger the section 3600.5(d) exemption. Defendant also failed to identify any "other law", which exempts applicant's entire cumulative trauma claim. As a consequence, applicant's claim for benefits is within the California Workers' Compensation System. Moreover, by virtue of

applicant having played for a California based team, the WCAB has subject matter jurisdiction over the applicant's entire CT claim.

The WCAB did find merit with one of defendant's arguments and held that subdivision 3600.5(e) does not limit the application of section 3600.5 solely to cases involving out-of-state teams. Accordingly, the WCAB rescinded the WCJ's F&O and substituted a new Order finding the applicant's cumulative claim was not exempt pursuant to section 3600.5(d).

However, the WCAB also indicated they were making no findings as to the possible applicability of subdivision (c) against employers other than the defendant (San Jose Sharks) and the applicant's last employer, a German team the Ingolstadt Panthers.

Factual Overview: Based on the pleadings, applicant filed a cumulative trauma claim for the limited period of December 7, 1997 to May 1, 1998, against the San Jose Sharks. Applicant played 17 total seasons as a professional hockey player. Notwithstanding his long employment as a professional hockey player from approximately June 17, 1989 to April 2006, he only filed a cumulative trauma claim for the approximately five months he played for the San Jose Sharks. With respect to the last three years of his professional hockey career, applicant played for the Ingolstadt Panthers, a German team, from April 18, 2003 to approximately April 2006. Other than his employment with the San Jose Sharks, applicant was never employed with any other California based hockey team.

Defendant San Jose Sharks did not dispute it was a California based employer and that applicant was employed by the Sharks from December 7, 1997 through August 26, 1998.
Applicant played for six different professional hockey teams before he played for the Sharks and four different professional hockey teams after he played for the Sharks.

Procedural Overview: A number of issues were raised at trial, but many of them were deferred by the WCJ. The Findings & Order issued by the WCJ on December 2, 2015, found that the WCAB could assert both personal and subject matter jurisdiction over applicant's claim. The WCJ also rejected defendant's argument that Labor Code § 3600.5(d) exempted the applicant's claim from WCAB jurisdiction. Also, the WCJ found Labor Code § 3600.5(d) relates back to the out-of-state employee and employer exemption contained in section 3600.5(c). The Judge also ruled that because the Sharks did not qualify for the exemption contained in section 3600.5(c), 3600.5(d) did not apply. Defendant filed a Petition for Reconsideration.

The WCAB's Decision and Discussion: The WCAB began their analysis by stating the California Workers' Compensation Act applies to all injuries whether occurring within the state of California or occurring outside California if "the contract of employment was entered into in California or if the employee was regularly employed in California" (citing *King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244].)

Since it was undisputed the applicant was an employee of a California based employer who allegedly suffered employment related injuries while working in California, the WCAB stated it had subject matter jurisdiction over the applicant's entire CT claim pursuant to Labor Code § 5500 as well as 5301, unless the claim is exempt pursuant to Labor Code § 3600.5. The WCAB

then analyzed the provisions of both Labor Code § 3600.5(d) as well as Labor Code Section 3600.5(c).

In terms of statutory construction in determining whether applicant's claim was exempt under Labor Code § 3600.5, the WCAB indicated they could not interpret or view the provisions of section 3600.5(d) in isolation and that section must be construed in the context of the entire statute of which it is a part, "As section 3600(d)(1) makes clear by reference, an essential provision for determining the meaning of section 3600.5(d) is section 3600.5(c)."

With respect to Labor Code § 3600.5(c), the Board characterized this provision as applying to "a cumulative trauma claim asserted by a professional athlete who is hired in a state other than California, when that athlete is temporarily doing work in California. (See, e.g., *Carroll v. Cincinnati Bengals* (2013) 78 Cal.Comp.Cases 655, 660 (Appeals Board en banc); *Dailey v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 727.)

Defendant's Argument and Contention that Labor Code § 3600.5 Applies to Both California Teams and Out-Of-State Teams: The WCJ rejected defendant's argument that Labor Code § 3600.5 applied to both California teams and out-of-state teams. At trial defendant argued that Ingolstadt, the German team applicant played for the last three years of his professional hockey carrier was exempt pursuant to Labor Code § 3600.5(c). The Board indicated they did not agree with the WCJ's reasoning. The WCAB noted that subdivision (e) of Labor Code § 3600.5, exempts out-of-state employers or professional athletes from certain notice provisions of the California Workers' Compensation system. In holding that Labor Code § 3600.5 applies to both California teams and out-of-state teams, the WCAB stated that 3600.5(e) "does not evidence any intent to limit the application of section 3600.5 as a whole to only out of state teams." As a consequence the WCAB found that it was error for the WCJ to find jurisdiction based partly upon subdivision (e). The WCAB stated "we agree with defendant that section 3600.5 may potentially apply to California teams: if a claim is exempt according to subdivision d), the applicant may not bring the claim in this forum, regardless of whether the claim includes employment with California teams."

Defendant's Other Exemption Arguments: Defendant also argued that applicant's employer during his last year as a professional athlete for the German Ingolstadt Panthers, was exempt pursuant to Labor Code § 3600.5(c). However, the WCAB stated that defendant's argument related to the exemption of the applicant's last employer was not clearly spelled out in the Petition for Reconsideration and from what the WCAB could glean from the record, defendant was arguing the exemption was premised on subdivision 3600.5(c)'s reference of professional athletes spending less than 20% of their duty days during the relevant period in California. Defendant argued that because applicant spent none of his duty days in California during the last year he was employed by the German team, which is less than 20%, that based on subdivision (c), applicant's entire claim was exempt based on subdivision (d) "in other words, defendant appears to be asserting that the worker can be "temporarily within this state doing work for his or her employer" even if he or she never actually set foot in California during the relevant period, because zero is less than twenty percent."

The Board characterized this argument as "superficially attractive" but that it could not be reconciled with the actual statute. The express unambiguous wording of the statute is that the employment has to be "within the state" in other words, "subdivision (c) defines the relevant 1-year period based on the professional athlete's last day of work within the state for the given employer. If the athlete never worked in this state for the relevant employer, subdivision (c) cannot apply, because there is no 365 day period to evaluate whether they athlete meets the 20% threshold." The Board also characterized defendant's argument as being at odds with the normal plain meaning of the phrase "temporarily within the state doing work for his or her employer." If a professional athlete or an applicant has never been within California doing work for one's employer, it is not possible to have been here "temporarily". Actual presence in the State is required under the statute. "Here, applicant, by all accounts, never performed *any* work in California for the Ingolstadt Panthers; as a result, subdivision (c) cannot exempt applicant and the Ingolstadt Panthers from the California worker's compensation system."

The WCAB also noted that prior case law interpreting the exemption found in present Labor Code § 3600.5(c) also emphasized that the exemption applies only when the applicant's entitlement to benefits depends on a theory that the injury was sustained in this state while the worker was here temporarily.

The WCAB also indicated that in enacting the amendments to section 3600.5 under AB 1309 the legislature was specific that any changes made to the statute would have no impact or alter in any way the prior decision of the Board in *McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23).

The WCAB emphasized the fact that even if the applicant's claim had involved temporary employment in California that had contributed to his injury, the record did not reflect that defendant proved the other necessary elements to establish the exemption specifically whether Ingolstadt had a worker's compensation policy or its equivalent that would cover injuries sustained in this state while here temporarily. Since Labor Code § 3600.5(c) cannot be applied to Ingolstadt the applicant's employer during the last year of his professional hockey career, subdivision (c) cannot be used to create a blanket exemption for the entire claim under subdivision (d).

Defendant's "any other law" Argument: Defendant asserted that subdivision (d) operates independently of subdivision (c) based on the argument that it references not only an exemption pursuant to subdivision (c), but according to "any other law" (Section 3600.5(d)).

Defendant asserted that the reference to "any other law" transforms subdivision (d) into a jurisdictional statute which bars the ability of the WCAB to assert jurisdiction over an individual employer in the same manner that the WCAB does not have subject matter jurisdiction over an individual employer under any other law including Labor § 3600.5(b), which defendant argued included a *Johnson* due process analysis for a lack of an employment contract or any work activities in California. However, defendant failed to establish any facts that supported their argument that the Ingolstadt Panthers were exempt according to "some other law" and that the entire cumulative trauma claim is exempt.

The WCAB rejected defendant's argument as follows:

> First, defendant's assertion that an employer might be exempt according to subdivision (b), and therefore the entire claim might be exempt according to subdivision (d), is essentially a red herring. Subdivision (b), which applied to all workers, not just to cumulative trauma claims by professional athletes, is essentially a more restrictive form of subdivision (c); in addition to the requirement of subdivision (c), the employer must also demonstrate that the other state recognizes the extraterritoriality provision of this state, and offers a similar exemption for California workers temporarily within that State. (See § 3600.5(b)(1)(A) & (B).) It is difficult to see any circumstances in which an employer could be exempt according subdivision (b) but not also exempt according to subdivision (c). Since subdivision (c) is specifically mentioned as a trigger for subdivision (d), the contention that the employer might also be exempt according to subdivision (b) is essentially just icing on the cake-the employer would already be exempt under subdivision (c), and therefore the claim would already be exempt under subdivision (d). As a result, although defendant may technically be correct that an exemption according to subdivision (b) could be an exemption according to "some other law" for purposes of subdivision (d), it is essentially a distinction without a difference.

The WCAB characterized defendant's further examples as unconvincing because defendant appeared to misinterpret holdings of the Board's prior cases on this issue. The WCAB did note defendant was correct that when there is a California contract of hire, the WCAB will have jurisdiction. "The amendments to section 3600.5 did not alter this path to finding subject matter jurisdiction."

AB 1309 expressly indicates the legislative intent that the amendments would not impact or alter in any way the decision of the Court of Appeal in *Bowen v. WCAB* (1999) 73 Cal. App.4th 15.

Defendant's "employer by employer" Subject Matter jurisdictional argument: Defendant argued that in the absence of a California contract of hire, there must be some other significant connection or nexus to the state of California in order to establish subject matter jurisdiction. Moreover, defendant also argued that such a "significant connection or nexus" to the state of California must be conducted on an employer by employer basis as opposed to the applicant's claim as a whole.

The WCAB summarily rejected this argument by stating:

> It has never been the law that each and every employer who is potentially liable must have a significant connection or nexus to the state of California in order for the WCAB to assert subject-matter jurisdiction; as long as the claim as a whole has such a connection or nexus, the requirement is met. For example in *Johnson*, the Court of Appeal phrased the inquiry thus: "If this state lacks a sufficient relationship with Johnson's injuries, to require the petitioner-the employer-to defend the case here would be a denial of due process such that the courts of this

state do not have authority to act. This may be referred to as a lack of subject matter jurisdiction (*Johnson*, supra, 221 Cal.App.4th at 1128.)

The Board indicated that for purposes of subject matter jurisdiction, the focal issue: "…[I]s not the extent of the employers connection to the state; it is the extent of the relationship between applicant's injuries and the state."

"Subsequent jurisprudence has explicitly confirmed that whether California can exercise subject matter jurisdiction over a claim does not depend on a significant nexus between every single employer and the state. (citing *New York Knickerbockers v. WCAB* (*Macklin*) (2015) 240 Cal.App.4th 1229, 1238-1239." The WCAB summarized the Court of Appeals holding finding that the operative question was the relationship between the applicant's injuries and the state, not the relationship between any one employer and the state. Because the applicant was employed by the San Jose Sharks, a California based team during the cumulative trauma period; there was a sufficient connection with the state to justify the exercise of subject matter jurisdiction.

Editor's Comments/Practice Pointers

1. Initially, what stands out about this case is that applicant's counsel did not file a cumulative trauma claim encompassing the applicant's entire 17 seasons as a professional hockey player from June 17, 1989 to April 2006. Instead, applicant's counsel filed a five month CT claim only for the period of December 7, 1997 to May 1, 1998, when the applicant played for the San Jose Sharks, a California based team/employer. None of the other 10 teams/employers the applicant played for appeared to be parties to the case. Consequently, the Sharks had to base a large part of their "exemption" argument from WCAB jurisdiction argument on behalf of not only another employer but an employer based in Germany.

2. There was no evidence applicant's contract with the Sharks was formed in California. As a consequence, California subject matter jurisdiction was premised on the fact applicant played for a California based team.

3. Under the best of circumstances, it is an evidentiary challenge to prove up the various elements to establish a basis to exempt an applicant and employer from a claim when you represent the actual employer. In this case however, defense counsel for the Sharks had the added burden of trying to prove up an exemption on behalf of a non United States based team they did not represent.

4. The 3600.5(d) exemption cannot be construed or applied in isolation. Both its meaning and application must be determined in conjunction with Labor Code § 3600.5(c).

5. Applicant never performed any work in California for the Ingolstadt Panthers, the German based team that employed him for the last three years of his professional hockey career.

6. In certain limited circumstances, Labor Code Section 3600.5(d) may operate and apply to more than simply cases where subdivision (c) applies to the last employees or employers. However, defense counsel failed to establish any relevant facts that would meet the examples they cited including a *Johnson* analysis, lack of an employment contract formed in California or any work activity performed in California by the applicant.

7. Unlike personal jurisdiction, subject matter jurisdiction relates to the power of the WCAB to hear the "claim". The required significant nexus or connection to California in the absence of a California contract for hire is not conducted on an employer-by-employer basis, but on the CT claim as a whole. As long as the CT claim as a whole has such a connection the requirement is met. As the Board indicated, defendant's argument in this regard was based on a misunderstanding and misapplication of the holdings in both *Johnson* and *Macklin*.

   For purposes of subject matter jurisdiction, the pivotal question is not the extent of each employer's connection to the state; it is the extent of the relationship between applicant's injuries and the state. As the WCAB indicated in *Macklin*, the Court of Appeal rejected the argument made by the New York Knickerbockers that California could not exercise subject matter jurisdiction over them, because applicant had only played in California for them a handful times. In rejecting that argument, the Court of Appeal found the operative question was the relationship between the applicant's injuries and the state, and not the relationship between any one employer and the state. In *Macklin* because the applicant had been employed by a California team during the period of the claimed CT injury there was a sufficient connection with the state to justify the exercise of jurisdiction over the entire CT claim. The important lesson in this case as the Board pointed out is that a *Johnson* analysis is conducted as to the claim as a whole, not to any individual employer and is separate and distinct from the analysis performed under section 3600.5, which depends on findings as to individual employers. Under the facts of *Sutton*, since applicant was regularly employed by a California based team and that fact alone establishes a significant connection to the state to allow for the exercise of subject matter jurisdiction under *Johnson* over the applicant's entire CT claim. However, a Labor Code § 3600.5 exemption analysis can be made by each individual employer under specific factual scenarios and also whether all of the required elements for any claimed exemption are met.

8. This case also illustrates the situation where various employers/teams are all insured by the same carrier and how it may impact a case significantly. Under the right set of facts there still may be a viable basis for a blanket exemption of an entire claim under Labor Code § 3600.5.

9. The only positive aspect of this case from a defense perspective is that the Board agreed with defendant that subdivision 3600.5(e) does not limit the application of 3600.5 solely to cases involving out of state teams.

Carroll v. Cincinnati Bengals, PSI, et.al. **(2013) 78 Cal.Comp.Cases 655; 2013 Cal. Wrk. Comp. LEXIS 102 (WCAB en banc decision)**

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

Factual/Procedural Background

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

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

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

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

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

The WCJ then issued his second Findings, Award and Order on January 24, 2011, again finding the Bengals were not exempted by section 3600.5(b) under the provisions of California workers' compensation law and that the WCAB has subject matter jurisdiction to award benefits against both the Bengals and the Saints. Once again, the Bengals' Petition for Reconsideration was granted leading to the Board's en banc decision in this case.

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

(1) The employee is temporarily within California doing work for the employer,

(2) The employer furnished coverage under the workers' compensation or similar laws of another state that covers the employee's employment while in California,

(3) The other state recognizes California's extraterritorial provisions, and

(4) The other state likewise exempts California employers and employees covered by California's workers' compensation laws from the application of its workers' compensation or similar laws.

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

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

The WCAB noted that applicant's counsel argued and presented cases that there was California subject matter jurisdiction and no exemption since a portion of the applicant's injurious exposure, i.e., a portion of an alleged cumulative trauma claim occurred within the state.

However, the WCAB noted none of the cases cited involve evidence that supported application of the section 3600.5(b) exemption as in the instant case. The WCAB ruled the Bengals consistently argued that section 3600.5(b) exempts both it and applicant from the provisions of California workers' compensation laws and presented more than sufficient evidence establishing the conditions required for the statutory exemption to apply.

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

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

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

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

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

1. The Bengals furnished workers' compensation under the laws of Ohio that covered applicant's employment while in California.

2. Ohio recognized the extraterritorial provisions of other states including California.

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

In dealing with applicant's argument regarding the application of the Ohio statute of limitations would render applicants claimed injury non-compensable in Ohio, the WCAB noted it really did not matter if the Ohio statute of limitations had run and prevented applicant from bringing his workers' compensation case in Ohio. The real issue was that the Bengals provided workers'

compensation coverage under the laws of Ohio that did cover applicant's work while he was temporarily in California in 1993 in the game against the San Francisco 49ers. Simply put, applicant failed to timely file a claim in Ohio when had the right to do so.

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

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

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

Love v. Tampa Bay Buccaneers **2015 Cal.Wrk.Comp. P.D. LEXIS 688 (WCAB split panel decision)**

Issue/Holding: Both the WCJ and the WCAB (in a split panel decision) found that defendant Tampa Bay was not exempt from California Workers' Compensation Laws by Labor Code §3600.5(b) or Florida statute §440.094. The Board indicated that §3600.5(b) on its face requires that the conditions required by the statute must exist, "while the employee is temporarily within

this state doing work for his or her employer." The Florida statute which became effective in 2011, was not in effect when applicant was employed by the Tampa Bay Buccaneers.

Factual & Procedural Background: Applicant was employed as a professional football player from 1991 through 1998. During the time he was employed by Tampa Bay he worked in at least one game in California.

The sole issue at trial was whether Tampa Bay was exempt from California workers' compensation laws by Labor Code §3600.5(b). Tampa Bay placed into evidence a number of exhibits related to its self-insured status and Florida law during the time applicant was employed by them. Tampa Bay's general counsel also testified related to Florida statute §440.094, which allegedly contained substantially similar provisions to §3600.5(b) which provides for reciprocity with other states that have similar statutes.

The Florida reciprocity statute became effective on July 1, 2011, and applied to all claims of injury filed on or after that date regardless of the actual date of injury. Defendant relied exclusively on the WCAB's en banc decision in *Carroll v. Cincinnati Bengals* (2013) 78 Cal.Comp.Cases 655 (Appeals Board en banc) (*Carroll*).

However, both the WCJ and the WCAB in construing and applying §3600.5(b) emphasized that the statute itself indicated that another state's reciprocity statute must exist, "while the employee is temporarily within the state doing work for his or her employer." The Board pointed out that since Florida did not have a statute that reciprocated the provisions of §3600.5(b) at the time applicant incurred injurious exposure while working in California, then Tampa Bay was not entitled to the §3600.5(b) exemption from California workers' compensation law. The Board emphasized the fact that, "It does not matter that the Florida statute includes a provision that makes it effective as to claims made on or after July 1, 2011.
That provision may apply to claims made under Florida law, but the Florida legislature has no jurisdiction or authority to change the content of California's statutes." The Board further stated:

> In order for an employer to claim the §3600.5(b) exemption, the extraterritorial provisions of §3600.5(b) must have been recognized in the other state "*while the employee is temporarily within the state* doing work for his or her employer" and employees in this state must also have been "likewise exempted" at that time from the application of the other state's workers' compensation laws. (Lab. Code, § 3600.5(b).) Those conditions did not exist when applicant worked in California for Tampa Bay and that employer cannot now claim an after-the-fact exemption from California law based upon the Florida statute that was not in existence when it employed applicant.

Commissioner Lowe in dissent would have exempted Tampa Bay from California workers' compensation laws based on the fact that "nothing in *Carroll* requires that the listed conditions must be present at the time of the employees doing work in California.

Comment: From a tactical standpoint perhaps defendant in this case should have raised both Labor Code §3600.5(b) as well as denial of due process since there was no substantial

connection between the applicant's one game played in California while working for the Tampa Bay Buccaneers and his claimed injury. However, as both the WCJ and the Board stated, the "sole issue" the case was tried on was the Labor Code §3600.5(b) exemption issue under *Carroll*.

Ambrose v. Baltimore Ravens/Cleveland Browns **(2014) 79 Cal.Comp.Cases 704; 2014 Cal. Wrk. Comp. LEXIS 64 (writ denied)**

Issues: WCJ and the WCAB both found that defendant and applicant were exempt from California subject matter jurisdiction pursuant to Labor Code section 3600.5(b). Moreover, the WCAB found the WCJ properly admitted a variety of documentary evidence over applicant's objections based on improper foundation and lack of authentication.

Factual & Procedural Background: Following trial, the WCJ found applicant was only employed (temporarily) in California pursuant to the requirements of Labor Code section 3600.5(b) and that defendants had established all of the required elements necessary to obtain an exemption from California subject matter jurisdiction as allowed by that section and based on the WCAB en banc decision in *Carroll v. Cincinnati Bengals* (2013) 78 Cal. Comp. Cases 655 (Appeals Board en banc).

In establishing the requisite elements under Labor Code section 3600.5(b), defendant relied on various sections of the Ohio Revised Code and also letters and several certificates of self-insurance.

Applicant's attorney claimed they were never served with sections of the Ohio Revised Code. However, defendant established service by way of Proof of Service. Applicant then argued that the sections of the Ohio Revised Code were "unauthenticated".
However, the WCAB relying on Evidence Code section 452(a) indicated that both the WCJ and WCAB could take judicial notice of the pertinent Ohio Code Sections.

With respect to applicant's evidentiary objections related to the letters from the Interim Director of the Ohio Bureau of Workers' Compensation, the WCAB indicated the signature was presumed to be authentic in the absence of contrary showing by the applicant and it was proper for the WCJ to receive copies of the letters into evidence relying on Evidence Code section 1271. "A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of…A public employee of any public entity in the United States". Reliance was also made on Evidence Code section1562 and various case citations.

Running of the Ohio Statute of Limitations and Applicant's Case: The applicant argued that since the applicant's claim with barred by the Ohio statute of limitations, i.e., that he could not file a workers' compensation claim in that State, then the exemption under Labor Code section 3600.5(b) should not apply. The WCAB citing their en banc decision in *Carroll* stated:

> "Nothing in section 3600.5(b) requires that the procedural provisions of the other state's workers' compensation laws be identical to the California statutes. Instead, section 3600.5(b) only requires that extraterritorial coverage be provided

> at the time the work is performed. Applicant's failure to timely file a workers' compensation claim in Ohio does not mean that the Bengals' self-insurance did not cover his employment while he was temporarily working in California. Nor does it mean that he is precluded on a jurisdictional or quasi-jurisdictional basis from filing a claim in Ohio. It only means that he did not timely file a claim in Ohio." (Footnote omitted).

Booker v. Cincinnati Bengals **2012 Cal. Wrk. Comp. P.D. LEXIS 114 (WCAB panel decision)**

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

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

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

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

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

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

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

Discussion:

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

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

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

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

The Lack of Notice Argument: Applicant also argued the WCAB had California subject matter jurisdiction because the Bengals allegedly failed to comply with the Ohio statutory requirements that it give notice to an Ohio administrative agency of this extraterritorial coverage. The Board summarily rejected this argument noting section 3600.5(b) only requires the out of state employer have valid extraterritorial insurance and does not encompass, from a jurisdictional standpoint, any alleged failure to comply with insurance notice requirements of the other state.

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

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

Payment of California Taxes for the One Game Applicant Played in California Does Not Invoke California Subject Matter Jurisdiction: The WCAB acknowledged non-resident professional athletes pay California income taxes based on what is described as a "duty day" formula. Applicant argued and raised various legal and public policy arguments as to why payment of such taxes should furnish the basis for California subject matter jurisdiction.

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

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

Based on the Parties Forum Selection Clause, the WCAB Indicated That Even if it Was Assumed There Was Subject Matter Jurisdiction Under Labor Code Section 3600.5(b) the WCAB Would Not Exercise Jurisdiction: In *Booker II* the WCAB provided a detailed discussion as to various reasons why, if they were called upon to rule on the validity of the parties' contractual choice of forum clause, they would most likely find it valid and therefore choose not to exercise California subject matter jurisdiction.

The WCAB also discussed in detail and at length the distinction between the WCAB declining to exercise jurisdiction under a forum non conveniens argument as opposed to the exercise of

subject matter jurisdiction pursuant to a forum selection clause. The WCAB noted an alleged statute of limitation bar is a relevant consideration when considering whether to decline jurisdiction under a forum non conveniens clause, but is not relevant in terms of determining the validity of the parties' forum selection clause in an employment contract.

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

> We are, of course, mindful that an injured employee cannot, by contract, waive his or her right to workers' compensation benefits or exempt the employer from liability for them. (Lab. Code §§ 5000, 2804.) However, a forum selection clause neither waives the right to California benefits nor exempts the employer from liability for them. *(Cf. Intershop Communications v. Superior Court* (2002) 104 Cal. App. 4th 191, 200-201 (holding that Lab. Code § 219, which provides that "no provision of this article [regarding the payment of wages] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied," was not violated by enforcement of a forum selection clause).
>
> Therefore, in light of the forum selection clause in applicant's Contract with the Bengals, we would decline to exercise jurisdiction under section 3600.5(b), even if arguably we would otherwise have jurisdiction.

Jameson v. Cleveland Browns **2012 Cal. Wrk. Comp. P.D. LEXIS 137 (WCAB panel decision)**

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

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

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

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

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

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

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

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

1.4 Personal Versus Subject Matter Jurisdiction

Denver Nuggets v. WCAB (Hollis Copeland, et al.) **(2017) 82 Cal.Comp.Cases 611, 2017 Cal.Wrk.Comp. LEXIS 39 (writ denied)**

In this case the WCJ, the WCAB, and the Court of Appeal found no California personal jurisdiction over Pinnacol Assurance, a Colorado insurance company, who provided workers' compensation insurance to the Denver Nuggets for the period 1972 through 1982. The WCAB found that Pinnacol made no general appearance in the consolidated cases, and that Pinnacol did not have sufficient minimal contacts with California during the period of coverage and after the period of coverage in 2009 to justify a finding of personal jurisdiction. Pinnacol had offices only in Colorado and directed its advertising, marketing, and coverage exclusively to Colorado employers. Moreover, Pinnacol's contacts with California after the period of injurious exposure was not material to personal jurisdiction even through the date of applicant's cumulative trauma injury under Labor Code §5412 was no earlier than 2009. In addition, the Nuggets were not in compliance with Labor Code §3700 since they never secured workers' compensation liability insurance from a carrier authorized to provide workers' compensation insurance in California. (see Labor Code §3700).

Editor's Comment: While this case was pending before the Court of Appeal, the United States Supreme Court issued its decision in *Bristol-Myers Squibb v. Superior Court of California, et al.* (2017) 582 U.S. _____, 137 S.Ct. 1773. *Bristol-Myers* shifted the analytical focus from a pure "minimum contacts" and "purposeful availment" assessment to one in which specific personal jurisdiction is confined or limited to adjudication of issues derived from or connected with the controversy and the specific claims at issue. Where there is no such connection "specific" personal jurisdiction is lacking regardless of the extent of defendants unconnected activities in the state."

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

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

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

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

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

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

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

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

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

Comment: Both of the above cases are excellent examples of the critical distinction between personal jurisdiction (either "general" or "specific") versus subject matter jurisdiction. There are two recent significant United States Supreme Court cases dealing with personal jurisdiction; *Daimler AG v. Bauman* (2014) 571 U.S. 117, 134 S.Ct. 736 and *Bristol-Myers Squibb Co. v. Superior Court of California, et al.* (2017) 582 U.S. _____, 137 S.Ct. 1773. From a due process standpoint "specific" personal jurisdiction is confined or limited to adjudication of issues derived from or connected with, the very controversy that establishes jurisdiction. This requires a connection between the forum and the specific claims at issue. Where there is no such connection "specific jurisdiction is lacking regardless of the extent of the defendants' unconnected activities in the state." As a consequence, California could not exercise personal jurisdiction over the claims of 592 non-California residents since they did not claim to have suffered harm in California and all the conduct giving rise to their claims occurred outside of California. However, establishing personal jurisdiction over an out of state employer will not automatically establish "subject matter" jurisdiction.

Copeland v. Denver Nuggets, Pinnacol Assurance **2013 Cal. Wrk. Comp. PD LEXIS 356 (WCAB panel decision)**

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

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

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

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

It is important to note that Pinnacol always appeared by "special appearance" in all proceedings. On removal, Pinnacol argued that the WCAB had no personal jurisdiction over it and that the Denver Nuggets and their seven employees were exempted from the provisions of California

Workers' Compensation laws by Labor Code section 3600.5(b). In essence, Pinnacol contends there was no insurance coverage issue to be sent out to arbitration and it was an abuse of discretion to order three of the seven cases to arbitration.
The WCAB granted removal rescinding the WCJ's arbitration Order and ordered the WCJ to conduct further proceedings related to whether or not the WCAB had personal jurisdiction over Pinnacol. The WCAB ruled that the threshold issue was not "insurance coverage" but rather, "instead, the threshold issue that must be first determined at a hearing is whether the WCAB has personal jurisdiction over Pinnacol." As to that issue, the WCAB has jurisdiction to conduct hearings to determine if it has personal jurisdiction over a named party as well as determine if it has jurisdiction over an injury claim.

Comment: In many sports cases personal jurisdiction as opposed to subject matter jurisdiction is not contested. However, in situations where there is a legitimate question as to whether there is California personal jurisdiction over a particular defendant all pleadings and all appearances before the WCAB on the Minutes of Hearing should indicate the defendant is making a "special appearance."

1.4 Validity of Contractual Choice of Forum/Law Provisions

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

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

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

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

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

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

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

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

1. California workers' compensation benefits are to be provided for industrial injuries sustained in the State of California so long as statutory conditions of compensation are met.

2. The California Workers' Compensation Act applies to all injuries whether occurring within the State of California or occurring outside of the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California.

3. The jurisdictional reach of the WCAB extends to both specific injuries that are the result of one incident or exposure that causes disability or need for medical treatment, but also to "cumulative injuries that occur as a result of physically traumatic activities extending over a period of time the combined effect which causes disability or the need for medical treatment".

4. The WCAB may also exercise jurisdiction over specific industrial injuries occurring outside of California's territorial boundaries in cases where the injured worker had more than a limited connection with the state. Most of the cases cited by the WCAB in support of this principle involved California residents where the contract for employment was made in California or a significant portion of applicant's employment was performed within the State of California.

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

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

Applicant's Limited Connection to California with Respect to Both the Aspects of Employment and Claimed Cumulative Injury: The WCAB noted that notwithstanding the fact applicant participated in 7 football games in California during his four years of employment

with the Cardinals and also participated in a 5 day training camp in La Jolla, California, these were insufficient and inadequate connections to California in a jurisdictional sense when viewed in the perspective of the choice of forum/law clauses in the employment contracts.

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

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

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

Forum Selection Clauses are Presumed Valid and are Generally Enforced Under Straight Contract Principles Unless They are Unreasonable or Contrary to a Fundamental Public Policy: From a historical perspective, the WCAB noted that for a period of approximately 38 years, from 1934 until 1972, when the United States Supreme Court issued their decision in *M/S Bremen v. Zapata Offshore Co.* (1972) 407 U.S. 1 that forum selection clauses were not favored. However, based on the *Bremen* decision, forum selection clauses in a variety of contracts, including employment contracts, were cloaked with a presumption of validity. Based on *Bremen* the WCAB articulated a number of key/core principles as follows:

1. There is a presumption in favor of enforcement of a forum selection clause which has been regularly applied by California courts in the years following the *Bremen* decision.

A forum selection clause should control absent a strong showing that it should be set aside and only upon particular grounds.

2. Enforcement of a forum selection clause is based upon principles of contract not equity. Therefore the principles of forum non conveniens are generally inapplicable.

3. When a defendant seeks to defend a forum selection clause, the burden of proof is upon the applicant to show the clause and selected forum are unreasonable and the factors involved in a traditional forum non conveniens analysis do not control. A forum selection clause is presumed valid and the courts have placed a substantial and heavy burden on the plaintiff to show that application of the forum selection clause would be unreasonable. Generally forum selection agreements should be honored and enforced by the courts absent some compelling and countervailing reason for not enforcing them.

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

The Selection of Arizona as the Proper Workers' Compensation Forum for the Applicant to Adjudicate any Workers' Compensation Claim was Reasonable: The Board indicated it was manifestly evident that Arizona had a substantial and material connection to applicant's employment and his related claim for workers' compensation. Moreover, the majority of the activities claimed to have caused applicant's cumulative trauma injury primarily occurred in Arizona. It was also objectively reasonable to identify Arizona as the proper forum to adjudicate his workers' compensation claims especially in light of the number of other states where the Cardinals played games and the potential for jurisdictional conflicts.

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

applicant's lack of diligence, or more importantly, whether applicant made a conscious decision not to file his claim in Arizona and instead made a deliberate and conscious decision based on advise that he could receive better benefits in California than in Arizona.

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

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

The Forum Selection Clause and Applicant's Multiple Employment Contracts with the Cardinals were not Contrary to California Fundamental Public Policy: Again the WCAB noted applicant's argument about a violation of public policy based on Labor Code section 5000 and the *Alaska Packers/Palma* case were not well taken since his employment contract was not formed or executed in California. They noted the policy arguments that were readily apparent in *Palma* were completely absent in the instant case.

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

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

California's Public Policy to not Allow Forum Shopping or Burdening Its Courts also Impacted this Case: The WCAB indicated that California courts and every court recognized and should recognize the decisions involving enforcement of forum selection clauses have an impact upon the delivery of justice in the forum state. California has an interest in the avoidance

of overburdening local courts with congested calendars in cases in which the local community has little concern. Citing the California Supreme Court's decision in *Price v. Atchison, T. & S. F. Ry. Co.* (1954) 42 Cal. 2d 577, 583-584, the Board stated:

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

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

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

- *Matthews v. National Football League Management Council* (2012) 688 F. 3d 1107; (9th Circuit) 77 Cal. Comp. Cases 711;
- *Miami Dolphins Ltd. v. Newson* (2011) 783 F. Supp. 2d 769 (W.D. Pa.);
- *Chicago Bears Football Club, Inc. v. Haynes* (2011) 816 F. Supp. 534 (N.D. Ill.);
- *Cincinnati Bengals v. Abdullah* (2013) 2013 WL 154077 (S.D. Ohio);
- *Kansas City Chiefs Football Club, Inc. v. Allen* (2013) U.S. Dist. LEXIS 46424 (W.D. Mo.);
- *Atlanta Falcons Football Club v. Nat'l Football League Players Assoc*. (2012) ____ F. Supp _____, 2012 WL 5392185 (N.D. Ga);
- *New Orleans Saints v. Cleeland* (2012) No. 11-CV-02093, ECF No. 55 (E.D. La)

***Walker v. Tampa Bay Buccaneers*; ACE/Pacific Employers 2015 Cal.Wrk.Comp. P.D. LEXIS 240 (WCAB panel decision)**

Issue: Whether defendant's failure to raise the applicability of a contractual choice of forum clause in applicant's contract at the outset or early in the case constituted a waiver of defendant's ability to litigate the choice of forum clause.

Holding: Both the WCJ and WCAB held that defendant effectively waived the choice of forum clause in applicant's NFL players contract by extensively litigating the case for 43 months and conducting substantial discovery without indicating it was seeking to enforce the choice of forum clause until late in the case. Based on the particular facts and circumstances of the case the WCJ and WCAB held that it would be unreasonable to enforce the forum selection clause.

Factual and Procedural Overview: The WCJ in a November 19, 2013, Findings and Award found applicant suffered a cumulative trauma injury resulting in 70% permanent disability. Moreover, the WCJ found that the choice of forum clause in applicant's player contract did not apply. Defendant filed a Petition for Reconsideration which was denied by the WCAB upholding the WCJ's finding that the choice of forum clause did not apply based on the facts and circumstances in this case.

The defendant had extensively litigated the case over a period of approximately 43 months without ever seeking an early determination of the enforceability of the forum selection clause in applicant's player contract.

Both the WCJ and the WCAB cited the case of *Trident Labs, Inc. v. Merrill Lynch Commercial Finance* (2011) 200 Cal. App. 4th 147. In *Trident*, a non-sports case, defendant made a motion to dismiss based on a forum selection clause in a contract but waited 19 months to do so. In Trident, the court denied the motion to dismiss indicating that Merrill Lynch had waived its right under the forum selection clause by litigating this case for 19 months in California.

The WCAB noted that defendant in the instant case had litigated extensively for 43 months and had conducted very significant and substantial discovery. On this basis, the WCAB indicated it would be unreasonable and unjust to enforce the forum selection clause in applicant's NFL player contract. The Board noted that to hold otherwise would encourage forum shopping and endorse delay in raising the issue while the parties seek favorable rulings on other issues.

The WCAB also pointed out that this was not a case focusing on jurisdiction but rather that if California subject matter jurisdiction applied, whether the forum selection clause in the applicant's NFL player contract would require applicant's workers' compensation claim to be litigated in another venue or forum.

Comments/Discussion: The lesson in this case is that where there is an alleged valid choice of forum/choice of law clause in a contract that a defendant before conducting extensive discovery should file a petition or motion for a bifurcated hearing as to the enforceability of the choice of forum/choice of law clauses in the relevant contracts. It would be advisable of course, at a minimum, to take applicant's deposition. However, based on this decision, other extensive discovery including medical discovery should not be undertaken since to do so would establish a basis for applicant to argue that any applicable *McKinley* defense has been waived.

From a strategy standpoint defendant should consider once the applicant's deposition has been taken and team records obtained that a motion/petition for a bifurcated hearing on the *McKinley* choice of forum/choice of law issue be filed in order to get an early determination as the applicability of the *McKinley* defense. If a WCJ refuses to set the matter for a bifurcated hearing on the *McKinley* defense, the options of course are removal/reconsideration.

Alternatively, if the WCJ refuses to grant the bifurcated hearing and orders the parties to obtain medicals and other relevant discovery, it could later be argued by defendant that there is no basis for waiver since at the earliest possible time they filed a motion/petition for a bifurcated hearing on this matter and therefore waiver was inapplicable.

Smith v. New York Giants; Gulf Insurance **(2014) 2014 Cal.Wrk.Comp. P.D. LEXIS 109 (WCAB panel decision)**

Holding: WCJ in granting defendant's Petition for Reconsideration found the contractual choice of law/forum clauses valid based on the WCAB's en banc decision in McKinley reversing the WCJ's decision to not enforce the forum selection clause in the applicant's contract with the New York Giants.

Factual & Procedural Overview: This case involved two trials on the same issues. After the first trial, in which the WCJ found there was a basis for California subject matter jurisdiction and awarded 71% permanent disability, defendants filed a Petition for Reconsideration which was granted by the WCAB. The case was then remanded so the WCJ could consider the effect of the parties' forum selection clause in light of the recent WCAB en banc decision in *McKinley.* However, after the second trial, the WCJ once again found a basis for California subject matter jurisdiction finding the forum selection clauses in the Giant's contracts were not enforceable and awarded 71% permanent disability. Predictably defendants filed a second Petition for Reconsideration.

At the second trial there was no additional evidence presented. The WCJ, in finding the forum selection clause should not be enforced, in contravention of the holding in *McKinley*, found the applicant did not have strong ties with New Jersey and the New York Giants were incorporated in New York, but physically located in New Jersey. The WCJ also found the forum selection clause was not reasonably based on an alleged or purported waiver since the defendant engaged in pre-trial discovery and utilized Agreed Medical Examiners who were asked to apply California law. The WCJ regarded this as a waiver and also that defendant would be estopped from asserting the validity of the contractual choice of forum clauses.

In reversing the WCJ, the WCAB engaged in an extensive discussion and analysis of its previous holding in *McKinley*. Under *McKinley*, a forum selection clause is presumed to be valid and enforceable unless the party challenging it meets a heavy and substantial burden of showing that the clause is unreasonable. In this case the Board indicated applicant presented no evidence that met that heavy and substantial burden. The Board noted the contract of employment in this case was not made in California. Also of the 49 or 50 games he played for the Giants, only one game was played in California. Moreover, both the Giants and the applicant had a significant connection to New Jersey contrary to the WCJ's view. The Giants' headquarters were located in East Rutherford, New Jersey where the team practiced and played half of its games. Moreover, based on a review of the evidence, the WCAB indicated applicant resided in New Jersey for at least some of the time he was employed by the Giants.

They characterized the applicant's connection to New Jersey as essentially the same as the applicant's connection to Arizona in *McKinley.* And as in *McKinley*, the forum state of New Jersey based on all of the factors has a materially greater interest than California in determining what, if any, workers' compensation benefits are due to the applicant.

The WCAB also indicated they were not persuaded the Giants waived enforcement of the forum selection clause merely because they participated in reasonable pre-trial discovery and the use of Agreed Medical Examiners. The Board noted the existence of the forum selection clause was timely raised by defendant on the Pre-Trial Conference Statement when it identified the issues for trial to include jurisdiction, choice of law and venue. The Board noted "it is when a party fails to raise an issue at the first hearing where it may properly be raised that it can be said that the issue was waived." Moreover, the Board found no basis for estoppel. There was no prejudice or surprise on applicant's behalf since he knew of the forum selection clause when he signed his employment contracts. Moreover, there was no showing that defendant performed any acts or made representations that justifiably induced the applicant to take no action.

In conclusion, applicant failed to show that forum selection clause was obtained by fraud or misrepresentation or that its enforcement would otherwise be unreasonable notwithstanding its presumptive validity. Applicant expressly and reasonably agreed with the Giants that any claim for workers' compensation would be made in New Jersey and adjudicated under New Jersey law. The fact the applicant desired to adjudicate his claim in California does not provide good reason for the WCAB to exercise jurisdiction in light of the limited connection between California and applicant's employment and the claimed cumulative trauma injury.

Cleveland Browns v. WCAB (Saleh) **(2014) 79 Cal. Comp. Cases 941; 2014 Cal. Work. Comp. LEXIS 87 (writ denied)**

Issue: Whether applicant was "regularly" employed in California pursuant to Labor Code §3600.5(a) and the jurisdictional impact of applicant having played for one team under an assumed contract that did not have Choice of Law/Choice of Forum clauses and playing under a later contract that did have Choice of Law/Choice of Forum clauses.

Holding: The WCAB granted reconsideration and remanded the case back to the WCJ to determine whether applicant was regularly employed in California given the fact applicant was claiming injury within the State of California and not outside the State of California. On remand the WCJ should also consider whether applicant playing under one contract that had a Choice of Law/Choice of Forum clauses encompassed his entire employment even under the period of an assumed contract that did not have such clauses.

Procedural & Factual Overview: Applicant played for the Panthers from May 15, 1997 to February 8, 1999, and for the Browns from February 9, 1999 to January 6, 2002. When applicant first came to the Browns on February 9, 1999, he played under his Panthers contract that was assumed by the Browns at least for the period of February 9, 1999 to March 1, 2000. The applicant's Panthers contract that was assumed by the Browns and under which he played from February 9, 1999 through March 1, 2000, did not contain Choice of Forum or Choice of Law provisions.
Applicant later signed a new contract with the Cleveland Browns from March 1, 2000 to February 28, 2001, and another contract from March 1, 2001 to February 28, 2002. These two contracts with the Browns had Choice of Law/Choice of Forum clauses/provisions.

Applicant never lived in California nor were any of his contracts formed in California. Applicant traveled to California two times and played in two games for the Browns. One game was in 1999, and that would have been during the period of time applicant was playing for the Browns under the assumed Panthers contract, which did not have Choice of Law/Choice of Forum clauses in it. He played in another game for the Browns in California in 2000. He testified he was injured in both games and the injuries involved his "whole body." He also testified he had medical treatment in California. He also practiced in California before both games.

The WCJ found applicant suffered a cumulative trauma injury from May 15, 1997 to January 6, 2002, while playing for the Panthers, and from February 9, 1999 to January 6, 2002, for the Browns. However, under Labor Code §5500.5 the judge found the Panthers had no liability. She found all liability under Labor Code §5500.5 was with the Cleveland Browns. The Cleveland Browns filed a Petition for Reconsideration raising among other things, the validity of the Choice of Law/Choice of Forum clauses in the Browns' contracts and also the Labor Code §3600.5(b) exemption.

The WCAB granted defendant's Petition for Reconsideration and remanded the case back to the WCJ to reconsider a number of issues. One issue related to the Board's opinion 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 entire period of employment with the Browns, from 1999 to 2001, especially when applicant had played for the Browns under the assumed Panthers contract, from February 9, 1999 to March 1, 2000, which had no Choice of Law/Choice of Forum clauses.

With respect to Labor Code §3600.5(a), the WCAB indicated that the WCJ on remand should refocus given the fact it appeared questionable as to whether or not applicant was "regularly employed" within California and he was really claiming injury during the two games he played in California and not outside California. The real issue is whether or not California would exercise jurisdiction over claims of cumulative trauma injury when only a portion of the injurious exposure causing cumulative injury allegedly occurred within California.

With respect to the Labor Code §3600.5(b) exemption, defendant appears to have met the first prong of the defense that applicant was only temporarily employed in California. However since the WCJ at trial had properly excluded bits of documentary evidence, there was no evidence in the record indicating the Cleveland Browns' self-insurance covered applicant's employment in California, as required by Labor Code §3600.5(b) and detailed in the *Carroll* case.

Vaughn v. Seattle Seahawks **2014 Cal. Wrk. Comp. P.D. LEXIS 732 (WCAB panel decision)**

Issue: Whether a choice of law provision in applicant's contract combined with the lack of substantial medical evidence applicant suffered only a portion of his cumulative trauma injury in California provided the basis that California should not exercise subject matter jurisdiction over applicant's claim.

Holding: The combination of a valid choice of law provision in applicant's contract combined with the lack of substantial medical evidence to establish that a portion of applicant's cumulative trauma claim was suffered in California is a sufficient basis for California not to exercise subject matter jurisdiction over applicant's claim.

Factual & Procedural Overview: During the course of his NFL career, applicant played six games in California out of a total of 80 games. While employed by the New England Patriots in 1991, he played two games in California. While with defendant Seattle Seahawks from August 25, 1993 to November 23, 1994, he played four games in California. The applicant was subsequently traded to the Kansas City Chiefs in 1994, and also later played for the Pittsburgh Steelers. He then played for an NFL Europe team before leaving professional football in 1998.

Applicant was examined by three Agreed Medical Examiners in the fields of orthopedics, internal medicine and neurology.

The WCJ found applicant suffered a cumulative trauma injury while employed by the Seattle Seahawks from August 25, 1993 to November 23, 1994, related to various body parts and conditions with 65% permanent disability. The WCJ also found the statute of limitations did not bar applicant's claim, and the WCAB had jurisdiction over applicant's claim despite a choice of law provision in applicant's employment contract with the Seattle Seahawks. Defendant filed a Petition for Reconsideration which was granted by the WCAB who rescinded the WCJ's Findings Award and Order. The WCAB found California should not exercise subject matter jurisdiction over applicant's claim.

The Medical Evidence: In reviewing the medical evidence, the WCAB noted the AMEs in neurology and internal medicine failed to discuss the cumulative nature of applicant's injury at all let alone whether his participation in four games in California for the Seattle Seahawks contributed to his alleged cumulative trauma injury. With respect to the AME in orthopedics, the WCAB noted the AME's opinion was ambiguous and opined only in general terms the applicant had suffered a cumulative trauma over his entire career as a Professional Football Player. However, the WCAB noted a physicians mere observation and conclusion that football was a physically demanding sport without more, is not substantial evidence of industrial injury in California. Moreover, the AME in orthopedics while discussing the general dangers in Professional Football, failed to explain the basis for his opinion concerning the effects of football on the particular individual in question. "This conclusory opinion did not provide substantial medical evidence of industrial injury in California."

The WCAB also noted that applicant's testimony also failed to provide substantial evidence be sustained and industrial injury in California. After applicant stopped working for the Seattle Seahawks in 1994, he continued to play Professional Football without restrictions until he retired in 1998 for a number of other teams.

The Choice of Law Provision and Applicant's Employment Contract with the Seattle Seahawks: Applicant's employment contract with the Seattle Seahawks contained a choice of law provision and not a choice of forum provision. It should be noted the applicant never resided in California, nor was he represented by a California agent, and never signed any employment contracts in California. In a split panel decision, the WCAB focused on the lack of substantial medical evidence to establish applicant suffered an injury in California and under the *Johnson* case, California therefore did not have a sufficient connection to the matter in order to exercise California subject matter jurisdiction. The WCAB majority did not specifically address the distinction between a choice of law provision, as opposed to a choice of forum provision in the applicant's contract. However, in a dissent by Commissioner Sweeny, she noted that the instant case, unlike *McKinley*, involved an ambiguous choice of law agreement which should be distinguished from a valid choice of forum agreement as found by the WCAB in *McKinley*. Based on this distinction she would have found a basis for California to exercise subject matter jurisdiction noting that "in this case, however, applicant's contract did not contain a choice of forum clause, it contained only an ambiguous choice of law provision". She noted that "a choice of law agreement is not necessarily identical to a choice of forum agreement, even in the context of workers' compensation, were most states apply their own workers' compensation laws exclusively."

Williams v. Jacksonville Jaguars **2013 Cal. Wrk. Comp. P.D. LEXIS 88 (WCAB panel decision) (Post McKinley)**

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

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

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

The parties stipulated at Trial that while the applicant played for the Jacksonville Jaguars he was always a resident of Florida and never a resident of the State of California. There was also a

stipulation there was no California agent involved and he did not sign his contracts within the State of California. Applicant practiced in one game in San Francisco in 2009, but did not play in the game. He did not play any games in California from 2005 to 2009 and played two games in California in 2004.

The employment contracts he signed with the Jacksonville Jaguars for the three years between 2008 and 2011, had a specific addendum indicating "the exclusive jurisdiction for resolving injury related claims shall be the Division of Workers' Compensation of Florida, and in the case of a Workers' Compensation claim the Florida Workers' Compensation Act shall govern." On reconsideration the WCAB acknowledged that "on occasion" it has exercised jurisdiction over cumulative injury claims when a portion of the injurious exposure occurred in California. Applicant's counsel relied on *Injured Workers' Ins. Fund of Maryland v. WCAB (Crosby)* (2001) 66 Cal. Comp. Cases 923 (writ denied). However, the WCAB pointed out that *Crosby* did not involve a contractual choice of forum provision or provisions.
The WCAB also noted that:

> The Appeals Board will decline to exercise jurisdiction over a claim of cumulative industrial injury when there is a reasonable mandatory forum selection clause in the employment contract specifying that claims for workers' compensation shall be filed in a forum other than California, and there is limited connection to California with regard to the employment and the claimed cumulative injury. (citing *McKinley v. Arizona Cardinals* (2013) 78 Cal. Comp. Cases 23, 24) (Appeals Board en banc)

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

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

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

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

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

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

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

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

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

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

However, the parties also stipulated applicant played two games in California during his five years of employment with the New Orleans Saints. One of the games applicant played in California was on November 7, 2004, after which applicant had his knee drained. There was also a stipulation applicant sustained a knee injury before November 7, 2004, on August 7, 2004, and again another knee injury on December 12, 2004, and had knee surgery at the end of the season. It is important to note applicant never made a claim for a specific injury in California.
The WCAB basically ran these facts through the *McKinley* analysis. The Board indicated that while the WCAB has in the past in certain cases exercised jurisdiction over cumulative injury claims where a portion of the injurious exposure occurred in California, many of those cases did not involve or deal with choice of law/forum clauses in the employment contract. Where there is

a reasonable mandatory forum selection clause, the Board may decline to exercise jurisdiction over a cumulative trauma injury. This is especially true when there is a limited connection to California with regard to employment and the claimed cumulative injury. The Board noted a party challenging the validity of a mandatory selection clause has the burden of showing the clause is unreasonable. They noted that applicant, a non-resident who was hired outside of California, had a very limited connection to California by virtue of two games played in the state while employed by the Saints. The Board noted that choice of forum/law clauses are presumed valid unless the challenging party can establish the clause was unreasonable basically pointing to four factors as follows:

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

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

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

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

Applicant's counsel cited the *Crosby* case at 66 Cal. Comp. Cases 932 (writ denied), a 2001 case for the argument or proposition that all that is necessary for California to validly assert subject matter jurisdiction is the applicant play a single game in California. First, the WCAB indicated that *Crosby* was not binding authority since it was a writ denied case, and more importantly was distinguishable. *Crosby* did not involve a contractual choice of law provision. The Board also noted they could consider the validity and enforcement of the forum selection clauses without reaching the question of whether there was jurisdiction to decide the case.

Kenlaw v. Houston Comets **(2013) 78 Cal.Comp.Cases 1153; 2013 Cal. Wrk. Comp. P.D. LEXIS 147 (writ denied)**

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

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

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

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

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

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

Jackson v. Denver Broncos and Cleveland Browns **2013 Cal. Wrk. Comp. LEXIS 427 (WCAB panel decision)**

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

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

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

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

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

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

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

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

Cross Examination Issue: The WCJ during trial on September 26, 2011, advised the parties that she was unavailable for the afternoon trial session. Initially it appeared the parties agreed to have the afternoon trial session before a different judge. However, once they appeared before the other WCJ, there was a dispute and the afternoon trial session did not take place. The trial was continued to November 14, 2011. Applicant did not appear for trial and the case was submitted over defendant's objection since they did not complete cross examination of the applicant.

On reconsideration the WCAB found there was a denial of due process related to defendants not being able to finish cross examining the applicant. On this basis alone, the WCAB rescinded the Findings and Award and returned the matter for further proceedings.

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

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

1.6 Jurisdictional Constitutional Due Process Issues

Federal Insurance Company v. WCAB **(Johnson) (2013) 221 Cal. App. 4th 1116, 78 Cal. Comp. Cases 1257**

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

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

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

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

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

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

Discussion: Initially the Court of Appeal indicated the issue in this case is which states workers' compensation law applies, not which state has personal jurisdiction. However, the court immediately noted the question of subject matter jurisdiction ordinarily precedes the conflict of laws question. "…For only after the workers' compensation commissioner determines that he has authority to entertain the action does he proceed to the "choice" of whether to award benefits under our Workers' Compensation Act or, rather, to defer to the earlier grant of benefits under the laws of another state".

The court then restated the issue characterizing it as not one of personal jurisdiction but rather one of whether one or more state compensation laws apply and whether in this case California may provide a forum for the claim. The Court of Appeal went on to discuss general principles extensively but focused primarily on the constitutional due process issue. "As we discuss, whether California workers' compensation law governs depends on the application of the due process clause of the United States Constitution. If an employer or the insurer are subject to workers' compensation law of a state that does not have a sufficient connection to the matter, they are deprived of due process." The Court of Appeal also indicated there was a full faith and credit dimension. "That is if the workers' compensation law of another state exclusively should apply and California does not have a sufficient contact with the matter, California must, under the full faith and credit clause accede to the other state to provide a forum."

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

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

The Court of Appeal noted that California law is consistent with United States Supreme Court authority on this issue. Labor Code § 5305 provides "The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of the state at the time of injury and the contract of hire was made in this state". However, the court of Appeal made no reference to Labor Code §3600.5 (a). The Court of Appeal then analyzed and cited a number of California decisions applying the legitimate interest-substantial connection analysis.

In determining whether there is a legitimate and significant interest, the Court of Appeal noted that "Thus, California maintains a stronger interest in applying its own law to an issue involving the right of an injured Californian to benefits under California's compulsory worker's compensation act than to an issue involving torts or contracts in which the parties' rights and liabilities are not governed by a protective legislative scheme that imposes obligations on the basis of a statutorily defined status."

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

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

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

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

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

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

> We are not, therefore, faced with an issue of which law to apply, but only with whether California workers' compensation law applies in this case. That issue has been framed as one of due process under the 14th amendment of the United States Constitution (See Res.2d. Conflicts of Law, *supra*, § 181, p. 537.) If this state lacks a sufficient relationship with Johnson's injuries, to require the petitioner-the employer- to defend the case here would be a denial of due process such that the courts of this state do not have authority to act. This might be referred to as a lack of subject matter jurisdiction. (See *Carslon v. Eassa* (1997) 54 Cal.App.4th 684, 691 ["subject matter jurisdiction 'relates to the inherent authority of the court involved to deal with the case of matter before it"']).

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

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

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

In terms of the "legitimate substantial interest" analysis, the court stated "[t]he effects of participating in one of 34 games do not amount to a cumulative injury warranting the invocation of California law. As the cases show, a state must have a legitimate interest in the injury. A single basketball game played by a professional player does not create a legitimate interest in injuries that cannot be traced factually to one game. The effect of the California game on the injury is at best de minimis."

More importantly the Court of Appeal stated the site of applicant's employment relationship is often the most realistic basis for invoking a state workers' compensation law. In this case the applicant's employment relationship was exclusively in Connecticut. Moreover, she had availed herself of the Connecticut workers' compensation system and received an Award. Thus the places of Johnson's injuries, employment relationship, employment contract and residence, all possible connections for the application of the state workers' compensation law, do not have any relationship to California.

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

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

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

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

Forsberg v. Nashville Predators; Colorado Avalanche; Philadelphia Flyers; Federal Insurance Company **(2015) 80 Cal.Comp.Cases 1353, 2015 Cal.Wrk.Comp. LEXIS 133 (writ denied) (Forsberg II).**

Issue: Whether under the *Johnson* case did California have a substantial and legitimate interest in order to apply California workers' compensation laws and exercise subject matter jurisdiction or whether there is more than a "di minimis" connection between applicant's work in California and his claimed a cumulative trauma injury over the period of 1995 to February 14, 2011.

Holding: In a split panel decision, the panel in *Forsberg II* reinstated the WCJ's August 12, 2014, finding of WCAB subject matter jurisdiction, and held that California has a legitimate and substantial interest in assuring that employee's injured while working in this state receive workers' compensation benefits. The connection between applicant's claimed cumulative

trauma injury and California is more than "di minimis" and sufficient from a due process standpoint to support WCAB jurisdiction over the defendants.

Discussion: The previous panel decision in *Forsberg I,* which issued on October 27, 2014, found no basis for California subject matter jurisdiction applying a qualitative/quantitative analysis that applicant played 712 NHL career games with 70 games in California comprising 7% of his total NHL games. Moreover, applicant played an additional 300 professional hockey games in Sweden.

From a procedural standpoint, applicant was newly aggrieved and filed a Petition for Reconsideration of the WCAB's October 27, 2014 decision. This resulted in a new panel comprised of Commissioners' Sweeney, Caplane, and Zalewski. In *Forsberg I,* Commissioner Sweeney wrote a strong dissent. In *Forsberg II,* she wrote the majority decision joined by Chairwoman Caplane. Commissioner Zalewski dissented. Defendant then filed a writ, which was denied.

Commissioner Sweeney consistent with her dissent in *Forsberg I* focused exclusively on whether or not the connection between the applicants's claimed cumulative trauma injury and California was "di minimis". There was an extensive discussion in *Forsberg II* of the meaning of "di minimis". Moreover, defendant conceded that applicant's injurious exposure while working in California did contribute in causing his overall cumulative trauma injury. Commissioner Sweeney stressed in support of her analysis that there was more than a "di minimis" exposure since applicant, while playing games in California, had a medical evaluation related to a work related hernia that ultimately required surgery. He also had injections of Toradol related to groin pain during two playoff games against the Los Angeles Kings, and was also evaluated by a physician in Los Angeles after some playoff games and had a subsequent splenectomy. Based on this injurious exposure in California, coupled with the AME's report in orthopedics, the majority in *Forsberg II* stated "the records shows that it is "reasonably probable" that applicant sustained cumulative trauma industrial injury because of his work as a hockey player, and it further shows that the injurious exposure he sustained while working in California was more than a trifling that caused that injury."

There was also an extensive discussion by the majority related to the defendants Labor Code § 5412 date of injury argument and its relationship to the statute of limitations issue.

Commissioner Zalewski, in her long dissenting opinion, stressed that from a "qualitative/quantitative" analysis of the 712 career NHL games the applicant played only 70 of those games in California which equated to 7% overall. She indicated that in her opinion this did not establish a legitimate and substantial connection between the claimed injury and California for the exercise of WCAB subject matter jurisdiction consistent with due process.

Commissioner Zalewski also referenced AB 1309 and Labor Code § 3600.5 establishing a legislative intent that reflected a 20% threshold quantitatively to support the exercise of WCAB subject matter jurisdiction. She noted that while AB 1309 did not apply to this case, it was a reasonable threshold, noting the 7% of the applicant's total career NHL games in California was well below the 20% AB 1309/3600.5 threshold.

She also indicated that consistent with *Johnson* the fact the applicant or any applicant is exposed to injurious trauma in California that contributes to the cumulative trauma injury, is not sufficient in and of itself to support the exercise of WCAB jurisdiction. She also stressed that there was nothing in applicant's testimony or in the medical evidence that would support that the games applicant played in California were qualitatively more traumatic than games played outside of the state. More importantly she argued that while applicant claimed to have incurred specific injuries in California they were not at issue due to the fact applicant chose not to plead any specific injuries. Moreover, he testified to numerous specific injuries he sustained while playing outside of California.

Comment: In *Forsberg II* and other recent post *Johnson* decisions, reflect there are a number of Commissioners who are exclusively applying a "di minimis" standard of the Court of Appeal's decision in *Johnson.* What is clearly evident is that the Commissioners who are applying the "di minimis" analysis or approach will not engage in any quantitative/qualitative analysis of the particular facts of any given case.

In contrast, there are a number of other Commissioners who in applying the *Johnson* case, use a quantitative/qualitative analysis coupled with an AB 1309/3600.5 20% minimum threshold, to buttress the quantitative prong.

In the author's opinion, it is clear that an en banc decision is necessary in an attempt to reconcile what appears to be two mutually exclusive analytical approaches applying the Court of Appeals decision in *Johnson* by the WCAB.

Moreover, in the author's opinion a "di minimis" analysis must be done in a comparative context. The quantitative/qualitative analysis manifested in a majority of the WCAB's recent *Johnson* decisions, does although not expressly, articulate factors comparatively as to whether the alleged California injurious exposure when compared to non-California injurious exposure is "di minimis". The comparative analysis reflected in the quantitative/qualitative approach appears to be analytically sound. Unless there is a comparative context or analysis then virtually any exposure in California, no matter how trivial, could be deemed to be more than "di minimis." For other cases following the *Forsberg II* analysis which focus exclusively on whether the exposure is "di minimis" or not, and ignoring any quantitative/qualitative approach are *Burt v. Carolina Hurricanes, et al. Federal Insurance Company* 2015 Cal. Work Comp. P.D. LEXIS 124. (Majority decision) finding a basis for California subject matter jurisdiction where applicant had 737 career games, 27 of which were in California and there was a basis for California subject matter jurisdiction given the fact the applicant's aggregate injurious exposure in California was not "di minimis"; *Coleman v. Detroit Pistons, et al, Federal Insurance Company,* (2015) 80 Cal.Comp.Cases 1073; 2015 Cal.Wrk.Comp. LEXIS 102 (writ denied) (781 career games with 49 in California less than 7% with WCAB affirming WCJ's findings of subject matter jurisdiction that the applicant's injurious exposure in California was not "di minimis." Moreover, defendant stipulated that applicant had suffered a cumulative trauma injury in California); *Steeple v. New Jersey Red Dogs; Granite State Insurance/AIG* 2015 Cal. Wrk. Comp. P.D. LEXIS 206. WCAB on reconsideration affirmed WCJ's finding of subject matter jurisdiction where applicant had an eight year career with only two games in California. WCAB

remanded to develop the medical record concerning the relationship between the alleged cumulative trauma and the alleged portion of the cumulative trauma suffered in California; *Detroit Pistons, Philadelphia 76ers, Federal Insurance Co. v. WCAB (Coleman)* 2015 Cal.Wrk.Comp LEXIS 102 (WCAB on reconsideration affirmed WCJ's finding of subject matter jurisdiction where applicant played in 781 career games in the NBA, with 49 played in California. Split panel decision with majority finding injurious exposure was not de minimis. Dissenting commissioner would have found no California subject matter jurisdiction based on a "quantitative/qualitative" analysis.

***Telemaco v. Philadelphia Phillies, Arizona Diamond Backs et al.*, 2018 Cal.Wrk.Comp. P.D. LEXIS 541 (WCAB panel decision, 11/17/18)**

Issue and Holding: At issue was a combination of a California based agent only as an alleged basis for contract formation in California with a *Johnson* due process issue. The WCAB panel consisted of Chairwoman Zalewski, and Commissioners Lowe, and Razo. The WCAB found that applicant failed to prove that his employment contract was formed in California and that under a *Johnson* due process analysis, California did not have a legitimate interest in applicant's injury sufficient to compel defendant to litigate the claim in California and as a consequence the WCJ and WCAB issued a take nothing.

Procedural and factual overview: From a procedural standpoint the WCAB provided a procedural lifeline to the defense. Defendant failed to list *Johnson* due process as a specific issue and instead only listed "subject matter jurisdiction" along with the contract formation issue. The WCAB or at least this panel said listing subject matter jurisdiction encompassed a *Johnson* due process issue or contention. In order to do so, the WCAB had to issue a special Notice of Intention after the initial Petition for Reconsideration was filed advising the parties they would address the *Johnson* issue along with subject matter jurisdiction on Reconsideration. But who knows what another panel would follow the same procedure under similar circumstances.

California based agent as basis for contract formation in California: In terms of the California based agent only contract formation issue, the evidence was overwhelming that the California based agent did not have authority to bind the applicant and the applicant had the final say on acceptance and he was outside of California when he accepted the contract. The California based agent testified that he could not remember where he was when he negotiated the applicant's contract and also provided other testimony that was favorable to the defense. The WCAB cited a large number of cases dealing with contract formation, and also included a full paragraph where the Board cited and discussed the recent *Tripplett* decision from the Court of Appeal to support their decision. (*Tripplett v Workers' Comp. Appeals Board, Indianapolis Colts et al.* (2018) 25 Cal.App.5th 556, 83 Cal.Comp.Cases 1175, 2018 Cal.App. LEXIS 652).

The *Johnson* due process issue: With respect to the *Johnson* due process issue, applicant had a career 425 regular season games played with 19 games and 69 related practices in CA which constituted 88 days of injurious exposure in California. The WCAB ruled there was subject matter jurisdiction over the claim but under an independent *Johnson* due process analysis this connection to California was insufficient to support adjudication of the claim under California law. The WCAB stated:

> Even if it is assumed that during his major league career Mr. Telemaco had 88 days of injurious exposure in California consisting of playing in 19 games and participating in 69 practices as set forth by applicant……..that represents a small fraction of the 425 regular season games and even more practices applicant participated in during his major league career. As such, the connection to this state is insufficient to support adjudication of the claim under California law over defendant's objection based upon due process and the holding in *Johnson.*

In further support of their decision the WCAB stated:

> As expressed by the Court in *Johnson,* the proper inquiry is whether the state has "a *legitimate* interest in the injury" that supports the application of state law against the defendant. (*Johnson,* supra, 221 Cal.App.4th at 1130, emphasis in original.) In this case, the number of games applicant participated in while in this state does not provide a legitimate interest in the claimed injury that is sufficient to compel defendant to litigate the claim in this state as a matter of due process under *Johnson.* (See, *Pippen v. Portland Trail Blazers* (2015) 81 Cal.Comp.Cases 73 [2015 Cal.Wrk.Comp. LEXIS 163] (writ den.).)

Editor's comments and practice pointers: If Commissioner Sweeney had been on this particular panel she would have dissented using her standard "de minimis" analysis versus Chairwoman Zalewski's "quantitative/qualitative" analysis as expressed in many of the *Johnson* panel decisions she has participated in. As a consequence, it is still a crap shoot of sorts in litigating *Johnson* at the WCAB. The composition of the panel will often be outcome determinative as opposed to the operative facts depending on which analysis of the facts is used either the quantitative/qualitative analysis used by Chairwoman Zalewski, or the diametrically opposed de minimis analysis favored by Commissioner Sweeney.

From a procedural standpoint it is strongly advisable that if you believe you have a viable *Johnson* due process defense, that you list that as a specific issue in addition to subject matter jurisdiction along with all other applicable issues and defenses and not just assume that either a WCJ or the WCAB will hold that raising subject matter jurisdiction automatically encompasses a *Johnson* due process issue.

Leavell v. W.C.A.B, Houston Rockets, Zenith/TIG Insurance Co./Fairmont Specialty Ins. Co., Tulsa Fast Breakers, CompSource Oklahoma **2018 Cal.Wrk.Comp.LEXIS 65 (Writ Denied)**

Issues: Whether under the *Johnson* case, California had a legitimate and substantial interest in applying its workers' compensation laws against the defendants based on the fact applicant played at least 92 games in California.

Holding: The WCJ found that under *Johnson*, California had a legitimate and substantial interest in applying its workers' compensation laws against the defendants based on the fact applicant played at least 92 games in California and also found there was a qualitative difference in the trauma he sustained in California as opposed to other locations. Defendant filed for

reconsideration which was granted by the WCAB. In a split panel decision (Zalewski and Lowe in majority, Sweeney in dissent), the WCAB **reversed** the WCJ and found there was not a California legitimate and substantial interest in requiring defendants to litigate applicant's cumulative trauma (CT) claim before the WCAB.

Discussion: For some unexplained reason the number of *Johnson* decisions from the WCAB trailed off somewhat last year. Applicant was represented by All Sports Law. He played for the Rockets from 1979 to 1989 and for the Tulsa Fast Breakers from February 1990 to March of 1990. He played a total of 700 games for the Rockets. Of those 700 games while temporarily employed in California, he played approximately 91 games in California for the Rockets and while with Tulsa, at least one game played in California. In addition to the cumulative trauma claim applicant also filed in January 2015 a separate specific right ankle injury that occurred on 11/4/86 when the Rockets played against Sacramento. The specific injury and the CT claims were not consolidated. Applicant was never a resident of California and none of his contracts were formed in California. The focus was on whether there was a sufficient California connection for the WCAB to exercise jurisdiction from a due process standpoint over the CT claim. In finding a lack of a California legitimate and substantial interest in the injury, the WCAB majority emphasized the following:

1. Applicant was never hired in the state and that basis for California WCAB jurisdiction does not exist.

2. Applicant was only temporarily in California for approximately 11% of the games he participated in during his career as a professional basketball player. The WCAB characterized this as a "minimal" connection under *Johnson*.

3. The total number of games played by applicant in California is far less than that the 20% now required under AB1309/3600.5 and it is reasonable and appropriate to use this as a guide even though applicants claim was filed pre AB1309.

4. With respect to the rather significant right ankle specific injury applicant suffered and for which he filed a separate application not consolidated with the CT claim, the WCAB held that this does not affect the CT legitimate interest assessment since only the CT claim was before the WCAB for trial and on appeal. Moreover, there was evidence the applicant suffered and was diagnosed with other significant specific injuries to multiple body parts outside of California. See also footnote 4 for a detailed discussion of improper merger of separate injuries per LC 5303.

5. The mere fact that applicant was exposed to injurious exposure in California that contributed to causing his CT injury is not sufficient in itself to support adjudication of the claim before the WCAB under *Johnson*.

6. On the present record there is not a substantial and legitimate connection between California and the claimed injury under *Johnson* in terms of due process. Commissioner Sweeney's dissent is based on her analysis that the connection

between applicant's CT injury and California was more than de minimis for a variety of reasons.

Parker v. Kansas City Chiefs, et al. **2017 Cal.Wrk.Comp. P. D. LEXIS 17 (WCAB panel decision)**

Issue and Holding: Both the WCJ and WCAB held that applicant's participation in twelve football games in California out of 176 career-total games where applicant did not claim any specific injuries in California and that a substantial portion of his injurious exposure related to an alleged cumulative trauma injury which was sustained outside of California, the connection to California was constitutionally insufficient to require defendant to litigate the claim in California as a matter of due process under *Johnson*.

Procedural and Factual Overview: Applicant filed a CT claim for the period of July 27, 1990 through June 3, 2002. He did not have a California agent during his entire football career and he was never hired in California by any football employer. Applicant was never employed by a California-based team. Over the course of his twelve year NFL career he played a total of 176 games. Twelve of those games were in California.

With respect to the twelve games applicant played in California, he received specific injuries while playing games in California, including a 1995 head injury and a 1999 elbow injury while playing in games in San Francisco. However, both the WCJ and WCAB noted that applicant had not filed any claims for specific injuries that occurred in California and that the claim that was being litigated was only for a cumulative trauma injury. The Board stressed that, "In order to hold defendant liable as a matter of due process there must be sufficient and legitimate connection between California and that claimed injury. Such connection is not established on this record."
Also, the fact that applicant received various healing modalities from a physician and others while in California also does not create or establish a sufficient and legitimate connection between California and the cumulative trauma injury. In that regard, the Board stated as follows:

> However, the fact that some treatment may have been provided in this state does not under *Johnson* establish sufficient contact with the injury to require a defendant to defend a claim of industrial injury in this state. Moreover, to the extent the treatment that was provided is similar to first aid, its provision does not give rise to a presumption of liability or establish a basis for jurisdiction over a claim. (see Lab. Code §§5401 & 5402."

The WCAB indicated that the threshold question raised by the *Johnson* decision is whether California's interest in adjudicating an applicant's claim for workers' compensation "is legitimate and substantial in and of itself." (*Johnson, supra,* 221 Cal.App.4th at 1124, quoting 9 Larson, §142.03 [5], p. 142-9, fn. Omitted). In essence, if a state's interest is not legitimate and substantial in itself, requiring defendant to participate in such a case in California is a denial of due process. Moreover, the WCAB clarified the distinction and relationship between subject matter jurisdiction over a claim and the due process issue in *Johnson*. In that regard, the Board stated:

> Thus, the question under *Johnson* is not whether the WCAB has subject matter jurisdiction over a claim. The question raised by *Johnson* is whether the state has "a legitimate interest in the injury." (*Johnson, supra*, 221 Cal.App.4th at 1130, emphasis in original.) If not, a defendant is denied due process in being required to litigate applicant's workers' compensation claim before the WCAB.

The Board concluded that given the fact applicant was not claiming a specific injury or injuries in California and a substantial portion of his injurious exposure and cumulative trauma was sustained outside of California there is not a "legitimate and substantial interest in the claimed injury that allows it to compel defendants to adjudicate applicant's claim under California's laws as a matter of constitutional due process."

Editor's Comment: See also, *Boucher v. Houston Gamblers* 2017 Cal.Wrk.Comp. P.D. LEXIS 126 (WCAB panel decision). WCAB reversed WCJ, finding that under *Johnson*, California's interest in adjudicating applicant's cumulative trauma injury was not "legitimate and substantial in itself." Applicant was temporarily employed in California playing in only 2 games out of 26 to 37 career total games. Moreover, applicant while alleging or claiming a specific injury in a game in California, did not file a claim for this injury in California and suffered several other specific injuries outside of California, also while applicant was "exposed" to injurious trauma in California that contributed to causing cumulative injury, this is insufficient in itself to support the exercise of WCAB jurisdiction under *Johnson*.

Wilson v. WCAB **(2016) 81 Cal.Comp.Cases 1054; 2016 Cal.Wrk.Comp. LEXIS 114 (writ denied)**

Issue/Holding: WCAB reversed the WCJ entering new findings that California under *Johnson* did not have a legitimate and substantial connection to the claimed cumulative trauma injury sufficient to make application of California workers' compensation laws reasonable against defendant employer, Harlem Globetrotters (HGI), despite the fact applicant over a 10 year career played and participated in 15 to 20 games and related practices and other activities in California out of approximately 200 total games played each year.

Procedural and Factual Overview: Applicant was employed by the Harlem Globetrotters for approximately 10 years (1996-2006). He filed a cumulative trauma claim for the period of 1/1/1996 to 12/31/2006. The Globetrotters corporate offices and training headquarters were located in Arizona, but they did not have a home arena in Arizona or any other state. The Globetrotters toured throughout the entire United States each year. Applicant executed all of his employment contracts in Arizona and was never a resident of California and resided in Tennessee. Applicant played fewer than 2% of his total games each year in Arizona with 98% of his employment activities taking place outside of Arizona.

Applicant played approximately 200 games each year over his ten year career. Of those 200 games, he played and had related practices of 12 to 15 games each year in California for a total of approximately 136 games in California over his 10 year career.

The WCJ found that California had a sufficient interest in the injury under *Johnson*, and also the Labor Code §3600.5(b) exemption did not apply to defendant. As a consequence the WCJ awarded applicant 56% PD and need for future medical treatment. Defendant filed a Petition for Reconsideration which was granted by the WCAB who reversed the WCJ's decision.

The 3600.5(a) and 3600.5(b) issues: With respect to the §3600.5(b) exemption issue, the WCAB indicated the WCJ's analysis was flawed. The fact that defendant employer did not have a "home state" was irrelevant. Contrary to the WCJ's finding the WCAB held that applicant was not regularly working or employed in California and was only temporarily in the state working for defendant, and §3600.5(a) did not apply. In that regard the WCAB stated:

> In this case, as in *Carroll*, the large majority of the applicant's work was outside of California. When applicant entered the state for HGI he knew and intended that it be for a temporary period to provide basketball entertainment. When applicant and HGI entered California they both expected and intended to leave the state as soon as the work was done. Applicant's presence in California on those occasions was transitory and not permanent, and he was not "regularly working" in this state as described in §3600.5(a).

The *Johnson* due process substantial and legitimate connection issue: In reversing the WCJ on this issue and entering new findings, the WCAB applying a "quantitative/qualitative" analysis held that California did not have a legitimate and substantial connection to applicant's CT claim sufficient enough to subject or hold defendant to California workers' compensation law without depriving it of due process, as held in *Johnson*. In that regard the WCAB stated as follows:

> The WCAB added that the threshold question under *Johnson* was whether California's interest in adjudicating Applicant's workers' compensation claim "is legitimate and substantial in itself," but that, here, Applicant never resided in California, was not hired in the state, and participated in only 15 to 20 games each year in California out of approximately 200 played each year. Under *Johnson*, such minimal connection between his injury and the state was not sufficient to legitimately support exercise of WCAB jurisdiction over defendant.

From a qualitative perspective or analysis, the WCAB noted that the record did not establish or show a qualitative difference in the trauma sustained in games played in California versus those played in other states which, "supports a conclusion that the substantial and primary cause of the claimed cumulative injury is injurious exposure sustained in games outside of this state." Also, minor first aid provided to applicant while playing in California did not compel jurisdiction over the claim.

The WCAB also noted that while the recent amendments to Labor Code §3600.5(a) did not apply to this case it was still reasonable to reference it as a guideline in considering the 20 percent threshold identified by the legislature constituting a legitimate and substantial connection between California and any cumulative trauma injury claim.

Palmer v. Kansas City Chiefs, Travelers **2015 Cal.Wrk.Comp. P.D. LEXIS 608 (WCAB panel decision)**

Holding: No California jurisdiction from a due process standpoint based on the fact applicant only played five games in California out of approximately sixty-two career games in the NFL. Moreover, applicant did not claim or file for a specific injury in California and a substantial portion of his injurious exposure and cumulative trauma was sustained outside of California. In a split panel decision, the WCJ and WCAB held there was not a sufficient connection between the claimed cumulative trauma injury and California to provide California based on due process with no a legitimate interest in and of itself in applying its workers' compensation laws to applicant's cumulative trauma claim.

Factual and Procedural Background: Applicant was never a resident of California nor were any of his contracts with the Chiefs formed in California. The only connection between the cumulative trauma injury and California was that applicant was temporarily employed in California for five out of the sixty-two career games he participated in during his career in the NFL.

Although applicant testified at trial he sustained injury to various body parts while playing three games in California, his trial testimony was inconsistent with his deposition testimony and the history he provided to his own QME. In his deposition testimony the applicant could not recall or remember playing any games in California.
With respect to the history he gave to the QME, applicant indicated he could not recall even the specific season when and where he may have been injured in California.

However both the trial WCJ and the WCAB indicated that even if the applicant did incur specific injuries while playing football in California he did not file a claim for any specific injuries and only filed a cumulative trauma injury. Both the WCJ and the WCAB seemed to have significant problems with the applicant claiming specific injuries in California on three occasions and the attempt to merge these alleged unplead specific injuries with one cumulative trauma. The Board stated:

> But even if applicant did incur specific injuries while playing football in California, the claim we address is for *cumulative* injury. Construing evidence of specific injuries to be evidence of a cumulative trauma will be contrary to the provisions of Labor Code §5303, which provides in pertinent part that, "No injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury…" Moreover, it is reasonable to infer that applicant similarly sustained injurious exposure in the fifty-seven games he played outside of California, and that exposure was the substantial and primary cause of the claimed cumulative injury.

The Board also indicated the alleged medical treatment the applicant claimed he received after playing in the games in California consisted of icing of the knees and shoulders which the Board

described as merely the provision of minor first aid and which did not give rise to a presumption of liability or establish jurisdiction.

The WCJ and the WCAB framed the issue as being "…not whether applicant sustained cumulative injury in the course of playing professional football. The question is whether there is sufficient connection between the claimed injury in this state to support adjudication of applicant's workers' compensation claim against defendant under the laws of this state. The answer to that question is, no. Applicant's insubstantial contact with this state is not sufficient to support the exercise of WCAB jurisdiction over defendants."

Again from a constitutional due process standpoint, the WCAB indicated since applicant was not claiming a specific injury and that a substantial portion of his injurious exposure and cumulative trauma was admittedly sustained outside of California that "California does not have a legitimate and substantial interest in the claimed injury that allows it to compel defendants to adjudicate applicant's claim under this state's law as a matter of constitutional due process (citing *Johnson*).

There was a long dissenting opinion from Commissioner Sweeney in which she indicated that applicant's exposure in California was more than di minimis, and there was a basis for California to exercise subject matter jurisdiction without offending or violating due process.

Comments and Practice Pointers: In a similar case, *Everett v. St. Louis Rams, et al.*, 2015 Cal.Wrk.Comp. P.D. LEXIS 628, the WCAB in a split decision reversed and rescinded the WCJ's determination that there was California subject matter jurisdiction over applicant's cumulative trauma claim. The WCAB held that 5 games played in California out of 103 career NFL regular season games did not establish a sufficient connection between the claimed CT injury and California to provide California with a "legitimate and substantial connection" to the claimed CT injury sufficient to make application of California's workers' compensation laws reasonable. More importantly, as the WCAB held in *Palmer* hereinabove, the fact applicant suffered a specific hamstring injury in California does not operate to establish California jurisdiction over an alleged CT claim. The WCAB held that attempting to construe evidence of a specific injury to be evidence of CT injury is contrary to Labor Code §5303, which prohibits the merger of separate and distinct injuries whether specific or cumulative for any purpose to merge into or form part of another injury.

Davis v. Atlanta Hawks, Federal Insurance, et al. **2015 Cal.Wrk.Comp. P.D. LEXIS 430 (WCAB panel decision)**

Issue: Whether there was a basis for California subject matter jurisdiction based on the fact that applicant's contract for hire was formed in California and he suffered a significant specific injury in California to his knee that caused him to be hospitalized in California and a later surgery in Texas, which resulted in the applicant missing the remainder of the NBA season.

Holding: The WCAB denied separate Petitions for Reconsideration filed by multiple defendants and affirmed the WCJ's determination that there was subject matter jurisdiction in this case based on the fact applicant's injurious exposure in California was more than de minimis since he suffered a significant specific injury requiring hospitalization in California and subsequent

surgery (outside of California) with significant lost time from work. Moreover, applicant's contract for hire was formed in California.

Factual and Procedural Overview: Applicant was employed as a professional basketball player for twelve years from 1991 through 2003. During the course of his career he participated in a total of approximately 254 professional basketball games with 20 of those games having taken place in California. (Less than 8% of the total number of games). It is important to note that the parties stipulated that applicant sustained cumulative trauma injury to multiple body parts while employed as a professional basketball player during the period of June 1996 through April 2003. Based on this stipulation the WCJ found applicant suffered 54% permanent disability apportionment.

The Labor Code §5500.5 liability period was determined to span the period from December 2001 through December 2002. During this period defendant, the Atlanta Hawks, was insured by both TIG and Federal Insurance/Chubb. Codefendant TIG argued that there was no basis for California subject matter jurisdiction over them since the applicant sustained no injurious exposure during the time period it provided coverage. The WCAB in this split panel decision indicated that applicant's injurious exposure in California was more than de minimis and in addition applicant sustained a tear to the anterior cruciate ligament in his right knee while playing a game against the Lakers in California in November 1996. It appears that immediately after that game, applicant was sent to a hospital in California and then when he returned to Texas he had surgery, and as a consequence missed the remainder of the Hawks' season. The WCAB was careful to distinguish these facts from the facts in *Johnson* where the applicant did not suffer a documented specific injury, but only a portion of his cumulative trauma injurious exposure was in California.
Moreover, the WCAB emphasized that there was an independent basis for California subject matter jurisdiction in that applicant's unrebutted testimony established that his employment contract was formed in California which again distinguished this case from the facts in *Johnson.*

In addition, the Board found no error in the fact that the award in this case was against both carriers for the Hawks, TIG and Chubb/Federal. It was TIG's argument that there was no basis for California subject matter jurisdiction against them since during their coverage he did not play any games in California during the Labor Code §5500.5 liability period. Citing numerous cases the Board indicated that the public policy underlying §5500.5 permits liability to be extended over any carriers or employers in the §5500.5 liability period stating, "These important public policy concerns would be undermined if TIG was dismissed only because its insured did not play a game in California during the applicable liability period."

Comments and Practice Pointers: The author ever since the *Johnson* decision issued by the Court of Appeal has had an ongoing problem with stipulations or admissions that the injured worker suffered a cumulative trauma injury. It is one thing for applicant to try and prove a portion of their cumulative trauma injury was suffered in California and that portion of the cumulative trauma injury was more than de minimis and was also qualitatively and quantitatively different than the injurious exposure that occurred outside of California without a defendant, as in this case, stipulating to a cumulative trauma injury occurring both in and out of California.

This case on its facts is clearly distinguishable from the facts in *Johnson*. In *Johnson* there was no evidence the applicant suffered a specific injury. In this case not only did the applicant suffer a specific injury, but it was a significant specific knee injury that required hospitalization in California and a follow-up knee surgery with applicant being unable to play the rest of the NBA season. On its face this would clearly not be de minimis and qualitatively the specific injury was the type of injurious exposure that was different than the cumulative trauma exposure outside of California. The other distinguishing feature of course is that the contract for hire was deemed formed in California and that in and of itself appears to trump *Johnson* in terms of being an independent basis for establishing California subject matter jurisdiction.

Perhaps the most provocative issue in the case is that the WCAB found that under Labor Code §5500.5 and applicable case law that one of the codefendants who insured defendant during the Labor Code §5500.5 liability period had liability under the award even though during their period of coverage the applicant played no games in California.

New York Knickerbockers v. WCAB (Macklin) **(2015) 240 Cal.App. 4th 1229; 193 Cal.Rptr. 3d 287; 80 Cal.Comp.Cases 1141**

Issue/Holding: If there is a California based team in the Labor Code §5500.5 liability period and applicant was employed by that California-based team, then there is no denial of due process in California exerting jurisdiction over the claim as well as jurisdiction over a non-California team who is also in the Labor Code §5500.5 liability period, especially if the applicant while employed by the non-California-based team played games or practiced in California during the 5500.5 liability period.

Factual and Procedural Background: Both the WCJ and WCAB found there was no denial of due process since California had a sufficient relationship with the applicant's injury to make the application of California Workers' Compensation Law reasonable, which is a matter of due process.

The Knickerbockers were not the terminal employer in the Labor Code §5500.5 period, and clearly, they were not a California based team. Having lost at the trial level and also on reconsideration to the WCAB, the Knickerbockers were the only employer that filed a writ with the Court of Appeal.

The CT that was pleaded ran from August 17, 1981 to November 15, 1985. Applicant's employment history indicates he was employed by the Atlanta Hawks from August 17, 1981 to June 29, 1983, and played three games in California. Applicant was then employed by the Knickerbockers from June 29, 1983 to December 20, 1983. During the course of his employment with the Knickerbockers applicant practiced in California and played one game against the Golden State Warriors. While with the Knickerbockers he came to California on two other occasions and participated in practices and warm-ups, but did not play in those two games against the Clippers and the Lakers. He then played for a minor league basketball team from late 1983 to late 1984, with no games played in California. From September 29, 1984 to October 24, 1984, applicant was employed by the Los Angeles Clippers. He attended Clippers training camp

in California and played in some preseason games in October 1984. He was released by the Clippers on October 24, 1984.

The WCJ found 76% permanent disability without apportionment, and determined there was California jurisdiction over applicant's claim.

Discussion: A significant portion of the Court of Appeal's decision dealt with the issue of the Knickerbockers' counsel's failure to file a verified Writ of Review.

The court easily distinguished the facts in the instant case from the facts in *Johnson. (Federal Ins. Co. v. Workers' Comp. Appeals Bd*. (2013) 221 Cal.App.4th 1116). Applicant in the instant case played for a California based team for a portion of the Labor Code §5500.5 liability period. Also with respect to the Knickerbockers, the non-California-based team, applicant played one game in California and participated in pre-game warm-ups and practices in two other Knickerbockers games in California. Applicant in Johnson never played for a California-based team during her entire professional career.

The court stated:

> Because of the employment by a California-based team, we do not have to determine if the other activities in California are sufficient by themselves to make the application of California Workers' Compensation Law reasonable, although those activities are more than the one game that *Johnson* concluded was di minimis.

The dispositive issue as framed by the Court of Appeal is, "whether Macklin's injuries have a sufficient relationship with California for the invocation of California Workers' Compensation Law. Whether those injuries have a sufficient relationship with California is dependent on a number of factors that we set forth in *Johnson*."

It is important to note that in Footnote 7, the Court of Appeal referenced §181 of the Restatement Second of Conflict of Laws, which address the issue of when a state may award relief to a person under its workers' compensation law without running afoul of due process constraints. Section 181 of the Restatement Second of Conflict of Laws provides that a state may award relief to a person under its workers' compensation law based on a number of factors including:

1. If the injury occurred in that state;

2. If the employment is principally located in the state;

3. If the employer supervised the employee's activities from a place of business in the state;

4. If the state is that of the most significant relationship to the contract of employment with the respect to the issues of workers' compensation under the rules of §§187, 188, and 196, the Restatement Second of Conflict of Laws;

5. If the parties have agreed in the contract of employment or otherwise that their rights should be determined under the Workers' Compensation Act of the state; or,

6. If the state has some other reasonable relationship to the occurrence, the parties, and the employment.

The court concluded that where there is employment by a California team during the period of the cumulative injury, so long as the requirements of Labor Code §5500.5 are met, is sufficient in this case to make reasonable the application of the California Workers' Compensation Law. **However, it is important to stress as reflected in at least 14 WCAB decisions subsequent to *Macklin*, that the WCAB has construed and applied the holding in *Macklin* to find California subject matter jurisdiction where the applicant "played for a California team for a portion of the period of the cumulative injury" and not just during the 5500.5 liability period. (Macklin, 240 Cal.App. 4th at p. 1239).**

Comment: If applicant was employed by a California-based team for a portion of the period of the cumulative injury, the court indicated there would be no need to engage in a "qualitative/quantitative" analysis or a "di minimis" analysis. Clearly, the case is distinguishable from *Johnson* since Ms. Johnson never played for a California-based team.

However, there are some provocative issues and questions in terms of the future application of similar cases under the same facts as *Macklin*, or with slightly different facts. In the author's opinion, the Knickerbockers incorrectly framed the issue in this case. Both the WCAB and the Court of Appeal correctly articulated what the correct issue was to focus on the sufficiency of the relationship with California to the injury or action claimed.

In the author's opinion, based on a plethora of post *Macklin* decisions, the mere fact the applicant did not play for a California team during the 5500.5 liability period would not result in dismissal of the claim or action against employers outside of the 5500.5 liability period where an employment contract was formed in California or the applicant played for a California based team for any portion or period of alleged cumulative trauma.

***James v. Angels Baseball, LLC, et al*. 2015 Cal.Wrk.Comp. P.D. LEXIS 634 (WCAB panel decision)**

Holding: Both the WCJ and WCAB determined there was California WCAB subject matter jurisdiction over applicant's cumulative trauma claim even though he played for a minor league affiliate of the Angels, a California based team, due to the fact he suffered a portion of his cumulative trauma injury in California and that the California employer/team directed and controlled his employment activities, his medical care, and provided workers' compensation insurance coverage for the out-of-state minor league affiliate.

Facts: Applicant played professional baseball for three major league teams and one minor league affiliate team of the California Angels, a California based employer. With respect to the first two major league baseball teams the applicant played for, the Tampa Bay Rays and Miami Marlins, there was no California subject matter jurisdiction. In 2004, the Angels, a California

based employer, signed applicant to an employment contract as a free agent. There was no dispute applicant signed and formed his employment contract with the Angels at their Spring training facility in Arizona. Applicant was at the Angels Spring Training Camp facility in Arizona for one and a half weeks before he was directed to report to one of the Angels' minor league affiliates, the Salt Lake City Stingers (Stingers). The Stingers season schedule called for them to regularly play against minor league teams in California. Applicant pitched in only four games for the Stingers, two of those games were in California. While playing for the Stingers in Sacramento in 2004, applicant noticed a significant and different kind of shoulder pain. Applicant then pitched in a game in Seattle. After the Seattle game the Angels directed him to treat at a medical facility in California. He had shoulder surgery in California and was unable to play the rest of the 2004 season. When the following baseball season started the Angels directed applicant to report to another of its minor league teams. He could no longer pitch due to his shoulder problems. The Angels then directed him to return to the medical facility in California where applicant underwent a second shoulder surgery. After that surgery he was unable to continue playing professional baseball. It appeared that the Angels supervised most, if not all, of applicant's employment activities from Anaheim, California.

Discussion: The WCAB adopted and incorporated the WCJ's Report on Consideration. Defendant on reconsideration cited two cases, one a panel decision and another a trial level Findings and Order in support of their argument there was no basis for the WCAB to exercise subject matter jurisdiction consistent with due process and under *Johnson*. However, the Board distinguished both cases since the applicants in both of those cases never performed any of their job duties in California. It was undisputed in this case that the applicant did perform job duties in California for the Angels and under their direction.

Moreover, the Board also pointed to AB 1309, specifically Labor Code §3600.5(c)(1), which among other provisions indicates that even in a situation where a professional athlete has been hired outside the state and their employer would be exempt from jurisdiction, only if two conditions were satisfied. Under the facts of this case the Angels could not satisfy the requirement that the employer furnished workers' compensation insurance coverage or its equivalent under the laws of a state other than California. Also, there was no evidence that the Salt Lake Stingers had their own workers' compensation coverage independent of the Angels' workers' compensation coverage for California, which apparently covered their minor league affiliates.

More importantly, in dealing with the defense *Johnson* argument in terms of whether or not from a due process standpoint California has sufficient interest in applicant's claim, the Board cited §181, the Restatement Second of Conflict of Laws, which reflects that a state may award relief to a person under its workers' compensation law if, among other considerations, the employer supervised the employee's activities from a place of business in the state even if those activities were outside of the state.

Booth v. Chicago Bulls **2014 Cal. Wrk. Comp. P.D. LEXIS 487 (WCAB panel decision)**

Issue: Whether applicant's participation in three practices for the Chicago Bulls in California established a substantial and legitimate interest in California adjudicating his workers' compensation claim.

Holding: The WCAB reversed the WCJ and found no basis for invoking California subject matter jurisdiction under *Johnson,* in that the effects of applicant's participation in three practices in California did not amount to a cumulative trauma injury and the effects of those practices would be de minimis

Factual & Procedural Overview: Applicant played with the Chicago Bulls for two seasons. During that period of time, the Chicago Bulls had 153 games on their schedule, of which only five were scheduled to be played in California. However, applicant did not play in any of those five games, having been on the injured reserve list two times and when he did travel with the Bulls to California on three occasions, only participated in practices. At trial, the WCJ focused on the cases of *Houston Comets v. WCAB (Kenlaw)* (2013) 78 CCC 1153 , as well as *Crosby* (2001) 66 CCC 923, which the WCJ found warranted invocation of California subject matter jurisdiction.

Defendant filed a Petition for Reconsideration, which was granted by the WCAB. The WCAB reversed the WCJ. The WCAB agreed with the judge that the *Johnson* case does not suggest a rigid application of a specific mathematical formula to determine jurisdiction, but rather the question to be addressed is whether or not the nature of an applicant's contacts with California are sufficient to support California's jurisdiction over an alleged injury claim.

The WCAB found the nature and sufficiency of applicant's contacts with California in participating in three practices was not substantial or legitimate under *Johnson*. In reversing the WCJ the Board stated:

> However, we do not agree with the WCJ that the applicant's few contacts with the state in this case is sufficient to support the exercise of jurisdiction. The effects of applicant's participation in practices on the three occasions when Chicago was in California during the two years of his employment by that team does not amount to a cumulative injury in California that warrants the invocation of California law. At best, the effect of those practices was de minimis. Thus, consistent with the holding in *Johnson*, we find that California does not have a legitimate interest in adjudicating applicant's claim for workers' compensation benefits.

Moreover, the WCAB noted that was no significant distinction between the facts of the instant case and the *Johnson* case even though the applicant testified in the instant case and the applicant in *Johnson* did not. The Board indicated that in both cases there was medical evidence applicant was exposed to injurious trauma that contributed to cumulative injuries. However, this may not always be enough to invoke California subject matter jurisdiction.

Johnson v. Philadelphia Eagles; California Insurance Guarantee Association for Reliance Insurance Company, in liquidation; Fairmont Premier Insurance Company **2014 Cal.Wrk.Comp. P.D. LEXIS 654 (WCAB panel decision)**

Issue: Whether California based on the *Johnson* decision has a sufficient interest to exercise subject matter jurisdiction were applicant played two games in California for defendant over the period of four NFL seasons and suffered only a portion of his cumulative trauma injury during the two games played in California.

Holding: Notwithstanding the fact a portion of applicant's alleged cumulative trauma injury was suffered in California during the two games he played over four seasons, the fact he had no other contact or connection with California does not establish that California has a sufficient and legitimate interest in the injury to exercise subject matter jurisdiction over applicant's claim for workers' compensation benefits.

Factual & Procedural Overview: Following trial the WCJ found applicant suffered a cumulative trauma injury from 1991 to December 24, 1994 awarding 59% permanent disability without apportionment. Defendant filed a Petition for Reconsideration which was granted by the WCAB who reversed the WCJ and found no basis under *Johnson* for California to exercise subject matter jurisdiction over applicant's claim for workers compensation benefits.

Applicant played for the Philadelphia Eagles for four seasons from 1991 through 12/24/94. During the entire four seasons he played for the Eagles, applicant only played two games in California one in 1992 the other in 1994.

The WCJ found that applicant sustained cumulative trauma injury because he suffered a portion of the cumulative trauma exposure in the two games he played in California. The applicant testified that after all of his games, including the games in California he would feel "beat up from head to toe". He also received treatment in San Francisco after the two games he played in California from team trainers consisting of pain and anti-inflammatory medications, as well as massage, heat, ice, and electrical stimulation. Both applicant's orthopedic QME and the defense orthopedic QME found applicant suffered a cumulative trauma while playing professional football. However, neither doctor specifically mentioned that applicant had played in California, let alone concluded it was reasonably medically probable that his two games in California were a contributing cause of the cumulative injury.

In reversing the WCJ, the WCAB noted there are cases were the WCAB has exercised jurisdiction over claims by professional athletes not hired or regularly employed in California who have sustained a portion of their cumulative trauma injury while temporarily employed in California. The WCAB pointed out that even if a professional athlete suffers a portion of a cumulative trauma injury in California in order for the WCAB to "lawfully adjudicate a claim of industrial injury, California must also have sufficient interest in the injury to apply its workers' compensation laws."

The WCAB also noted as in *Johnson*, that applicant had no contacts, nor relationship to California other than the two games he played in California while employed for the Eagles over four NFL seasons. They also noted the overwhelming majority of applicant's employment activities while employed with the Eagles including games, training camps and employment related workouts that occurred outside of California.

The WCAB did agree with the WCJ that the application of the *Johnson* holding does not suggest rigid application of a mathematical formula in order to determine jurisdiction. In that regard the WCAB stated:

> There is no bright line about how long an out-of state employee must have worked in California in order to justify WCAB jurisdiction over a cumulative trauma claim. Instead, each claim of jurisdiction must be assessed on a case-by-case basis. The factors relevant to that analysis include, but are not necessarily limited to the following: (1) how long the injurious employment in California was in relation to the overall injurious employment (i.e., a quantitative factor); and (2) the extent to which the microtrauma in California causally contributed to the cumulative injury, e.g., whether the microtrauma sustained in the state was relatively long, intense, or severe in relation to the out-of-state work activities that also contributed to the cumulative trauma (i.e., a qualitative factor).

The WCAB indicated that even assuming the two games in California contributed in some way to the cumulative trauma, under *Johnson* this would be "de minimus".

The Board noted that both in *Johnson* and in the instant case, there was "medical evidence that the players were exposed to injurious trauma that contributed to their cumulative injuries. However, that is not sufficient in itself to support the exercise of California jurisdiction under the holding in *Johnson*. Instead, the applicant has the burden of proving the connection between the claimed injury in California is sufficient to invoke the jurisdiction of the WCAB." In this case it was not.

The WCAB also disagreed with the WCJ's determination that CIGA had waived the jurisdictional question. The WCAB noted that subject matter jurisdiction "cannot be conferred by consent, waiver, or estoppel."

Comment: This is another case in what appears to be an ever-growing number of cases under *Johnson* were trial judges at the WCAB District Offices are narrowly construing and applying the *Johnson* holding and finding jurisdiction. However, once the case goes up on reconsideration, many of these decisions are being reversed by the WCAB finding no basis for California subject matter jurisdiction under *Johnson.*

The analytical framework currently being applied by the WCAB in numerous cases is a "qualitative/quantitative" assessment resulting in a lack of sufficient substantial interest to exercise California subject matter jurisdiction from a due process standpoint. Applying this analysis, the WCAB found no subject matter jurisdiction in all of the following cases. (*Vaughn v. Seattle Seahawks* 2014 Cal. Wrk. Comp. P.D. LEXIS 732 (WCAB panel decision) (29 regular

season games only 4 in California); *Boulware v. Houston Texans* 2015 Cal. Wrk. Comp. P.D. LEXIS 4 (panel decision) (80 career games, 7 games in California); *Byars v. N.Y. Jets* (2015) 81 Cal.Comp.Cases 64; 2015 Cal. Wrk. Comp. LEXIS 154, (writ denied) (13 seasons, 240 career games, 9 games in California); *Phegley v. Dallas Mavericks* 2015 Cal.Wrk.Comp. P.D. LEXIS 231. (WCAB panel decision) (345 career games, 23 games in California); *Pippen v. Portland Trail Blazers, et al*. 2015 Cal. Wrk. Comp. LEXIS 163 (writ denied) (1,145 career games, 100 games in California); *Collins v. Atlanta Falcons* (2015) 80 Cal.Comp.Cases 1202; 2015 Cal.Wrk.Comp. LEXIS 119 (writ denied) (68 career games, 6 games in California); *Delgado v. New York Mets* 2015 Cal.Wrk.Comp. LEXIS 131 (writ denied) (22 year career, 2,035 games, plus 635 minor league games, 138 in California); *Wallace v. Phoenix Suns* 2015 Cal.Wrk.Comp. P.D. LEXIS 242 (WCAB panel decision); (8 year career, 386 career games, 19 games in California, and of these 46 games for the Suns, 7 games in California); *Timmerman v. The St. Louis Rams et al*. 2015 Cal.Wrk.Comp. P.D. LEXIS 425 (WCAB panel decision) (12 year career, 189 games only 12 games in California. *Chase v. St. Louis Blues Hockey Club; Federal Ins. Co.* 2015 Cal.Wrk.Comp. P.D. LEXIS 411 (WCAB panel decision). WCAB split panel decision. WCAB reversed WCJ and found no California subject matter jurisdiction utilizing a "quantitative/qualitative" analysis where applicants only contact with California consisted of 21 games played in California over an 11 year career with 485 hockey games played (equated to less than 5% of total games played in California). WCAB also referenced the 20% threshold of newly enacted Labor Code §3600.5(b).; *Stryzinski v. New York Jets, et al.* 2015 Cal.Wrk.Comp. P.D. LEXIS 618 (WCAB panel decision) (275 career games, 21 games in California, 7.6%); *Everett v. St. Louis Rams, LLC. et al*. 2015 Cal.Wrk.Comp. P.D. LEXIS 628 (WCAB panel decision). (8 year NFL career for multiple teams, with 103 career games, only 5 in California. WCAB reversed WCJ and found no subject matter jurisdiction on *Johnson* due process grounds. Applicant suffered a specific injury in California that was not plead and WCAB said to construe a specific injury as part of a CT claim is contrary to Labor Code §5303, the anti-merger statute.).

See also, *Skorupan v. New York Giants, ACE USA Insurance* 2015 Cal.Wrk.Comp. P.D. LEXIS 506 (WCAB panel decision). No California WCAB jurisdiction over cumulative trauma claim filed against the Giants. In his career applicant played five games in California out of a total of 141 games. With respect to the Giants, he played in 53 games of which only 3 were played in California (5.6%). In one of those 3 games in California, on November 23, 1980, applicant suffered a specific injury to his right knee that caused him to miss the rest of the season. Notwithstanding the fact applicant suffered a specific injury in California, applicant only filed a CT claim. In this regard the Board stated:

> Applicant testified to specific injuries he received while playing in games in California, but applicant has filed no claim of specific injury in this state. The claim we address is for *cumulative injury*, and for the WCAB to have **jurisdiction** over defendants there must be sufficient and legitimate connection between this state and that claimed injury. Such a connection is not established on this record. (original emphasis)

In addition to using a "quantative/qualitative" analysis in the cases cited hereinabove, the WCAB buttressed their analysis by referring to the legislative intent in AB 1309/3600.5 as guidance in establishing a 20% of games in California as a minimum quantitative threshold for establishing

California subject matter jurisdiction. See also, *Hulse v. Calgary Flames* 2017 Cal.Wrk.Comp. P.D. LEXIS 33 (WCAB panel decision). Applicant had 848 career NHL games with between 25-42 games played in California. WCJ found California had a legitimate interest from a due process standpoint in applicant's CT injury. On appeal the WCAB reversed and under *Johnson* applying a quantitative/qualitative analysis that there was not a significant or legitimate connection to require defendant to litigate the claim in California as a matter of due process. Applicant was never hired in California and was only temporarily in California for only 25 to 42 of the more than 848 total games he participated in. The WCAB found that despite the fact applicant testified he sustained a high ankle sprain in California, this fact was not jurisdictionally sufficient since he did not file any claim related to this specific injury in California, and his claim before the WCAB related only to a CT claim. As reflected in footnote 4, "[t]o automatically consider that (the high ankle sprain) or other specific injuries to be evidence of a cumulative trauma injury would constitute improper merger of cumulative and specific injuries contrary to the prohibition of section 5303…"

Germany v. Buffalo Bills, Inc.; Travelers Insurance Company **2014 Cal.Wrk.Comp. P.D. LEXIS 496 (WCAB panel decision)**

Issue: Whether the WCAB should decline to exercise jurisdiction due to the fact applicant had minimal contacts with the state of California and whether the choice of law clause in the applicant's employment contract was reasonable and should be enforced.

Holding: Under the *Johnson* case, the applicant's contacts with California were minimal. As a consequence subject matter jurisdiction would not be exercised since California does not have a legitimate and substantial interest in the matter. Moreover, the Choice of Law clause was reasonable and did not violate public policy.

Factual & Procedural Overview: The parties admitted/stipulated that applicant sustained a CT injury for the period of June 9, 2001 through November 20, 2002, while playing for the Buffalo Bills to his cervical spine, lumbar spine, shoulders, elbows, wrists, thumbs, knees and ankles. The applicant was employed for seventeen months with the Buffalo Bills during which time he played in two games. He also participated in two practice sessions for those two games in California. The applicant also filed a workers' compensation claim in the State of New York for a specific injury to his left knee. The applicant played a total of 20 games for the Buffalo Bills with only two games played in California with related practices. The applicant was never a resident of California and had no contact with California other than the two games and two related practices in California for the Buffalo Bills. Both the WCJ and WCAB noted there was no evidence the applicant sustained any specific injury or required medical treatment while participating in the two games and two practices in California. There was no medical report indicating any history of injury occurring in California. Given applicant's minimal contact with California, the WCJ and WCAB indicated that under Johnson, subject matter jurisdiction should not be exercised because California did not have a legitimate substantial interest in the matter. Moreover, there was no medical treatment received or rendered in California.

With respect to the choice of law issue, the NFL player contact between the applicant and Buffalo Bills had a choice of law provision that stated "this contract is made under and shall be

governed by the laws of the state of New York". The WCAB properly characterized this as a choice of law clause as opposed to a choice of forum clause. The WCJ and WCAB found the choice of law clause was reasonable and did not violate any California public policy. Moreover the fact applicant had adjudicated a workers' compensation case in New York for a specific injury and received an award of $28,860.00 in temporary disability and partial permanent disability reflected the parties' contractual intent that New York state law should apply under the terms of the applicant's NFL player contact.

Swinton v. Arizona Cardinals, et al. **(2016) 81 Cal.Comp.Cases 1078; 2016 Cal.Wrk.Comp. P.D. LEXIS 305 (WCAB panel decision)**

Holding: In this very complex procedural case the WCAB affirmed the WCJ's determination that there was WCAB subject matter jurisdiction over the defendant and while "true" subject matter jurisdiction cannot be waived, other affirmative defenses which may involve jurisdiction can be waived. In this case defendant failed to raise a number of affirmative defenses in a timely manner and the Board found defendant was not denied due process.

Factual and Procedural Background: As indicated hereinabove, this case is very procedurally complex. There were two trials. Following the first trial in May of 2012, the judge issued a decision finding injury AOE/COE and that applicant's claim was not barred by the Statute of Limitations. Defendant filed a Petition for Reconsideration, but at that time raised no contention or issues related to the alleged denial of due process (*Johnson*) or the applicability of a forum selection clause in applicant's player contract (*McKinley)*. The WCAB denied defendant's Petition for Reconsideration and defendant sought no further review by way of writ with the Court of Appeal. As of April 12, 2013, the decision was final for all purposes.

In May of 2014, the WCJ issued an Order related to development of the medical record under Labor Code §5701 by appointment of a regular physician who examined the applicant and provided a report. In response defendant filed a Petition for Removal with the WCAB. In addition to challenging the judge's Order to develop the record under Labor Code §5701, defendant raised a number of other ancillary issues, including that the WCAB had no subject matter jurisdiction over applicant's claim. Defendant's Petition for Removal was denied by the WCAB in August of 2014, with the case being sent back down to the trial level for development of the record for decision by the WCJ. Once again, defendant did not petition for review of the WCAB's August 20, 2014, decision after removal and with respect to the issues raised, including subject matter jurisdiction. As a consequence, the WCAB's decision became final and also became law of the case.

The Second Trial: Following a second trial the WCJ issued a Findings and Award on December 7, 2015, which found applicant properly elected to proceed against the Arizona Cardinals under Labor Code §5500.5(c) as well as the fact the WCAB had subject matter jurisdiction over the claim and applicant sustained a cumulative trauma injury while employed by three NFL teams, the Arizona Cardinals, the Dallas Cowboys, and the Seattle Seahawks. The WCJ found 52% permanent disability without apportionment and need for further medical treatment. Defendant Arizona Cardinals filed a Petition for Reconsideration arguing that the WCAB lacked subject matter jurisdiction and they were denied due process. The WCAB denied

defendant's Petition for Reconsideration finding that they had been afforded ample time and opportunity to raise any applicable affirmative defenses, but due to the fact they were not timely raised, the Board found that those objections and affirmative defenses had been waived.

The January 16, 2016 Arbitration Award Issue: Before the WCAB issued their decision denying defendant's Petition for Reconsideration on June 14, 2016, they received a request from defendant on March 15, 2016, that the Board take judicial notice of a January 21, 2016, arbitration award between the National Football League Management Counsel and the National Football League Players Association in which the arbitration award indicated the applicant was to "cease and desist pursuing a claim in California for workers' compensation benefits against Arizona." Applicant objected to the Board taking judicial notice of the arbitration award. The Board indicated that, in their opinion, the stipulated January 21, 2016, arbitration award was not relevant to the contentions raised in defendant's petition, and defendant's request for judicial notice was denied.

Discussion: The WCAB in reaching their decision was careful to distinguish what they characterized as "true" subject matter jurisdiction, which cannot be conferred on a court by stipulation nor estoppel and its absence cannot be waived. (2 Witkin, California Procedure (5th ed. 2008) Jurisdiction, § 13, pp. 585-588, and cases cited therein.) In doing so the Board cited a California Supreme Court case, *Abelleira v. Dist. Court of Appeal* (1941) 17 Cal. 2d 280, 288 with respect to this distinction the court in *Abelleira* stated as follows:

> Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. *(Abelleira, supra, 17 Cal. 2d at pp. 288-289 see also ACIC, supra, 33 Cal.4th at p. 660-6612; Macklin, supra, 240 Cal.App.4th at p. 1232, fn. 1* [*10] "[t]he term 'jurisdiction' over the action is also used in a variety of less fundamental circumstances, requiring care in reliance on cases using the term"].)

In essence, the WCAB indicated defendant had erroneously interpreted *Johnson,* and as a result of that misinterpretation had framed the issues on appeal incorrectly. The Board held that the WCAB had subject matter jurisdiction over applicant's claim. What defendant was really asserting under *Johnson* was whether or not California had a sufficient connection to applicant's claim from a due process standpoint. The Board's reading and interpretation of *Johnson* led them to conclude that "*Johnson* involved issues of conflicts of law and due process, not the existence of WCAB subject matter jurisdiction in its most fundamental sense."

The WCAB reframed the issue in the context of *Johnson*, *Macklin*, and *Abelleira* as follows:

> Thus, the question under *Johnson* is not whether the WCAB has subject matter jurisdiction over the claim in this case, because it does. The question is whether defendant was denied due process in being found liable under California law for applicant's cumulative trauma injury. The answer to that question is, no.

The WCAB then went on at great length with a detailed procedural history, indicating that from the outside of the claim defendant filed an Answer and generally appeared and in their Answer did not raise a claim of denial of due process. Defendant also failed to raise in their Answer a defense based on a forum selection clause in applicant's employment contract. In objecting to an initial Declaration of Readiness to Proceed by an applicant's counsel again defendant failed to raise a denial of due process and applicability of a forum selection clause defense. Defendant also appeared at a January 18, 2012, mandatory settlement conference and a March 29, 2012, trial. There was no identification of any due process objection by defendant and no reference to a defense based upon a forum selection clause at either hearing.

With respect to the forum selection clause issue (*McKinley*), the WCAB noted this has nothing to do with subject matter jurisdiction per se in its fundamental sense. Under *McKinley* the WCAB may "decline to exercise jurisdiction" in a case involving a forum selection clause when certain conditions are satisfied. The Board noted that under *McKinley*, it is assumed the WCAB has subject matter jurisdiction over a claim or the existence of a forum selection clause is irrelevant. It is only when a party seeks to enforce a forum selection clause that a question arises as to whether that subject matter jurisdiction should be exercised." (citing *McKinley*).

Defendant's last argument was that it was unaware for a certain period of time during the proceedings that it could raise the objections of a denial of due process (*Johnson*) and forum selection clause (*McKinley*) because those decisions did not come out until 2013.

This seems to implicate the fact that even after *Johnson* and *McKinley* were both decided in 2013, defendant made no effort to amend any of the pleadings or to timely interpose the applicability of either *McKinley* or *Johnson*. In that regard the Board stated as follows:

> In sum, defendant obtained notice of applicant's claim in 2010, and actively litigated the substance and merits of the claim for several years without objection based upon due process or a forum selection clause. Defendant's participation in the case since the time of its answer and general appearance includes attendance at depositions, conferences and hearings, actions to develop the medical record, the advancement of affirmative defenses and requests for affirmative relief, including the earlier denied Petition for reconsideration of the WCJ's April 12, 2013 decision. A petitioner, "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration. (Lab. Code, § 5904,)

The Board indicated, supported by numerous case citations, that "due process rights may be waived by a party." Also, the WCAB noted that objections and defenses may be waived by failing to timely assert them regardless of the parties' intent not to relinquish the claim. In essence, the Board concluded, supported by numerous case citations, that objections and defenses that do not implicate pure subject matter jurisdiction issues "may also be waived when not timely asserted, even if the objection is identified as "jurisdictional" in one of the "less fundamental circumstances" noted in *Macklin*."

2. AB 1309 ISSUES

Walker v. WCAB ***(2015)*** **80 Cal.Comp.Cases 1499; 2015 Cal.Wrk.Comp. LEXIS 149 (writ denied)**

Issues/Holding: Whether applicant's claim was barred by the AB 1309 amendments to Labor Code §3600.5 for professional athletes which became operative on September 15, 2013, given the fact applicant's claim was filed on September 16, 2013, one day after AB 1309 became operative.

Factual and Procedural Overview: The WCAB reversed the trial judge's decision that applicant's claim had been timely filed pursuant to AB 1309/Labor Code §3600.5(h). The WCAB granted defendant's Petition for Reconsideration and reversed the trial judge's ruling and found that by, the plain terms of the statute, Labor Code §3600.5(h), and the amendments to Labor Code §3600.5 "apply to all claims for benefits pursuant to this division filed on or after September 15, 2013." Applicant's Petition for Writ of Review was denied by the Court of Appeal.

Discussion: Both the WCAB and the Court of Appeal framed the issue as to "whether the 9/15/2013 date specified in Labor Code §3600.5(h) was "the last day for the performance" of an act the law requires to be performed "within a specified period of time" as set forth in Code of Civil Procedure §12(a), and the "last day for exercising or performing any right or duty to act" as set forth in 8 Cal.Code.Reg. §10508.

Both the WCAB and the Court of Appeal applying fundamental statutory construction, and the plain language of Labor Code §3600.5(h), held that:

> As plainly expressed in the statute, the September 15, 2013 date specified in section Labor Code §3600.5(h) is the date on which the amendments to section 3600.5 begin to apply to claims that are filed on or after that date. Thus, the fact that a claim could not be filed on September 15, 2013, is irrelevant to the question of whether the section 3600.5 amendments apply, as is the fact that the employer may or may not otherwise have had "notice of injury by the fact he was a hockey player," as discussed by the WCJ in her Report. The dispositive point is when the claim was filed. If the claim was filed before September 15, 2013, the amendments to section 3600.5 do not apply. If the claim was filed after September 15, 2014, the amendments to section 3600.5 do apply.

3. Stays and Consolidations

Bladischwiler v. Detroit Lions, CNA Claims Plus, Inc. **2012 Cal. Wrk. Comp. P.D. LEXIS 225 (WCAB panel decision); see also, California Workers' Compensation Law & Practice, §21:114**

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

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

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

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

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

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

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

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

Defendants failed to demonstrate substantial prejudice and irreparable harm.

4. Validity and Scope of Releases and Settlements

Ferragamo v. St. Louis Rams *(formerly known as Los Angeles Rams, et al.)* **2017 Cal.Wrk.Comp. P. D. LEXIS 283 (WCAB panel decision)**

Issues and Holding: Whether an Application for Adjudication applicant filed in September of 2013, alleging injury while working as a professional football player to his head, neck, upper extremities, leg, and other body parts was barred by the doctrine of res judicata given the fact applicant entered into a prior Compromise and Release related to a cumulative trauma injury for the period of April 15, 1977 to October 1, 1987, with a Compromise and Release and Order Approving issued in October 1988, in the amount of $55,000.00. The 1988 Compromise and Release described and covered as injured body parts and conditions, "multiple parts, including but not limited to orthopedic, internal, psych, ENT, and all other parts of the body as described in the medical reports filed herein." The brain was not specifically listed as a covered body part in the 1988 Compromise and Release.

The WCJ found that applicant's 2013 cumulative trauma claim was barred by the 1988 Compromise and Release settlement. Applicant filed a Petition for Reconsideration which was granted by the WCAB. The WCAB in a split panel decision reversed the WCJ and found that applicant's new September 2013 Application was not barred by the doctrine of res judicata.

Factual and Procedural Overview: It was undisputed that applicant had experienced headaches, concussions, and vertigo during his career as a professional football player. Moreover, there was a medical report in June of 1988, before the original October 1988 Compromise and Release was entered into in which indicated applicant had a "mild" form of "post-concussion syndrome." Defendant also argued on reconsideration that applicant should have known that he had sustained cumulative injury to his brain based upon his concussions while playing football with ongoing headaches and vertigo. In contrast, there was a report in August of 2015, obtained after applicant filed his second Application for Adjudication in 2013, alleging injury to his brain in which the physician indicated that medical reporting in applicant's claim in 1988 did not include a diagnosis of cumulative trauma injury to applicant's brain and CTE was not yet known to be an issue for professional football players. At trial the defense expert witness also confirmed this fact.

Defendant also argued the October 1988 Compromise and Release/settlement agreement had a Civil Code §1542 waiver or release, which specifically indicated that the parties release relates to "any disability concerning applicant's condition, present and/or future nature, whether now known or unknown."

With respect to the effect of the release language in the October 1988 Compromise and Release, both the WCJ and the WCAB indicated that, "The question of whether the release bars a subsequent claim is an issue of fact that requires a determination of whether the release was "knowingly" made based upon evidence other than the language of the release. (*Casey v. Proctor* (1963) 59 Cal.2d 97, 111-112.)

The WCAB indicated that in applying the *Casey* standard to the facts of this case that:

> In this case, the 1988 release does not bar the pending claim because the brain injury/CTE (chronic traumatic encephalitis) now claimed by applicant did not exist and was unknown at the time of the earlier settlement. Applicant's "brain" was not expressly identified as an injured body part in the 1987 Application for Adjudication of Claim…and it is not listed as a covered body part in the subsequent compromise and release agreement.

The WCAB in finding that the prior Compromise and Release was not res judicata and did not bar applicant's new 2013 alleged injury to the brain indicated, "There is no evidence that applicant suffered from compensable disability due to brain injury at the time of the 1988 settlement, in the absence of compensable disability there is no industrial injury."

The WCAB also stated:

> If the injury is known at the time of the settlement, the release is binding upon the parties, even if unknown or unexpected consequences result therefrom, but if the injury is unknown, and the parties purport to settle for all injuries sustained, then the release will not be held to be binding upon the parties as to the injury which was unknown to the parties at the time of executing the release. (citations)

The WCAB indicated that the injury claimed to applicant's brain in 2013 was unknown at the time of the 1988 general release and therefore the §1542 release and other related provisions does not apply to bar the pending claim. Moreover, since neither party was aware of the risk that was imposed in making the 1988 release the defendant would receive a windfall if the applicant's current claim was barred by the prior relief.

Editor's Comment: There is some question as to whether or not applicant's 2013 claim would be barred by res judicata if the 1988 Compromise and Release had in fact listed "brain and all related conditions and symptoms" as a body part or condition. Neither the brain nor any related symptoms were listed in the 1988 Compromise and Release and the ambiguous reference to "all other parts of the body as described in the medical reports filed herein" was simply insufficient to put applicant on notice or create an awareness he was settling or resolving all claims related to his brain, known or unknown at that time. So the practice pointer is that since the Compromise and Release is treated as an Application for Adjudication all body parts and conditions should be listed expressly and specifically, including all related symptoms and conditions without reference to "those listed in the medical reports." (see also, *Bell v. Los Angeles Raiders*, CIGA 2015 Cal.Wrk.Comp. P.D. LEXIS 338 (WCAB panel decision) (finding that earlier Compromise and Release was not res judicata as to applicant's subsequent claim for a cumulative brain injury since the earlier Compromise and Release and general release language related only to applicant's orthopedic claims and injuries.)

Dorsett v. Denver Broncos and Dallas Cowboys **2013 Cal. Wrk. Comp P.D. LEXIS 359 (WCAB panel decision); see also, California Workers' Compensation Law & Practice §15.50; 15:55**

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

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

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

At Trial, the WCJ took judicial notice of the 1991 Compromise and Release agreement and Order Approving. Also during the course of the hearing applicant testified he did not recall his earlier settlement by way of a Compromise and Release, but did recognize and acknowledge his signature on the Application and Compromise and Release in the first case. Applicant also testified he experienced numerous hits to his head and concussions during his years of employment as a football player. The WCJ and the WCAB noted that "head" was specifically identified as an injured body part in the first application and that "head" was specifically listed in the Compromise and Release agreement. The WCJ found the 1991 Compromise and Release and Order Approving was res judicata and barred applicant from proceeding further in alleging a new claim. Applicant filed a Petition for Reconsideration. In denying applicant's Petition for Reconsideration, the Board emphasized that in addition to listing "head" as an injured body part, there was an express release, which released defendants of "all" claims of injury concerning his head based on language that indicating applicant was releasing and forever discharging the employer and carrier from "all claims" and causes of actions, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury.

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

Discussion/Practice Pointers: Given the current focus on concussion, dementia, and CTE, this case is significant in that defendants, in drafting settlement documents, should be extremely

careful in making sure that all known body parts and conditions are included in the Compromise and Release settlement with as much specificity and elaboration as necessary. A good example of where a subsequent claim was not barred by a prior settlement by way of Compromise and Release is *Duckworth v. Los Angeles Rams, et al.* (2016) 81 Cal.Comp.Cases 234; 2016 Cal.Wrk.Comp. LEXIS 11 (writ of review dismissed). In *Duckworth*, applicant settled a 7/81-11/30/86 CT claim by C&R for $32,000.00 in 1989. The body parts and conditions specified in the 1989 C&R related expressly to multiple listed orthopedic body parts and those listed or mentioned in the medical reports (also all orthopedic). There was no mention or reference to head and brain in the C&R. In 2013, applicant filed an Application for the same CT date of injury, but for injury to brain and nervous system.

Defendant argued the prior C&R barred applicant's new claim. Both the WCJ and the WCAB held the new claim was not barred by the prior C&R since the prior 1989 C&R reflected it was the intent of the parties to settle all claims of orthopedic injury only. It appears defendant was unable to prove (unlike in *Dorsett*) that applicant was aware of the existence of a brain injury when the 1989 C&R was executed. Moreover, there should also be similar language, as in the *Dorsett* case, related to a release of all claims and causes of action whether now known or ascertained or which may hereafter arise or develop as a result of any injury. (See also, *Giles v. Tennessee Titans* 2013 Cal. Wrk. Comp. P.D. LEXIS 644 (WCAB panel decision) (same holding as *Dorsett* and *Moss v. WCAB, Golden State Warriors* (2018) 83 Cal. Comp. Cases 725 (writ denied); WCAB refused to set aside C&R for cumulative injuries in which applicant settled for the period of 1982-1996, when he played for the Warriors. No basis to support applicant allegations that C&R settlement was procured by fraud, was not supported by the evidence, and did not sufficiently address issues of permanent disability, that there was newly discovered evidence.

See also *Ford v. Houston Oilers* 2012 Cal. Wrk. Comp. P.D. LEXIS 179 (WCAB Panel Decision) Parties entered into Stipulations with Request for Award that did not expressly list either neurological or dental injuries as parts of body or conditions injured. Post Award, applicant sought dental and neurological medical treatment. Treatment was denied by defendant. Applicant argued it was the parties' intent to include these body parts in the Stipulations. Both the WCJ and the WCAB on reconsideration found no mutual mistake, fraud, duress, undue influence, inadvertence, excusable neglect, or mistake of law or fact.

Also the failure of one party to exercise due diligence does not establish good cause to set aside the Stipulated Award. "Stipulations once accepted and acted upon become an executed contract, from which a party cannot be released without good cause." (*Huston v. WCAB (Coast Rock*) (1979) 44 Cal. Comp. Cases 798) Another case dealing with the binding force and effect of stipulations on the parties and the difficulty in establishing good cause to set them aside is *County of Sacramento v. WCAB (Weatherall)* (2000) 77 Cal. App. 4th 1114; 65 Cal. Comp. Cases 1.

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

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

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

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

Applicant filed a Petition for Reconsideration.

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

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

It releases defendant from any and all workers' compensation claims that involve applicant and both the Washington Redskins and the Hartford Insurance Company. Applicant's argument that the General Release only applied to his injury to his right hip

and shoulder would be correct if the General Release only applied to the allegations in the Application filed in Maryland. However, that is not the language of the General Release, which specifies that it applies to all claims that could be filed against those two entities.

5. Venue

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

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

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

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

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

6. Statute of Limitations

O'Berry v. World League of American Football aka National Football League Europe (NFL Europe) **2017 Cal.Wrk.Comp. P. D. LEXIS 173 (WCAB panel decision)**

Issues: Whether California has a legitimate substantial interest in applicant's cumulative trauma injury from 4/15/95 through 6/1/97, while playing for defendant NFL Europe and whether his claim was barred by the one year statute of limitations under Labor Code §5405 and the methodology for determining the date of injury under Labor Code §5412.

Holding: Both the WCJ and WCAB determined applicant's cumulative trauma injury was not barred by the one year statute of limitations under Labor Code §5405 since his date of injury under Labor Code §5412 based on applicant's first documented date of knowledge of the potential connection between his employment and the cumulative trauma injury was December 17, 2015, when he filed an Application for Adjudication of Claim with the WCAB.

Procedural and Factual Overview: Applicant was initially hired in California by the St. Louis Rams and then subsequently worked briefly for teams in the Canadian Football League and NFL Europe. He retired from professional football in 1998. Applicant suffered a left knee injury while playing college football. He then sustained an additional injury to his left knee while employed by NFL Europe and underwent arthroscopic surgery both before and after his retirement in 1998. After his retirement he continued to have left knee problems. He also developed problems with his right knee and other body parts. However, none of the medical records indicated any discussion or mention by the applicant or any physicians of an industrial cumulative trauma injury as the cause of his knee problems. Moreover, there was no evidence applicant ever received notice that his left knee problems or other medical conditions might be subject to a claim for workers' compensation benefits under California law. The WCJ and the WCAB indicated the first documentary evidence that applicant knew a claim of cumulative injury could be filed under California law to his knees and other body parts was when he filed the Application for Adjudication on December 17, 2015.

Defendant filed a Petition for Reconsideration. Defendant argued that the one year statute of limitations under Labor Code §5405 barred applicant's cumulative trauma claim. None of the applicant's employment or medical records prior to his filing an Application evidenced he had knowledge of a connection between his work as a football player and his cumulative injury.

The WCAB in denying defendant's Petition for Reconsideration provided a comprehensive overview of the law related to Labor Code §5405 and the related issue of a determination of a date of injury under Labor Code §5412. In that regard the WCAB noted as follows:

> For a cumulative injury like the one claimed by applicant, proceedings are to be commenced within one year from the date of injury. (Lab, Code, §5405(a), The date of injury for a claim of cumulative injury is *not* when the injury occurs, it is the date when the employee first suffered disability and knew, or should have

> known, that the disability was caused by his or her employment. (Lab. Code, § 5412.) An employee is not charged with knowledge of an employment relationship without evidence of medical advice to that effect unless the nature of the disability and the employee's training is such that the relationship between employment and disability is otherwise recognized. (*Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556 [33 Cal.Comp.Cases 722].)

In terms of Labor Code §5412, defining a date of injury for purposes of the statute of limitations under §5405, the WCAB also noted as follows:

> The section 5412 date of injury identifies when the cumulative injury manifested itself through compensable temporary disability or permanent disability with the employee's knowledge that the disability was caused by industrial injury, and it is used for statute of limitation and section 5500.5 liability purposes. (citations omitted) ["The 'date of injury' is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury…[T]he "date of injury" in latent disease cases 'must refer to a period of time rather than a point in time.' The employee is, in fact, being injured prior to the manifestation of disability…[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury" (citations omitted)]

The WCAB noted the WCJ made no express finding of the date of injury. However, it appeared to the WCAB the WCJ determined the date of applicant's knowledge of the cause of his disability was July 19, 2016. This date was based on a medical report reflecting the earliest medical record of the relationship between applicant's employment and his cumulative trauma injury. However, since the Application for Adjudication was filed on December 17, 2015, earlier than the medical report of July 19, 2016, the Application as opposed to the medical report "provides the earliest documented date of applicant's knowledge of the applicant's relationship of the cumulative injury to his employment, and that is the date of injury that is entered as a finding in this case."

Banks v. Cincinnati Bengals **2017 Cal.Wrk.Comp. P.D. LEXIS 1 (WCAB panel decision)**

Case Summary: The WCAB rescinded and remanded for further development of the record the WCJ's finding that applicant's cumulative trauma injury claim for the period of May 1, 1967 through August 25, 1969, was not barred by the Labor Code §5405(a) Statute of Limitations based on insufficiency of the evidence.

Discussion: The trial proceedings related to a bifurcated trial on the single issue of defendant's statute of limitations defense. Defendant argued that applicant's claim was barred by the Labor Code §5405(a) statute of limitations based on applicant's testimony as to the date of his CT injury under §5412. Moreover, defendant argued the *Reynolds* case was inapplicable since *Reynolds* did not apply to the notice requirements in effect at the time of applicant's cumulative

trauma injury, i.e. 1967 to 1969, under former and repealed California Code of Regulations Title 8, §9816. The critical issues related to the statute of limitations pursuant to Labor Code §5405(a), Labor Code §5405(b), Labor Code §5405(c).

With respect to all three issues, the WCAB indicated there was insufficient evidence to substantiate any finding of fact related to these three separate subdivisions. There was insufficient evidence in the record to allow any finding of fact regarding whether defendant ever paid applicant benefits or provided medical treatment for purposes of Labor Code §5405(b). In fact, the Pre-Trial Conference Stipulations at the Mandatory Settlement Conference and trial reflected that defendant stipulated to providing "some" medical treatment to applicant. Then later, contrary to the stipulation and in arguing that applicant's claim was barred by the one year statute of limitations, defendant argued they never paid applicant compensation or provided any medical treatment. The WCAB said there was insufficient evidence in the record for the WCJ to make any findings of fact or orders related to §5405(b) or (c). As a consequence, the WCAB was unable to engage in a meaningful process of reconsideration of the WCJ's decision on whether defendant met its burden of proof on these two subsections.

The WCJ's decision was also defective because there was no specific finding as to compensable disability related to either temporary or permanent disability. On reconsideration the WCAB expressly found that "the WCJ made no findings and did not determine when and if applicant sustained compensable disability." Moreover, there was no evidence in the record to determine this issue.

With respect to insufficiency of the evidence, the WCAB noted the mandatory requirements of Labor Code §5313, that every WCJ must make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. (*Blackledge v. Bank of America, Ace American Insurance Company (Blackledge*) (2010) 75 Cal.Comp.Cases 613, 621-22).

A WCJ's compliance with the findings requirement under Labor Code §5313, "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful."

In remanding the case for further development of the record the WCAB stated:

> Accordingly, as there is insufficient evidence to substantiate any finding of fact with respect to section 5405(a), (b) or (c), and insufficient evidence to establish when applicant knew or should have known that his claimed CT injury was industrially related pursuant to section 5412, it is our decision after reconsideration to rescind the Findings and Order and return the matter for further proceedings.

Wenzel v. San Diego Chargers, Zenith Insurance Company **2016 Cal.Wrk.Comp. P.D. LEXIS 628 (WCAB panel decision)**

Whether the Labor Code §5405 one year Statute of Limitations was tolled based on applicant's alleged "incompetency" under Labor Code §5408: The WCAB remanded the case back to the trial level for further development of the record on the issue of whether applicant was competent for 365 days (not necessarily continuous), between the Labor Code §5412 date of injury and the date the Application was filed related to applicant's cumulative claim.

Discussion: Following trial the WCJ found applicant's claim was barred by the Statute of Limitations. Applicant filed a Petition for Reconsideration alleging the WCJ erred in finding that the applicant's cumulative trauma claim was barred by the Statute of Limitations, contending that it was tolled pursuant to Labor Code §5408 based on applicant's alleged mental incompetency.

Applicant filed a cumulative trauma claim ending on December 31, 1973. Applicant passed away during the pendency of the workers' compensation proceedings. The WCJ determined applicant's Labor Code §5412 date of injury was July 1, 2002. However, the actual Application for Adjudication for applicant's CT claim was not filed until April 5, 2010. Defendant contended the filing of the Application for Adjudication on April 5, 2010, was outside the one year limitations period imposed by Labor Code §5405(a).

The primary argument with respect to applicant's Petition for Reconsideration was Labor Code §5408, which provides in pertinent part that, "no limitation of time provided by this division shall run against any…incompetent unless and until a guardian or conservator of the estate or trustee is appointed."

There was conflicting evidence with respect to the nature and degree of applicant's alleged incompetency based on testimony from applicant's wife and his treating physician in the late 1990s and early 2000s. Moreover, there was evidence that even during the first part of 2012, applicant had been substitute teaching a couple of days a month.

The definition of incompetency for purposes of Labor Code §5408. The WCAB: The WCAB pointed to two separate definitions of "incompetent" for purposes of Labor Code §5408, in that regard the WCAB stated:

> The California Supreme Court has interpreted "incompetent" in this context to mean "any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons." (*Francisco v. Industrial Acci. Com. (Mack)* (1923) 192 Cal. 635 [10 I.A.C. 357].) Similarly, the test for tolling of the statute of limitations in civil cases under the analogous civil statute is whether a plaintiff "is incapable of caring for his property or transacting business, or understanding the nature or effects of his

> acts." (*Hsu v. Mt. Zion Hosp*. (1968) 259 Cal.App.2d 562, 571; see Code. Civ. Proc., § 352, subd. (a).)

The WCAB indicated that neither party had introduced any expert evidence on the question of whether applicant was able to care for his property in the period following the §5412 date of injury of July 1, 2002, up to and including when the Application for Adjudication was filed on April 5, 2010.

The Board stated that it was their belief that "an expert must get a precise history of the relevant period and offer an expert opinion regarding whether applicant was rendered "incompetent" prior to the expiration of the statute of limitations."

In remanding the matter back to the trial level for further development of the record under *Tyler v. WCAB* (1997) 56 Cal.App.4th 389, [62 Cal.Comp.Cases 924], the WCAB provided guidance to the WCJ as follows:

> In the further proceedings, the parties should agree on an agreed medical evaluator, and if an agreement cannot be made, the WCJ should consider the appointment of an independent expert. The expert should take a thorough history, ensuring that the history is consistent with Dr. Schilder's contemporaneous reports, and then determine whether there were 365 days (not necessarily continuous) between the July 1, 2002 date of injury and the date the application was filed that applicant was competent pursuant to Labor Code Section 5408.

Moreover, in terms of burden of proof as it relates to the development of record, the WCAB indicated it was applicant's burden of proof to show the statute was tolled pursuant to Labor Code §5804. In that regard, the WCAB stated, "as a general rule, where a claimant asserts exemptions, exceptions, or other matters which will avoid the statute of limitations, the burden is on the claimant to produce evidence sufficient to prove such avoidance." Citing (*Permanente Medical Group v. Workers' Comp. Appeals Bd. (Williams)* (1985) 171 Cal.App.3d 1171, 1184 [50 Cal.Comp.Cases 491].)

Comment: For another case dealing with incompetency and the statute of limitations, see *Houston Astros v. WCAB (Richard)* (2014) 79 Cal.Comp.Cases 1451

Estrella v. WCAB **(2016) 81 Cal.Comp.Cases 525; 2016 Cal.Wrk.Comp. LEXIS 57 (writ denied); see also, *Benard v. San Francisco Giants* 2016 Cal.Wrk.Comp. P.D. LEXIS 85 (WCAB panel decision)**

Holding/Issues: In this writ denied case the Court of Appeal affirmed the decision of the WCJ and the WCAB (split panel decision *Sweeney* dissenting) finding that applicant's cumulative trauma claim was barred by the Labor Code §5405 one year statute of limitations. No tolling of statute of limitations based on the fact that applicant had actual knowledge of his right to seek workers' compensation benefits in 2007 or 2008, based on his filing and adjudicating a specific right elbow injury against the Kansas City Royals. In addition, applicant's deposition and trial testimony reflected the fact that he made a correlation between his orthopedic symptoms and

playing professional baseball and that those same symptoms forced him to retire. The WCAB majority also found no requirement by defendant to provide applicant with a *Reynolds* notice since there was no evidence defendant knew of applicant's cumulative trauma injury.

Procedural and Factual Overview: Applicant was employed by several Major League Baseball (MLB) teams from 1993 to 2007. The last MLB team he played for was the Kansas City Royals. The last game he played in for the Royals was on 3/17/2007, when he suffered a specific right elbow injury which effectively ended his MLB career. He continued to play baseball in the Dominican Republic until 2009, when he retired.

With respect to the 3/17/2007 specific right elbow injury with the Royals, applicant filed and adjudicated this claim in Missouri in 2007 and 2008. He received extensive medical treatment, rehabilitation, and temporary disability benefits related to the 3/17/2007 specific injury before he settled the claim in Missouri in 2008. In 2013, applicant filed his cumulative trauma claim in California against defendants, Milwaukee Brewers and the San Francisco Giants, which apparently were the only teams he believed were subject to California jurisdiction. The WCJ determined applicant's CT claim was barred by the Labor Code §5405 statute of limitations. Applicant filed for Reconsideration, which was denied by the WCAB. A writ with the Court of Appeal was also denied.

Determination of the Date of Injury Under Labor Code §5412 for application of the one year statute of limitations under Labor Code §5405: On reconsideration applicant argued that the statute of limitations should be tolled since he was unaware of his right to file for workers' compensation benefits until his attorney advised him of his right to do so in 2013, and that the first medical evidence in the record that he suffered disability due to an industrial cumulative trauma claim was based on a QME report that issued after applicant filed his cumulative trauma claim.

The WCJ concluded and held that by at least 2009, applicant clearly understood that his orthopedic physical symptoms were related to his employment as a professional baseball player, but made a decision not to assert or file a second workers' compensation injury claim against his MLB employers based on his belief that, if he filed another claim, he would be unable to secure future employment contracts with any other professional baseball teams. "Applicant's knowledge regarding his prior specific injury coupled with his physical symptoms, were sufficient to give him knowledge of this CT claim, even absent medical or legal confirmation of the industrial nature of the injury," The WCJ and the WCAB cited and discussed in detail the Court of Appeal's decision in *Basset-McGregor v. Workers' Compensation Appeals Board* (1988) 205 Cal.App.3d 1102; 53 Cal.Comp.Cases 502; 1988 Cal.App. LEXIS 1045.

The WCJ and the WCAB as well as the Court of Appeal elaborated on the determination that the correct date of injury under §5412 for applying the §5405 one year statute of limitations was in late 2008 or 2009, and not 2013, as asserted by applicant as follows:

> The Trial Court observes that, in calculating the commencement date for the one year statute of limitations under Labor Code §5405(a), an injured employee does not have to know whether he has a potential injury claim for either a specific as

opposed to a cumulative trauma injury under Labor Code §5412, the injured employee only needs to know, or in the exercise of reasonable diligence, should have known, that his injury or physical complaints are related to his employment activities. (See *Bassett McGregor*, supra.)

The Trial Court further observes that it is not always necessary that an injured employee obtain medical advice and medical confirmation from a physician that his physical symptoms or injury are employment related, in circumstances where he is already aware that there is an industrial correlation based upon his own lay common sense knowledge, such as when "the nature of the disability" is such that the employee "should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Bassett McGregor*, supra, 472-473, emphasis supplied [by WCJ].)

In the present case, the applicant confirmed that he himself made the correlation that his injury or physical symptoms were caused by his employment as a baseball player, in that he knew that his hands, his right elbow, his right knee and his low back were all injuriously exposed as a result of his pitching activities and as a result of other employment activities, such as batting, running and sliding. The Trial Court notes that the types of physical symptoms and problems which are involved in the applicant's case are not unusual and exotic, and therefore, are the types of injuries and physical symptoms which a lay person, such as the applicant, can easily correlate to his employment activities.

The applicant confirmed at both his deposition and at trial proceedings that he was aware that his physical symptoms were related to his employment by late 2008 or early 2009, but that he did not go ahead and make a claim for workers' compensation benefits against any of his prior employers, with the exception of the 2007 specific injury claim with the ROYALS filed on applicant's behalf, because he felt that if he did file an injury claim during this time frame of 2008 and 2009, that he would not be able to play for any other professional baseball teams. [Citations to record omitted]

No Duty by Defendants to Provide *Reynolds* Notice Issue: There was no duty under Labor Code §5402(a) and *Reynolds v. WCAB* (1974) 12 Cal.3d 726, 39 Cal.Comp.Cases 768 for applicant's employers to notify him of his actual or potential workers' compensation rights resulting in the statute of limitations not being tolled on the cumulative trauma claim. In support of this conclusion and holding the Court stated:

....[T]here were no contemporaneous medical reports/records or team reports from Defendants in evidence demonstrating that Applicant sustained any injury or injurious exposure while in their employ that would have alerted Defendants that they had a duty to investigate and ascertain whether Applicant might be entitled to workers' compensation benefits in connection with any type of work-related injury. Moreover, Applicant went on to play for other teams after leaving his employment with Defendant.

***Polk v. Chargers Football Company, LLC*. 2016 Cal.Wrk.Comp. P.D. LEXIS 23 (WCAB panel decision)**

Holding/Issue: Applicant's cumulative trauma claim for the period of April 22, 2001 through August 30, 2008, was not barred by the statute of limitations since defendant failed to establish that applicant had actual knowledge of his worker's compensation rights at a time earlier than he was advised by a former teammate that he could file a workers' compensation claim in California.

Discussion: Applicant was employed by the San Diego Chargers from April 22, 2001 through August 30, 2008. Both the WCJ and the WCAB on reconsideration held defendant had failed to establish their affirmative defense of the statute of limitations. The WCJ found applicant's testimony credible, that he first learned of his right to file a workers' compensation claim from a former teammate. Defendant claimed that applicant had actual knowledge of his cumulative trauma injury as early as his first training camp. Defendant asserted the team had provided applicant with "notices and materials" as to his right to file a workers' compensation claim from 2001 to 2008. Defendant tried to establish that applicant had actual knowledge of his right to file a workers' compensation claim by introducing selected portions of the Charger's medical authorization form as well as an NFL Player Retirement Plan document.

With respect to the medical authorization document, there was a separate paragraph the WCJ indicated was in much smaller print and without a particular designation, which purported to provide notice of workers' compensation rights. That paragraph specifically provided as follows: ”WORKERS COMPENSATION: I acknowledge that I have received a copy of the updated pamphlet entitled facts about Workers Compensation. I have read this and understand it."

The WCJ emphasized there was no evidence offered as to the actual nature or contents of the pamphlet that was allegedly given to the applicant. Applicant testified he did not recall receiving such information. The WCJ indicated applicant's testimony was not contradicted. As a consequence, the WCJ and the WCAB found this was insufficient evidence to establish applicant had actual knowledge of his right to file a workers’ compensation claim.

***Williams v. Miami Dolphins, San Francisco 49ers, Fireman’s Fund* (2016) 81 Cal.Comp.Cases 816 (writ denied), 2016 Cal.Wrk.Comp. LEXIS 99**

Holding: Both the WCAB and Court of Appeal found that applicant's cumulative trauma claim and nine specific injuries were not barred by the Labor Code §5405 one year statute of limitations even though he filed them approximately 30 years after he retired from playing professional football.

Procedural and Factual Overview: In 2010, applicant filed 12 separate worker's compensation claims. Four specific injuries and a cumulative trauma claim were filed against the San Francisco 49ers and seven specific injuries and a cumulative trauma claim were filed against the Miami Dolphins. There was a bifurcated trial on the issues of statue limitations and jurisdiction. All other issues were deferred. Applicant last played in the NFL in 1981. He then played very briefly

for a few weeks with the Oakland Invaders in the United States Football League in 1983, and never worked again as a professional football player.

In 1982, applicant filed three workers compensation specific injury claims against the San Francisco 49ers. In one of those three cases he was represented by an attorney and in the other two cases applicant represented himself. In the case where he was represented by an attorney, it settled by way of a Compromise and Release for $6,500.00 in 1983. Applicant in pro per also filed a specific injury claim against the Oakland Invaders in approximately 1984. In both 1983 and again in 1995, applicant filed for NFL retirement line of duty disability benefits. He was eventually approved for these benefits. Also in 1989, applicant filed a civil complaint in California Superior Court against the Miami Dolphins and the Green Bay Packers.

With respect to the cumulative trauma injury, the WCJ determined that it was reasonable to infer that applicant obtained knowledge that it caused him permanent disability following his 1995 examination by a physician in connection with his second application for NFL line of duty disability benefits. Medical reports from this physician indicated applicant's disability was directly related to cumulative traumas during his employment as a professional football player in the NFL. The WCJ also concluded that applicant had knowledge of the cause of his permanent disability for more than a year preceding the filing of his Application for a cumulative trauma injury in 2010. However, the WCJ found that the statute of limitations was not tolled since the employers did not provide applicant with the required *Reynolds* notices. The WCJ stated as follows with respect to the *Reynolds* notices:

> As discussed above, it can be inferred from applicant's earlier filing of Applications for specific injuries in 1976 and 1983, that he had a basic and general knowledge of his worker's compensation rights; however, an employer is not relieved of the obligation to provide notice of worker's compensation rights merely because the employee has a basic and general knowledge of worker's compensation. Instead, the employee's knowledge must encompass all the information the employer is obligated to provide upon learning of an injury.

As a consequence, the WCJ found the statute of limitations was tolled until the time applicant actually filed his claims in 2010. Both defendants filed Petitions for Reconsideration asserting that all of applicant's claims should be barred by the statute limitations. In a split panel decision the WCAB affirmed the WCJ's decision with respect to the statue limitations, not barring the applicant's multiple specific injury claims and CT claim.

There was a strong dissent by former Chairwoman Caplane. In her dissent, she emphasized the fact that the preponderance of evidence presented by defendant showed applicant had extensive contact with lawyers and litigation for over 30 years following his retirement from professional football that directly involved statutes of limitations, and claims for worker's compensation or disability as a result of football injuries. This evidence reasonably supports the inference that at some point during those 30 years, and more than one year before filing the pending claims, applicant obtained the requisite knowledge that the statute of limitations might bar additional claims by him for worker's compensation.

Editors Comment: The editor believes the facts of this case are more consistent with the facts in *Rudd v. Oakland Raiders* 2011 Cal.Wrk. Comp. P.D. LEXIS 243 in which the WCAB held that failure of a defendant to give an applicant the required *Reynold's* notice will not automatically toll the statute of limitations where there was evidence applicant was represented by multiple law firms and engaged in extensive litigation as the applicant in Williams did. The writ denied case cited by Chairwoman Caplane in her dissent, *Myer v. WCAB* (2010) 75 Cal.Comp.Cases 1210 as well as *Nairne v WCAB* 2013 Cal.Wrk.Comp. LEXIS 127 another writ denied case also lend support to establishing a viable statute of limitations defense. See also, *Brandes v. San Francisco 49ers* 2016 Cal.Wrk.Comp. P.D. LEXIS 418 (WCAB panel decision). Applicant's claim for a cumulative trauma from 5/11/87 to 2/17/94, was not barred by the Labor Code §5405 one-year statute of limitations even where he signed a sworn and notarized affidavit in connection with an injury settlement with the New York Giants. Also, the fact applicant filed for retirement under the NFL Retirement Fund, did not indicate his application included any information related to his rights to file for workers' compensation benefits. Defendant was also estopped from claiming the affirmative statute of limitations defense since they failed to provide applicant with the required statutory notices under *Reynolds*.

Neu v. Los Angeles Dodgers, et al. **2015 Cal.Wrk.Comp. P.D. LEXIS 603 (WCAB panel decision)**

Holding: Applicant's cumulative trauma claim was not barred by the Labor Code §5405 one year statute of limitations. Moreover, Labor Code §3600.6(e) did not exempt the Dodgers from their obligation to provide applicant with notice of his workers' compensation rights, including a DWC-1 claim form. The WCAB found that applicant was employed by a "California-based team" even though he played for the Dodgers minor league team located in Nevada.

Case Summary: The WCJ found applicant suffered a cumulative trauma involving orthopedic body parts for the period of August 12, 1999 through October 15, 2005. The WCJ also found applicant's claim was not barred by the statute of limitations. Moreover, the Dodgers and their minor league team, the Nevada 51's, were not exempt from their duty to provide applicant with notice of his workers' compensation rights under Labor Code §3600.5(e), applicable to claims filed after September 15, 2013. Defendant filed a Petition for Reconsideration, which was denied by the WCAB who adopted and incorporated the WCJ's Report on Reconsideration.

Discussion: Although the applicant testified at trial that he knew his symptoms even a year before he last played were related to playing baseball, the WCJ and the WCAB found this was insufficient to prevent the tolling of the statute of limitations. With respect to the statute of limitations issue, the WCAB stressed there was no concurrence of disability coupled with the applicant's knowledge that his cumulative trauma claim was industrially caused. There was no dispute there was evidence of disability from the time the applicant stopped playing baseball. However, in this case both the judge and the WCAB found the applicant had never received any medical advice or a medical opinion in the one year preceding the onset of disability that he sustained a cumulative trauma injury. It is insufficient and inadequate that an injured worker knows that his symptoms may be related to his industrial activities. The WCJ and the WCAB also stressed that it is the employer's burden of proof to avoid the tolling of the statute of limitations period to show that the applicant had the necessary knowledge of his workers'

compensation rights more than one year before filing the claim, and in this particular case defendant failed to meet their burden of proof.

Defendant's secondary argument related to Labor Code §3600.5(e) also failed. In essence, defendant argued that it had no obligation to provide applicant with a notice of his workers' compensation rights under §3600.5(e) since his claim was filed after September 15, 2013. However, both the WCJ and the WCAB noted that they found the defense argument had no merit because when applicant was injured in the period of 2005 through 2006, Labor Code §3600.5(e) did not exist and could not apply to his injury. The Board noted that even if they determined Labor Code §3600.5(e) applied retroactively, the Dodgers would not be exempt from these provisions because they are a "California-based team." Defendant argued that because applicant played for a minor league team in Nevada, even though that team was owned by the Los Angeles Dodgers, his employment with the Nevada minor league team would not meet the definition of a "California-based team." (See also, *Stinnett v. Los Angeles Dodgers* 2015 Cal.Wrk.Comp. P.D. LEXIS 644 (WCAB panel decision).

Both the WCJ and WCAB indicated that applicant signed his minor league contract with the Los Angeles Dodgers and that applicant was a California resident. His contract with the Los Angeles Dodgers specifically directed him to perform his employment activities for the Dodgers minor league team in Las Vegas. Moreover, in the 2005 season, applicant played sixteen scheduled games in California for the Nevada minor league team. The Board noted that "All of applicant's professional baseball activities while employed by Los Angeles were subject to the direction and control of Los Angeles, and they were performed for the benefit of that "California-based team." Los Angeles is not exempt from the obligation to provide its employees with notice of their workers' compensation rights when they sustain injury arising out of and in the course of employment."

McCardell v. Chargers Football, Co. et al. **2013 Cal. Wrk. Comp. P.D. LEXIS 65 (WCAB panel decision); see also, California Workers' Compensation Law & Practice §18.53**

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

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

Discussion: The record reflected applicant was a player representative during the 1997 – 2004 seasons and served on the executive committee of the NFL Players' Association during the

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

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

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

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

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

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

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

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

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

Comment: See also: *Brandes v. San Francisco 49ers, et al.,* 2016 Cal.Wrk.Comp. P.D. LEXIS 418 (WCAB panel decision). Cumulative trauma claim from 5/11/87 to 2/17/94, not barred by Labor Code §5405 one-year statute of limitations despite the fact applicant settled a prior workers' compensation claim in New Jersey for $20,000.00 for which he claimed no knowledge of and denied receiving any settlement proceeds in which he was not represented. Also, applicant suffered multiple injuries in California for which he received treatment beyond first aid and loss of time from work. Defendant also had actual and constructive notice of applicant's injuries and failed to provide applicant with a *Reynolds* notice of his potential right to workers compensation; *Weibl v. St. Louis Cardinals* 2012 Cal. Wrk. Comp. P.D. LEXIS 107 (WCAB Panel Decision) Applicant's cumulative trauma claim not barred by the statute of limitations since prior symptomatology and even a prior specific injury insufficient to establish the requisite knowledge requirement of Labor Code section 5412. No evidence applicant received any medical advice that he suffered an industrial cumulative trauma one year before he filed his application. This case has a good discussion of the legal principles and cases related to cumulative trauma cases and the application of the statute of limitations. Also, *Houston Astros v. WCAB (Richard)* (2014) 79 Cal. Comp. Cases 1451 (effect of incompetency on tolling of statute of limitations and whether cognitive impairments effected applicant prematurely dismissing his case.); *Stabler v. KS Adams, et al.* 2015 Cal.Wrk.Comp. P.D. LEXIS 424 (WCAB panel decision) (applicant's claim not barred by statute of limitations).

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

Swinton v. Arizona Cardinals **2013 Cal. Wrk. Comp. P.D. LEXIS 182 (WCAB panel decision)**

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

Factual and Procedural Background: This case involves a bifurcated trial on the issues of injury AOE/COE and the application of the statute of limitations. Following trial, the WCJ found a cumulative trauma injury from February 24, 2000, to March 11, 2006, against the elected defendant, the Arizona Cardinals. In doing so, the WCJ found the one year statute of limitations

under section 5405(a) was tolled and the five year statute of limitations under Labor Code section 5410 was triggered. Defendant filed a Petition for Reconsideration claiming the statute of limitations effectively barred applicant's claim.

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

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

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

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

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

Geren v. WCAB **(2012) 77 Cal.Comp.Cases 999; 2012 Cal. Wrk. Comp. LEXIS 147 (writ denied)**

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

Procedural and Factual Summary: The applicant was a long term employee of Warner Brothers Studio. She was employed as a driver. She filed a cumulative trauma claim alleging injuries to her neck, back and psyche as well as lower extremities from May 6, 2004, to May 6, 2005. Her last day of work was May 6, 2005.

During the course of applicant's deposition, she testified that while working in one department she realized her job was causing injury to her back and neck. She also testified in her deposition that in 2006 she was told by a specific physician that her physical problems were work related. At trial, applicant testified that while she knew her work was causing her physical pain, she did not know she could file a workers' compensation claim until she saw a television commercial discussing the concept of cumulative injury shortly before consulting with an attorney and filing her Application for Adjudication of Claim on November 4, 2010.

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

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

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

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

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

Rudd v. Oakland Raiders/ACE/USA **2011 Cal. Wrk. Comp. P.D. LEXIS 243 (WCAB panel decision)**

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

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

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

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

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

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

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

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

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

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

See also, *Nairne v. W.C.A.B.* 2013 Cal. Wrk. Comp. LEXIS 127 (writ denied). A non-sports case where WCAB reversed WCJ who found defendant was estopped from asserting the statute of limitations defense. The WCAB in reversing the WCJ found applicant had actual knowledge of his workers' compensation rights when he consulted with a civil attorney after receiving a denial. Since defendant paid no benefits and provided no medical treatment, applicant had only one year under Labor Code section 5405 to file a claim for benefits. Since neither applicant nor his civil attorney did so, the statute of limitations barred his claim and defendant was not estopped to assert this affirmative defense. See also, *Stratton v. San Diego Chargers; Zenith North America; Buffalo Bills, PSI* (2014) (WCAB Panel Decision) (Labor Code §5405 limitations period was not tolled and barred applicant's cumulative trauma injury ending in 1973 was not filed until 2012. No evidence employers/teams breached an existing statutory or regulatory duty since CT date was prior to *Reynolds* case and subsequently enacted regulations.

7. Injury AOE/COE

Hyder v. St. Louis Rams **2013 Cal. Wrk. Comp. P.D. LEXIS 56 (WCAB panel decision)**

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

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

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

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

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

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

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

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

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

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

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

Johnson v. Pittsburgh Steelers **2013 Cal. Wrk. Comp. P.D. LEXIS 112 (WCAB panel decision)**

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

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

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

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

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

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

applicant suffered a specific or cumulative trauma injury during his temporary employment in California.

Discussion/Analysis:

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

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

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

> We briefly observe that the WCAB also has extraterritorial jurisdiction over injuries sustained *outside* of California by employees *regularly* employed here. (Lab. Code, 3600.5(a).) However, we conclude as a matter of law that applicant's single trip to California with the Steelers in November 1999 did *not* constitute "regular" employment here. Indeed, if a single business trip of one or two days were to be deemed "regular" employment under section 3600.5(a), this would mean that virtually any work in California, no matter how abbreviated, would constitute "regular employment." Such an interpretation would render "regular" meaningless. (See *People v. Lara* (2010) 48 Cal.4th 216, 227 ["we must follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless"].) Moreover, there is nothing in section 3600.5(a) which suggests that the Legislature intended

to have California's extraterritorial jurisdiction to be almost boundless, i.e., limited only if an employee essentially *never* worked in California. The statutes establishing the scope of the WCAB's subject matter jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (See 9-142 *Larson's Workers' Compensation Law*, § 142.03 (LexisNexis 2012); *Alaska Packers Ass'n v. Industrial Acc. Com. (Palma)* (1935) 294 U.S. 532 [55 S. Ct. 518, 79 L.Ed. 1044, 20 IAC 326]; *King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355 [24 Cal. Comp. Cases 244], cert den., 362 U.S. 928 [80 S. Ct. 753, 4 L.Ed.2d 746](1960).) Therefore, we conclude that California does not have jurisdiction with respect to any injury or injuries applicant might have sustained while playing football *outside* of California.

8. Labor Code 5500.5

Introduction

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

Statutory Definitions:

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

Labor Code section 3208.1 provides as follows:

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

Labor Code section 3208.2 provides as follows:

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

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

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

> Labor Code section 3208.1 provides that a cumulative industrial injury occurs whenever the repetitive physically traumatic activities of an employee's occupation cause any disability or a need for medical treatment. The date of injury for an industrial cumulative trauma injury is defined by Labor Code section 5412, as follows: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." As used in Labor Code section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Worker's Comp. Appeals Bd.* (1991) 235 Cal. App. 3d 463 [56 Cal. Comp. Cases 631]; *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd*. *(Rodarte)* (2004) 119 Cal. App. 4th 998 [69 Cal. Comp. Cases 579].)
>
> Here, the issue presented is whether there were two cumulative trauma injuries with different dates of injury per *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal. App. 3d 329 [38 Cal. Comp. Cases 720] and *Ferguson v. City of Oxnard* (1970) 35 Cal. Comp. Cases 452 (Appeals Board en banc) (separate cumulative injuries occur where "periods of disability and/or need for medical treatment are interspersed within the alleged course of the repetitive activities); or there was a single cumulative trauma with one date of injury (i.e., the first period of compensable temporary disability) because the periods of temporary disability were linked by a continued need for medical treatment under *Western Growers Ins. Co. v. W.C.A.B. (Austin)* (1993) 16 Cal. App. 4th 227 [58 Cal. Comp. Cases 323]. Of course, the number and nature of the injuries suffered are questions of fact for the WCJ or the Appeals Board. *(Western Growers Ins. Co. (Austin),* 16 Cal. App. 4th at pp. 234-235; *Aetna Cas. & Surety Co. (Coltharp)* 35 Cal. App. 3d at p. 341.)
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> When *Western Growers (Austin)* is read in conjunction with the Labor Code section 3208.1 definition of "cumulative injury," the anti-merger provisions of Labor Code sections 3208.2 and 5303, and the holding of *Aetna Casualty (Coltharp),* the following principles apply: (1) if, after returning to work from a period of temporary disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma (i.e., if the occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment), then there are two separate and distinct cumulative injuries that cannot be merged into

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

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

As expressly required by Labor Code section 3208.2, any disability, need for medical treatment or death that results from the combined effects of two or more injuries, either specific or cumulative, or both, all questions of fact and law shall be separately determined with respect to each injury. As can be readily seen by reading cases in this area, each case is very fact specific with the applicable medical history being filtered through the *Austin, Coltharp,* and *Rodarte* cases. See also, *Alea Work Comp Project v. WCAB* (2012) 77 Cal. Comp. Cases 681; 2012 Cal. Wrk. Comp. LEXIS 87 (writ denied) finding of one cumulative trauma injury and not two as asserted by one of two employers/carriers; (see also, *Bass v. State of California* 2017 Cal.Wrk.Comp. P.D. LEXIS 213, where WCAB found one cumulative trauma injury and not two separate cumulative trauma injuries since there was one period of injurious exposure.) *Matthews v. San Diego Chargers et.al.* 2016 Cal.Wrk.Comp. P.D. LEXIS 240 (WCAB panel decision), WCAB found two separate cumulative traumas where there was a one year gap in applicant's employment due to a players strike resulting in cessation of treatment and injurious exposure; *Guillen v. Pro American Premium Tools* 2015 Cal.Wrk.Comp.P.D. LEXIS 662 (WCAB panel decision) (WCAB amended WCJ's decision and found two separate cumulative trauma instead of one cumulative trauma based on two separate periods of TTD).

Interaction between Labor Code Sections 5500.5 and 5412:

In many cases there is understandable confusion engendered by Labor Code section 5500.5 in defining a date of injury or injuries as opposed to injurious exposure. As will be set forth hereinafter, both dates are not synonymous.

Section 5412 was originally enacted to codify the holding in *Marsh v. I.A.C.* (1933) 217 Cal. 338; 19 I.A.C.159. In many cumulative trauma cases it is not the last date of injurious exposure to the harmful work environment that determines the date of injury, but the first date "when the accumulated effects culminate in disability" and the injured worker knows through reasonable diligence, of the industrial origin of the disability." This essentially translates to the formula of both knowledge and resultant disability which are often not simultaneous or synonymous. (See, *State Compensation Insurance Fund v. WCAB (Rodarte)* (2004) 119 Cal. App. 4th 998 [69 Cal. Comp. Cases 579.]

In *Rodarte*, the WCJ and the WCAB found the applicant had knowledge that her disability was caused by her work when she filed a claim in October of 1997. However, she did not "suffer disability" pursuant to Labor Code section 5412 until ten months later on August 7, 1998, which was her last day of work. The lesson of *Rodarte* is that Labor Code section 5412 requires compensable disability and medical treatment. Modified work alone without wage loss does not constitute disability for purposes of Labor Code section 5412 and Labor Code section 5500.5. However, the Court of Appeal did clarify that medical treatment and permanent disability, even without wage loss could constitute "disability" under Labor Code section 5412 and Labor Code section 5500.5.

Liability for an industrial cumulative trauma injury is limited, pursuant to section 5500.5 to those employers who employed the employee during a period of one year immediately preceding either the date of injury, as determined pursuant to Labor Code section 5412, or the last date on which the employee was employed in an occupation exposing him to cumulative injury, **whichever occurs first**. For an excellent discussion and analysis of the genesis and operative effect of 5500.5, see *Stabler v. KS Adams, et al*. 2015 Cal.Wrk.Comp. P.D. LEXIS 424 (WCAB panel decision) (Detailed discussion of the California Supreme Court's en banc decision in *Flesher v. WCAB* (1979) 23 Cal.3d 322, 44 Cal.Comp.Cases 212).

In order to properly determine liability of an employer or employers under section 5500.5, an initial threshold determination must be made as to the date of injury as defined by section 5412 and also the period of injurious exposure. In many situations these could be different dates. Once this initial determination is made, then liability can be properly imposed on the employer or employers who employed the employee during the one year period immediately preceding the date of injury (per Labor Code section 5412) or the last date of injurious exposure, whichever occurs first.

The interaction of 5500.5 and 5412 and calculating the legally correct liability period is challenging both factually and legally especially when an applicant files a CT claim many years after the last date of injurious exposure or conversely gains knowledge of a CT mechanism of injury combined with disability before the last date of injurious exposure. In a recent case, *Villa v. Joe Cardoza Dairy et al.*, 46 CWCR 245 (November 2018), the applicant filed a CT injury to his left knee for the period of 4/7/00 to 9/20/11 more than ten years after suffering a specific injury to the same knee in 1998 and receiving a 32% PD award for the specific injury and having 15 surgeries. He remained employed with the same employer after the 32% award. With respect to the CT, applicant testified at deposition that he first became aware of his ability to file a CT claim when he retained an attorney on 9/4/12.

Two reporting physicians opined applicant suffered a CT for the same period plead in the application, 4/7/00 to 9/20/11. The WCJ relying on *Western Growers (Austin)* and consistent with the medical reporting found applicant suffered a CT from 4/7/00 to 9/20/11. One of the defendants appealed arguing that the correct CT period pursuant to 5500.5 and 5412 was either 12/7/05 to 12/7/06 or 9/4/11 to 9/4/12, with the later CT period ending when applicant first consulted an attorney on 9/4/12. The WCAB granted reconsideration and amended the WCJ's CT date determination under 5500.5 and 5412. The WCAB found applicant had suffered a CT from 9/4/11 to 9/4/12 the end date of the CT being the day the applicant met with his attorney.

The WCAB reasoned that there was no evidence applicant "was aware of the legal concept of a cumulative trauma until he met with his attorney." Prior to meeting with his attorney no physician had ever advised applicant that his symptoms were attributable to or caused by a CT mechanism of injury.

In *Cole v Marconi Conference Center* 2018 Cal.Wrk. Comp. P.D. LEXIS 422, 46 CWCR 247 (WCAB panel decision), the WCAB reversed a WCJ's decision that was based on an opinion from an AME that the 5500.5 liability period was the one year preceding applicant's last day of work and injurious exposure on 8/29/16. Instead, the WCAB ruled that the correct date of injury under 5412 was an earlier date than the last date of work and injurious exposure. The earlier date was on 12/10/14 when she had previously suffered disability caused by work and acquired knowledge she suffered a CT mechanism of injury when she first consulted an attorney on 12/10/14. The WCAB determined the correct 5500.5 liability period was from 12/10/13 to 12/10/14. As a consequence an entirely different carrier became liable for applicant's workers' compensation benefits. The WCAB stated , "Here, the last date of occupational exposure was August 29, 2016. Thus, the decisive question is whether applicant's Labor Code section 5412 date of injury was prior to that date." In cases where an applicant sustains disability and then later obtains knowledge that the disability suffered was industrial, "the date of injury will be the date of knowledge." Conversely, "where applicant already has knowledge that a condition is industrial , but has not yet sustained temporary or permanent disability, as a result of the condition, the date of injury will be the date that applicant finally sustains disability."

To illustrate this point the Board in *Cole* cited *City of Los Angeles v WCAB (Calvert)* (1978) 88 Cal.App.3d 19, 43 Cal.Comp.Cases 1280. In *Calvert* the applicant suffered an industrial heart attack in October of 1971 resulting in his being hospitalized for almost 3 weeks. He returned to work in December of 1971. However the applicant first acquired knowledge of the industrial nature of his disability in 1975. The Court of Appeal found that the "date of injury" for purposes of 5412 was 1975 since that was the first time there was concurrence of both "disability" and "knowledge."

As used in section 5412 "disability" means either temporary total disability or permanent disability which are not synonymous with medical treatment alone or mere symptoms. (*Chavira v. WCAB* (1991) 235 Cal. App. 3d 463 [56 Cal. Comp. Cases 631]; *State Compensation Insurance Fund v. WCAB (Rodarte)* (2004) 119 Cal. App. 4th 998 [69 Cal. Comp. Cases 579].)

For example, a treating physician may prescribe wrist splints and physical therapy as well as modified work but these alone, without any indication of permanent disability or temporary total disability resulting in wage loss, will not be sufficient to establish a date of injury for purposes of Labor Code section 5412. (See generally Hanna Cal. Law of Emp. Inj. and Worker's Comp. 2nd §§4.71, 24.3[6]).

For other cases examples dealing with the interaction of Labor Code section 5500.5 and 5412 please see cases in this outline under the heading "Permanent Disability".

In conclusion, the anomaly of Labor Code section 5412 as used in section 5500.5 can operate to define a date of injury for purposes of determining the statute of limitations and assessing entitlement to benefits, before the last date of injurious exposure under Labor section 5505.5(a).

Totten v. Los Angeles Dodgers, Ace American Insurance **2018 Cal.Wrk.Comp. P.D. LEXIS 366 (WCAB panel decision; Writ denied 10/30/18)**

Issue: Whether California subject matter jurisdiction can be based on the fact applicant played for The Los Angeles Dodgers ("Dodgers") a California-based team during the cumulative trauma period even if applicant never played a game in California for the Dodgers and only played for a number of its minor league affiliates.

Holding: Both the WCAB and the WCJ relying in part on prior WCAB panel decisions in *Stinnett* and *James* held that applicant while playing for Dodger minor league teams located outside of California was deemed to be an employee of the Dodgers a California based major-league team.

Factual Overview: Applicant filed a cumulative trauma for the period of June 1, 2000 to October 25, 2011. During his entire period of employment, he played for minor league teams that were part of the Dodger organization. The Dodgers supervised most, if not all of applicant's employment activities from California. The Dodgers supervision included but was not limited to deciding when the applicant would play, where he would play, and how often he would play, and whether he would play at all. Entered into evidence was a letter from Dodgers which indicated that applicant is "a Dodger minor league player and the program is an investment by the Dodgers and you in your future." Applicant also received bonuses and pay directly from the Dodgers. Applicant was also sent for medical treatment by the Dodgers.

Both the WCJ and the WCAB cited the *Johnson* case, specifically the reference in *Johnson* to the Restatement Second of Conflict of Law section 181 which states "[a] state may award relief to a person under its workers' compensation law if the employer supervised the employee's activities from a place of business in the state."

No evidence was presented that the minor-league clubs or affiliates the applicant played for provided a workers' compensation policy separate from that provided by the Dodgers. Also of significance was the fact there were numerous DWC-1 claim forms for specific injuries suffered by applicant over several years. Each DWC-1 claim form indicated applicant was employed by the Dodgers. Both the WCJ and the WCAB concluded the evidence presented was that of an employment contract with only the Dodgers and the applicant and not the minor league teams.
Moreover, the WCAB stated that subject matter jurisdiction is found over the entire claim and not part and parcel for each Dodger minor-league team applicant played for. Given the fact that the Dodgers are a California employer and employed the applicant during his period of alleged industrial injury, it was found there was California WCAB subject matter jurisdiction over the entire cumulative trauma claim.

Fauria v. Carolina Panthers; Washington Redskins; New England Patriots; Seattle Seahawks **2013 Cal. Wrk. Comp. P.D. LEXIS 543; (WCAB panel decision); see *Fauria v. Carolina Panthers* 2017 Cal.Wrk.Comp. P.D. LEXIS 263 for subsequent decision by the WCAB after Reconsideration finding applicant was not hired in California by the Carolina Panthers.**

Issues:

1. Proper determination of the Labor Code section 5500.5 liability period;

2. Whether there was substantial evidence to establish a portion of the applicant's cumulative trauma claim was suffered in California;

3. Application of the "relation back" doctrine;

4. Impact of California residency on California subject matter jurisdiction when the California residency may have had no relationship to the applicant's actual work for the Seahawks and Patriots.

Factual and Procedural Background: Following trial, the WCJ found applicant suffered a cumulative trauma from July 17, 1995 to February 27, 2008, resulting in 93% permanent partial disability without apportionment and that the Seattle Seahawks and New England Patriots were liable for the benefits through June 2002, pursuant to Labor Code section 5500.5. Both the Seahawks and the Patriots filed separate Petitions for Reconsideration alleging and asserting various arguments and issues. Both Petitions for Reconsideration were granted. The WCAB rescinded the Findings and Award and remanded for further development of the record.

Applicant was employed by the Seahawks from July 17, 1995 to February 28, 2008, and then by the New England Patriots from March 22, 2002 to March 11, 2006. Applicant lived in California through high school and then resided in California from 1995 until 2003 or 2004. He was employed by the Washington Redskins from March 13, 2006 to February 38, 2007 and finally by the Carolina Panthers from September 11, 2007 to February 2, 2008. While employed by the Redskins and Panthers he played no games in California. Applicant testified that while playing for the Seahawks he was treated by team doctors and also underwent surgery in California and Seattle as a result of those injuries.

The basis for the WCJ finding California subject matter jurisdiction was based on Labor Code section 3600.5(a) that the applicant was "regularly employed" within the state and therefore there was jurisdiction for injuries sustained outside of California.

On reconsideration, the WCAB discussed in depth the issue of whether applicant was "regularly employed" in California. The Board noted that while employed by the Seahawks and Patriots, the applicant played only a limited number of games in California. They also noted the only difference between the instant case and the facts in Carroll were that applicant was a resident of California while he was employed by the Seattle Seahawks and New England Patriots.
However, the Board carefully distinguished a number of cases that found that California

residents, who spend a portion of their employment in California, may be "regularly employed within the state." The WCAB distinguished those cases from the facts in the instant case, noting there was no evidence applicant's work for the Seattle Seahawks and the New England Patriots had any connection to applicant's California residence. Also, unlike the other cases discussed and distinguished by the WCAB, there was no evidence the Seahawks or Patriots derived any special or significant extra benefits from the fact applicant may have resided in California during a portion of his employment with the Seahawks and Patriots. The Board stated:

> "There is no evidence that applicant's work for the Seattle Seahawks and the New England Patriots had any connection to applicant's California residence. Nor is there any evidence that those teams benefited from applicant's residency in any way. We must therefore rescind the October 23, 2012 Findings and Award because applicant was not "regularly employed" in California under section 3600.5(a)."

However, the WCAB noted that on remand, even if the applicant was not regularly employed in California, there were still issues as to whether or not he sustained an industrial injury in California or was hired in California and then suffered an industrial injury outside of the state.

Substantial Medical Evidence Issue: The WCAB noted the AME in orthopedics in this case had generally opined the applicant had suffered a cumulative trauma injury over the entire period of his professional sport career. However, "Dr. Morgan did not discuss the mechanism of injury or provide any other information about whether applicant's activities in California contributed to his cumulative injury." The Board also referenced the AME in neurology and again focused on what they perceived as a lack of substantial medical evidence due to the fact that "Dr. Richman did not discuss applicant's injuries in California or the way in which games or practices contributed to applicant's overall cumulative injury." In determining whether or not a medical report constitutes substantial medical evidence as to whether an applicant suffered a cumulative trauma injury or a portion of the cumulative trauma injury in California, the Board stated:

> "The mere observation that football involves physical activity, by itself, is not enough to constitute substantial evidence of injury in California. The AMEs did not explain the way in which individual games contributed to the cumulative trauma or otherwise discuss the issue of injury in California"…[A]n expert's opinion which does not rest upon relevant facts…cannot constitute substantial evidence upon which the board may base an apportionment finding." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal. Comp. Cases 358].)

Whether Applicant was Hired in California: On remand the WCAB also indicated the WCJ must determine whether or not applicant had been hired within the state. If a contract for hire is made in California and the applicant sustains an injury outside of California, the employee shall be entitled to compensation according to the law of California (citing numerous cases). The WCAB also noted that consistent with a long line of California cases an employment contract that is formed over the telephone is deemed a California contract of hire, if it is accepted in California. They noted that for purposes of sections 5305 and 3500.5(a) "a contract of hire may

be formed even if some conditions must still be satisfied after acceptance." They also noted that "a contract may also be formed in California even when particular terms are to be determined later, outside the state."

In this particular case, applicant apparently testified relating to the negotiation and acceptance of his employment contracts and his relationship with his agent.

The Labor Code Section 5500.5 and the "relation back" Issue: The WCAB in discussing Labor Code section 5500.5 liability and what is generally referred to as the "relation back" doctrine stated as follows:

> "Jurisdiction is exercised over applicant's claims against the various defendants, not over a particular span of time. Once the WCJ had determined that the WCAB has jurisdiction over applicant's claim for industrial injury, the relevant time period is the period of liability according to Section 5500.5. Under that statute, liability for a cumulative injury is limited to the employer or employers for whom the applicant worked during the year "immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the …cumulative injury, whichever occurs first." (Lab. Code. § 5500.5(a).) If the WCAB lacks jurisdiction over applicant's claims against the final employer(s) during the period of cumulative injury under section 5500.5, the one year period will be extended back to the time during which applicant was working for an employer subject to California workers' compensation law. (*Ibid,; Whatley, supra;* San Francisco 49ers v. Workers' Comp. Appeals Bd. (Green) *(1996) 61 Cal. Comp. Cases 301 (writ den.*); *Employers Mutual Liability Insurance Co. v. Workers' Comp Appeals Bd. (Patterson)* (1987) 52 Cal. Comp. Cases 284 (writ den.).)

Basically, the WCAB provided guidance to the WCJ that if there was no jurisdiction over a team that employed applicant during the final one year period established by section 5500.5(a), then the WCJ should then work backwards considering applicant's claim against his employer in each preceding year. If the WCJ finds jurisdiction over applicant's claim against a team or teams for a given year, she may issue an Award without evaluating jurisdiction over any earlier employers.

Comment: see *Fauria v. Carolina Panthers* 2017 Cal.Wrk.Comp. P.D. LEXIS 263 (WCAB panel decision) for subsequent decision by the WCAB after Reconsideration finding applicant was not hired in California by the Carolina Panthers.

Huscroft v. Calgary Flames, Fresno Falcons, et al. **2017 Cal.Wrk.Comp. P. D. LEXIS 220 (WCAB panel decision); see also, *Huscroft v. Calgary Flames, Fresno Falcons, et. al*, 2017 Cal.Wrk.Comp. P.D. LEXIS 367 (defense Petition for Reconsideration of the WCAB's May 19, 2017, Decision after Reconsideration).**

Issue: Whether applicant having been hired and played for a California based team during a portion of the alleged cumulative trauma period and not necessarily the Labor Code §5500.5 liability period, provides a basis for subject matter jurisdiction pursuant to Labor Code §§3600.5(a) and 5305 even where applicant was exposed to injurious exposure outside of California.

Factual and Procedural Overview: Applicant was employed as a professional hockey player by several teams. He filed a cumulative trauma for the period of January 17, 1988 to January 12, 2000. In late 1994, during the alleged cumulative trauma period applicant signed an employment contract in California for a California-based team, the Falcons during the National Hockey League Player Lockout and Labor dispute. He practiced with the Fresno Falcons and played in 3 games for them. It appears his employment by the Falcons was during 1994 and 1995. Following his employment with the Falcons, applicant played for several NHL hockey teams and while playing for those teams he played an additional 20 games in California. He also claimed specific injuries in California, including being knocked out in a game in San Jose, breaking his nose, and obtaining a black eye in a game in Anaheim. There was a bifurcated hearing on subject matter jurisdiction.

Following trial the WCJ found that the WCAB did not have subject matter jurisdiction and ordered applicant's claim dismissed on that basis. In finding no basis for WCAB subject matter jurisdiction the WCJ indicated that the applicable Labor Code §5500.5 liability period was 1/12/99 to 1/12/00. During that period the applicant played 3 games in California. The WCJ indicated that under the *Johnson* case the applicant played fewer than 10 games in California during the Labor Code §§5500.5 liability period and, therefore, even though applicant may have suffered injurious exposure in California, it would be deemed de minimus in comparison to applicant's overall work activity and injurious exposure and the last year. The WCJ also distinguished the *Macklin* case as requiring employment by a California team during the last year of a cumulative trauma and not by games played in the state while employed elsewhere.

Applicant filed a Petition for Reconsideration, which was granted by the WCAB. The WCAB reversed the WCJ and found a basis for California subject matter jurisdiction since applicant was hired in California and employed by a California-based team during a portion of the alleged cumulative trauma period and not just the Labor Code §§5500.5 liability period. The WCAB also indicated that the WCJ had erroneously interpreted and applied the *Macklin* case. In that regard the WCAB stated:

> Here, the WCJ writes in his Report that he did not find subject matter jurisdiction under sections 3600.5(a) and 5305 because applicant's California employment occurred outside of what the WCJ concluded was the section 5500.5 "liability

> period" in this case, and he cites the decision in *Macklin* in support of his conclusion. The WCJ's conclusion that *Macklin* requires proof of hiring in California during the section 5500.5 "liability period" in order for the WCAB to obtain subject matter jurisdiction under sections 3600.5(a) and 5305 is incorrect. While the California employment in *Macklin* did occur toward the end of the worker's career in that case, that was *not* a determining factor. To the contrary, the Court in *Macklin* wrote that the "dispositive" factor in that case, which was present in *Johnson*, was that applicant "played for a California team *for a portion of the period of the cumulative injury*." (*Macklin, supra,* 240 Cal.App.4th at p. 1239.) As the evidence shows, applicant's employment by Fresno in 1994 and 1995 was during "a portion of the period of the cumulative injury" that ran the entire length of applicant's professional hockey career from 1988 to January 2000.

The key issue for the WCAB was that applicant was hired in California by a California-based team, and as a consequence that fact alone is a "sufficient connection with California to support WCAB subject matter jurisdictions pursuant to sections 3600.5 and 5305 notwithstanding the number of games applicant participated in while in this state."

With respect to the WCJ's issue that the employers outside of the Labor Code §5500.5 liability period would be denied due process, was negated by the WCAB in that an allocation of liability under Labor Code §5500.5 had not been determined at the trial level since this was only a bifurcated trial on subject matter jurisdiction. The WCAB indicated that the *Johnson* case and decision addresses the due process rights of employers and not subject matter jurisdiction per se.

As a consequence, the WCAB rescinded the WCJ's finding and substituted its own findings, finding subject matter jurisdiction, indicating the remainder of the case was being remanded with all other issues deferred.

Webster v. Montreal Expos **2017 Cal.Wrk.Comp. P. D. LEXIS 78 (WCAB panel decision)**

Issue and Holding: Whether a determination California had a legitimate substantial interest in applicant's cumulative trauma claim based upon an analysis as it applies to a particular defendant as opposed to the entire claim and whether California should decline jurisdiction where an applicant's California-based employment is outside the last year of liability, as determined by Labor Code §5500.5. Both the WCJ and the WCAB held that based on *New York Knickerbockers v. WCAB* 80 Cal.Comp.Cases 1141, 1149 *(Macklin*), where there is employment by a California-based team the WCAB does not have to determine if the other activities in California are sufficient by themselves to make the application of California Workers' Compensation law reasonable, although those activities are more than the one game that *Johnson* concluded was de minimis. Moreover, subject matter jurisdiction based on the facts of this case relates to the entirety of applicant's cumulative trauma claim against multiple employers/defendants and not individual defendants.

Factual and Procedural Overview: Applicant, a professional baseball player, alleged a cumulative trauma claim from August 19, 1985 through September 23, 2000.
He was initially employed by the Minnesota Twins from 1985 until early 1989. In March 1989, the applicant was optioned by the Twins to the Visalia Oaks located in Visalia, California. He traveled to California and signed a contract with the Oaks. He played for the Oaks in 63 games in California and in addition, there were team practices in California. He was with the Visalia Oaks from March 1989 until June 11, 1989.

After leaving the Visalia Oaks, applicant played for several other minor and major league teams before he ended his career with the Montreal Expos on October 31, 2000.

The WCJ found that California had subject matter jurisdiction based upon applicant's employment with a California-based team the Visalia Oaks in 1989. More importantly, the judge and the WCAB found that applicant's last exposure under Labor Code §5500.5 was while he was employed with the Montreal Expos in the year 2000, almost 11 years after he played his last game with the Visalia Oaks on June 11, 1989. Defendant filed a Petition for Reconsideration, which was denied by the WCAB. Defendant advanced two primary arguments. First, the determination of whether California had a legitimate substantial interest to invoke subject matter jurisdiction should apply to each individual defendant and not the applicant's entire claim. Second, that applicant's employment with the Visalia Oaks in 1989 was well outside the last year of liability as determined under Labor Code §5500.5 since it was almost 11 years before applicant played for the Montreal Expos in 2000.

The WCAB adopted the WCJ's Report on Reconsideration in its entirety. The WCAB relied on three cases to deny defendant's Petition for Reconsideration, including *New York Knickerbockers v. WCAB* (*Macklin*) 80 Cal.Comp.Cases 1141, *Gordon v. New York Jets* (2016), and *Stinnett v. Los Angeles Dodgers* 2015 Cal.Wrk.Comp. P.D. LEXIS 644.

With respect to *Macklin*, the WCAB indicated that due to applicant's employment by a California-based team for a period during the applicant's entire employment period as reflected in the CT claim, there did not have to be an independent determination if the other activities in California were sufficient in and of themselves to make the application of California workers' compensation law reasonable.

In *Gordon*, the "…WCAB had subject matter jurisdiction over applicant's claim because he was hired and regularly employed in California by <u>one</u> of his employers during the period of the cumulative trauma." The WCAB pointed out that in *Gordon* there was no requirement that applicant's employment with a California-based team fall in the Labor Code §5500.5 liability period, as applicant's last year of employment in that case was not with the team located in California.

In the *Stinnett* case it was found that California had a significant and legitimate interest in applicant's injury and claim because he was regularly employed by the Los Angeles Dodgers, a California-based employer for a <u>portion</u> of the period of cumulative trauma that caused his injury.

The WCAB in finding that employment by a California-based team at any point in the applicant's cumulative trauma claim was adequate or sufficient to establish subject matter jurisdiction stated as follows:

> Subject matter jurisdiction in this case relates to the entirety of applicant's claim for cumulative trauma. Applicant's employment with the California-based Visalia Oaks is sufficient to establish subject matter jurisdiction over applicant's claim. The fact that applicant was also employed by out-of-state entities does not work to negate California taking subject matter jurisdiction, neither does it operate on a party-by-party basis.

Harper v. Tampa Bay Buccaneers **(2014) 79 Cal.Comp.Cases 595; 2014 Cal. Wrk. Comp. PD LEXIS 62 (writ denied 5/1/14)**

Holding: Where there is no California subject matter jurisdiction over the last employer or employers in the Labor Code section 5500.5 liability period, it is permitted to relate back to an earlier period where there is an employer over which California subject matter jurisdiction may be found. It is that employer who is liable for benefits under Labor Code section 5500.5.

Factual/Procedural Background: Following trial, the WCJ found the applicant suffered a cumulative trauma injury from March 8, 1995 to February 2001, without apportionment resulting in 94% permanent partial disability. Defendant filed a Petition for Reconsideration alleging that no liability should have been found on the part of the Buccaneers since they were outside of the Labor Code section 5500.5 liability period. They also argued the WCJ should have found the applicant's Award was subject to apportionment pursuant to Labor Code section 4663.

The applicant was employed by the Tampa Bay Buccaneers from March 8, 1995 through 1996. After he left the Buccaneers he played for a few teams, usually not for full seasons but only a few games. He played for the Saints in 1997. He did not play at all in 1998. He played three games for the Cowboys in 1999 and then played one game for an XFL team. With respect to any other teams the applicant played for subsequent to the Tampa Bay Buccaneers, there was no basis for California subject matter jurisdiction. The parties stipulated the last team for which applicant played for in California was the Tampa Bay Buccaneers.

The Relation Back Issue: Defendant argued that Labor Code section 5500.5 should be construed and applied to prohibit finding liability for any employer that was outside the last year of injurious exposure and liability under Labor Code section 5500.5. If there was no California subject matter jurisdiction over the last employer or employers under Labor Code section 5500.5, then there should be no relation back or claw back methodology to find liability over an earlier employer.

The WCAB denied defendant's Petition for Reconsideration and adopted and incorporated the WCJ's Report on Reconsideration.

First, there was an issue with respect to whether or not the Tampa Bay Buccaneers were insured or self-insured. At the time of trial there was a stipulation by the parties that the Buccaneers

were self-insured, when in fact they were insured. The WCJ impliedly found, based on the stipulations of the parties, the Buccaneers would be assumed to be self-insured pursuant to the stipulation. Moreover, the WCJ pointed out defendant failed to note or discuss various cases that held that the WCAB could relate back to a previous employer prior to the Labor Code section 5500.5 period in order to find liability were there was no California subject matter jurisdiction for any employer in the last section 5500.5 liability period. The cases cited by the WCAB were *Tampa Bay Buccaneers v. WCAB (Curry)* (2008) 73 Cal. Comp. Cases 944 (writ denied), as well as *Portland Trailblazers v. WCAB (Whatley)* (2007) 72 Cal. Comp. Cases 154 (writ denied). The WCAB and the WCJ also cited *Employer's Mutual Liability Insurance Company v. WCAB (Patterson)* (1987) 52 Cal. Comp. Cases 284 (writ denied).

The WCAB found Labor Code section 5500.5 permits liability to be determined over a prior employer or employers that preceded the last year of injurious exposure under Labor Code section 5500.5. This would permit the WCAB to relate back until they found California subject matter jurisdiction over a particular employer and then impose liability for the entire cumulative trauma, even though the prior employer may have been years before the last date of injurious exposure in the cumulative trauma period.

The WCAB indicated a legislative intent as well as the practical implication that if Labor Code section 5500.5 did not have a relation back proviso, an applicant would be left without benefits even if there was California subject matter jurisdiction over one of the earlier employers.

There are also situations where the "relation back" provision of Labor Code §5500.5(a) can be misapplied. In *Riley v. Kansas City Chiefs* (2015) (WCAB panel decision), the WCAB reversed a WCJ's decision improperly relating back liability to a defendant (the Chiefs) outside of the Labor Code §5500.5 liability period. The New Orleans Saints were in the Labor Code §5500.5 liability period, but had been dismissed without prejudice at applicant's request, but over the Chiefs' objection. There is an extensive discussion by the Board of the Labor Code §5500.5 relation back provision and its proper application. "The provision for relation back in §5500.5(a) has been held to apply when the WCAB does not have personal jurisdiction over an employer during the otherwise applicable liability period and there is no other employer with insurance during that period." (citations)

The Board found there was no valid basis to relate liability back to the Chiefs since there was no finding that the Saints were not insured for workers' compensation and no finding the WCAB lacked personal jurisdiction over the Saints. In fact, during two seasons with the Saints, applicant played games in California.

The author questions whether the result would have been the same if the Saints had been dismissed "with" prejudice and that order of dismissal had become final. (See also, *Anderson v. New Orleans Saints* (2015) (WCAB panel decision), WCAB reversed a WCJ who permitted an improper election that resulted in a misapplication of the "relation back" provisions of Labor Code §5500.5(a).

Apportionment: In the *Harper* case, the WCAB indicated there was no substantial evidence to support apportionment of the applicant's permanent disability award. Defendant's QME, in an

attempt to apportion 20% of the applicant's disability to activities pre-existing or subsequent to the applicant's professional football career, did not adequately explain "how and why" these particular non-industrial factors were a contributing cause of the applicant's overall permanent disability. Moreover, it appears there was an attempt by defendant's QME to apportion on a pro rata basis which is not permitted under Labor Code section 5500.5.

Comment: It is questionable whether or not there would have been the same result in *Harper* subsequent to the Court of Appeal's published decision in *Federal Insurance Company v. WCAB (Johnson)* (2013) 221 Cal.App.4th1116. While applicant was playing for the Tampa Bay Buccaneers, it was unclear whether from a constitutional due process standpoint, if applicant played only a few games in California for the Tampa Bay Buccaneers, California would have a legitimate and substantial interest in providing a forum as opposed to the greater interest of Florida.

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

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

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

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

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

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

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

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

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

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

Practice Pointer: This case as, well as the *Whatley* and *Curry* cases, illustrate the interaction between Labor Code section 5500.5 liability and California subject matter jurisdiction. If the Labor Code section 5500.5 liability period is determined based merely on the last employment and last injurious exposure this would in many cases lead to a result where the applicant would be without a remedy since there would be no California subject matter jurisdiction. Hence, the practical necessity of relating back in time to find an employer where there is California subject matter jurisdiction and injurious exposure and then determining the correct Labor Code section 5500.5 liability period. (See also, *Employers Mutual v. WCAB (Patterson)* (1987) 52 Cal. Comp. Cases 284, 295 (writ denied); *Roundfield v. Washington Wizards, aka Washington Bullets et.al.* 2006 Cal. Wrk. Comp. P.D. LEXIS 26 (WCAB panel decision); *San Francisco 49ers v. WCAB (Green)* (1996) 61 Cal. Comp. Cases 301).

Caveat: It remains to be seen what impact AB 1309 will have on the "rollback" or "relation back" cases and whether a distinction will be made between claims filed before September 15, 2013, or only to claims filed after that date. (See Labor Code § 3600.5 (d)(1).)

9. Contribution

Matthews v. San Diego Chargers et.al. **2016 Cal.Wrk.Comp. P.D. LEXIS 240 (WCAB panel decision)**

Holding/Issues: Whether in contribution proceedings there was one cumulative trauma injury or two separate cumulative trauma injuries and the respective contribution rights and liabilities related to multiple cumulative trauma injuries and prior dismissal of CIGA who had coverage for the entire §5500.5 liability period.

Factual and Procedural Overview: Applicant was employed by the Chargers from 8/3/74-12/29/79, with coverage by Zenith. He was then with the NY Giants from 8/4/80-11/6/81, insured by ESIS. He played for the Dolphins from 12/2/81-1/2/82. Applicant sat out the entire 1982 NFL season because of a player's strike. When he returned to the NFL he played for Denver from 3/6/83-2/2/85, with coverage by Mission Insurance (CIGA) and NRIC. NRIC's coverage for Denver ended on 2/1/84, one day before the second cumulative trauma injury began.

There was a settlement by way of a joint Compromise and Release in 2014, for $75,000.00. Zenith paid $25,000.00 of the settlement and NRIC paid $50,000.00. NRIC evidently paid their portion of the C&R mistakenly believing they had provided coverage for a portion of the §5500.5 liability period that constituted "other insurance" pursuant to Insurance Code 1063.1(c) and CIGA had no liability. It appears CIGA was mistakenly dismissed as a party defendant at or before the C&R was entered into and approved. Both Zenith and NRIC filed timely Petitions for Contribution against ESIS, the carrier for the Giants.

The Arbitration Proceedings: Consistent with the medical reporting from one of the QMEs, the arbitrator found two cumulative trauma injuries relying on the *Coltharp* decision. Initially, the Arbitrator ordered ESIS to pay/contribute $25,000.00 to NRIC. ESIS then filed for reconsideration. In his Report and Recommendation on Reconsideration the Arbitrator recommended that his decision be amended and modified since there was no equitable or legal basis for requiring ESIS to contribute a portion of the money NRIC mistakenly paid as part of the 2014 Compromise and Release. The Arbitrator in that regard stated:

> "He notes that CIGA should not have been dismissed as a defendant, as it appears it would have had stand-alone liability under §5500.5 for the second cumulative trauma injury because Mission was the sole insurer during the last year of applicant's employment. As the Arbitrator now views it, NRIC is not "other insurance" under Insurance Code §1063.1 (c)(9) and it has no liability for the second cumulative trauma injury through February 2, 1985, because its coverage ended outside of the one-year §5500.5 liability period."

Discussion: This case has an excellent and comprehensive discussion of both the *Coltharp* and *Austin* cases and how they both impact the anti-merger doctrine and provisions of Labor Code §§3208.1 and 3208.2. The fact that applicant did not play the entire 1982 NFL season was significant because it was the basis for separating and creating two separate and distinct periods

of cumulative trauma. As a consequence there were separate periods of disability and separate need for medical treatment.

Also of significance is the fact that if CIGA had not been erroneously dismissed, they would have had the entire stand-alone coverage and resultant liability under the last year of injurious exposure for the second cumulative trauma and there would have been no "other insurance." Both Zenith and NRIC should not have prematurely and mistakenly dismissed CIGA at or before the time the Compromise and Release was entered into. It is also assumed for purposes of this case summary that CIGA was dismissed with prejudice.

Garner v. Tampa Bay Buccaneers; Oakland Raiders **2014 Cal. Wrk. Comp. P.D. LEXIS 320 (WCAB panel decision)**

Issue: Whether the arbitrator in contribution proceedings erroneously determined the Labor Code §5500.5 liability period by failing to consider unrebutted medical evidence that applicant's mandatory participation in a vigorous team rehabilitation program and post-injury workouts for the Tampa Bay Buccaneers exposed him to the hazards of a cumulative injury pursuant to Labor Code § 5500.5.

Holding: The WCAB reversed the arbitrator's Findings and Order wherein it was found that the Tampa Bay Buccaneers were entitled to contribution from the Oakland Raiders of 45% of the benefits paid to the applicant. The WCAB found the arbitrator erroneously calculated the Labor Code §5500.5 liability period.

Factual & Procedural Overview: This is a complicated case both factually and procedurally. Applicant started his NFL career in 1994. He was in the NFL until he was terminated by the Tampa Bay Buccaneers on August 30, 2005. Applicant played for the Oakland Raiders for three NFL seasons. He voided his contract with the Oakland Raiders on March 2, 2004, and then signed with the Tampa Bay Buccaneers on March 9, 2004. While playing for the Tampa Bay Buccaneers three games into the 2004 regular season, he suffered a ruptured patella on September 26, 2004, in a game against co-defendant the Oakland Raiders. Two days later he was placed on injured reserve. He underwent surgery to repair his injured patella. While on injured reserve he continued to be paid his regular salary.

Unrebutted evidence established that while applicant was on injured reserve, Tampa Bay expressly advised and informed him that he was required by the terms of his NFL Player Contract to attend mandatory appointments scheduled by the Club's trainer and/or physician and to participate in the team strength and conditioning program, and any other related directives given to him. Applicant testified in detail as to the nature of the Tampa Bay Buccaneers mandatory team rehabilitation program and post-injury workouts. He participated and continued in his rehabilitation program through the 2004 season and into the 2005 season. Prior to the commencement of the 2005 regular season, he participated in mini-camp in late or early May 2005. Also after mini-camp, he participated in organized team activities (OTA's) which consisted of four separate short training camps, each four days in duration. He then reported to pre-season camp in mid-July 2005, and participated in pre-season camp for approximately six

weeks until he was terminated by Tampa Bay on August 30, 2005. He never played in the NFL again.

In 2011, long before the contribution proceedings took place, applicant entered into separate Stipulations with Request for Award with Tampa Bay, with a stipulated Award issuing on October 18, 2011, with Permanent Disability stipulated to be 88%. Subsequently, the Tampa Bay Buccaneers filed a Petition for Contribution under Labor Code §5500.5 seeking contribution from the Oakland Raiders. The arbitrator issued a Findings and Order in 2012, finding the Tampa Bay Buccaneers were entitled to contribution from the Oakland Raiders of 45% of the benefits paid to the applicant.

The Oakland Raiders filed a Petition for Reconsideration, primarily raising the issue that the arbitrator had erroneously determined the liability period under Labor Code §5500.5, and that if it were correctly calculated, the Tampa Bay Buccaneers would not be entitled to any contribution from the Oakland Raiders.

The WCAB granted the Raiders Petition for Reconsideration and reversed the Findings and Order of the arbitrator. The WCAB determined the correct liability period under Labor Code §5500.5 was from August 30, 2004 to August 30, 2005, and not September 26, 2003 to September 26, 2004 as found by the arbitrator.

The WCAB in reversing the arbitrator, indicated the arbitrator failed to consider the unrebutted testimony from the applicant, that he had suffered injurious exposure while on injured reserve for the Tampa Bay Buccaneers from March 28, 2004, until he was terminated by Tampa Bay on August 30, 2005. Moreover, there was unrebutted medical evidence that supported the fact applicant's participation in a mandatory rehabilitation program and post-injury workouts, as well as mini camps and training camps constituted injurious exposure. The panel QME in orthopedics was deposed and confirmed his previous assessment that applicant's rehabilitation program and practices constituted injurious exposure while with the Tampa Bay Buccaneers.

Co-defendant Tampa Bay raised the issue that in the Stipulations with Request for Award and stipulated Award of October 18, 2011, applicant stipulated the end date of the cumulative trauma injury was September 26, 2004 not August 30, 2005. However, the WCAB indicated the stipulated Award was effectuated without the Oakland Raiders participation and was not binding on Oakland. Moreover, Petitions for Contribution under Labor Code §5500.5 constitute de novo proceedings with respect to determining the correct or proper date of injury.

In analyzing and determining the correct Labor Code §5500.5 liability period, the WCAB indicated that Labor Code §5500.5 states the one year liability period dates back from the **earlier** of the Labor Code §5412 date of injury, or the last date of injurious exposure, whichever occurs first. The WCAB indicated that based on the unrebutted medical and testimonial evidence in the case "it appears uncontested in this case that the last date of injurious exposure was earlier than the section 5412 date of injury. Given the fact applicant while on injured reserve was paid full salary and received his full salary until he was terminated by the Tampa Bay Buccaneers on August 30, 2005, there was no compensable temporary disability until applicant suffered a wage loss."

Also the WCAB indicated the arbitrator incorrectly determined which co-defendant had the burden of proof in this case. The WCAB indicated that Oakland did not have the burden of proof, but rather the burden of proof rested with Tampa Bay. It was the Buccaneers burden to show that applicant was not subjected to the hazards of cumulative trauma injury after March 9, 2005.

In finding that the correct Labor Code §5500.5 period was from August 30, 2004 to August 30, 2005, the WCAB reversed the arbitrator's Findings and Order and indicated that Tampa Bay was not entitled to any contribution from the Oakland Raiders.

Gordon v. Oakland Raiders; Atlanta Falcons **2011 Cal. Wrk. Comp. P.D. LEXIS 163 (WCAB panel decision)**

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

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

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

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

The arbitrator erroneously went outside of the Labor Code section 5500.5 period and looked at all periods of employment which included 141 days for the Falcons, 147 days for the Packers,

and 77 days for the Raiders, much of which was outside the Labor Code section 5500.5(a) liability period.

The WCAB indicated that focusing exclusively on the Labor Code section 5500.5 period the Falcons employed applicant for only 2 days as opposed 141 days, if one were to include periods outside the Labor Code section 5500.5 period. Therefore, the WCAB reversed the WCA's decision and found the Atlanta Falcons liable for only 4% reimbursement to the Raiders as opposed to 39%. Also of note is the fact that it was improper to include the Green Bay Packers in the Labor Code section 5500.5 analysis since there appears to have been no California subject matter jurisdiction over the Green Bay Packers and the Packers were not involved in the case in chief before the arbitration proceedings commenced again based on a lack of California subject matter jurisdiction.

10. Permanent Disability

Paddio v. Cleveland Cavaliers; Seattle Supersonics et al., **(WCAB Panel Decision October 1, 2018 ADJ7041227)**

Issues: The two primary issues presented were determination of the correct permanent disability indemnity rate and whether the rate is to be determined by the last date of injurious exposure, as opposed to the date of injury as defined under Labor Code §5412. The other issue was whether applicant was entitled to the Labor Code §4658(d)(2) 15% increase in permanent disability indemnity.

Holding: In terms of determining the correct disability rate, the WCAB held that in cumulative trauma injury cases the last date of injurious exposure does not automatically equate to a "date of injury" for determining the correct indemnity schedule and disability rate. Instead, the WCAB indicated that in cumulative trauma cases, the permanent disability compensation rate is the rate in effect on the date of injury per Labor Code §5412 which by definition may be when the applicant first suffered compensable disability and when the right to claim benefits under a cumulative trauma injury arose.

Procedural & Factual Overview: The ancillary issues in this case related to determining the applicable permanent disability indemnity rate and the 15% increase in benefits pursuant to Labor Code§4658(d)(2). These two issues were left open, when the Board deferred these issues after the primary issue of whether or not the WCAB had subject matter jurisdiction over applicant's claim was resolved in a prior proceeding. In that bifurcated proceeding the WCAB reversed the WCJ and found there was WCAB subject matter jurisdiction over the applicant's entire claim based on the fact that one of applicant's contracts during the cumulative trauma period was formed in California.

Defendant in the instant case contends they were newly aggrieved by the July 10, 2018, decision by the WCAB on reconsideration in that the WCAB "improperly ordered the WCJ to make a determination on benefits due pursuant to Labor Code §4658(d)(2) and improperly instructed the WCJ on the application of Labor Code §5412 in determining the permanent disability benefits rate."

The WCAB's Decision: On remand to the WCJ on the deferred issues, the WCAB ordered further development of the record on determining the correct permanent disability indemnity rate. The Board instructed the judge that based on prior case law, the weekly rate of permanent disability benefits should be based upon the rate in effect on the §5412 date of injury. The WCAB noted the dual operation of Labor Code §5412 which on one hand identifies the date of injury for purposes of the statute of limitations, and also establishes the date for measurement of compensation payable.

On reconsideration, defendant argued that the date of compensable disability (last date of injurious exposure) establishes which indemnity schedule applies. Defendant on reconsideration cited several Court of Appeal cases to support their argument. The WCAB however, carefully

distinguished those cases and contrary to defendant's argument, those decisions established that the correct permanent disability indemnity rate to apply is the one in existence when the right to claim benefits arises, and not necessarily the date of injury i.e., the last date of injurious exposure in a cumulative trauma claim.

In *Argonaut Mining Company v. Industrial Acc. Com.* (*Gonzalez*) (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118] (*Gonzalez*). Applicant's last date of injurious exposure and allegedly his date of injury was in 1928 when he last worked for a mining company. However, the Court of Appeal ruled that the correct date of injury for determining permanent disability benefits and later death benefits was when the applicant first suffered compensable disability in 1948 twenty years after his last date of work and last date of injurious exposure. The reason for the court's ruling was because the applicant had no right to seek benefits until he suffered compensable disability. "When the right comes into existence certain rates are applicable. It would seem that these are the rates by which compensation should be payable." (*Gonzalez, supra*, 104 Cal.App.2d at p. 31). The Court of Appeal applied the same analysis in *Dickow v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762 [38 Cal.Comp.Cases 664]. Applicant suffered a cumulative trauma by way of exposure to dust that led to the development of lung disease. The Court of Appeal held the applicable compensation rate and benefit schedule was that which was in effect when the applicant first sustained compensable disability, as opposed to when his last date of work was, or last date of injurious exposure.

In the instant case, the WCAB indicated that while the examining physician opined that applicant had compensable disability at the time he stopped working as a professional basketball player, the actual record showed that applicant was unaware until later that he could claim workers' compensation benefits due to an industrial cumulative injury. In this situation the WCAB said "it is appropriate to rely upon the section 5412 date of injury as the date for the measure of compensation, consistent with the above cited cases and set forth in the July 10, 2018 decision and others." (citations omitted)

The Labor Code §4658(d)(2) 15% Increase in Permanent Disability.

On reconsideration defendant argued that because applicant did not miss time from work while employed by the Las Vegas Slam, one of the teams he played for, and he continued to work after that employment ended, section 4658(d)(2) should not apply to the award.

However, the WCAB stated that it is irrelevant whether the applicant continued to work while he was employed by the Las Vegas Slam team or even that he continued to work after that employment ended. The Board stated "….4658 does not provide for an exception depending on whether the injured worker requested work, or whether the employer was aware of section 4658 work, or depending upon when the workers' condition became permanent and stationary."

Instead,….. "if the conditions described in section 4658(d)(2) exist, the injured worker is entitled to the increased benefit provided by that section. (See, *Stinnett v. Dodgers* (2015) (October 22, 2015, ADJ8499686 [2015 Cal.Wrk.Comp. P.D. LEXIS 644] (panel dec.); *Horton v. Oakland Raiders* (November 7, 2014, ADJ7826039) [2014 Cal.Wrk.Comp. P.D. LEXIS 592] (panel dec.)."

Hurley v. Sacramento Kings; Vancouver Grizzlies; TIG **2014 Cal.Wrk.Comp. P. D. LEXIS 124 (WCAB panel decision)**

Issues: Whether the 1997 or 2005 Permanent Disability Rating Schedule should be used to rate applicant's permanent disability related to a cumulative trauma injury that had a last date of injurious exposure of July 1, 1998, but with a definable date of injury under Labor Code section 5412 of 2011.

Factual & Procedural Background: Following trial the WCJ found the applicant suffered a cumulative trauma injury from January 1, 1993 through July 1, 1998, resulting in 81% permanent partial disability without apportionment and need for future medical care and treatment. The WCJ used the 1997 Permanent Disability Rating Schedule (PDRS) to determine applicant's permanent disability. Defendant filed a Petition for Reconsideration which was granted. The WCAB rescinded the WCJ's decision in its entirety and remanded the case for further development of the record.

In this case there was really no basis to challenge California subject matter jurisdiction since the applicant played more than 269 games while employed by both the Kings and the Grizzlies, many of those games were played in California. The primary focus of defendant's Petition for Reconsideration was their contention that the WCJ should have applied the 2005 Permanent Disability Rating Schedule as opposed to the 1997 Permanent Disability Rating Schedule.

The WCJ, in finding applicant's permanent disability should be determined using the 1997 PDRS, felt there was an exception under Labor Code section 4660(d) in that defendant was required to provide notice per Labor Code section 4061 given the fact applicant was on paid injured reserve status at some period and defendant had paid salary continuance in lieu of temporary disability. The WCJ reasoned that when the applicant returned to regular duty after each injury, defendant was required to provide notice under Labor Code section 4061. Since they did not, the 1997 PDRS applied as opposed to the 2005 PDRS.

In reversing the WCJ and finding the 2005 PDRS applied, the Board noted that section 4061(a) provides that notice regarding permanent disability indemnity is to be provided to the injured worker "with the last payment of temporary disability indemnity." If a defendant is not obligated to make the last payment of temporary disability indemnity until after January 1, 2005, the section 4660(d) exception to the use of the 2005 PDRS will not apply.

Although the last date of injurious exposure under the cumulative trauma injury was the period through July 1, 1998, the actual date of applicant's injury under Labor Code section 5412 was the date applicant first suffered disability there from and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment. The WCJ determined that applicant did not have knowledge of the cumulative trauma injury until 2011, which was within one year of the date the actual claim was filed. Given this fact "The plain language of section 4660(d) cannot be construed to require a defendant to provide notice to an injured worker about an injury claim that has not yet come into existence".

In this regard the board further stated:

> In that the cumulative injury claim did not exist when applicant was on the injured reserve list in 1994, 1996 and 1998 as described by the WCJ in his Report, defendant had no obligation to provide applicant with a section 4061(a) notice regarding the cumulative injury at those times. In that the cumulative injury claim did not come into existence until 2011, defendant had no obligation to serve any notices concerning that injury claim prior to January 1, 2005. Thus the third exception to the use of the 2005 PDRS described in section 4660(d) does not apply to the cumulative injury in this case, and no other exception has been shown to apply.

Maxwell v. The Los Angeles Rams National Union Fire Insurance Company of Pittsburgh Pennsylvania (Third Party Administrator Chartis, Seattle Seahawks; Phoenix Cardinals) **2013 Cal. Wrk. Comp. P.D. LEXIS 498**

Holding: Applicant deemed 100% permanently totally disabled under LeBoeuf v. WCAB not withstanding having only 52 days of employment for the Los Angeles Rams during training camp.

Procedural and Factual Background: Applicant played in the NFL for a number of teams for a cumulative trauma period of 1983 to July 31, 1991. He also played one season in the Canadian Football League after his NFL career ended. He only played for the Los Angeles Rams for 52 days during training camp from June 10, 1991 to July 31, 1991.

The WCJ found the applicant to be 100% permanently totally disabled. Defendants filed a Petition for Reconsideration raising a number of issues with the primary issue being whether applicant was permanently totally disabled based on the fact he could not compete in the open labor market. The WCAB denied defendants Petition for Reconsideration adopting, and incorporating the WCJ's report on Reconsideration.

Discussion: In addition to the 100% permanent total disability finding based in part on LeBoeuf there were a number of provocative side issues.

Following trial the WCAB found applicant's claim was not barred by the statute of limitations but also concluded it was insufficient to establish California subject matter jurisdiction over the Arizona Cardinals based only on the fact the applicant had a California agent. Also the Seattle Seahawks' contract with the applicant had a choice of law and venue provision which the WCJ found unenforceable due to the fact the applicant's contract with the Seattle Seahawks was not signed by his agent even though he was represented by an agent.

Each party chose their own respective QMEs since this was a pre-2005 case. The QMEs were selected in the fields of psychology, orthopedics and neurology. The respective QME in psychology arrived at similar permanent partial disability based on GAF scores of 45 and 42. Both orthopedists found approximately 30% whole person impairment. Both neurologists

diagnosed dementia and imposed the same whole person impairment for headaches and for post-traumatic head syndrome manifesting itself in memory and concentration deficits.

It was of some interest that the defense QMEs in orthopedics and psychology never asked applicant to describe in detail his seven weeks of training camp activity with the Rams. In contrast, applicant testified in detail with respect to the twice a day training camp routine and numerous hits to his head. Defendant put on no rebuttal evidence on behalf of the Rams to rebut the applicant's description of training camp and its attendant rigours. Applicant also had a history of documented concussions even before his 52 days of training camp with the Rams. The WCJ in finding applicant's testimony credible about training camp activities stated, "After all is said and done, petitioner presented no witness to testify that applicant's description of training camp is incorrect or untrue."

Moreover, with respect to the *LeBoeuf* issue and its relationship to providing a basis for determining the applicant was 100% permanently disabled, applicant presented a vocational expert who testified the applicant's math, reading comprehension and problem solving abilities were that of only a third or fourth grader. Defendant put on no vocational rebuttal evidence and did not have a vocational expert. There was no substantial evidence to support apportionment under either Labor Code section 4663 or Labor Code section 4664.

Defendant also argued applicant was only employable in a sheltered employment environment, should preclude a finding of 100% disability which the WCJ and the WCAB rejected based on the reporting of psychologist Rothberg and a vocational expert that applicant was not feasible for any occupation in the open labor market.

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

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

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

Defendant filed a Petition for Reconsideration arguing that the WCJ had erroneously calculated the start date for payment of the 15% increase and applicant's employer, The Georgia Force, was no longer in business and had conducted business outside of the State of California and therefore should be exempt from providing the required notice and payment of the 15% increase. The

WCAB granted defendant's Petition for Reconsideration finding applicant was still entitled to the 15% increase/bump up but the WCJ had erroneously calculated the start date. Therefore, the WCAB issued an amended Findings of Fact that the correct start date for the 15% increase was November 21, 2010, and not August 1, 2007.

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

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

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

Even with the recalculated date, defendant failed to send the required notice and they were still liable and obligated to pay the 15% increase. Moreover, the WCAB indicated there was no authority to exempt an employer from its obligation to provide the Labor Code section 4658(d)(2) notice if they were no longer in business or that its primary business was not conducted in the State of California.

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

Nittel v. San Jose Sharks, Chubb Group **(2010) 76 Cal.Comp.Cases 545; 2011 Cal.App.Unpub. LEXS 4704 (Unpublished Court of Appeal)**

Issue/Holding: Defendant breached duty to applicant pursuant to Labor Code §4061(a) of notice of entitlement to permanent disability at time last payment of temporary disability was made.

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

The Court of Appeal in reversing the WCAB held that while on injured reserve, applicant received his full salary of $40,000.00 pursuant to his Standard Player's Contract. As a consequence, the court held that the employer/defendant had an obligation to provide a section 4061(a) notice and therefore there was an exception under Labor Code section 4660(d) which required the application of the 1997 Permanent Disability Rating Schedule and not the 2005 PDRS.

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

11. APPORTIONMENT

Godfrey v. San Diego Chargers; Great Divide Insurance Company **(2014) (WCAB panel decision)**

Holding: Reporting physicians cannot ignore prior specific injuries where there is documented lost time from work and significant medical treatment and merge those injuries into one cumulative trauma injury. Such a report would not constitute substantial medical evidence.

Factual and Procedural Background: Following trial, the WCJ found applicant suffered 77% permanent disability without apportionment. The WCJ also found applicant was entitled to the 15% increase in permanent disability pursuant to Labor Code section 4658(d).

Over the course of his career, spanning the years 1996 to March 21, 2007, applicant was employed by five different teams. The terminal employer was the San Diego Chargers. From a procedural standpoint, applicant elected to proceed against the Chargers and the other defendants were excused for purposes of trial.

Applicant was a defensive linebacker and also participated on special teams. During the course of his career he had nine surgeries involving his right shoulder, twice to his elbows, as well as his left wrist and bilateral knees. After each surgery he underwent rehabilitation and returned to full duty after being cleared by a team doctor.

However, applicant also testified that as a result of the surgeries he missed games as well as off-season workouts. Specifically, in 2001, while he was playing for the Tennessee Titans, he missed games after he tore his left meniscus and had surgery. While playing for the Chargers in 2005, he missed one game due to a neck injury when he thought his neck was fractured.

Applicant's primary treating physician prepared five reports. There was also a reporting SPQME in orthopedics. The SPQME identified a number of specific injuries and also provided a permanent disability rating for each body part and offered an apportionment determination. Applicant's treating physician, while apparently taking a history of the applicant's numerous specific injuries and related surgeries, still concluded that applicant's permanent disability and current symptomatology were all attributable to one continuous cumulative trauma during the entire period he was employed as a professional football player. Applicant's primary treating physician refused to apportion any of applicant's disability to "non-industrial factors, specific traumas, or to specific injuries/incidences."

Following trial, the WCJ vacated the submission of the case based on the fact applicant's primary treating physician did not have an accurate history of applicant's injuries. The WCJ concluded the reporting SPQME had never worked on a professional athlete case before and appeared to lack an understanding of how to determine the date of injury for a cumulative trauma injury and apportionment. The WCJ ordered the parties to obtain supplemental reports from both physicians. The primary treating physician's supplemental report indicated his opinion with regard to apportionment was unchanged, i.e., that there was only one single cumulative trauma and no specific injuries. The reporting SPQME, in a supplemental report, did provide an

apportionment determination, but emphatically stated that he believed whether the applicant suffered one cumulative trauma versus multiple cumulative traumas or specifics was a legal question and not a medical question.

Following resubmission, the WCJ relied on the primary treating physician's reports and opinions, finding, as indicated hereinabove, 77% permanent disability with no apportionment. Defendant filed a Petition for Reconsideration contending there was an impermissible merger of specific injuries with a cumulative trauma injury and there was a basis for apportionment and also that the San Diego Chargers should not be liable for the 15% increase pursuant to Labor Code section 4658(d).

The WCAB's Decision on Reconsideration: The WCAB granted defendant's Petition for Reconsideration vacating the WCJ's decision and remanding the case for further development of the record. In essence, the Board indicated the opinion of the primary treating physician that there was only one cumulative trauma was clearly not supported by the medical evidence in this case and there was an impermissible merger of specific injuries with a cumulative trauma injury. It was also clear the SPQME's report did not constitute substantial medical evidence. Given the respective reporting of the primary treating physician and the SPQME, the WCAB indicated on remand the parties should attempt to reach an agreement on an AME, or, if that was not possible, then the WCJ should appoint a "regular physician" as provided in Labor Code section 5701 to conduct an examination and to prepare a report.

In criticizing the primary treating physician's analysis and opinion that there was only one indivisible cumulative trauma the Board stated as follows:

> His determination is essentially a finding that there should be no apportionment because it is too difficult. He bases his finding of a single period of cumulative trauma upon the fact that after applicant sustained an injury requiring surgery or other medical treatment, he was cleared to continue playing football by the medical staff on each team. Accordingly to Dr. Fonseca's logic, because applicant played despite his injuries, he could not have sustained any specific injuries. The matter of record of multiple surgeries and periods of rehabilitation where applicant missed games and scheduled work-outs, is an indication of a specific injury. That he was able to continue to play football does not negate the existence of a specific injury.

The WCAB also commented with respect to not only the issue of whether there were possible multiple specific injuries and a cumulative trauma but also whether there might be apportionment pursuant to Labor Code sections 4663 and 4664 as follows:

> Where there is evidence that there are multiple causes contributing to the current level of disability that an apportionment determination be made to parcel out the causes of each source of disability. (Citations)

12. Medical-Legal (Admissibility and Costs)

Burnett v. Anaheim Ducks Hockey Club, et al. *(October 7, 2015; (AHM 0152213); ADJ4558864)* **(trial level decision Findings, Award and Orders).**

Holding: All of applicant's treating physicians' reports were excluded on the basis they violated Labor Code §4062.2 since they were obtained primarily as medical-legal opinions and were disguised as treating physician reports.

Case Summary: The trial judge found jurisdiction and 68% permanent disability after significant nonindustrial apportionment. However, the WCJ also excluded all of the reports of applicant's multiple treating physicians.

In excluding the reports the WCJ emphasized a number of factors. First, the distance applicant had to travel for the multiple evaluations. Second, the fact that all four specialists evaluated applicant on the same day (which suggests that all of the evaluations were scheduled in advance), before the "primary" treating physician could even determine whether other evaluations were necessary. Third, the fact applicant only saw each physician one time.

In excluding the reports the judge stated, "The court believes it is more likely than not that the evaluations were scheduled in order to obtain medical-legal opinions regarding the various injuries alleged by applicant rather than actual medical treatment many years after applicant stopped playing."

Discussion: In many sports cases even when the applicant resides out-of-state they usually have a regular treating physician or physicians in their home state and are covered by insurance. Some applicants' attorneys will bring the applicant out to California and schedule multiple "treating evaluations" on the same day, as was done in this case. Based on the particular facts in this case and similar cases, the reports generated from these "treating physicians" are really medical-legal reports being disguised as treating physician reports. Frequently, three or four examinations are scheduled on the same day with no initial examination by a purported primary treating physician, who in normal circumstances would make referrals out to other medical specialties. To the author this appears to be a clear abuse of the system and it needs to be monitored carefully by the WCAB.

Ransom v. Jacksonville Jaguars **2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB panel decision)**

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

Factual and Procedural Background: During the course of litigation, defendant the Jaguars were named by applicant on a request for a selection of a SPQME evaluator in orthopedics. The SPQME in his initial report indicated that in order for him to complete his evaluation certain

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

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

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

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

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

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

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

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

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

Practice Pointer: This case appears to make a distinction between the affirmative defense of statute of limitations as opposed to subject matter jurisdiction and whether medical-legal costs are reimbursable. The Board indicated that even if one or more of the defendants was successful in establishing the affirmative defense of statute of limitations there would still be liability for reimbursement of medical-legal expenses reasonably and necessarily incurred. However, the WCAB implied the same would not be true if there was a lack of WCAB subject matter jurisdiction. (See, *Ransom v. Jacksonville Jaguars* 2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB panel decision) California subject matter jurisdiction must be determined first before subjecting a defendant to payment of medical-legal costs.) The WCAB ordered defendant the San Francisco 49ers, over which there was no dispute as to California subject matter jurisdiction, to immediately reimburse applicant for medical-legal expenses reasonably, actually, and necessarily incurred to be later adjusted by the parties with jurisdiction reserved. However, the question remains as to whether the 49ers could ever be successful in recovering medical-legal costs in any contribution proceedings absent California subject matter jurisdiction over the Packers and Dolphins.

13. Bifurcated Trials for Dispositive Issues

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

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

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

Applicant suffered an admitted April 17, 2007, psychiatric injury related to a robbery. Defendant provided treatment and then approximately 2 ½ years later notified applicant they were closing her file. Applicant first filed an Application for Adjudication of Claim related to the April 17, 2007, injury on August 29, 2012, which was more than one year from the date of the notice from defendant they were closing there file and more than five years from the date of injury. Based on these facts, State Farm requested a bifurcated trial on their case related to the statute of limitations issue. This request was denied by the WCJ and the matter taken off calendar. Defendant then filed a timely Petition for Removal which was granted by the WCAB.

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

Comment: WCAB rule 10560 does provide that a party upon a showing of good cause is entitled to a bifurcated hearing or trial. This is especially true with respect to any critical threshold or dispositive issue such as the statute of limitations or subject matter jurisdiction. Without the ability for a party to obtain a bifurcated hearing on a critical threshold issue such as subject matter jurisdiction or statute of limitations, they would be exposed unreasonably and unnecessarily to litigation costs and medical/legal costs which they would otherwise, be able to avoid altogether if they prevailed at a bifurcated hearing. It is incumbent upon any party seeking a bifurcated trial to file a detailed petition or points and authorities establishing a good cause for a bifurcated hearing. (See also: *Ransom v. Jacksonville Jaguars* 2013 Cal. Wrk. Comp. P.D. LEXIS 122 (WCAB Panel Decision) and also supporting language in *Federal Insurance Company v. WCAB (Johnson).* See also *Banks v. Cincinnati Bengals* 2017 Cal.Wrk.Comp. P.D. LEXIS 1 (WCAB panel decision). Bifurcated trial on issue of statute of limitations defense.

14. Dismissals

Noble v. Washington Redskins; Dallas Cowboys; San Francisco 49ers et. al. **(7/30/18) (WCAB panel decision)**

Issue and Holding: Whether the Redskins untimely objection to an Order of Rejoinder after a prior dismissal by way of an Order of Dismissal with Prejudice constituted waiver. The WCAB overruled the WCJ and held that the Redskins untimely objection and other actions served to waive their objection to the Order of Rejoinder even when there had been a prior order dismissing them as a party in the case with prejudice.

Factual and Procedural Overview: Applicant's last employer was the Redskins. He also had significant periods of employment with the Cowboys and the 49ers. On 8/20/14, applicant's attorney filed a Petition for Dismissal of the Redskins. It appears the basis for the dismissal was an arbitration award. The Order of Dismissal of the Redskins with prejudice was issued by the Presiding Judge on 9/10/14. There is nothing in the record that applicant's counsel ever filed and served a verified Petition to Rejoin the Redskins. On 3/13/17 a WCJ issued an Order rejoining the Redskins even in the face of the prior 9/10/14 Order of Dismissal with Prejudice. A hearing was scheduled on 5/19/17. The Redskins made no appearance. Another hearing was scheduled on 7/25/17 at which the Redskins appeared for the first time. At the 7/25/17 hearing, counsel for the Redskins made a general appearance and also made no objection to the Order of Rejoinder.

The first time the Redskins objected to rejoinder as a party was in a joint pre-trial conference statement dated 10/19/17. The matter was then set for trial which took place over two days on 12/14/17 and 2/22/18. Applicant testified at both trials. As indicated by the WCAB "The issues of the prior dismissal of the Redskins and the arbitration were raised in post-trial briefing. The Redskins' brief argues that it could not have been validly rejoined to the case because it had been previously dismissed with prejudice. The brief does not explain why the Redskins neglected to raise the issue until trial, approximately 8 months after the Order rejoining them. The brief also argues that applicant should be precluded from bringing his claim in California based upon the arbitration agreement."

The WCJ issued a Findings and Order dismissing the Redskins with prejudice based on no good cause being established by applicant to reverse or overturn the Prior Order of Dismissal with Prejudice of the Redskins on 9/10/14. The WCJ also issued a take nothing on the basis there was no other defendant liable for applicant's injuries pursuant to 5500.5. AA filed a Petition for Reconsideration which was granted by the WCAB. The WCAB reversed the WCJ's decision and found that the Redskins had waived any valid objection to the Order of Rejoinder by not objecting in a timely manner.

The WCAB's Decision: The WCAB initially discussed that a WCJ has broad powers to join interested parties per LC 5703.5(b). They also set forth a general discussion of the law related to dismissals with prejudice. The first defense to an order of rejoinder is the doctrine of res judicata. However, the Board also stressed that the defense and doctrine of "res judicata is not jurisdictional and is subject to waiver if not properly raised by pleading or evidence."

More importantly, the WCAB pointed out the significant difference between a dismissal of an entire action or case versus dismissal of just a party to the action. "A voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties."Subject matter jurisdiction over the dispute as opposed to personal jurisdiction "cannot be conferred by consent, waiver, or estoppel…." Any "order issued after voluntary dismissal of an entire action is void on its face for lack of subject matter jurisdiction, and may be set aside at any time, **the doctrine of waiver does not apply."**

However, when only a portion of an action or case is dismissed or a party is dismissed as opposed to the entire case or action, the Court is only deprived of personal jurisdiction and still has subject matter jurisdiction over the case. **Personal jurisdiction is subject to waiver** such as by a further appearance on the case without objection**.** The Board noted that the Redskins could have easily objected to their rejoinder to the case after receipt of the rejoinder order dated 3/3/17 based on the prior dismissal with prejudice. They failed to do so. They did not object until 10/9/17. There was no explanation why defendant waited almost seven months to assert an objection, nor did they explain their failure to timely object in their Answer to applicant's Petition for Reconsideration.

The WCAB stated that the key question was whether the Redskin's objection to rejoinder was subject to waiver. The Board held that it was subject to waiver based on the fact only a party was dismissed and not the entire action or case by the prior Order of Dismissal with Prejudice issued on 9/10/14. The court still retains subject matter jurisdiction under these circumstances since the order rejoining the Redskins while "presumably erroneous in light of the dismissal with prejudice, was not void on its face for want of subject matter jurisdiction."

By failing to timely object to the rejoinder order of 3/13/17, and raising that issue at the first opportunity, the Redskins waived the issue. The WCAB said the last opportunity the Redskins had to object was at the 7/25/17 hearing when they first appeared on the case subsequent to their rejoinder by the order dated 3/13/17. The Redskins did not object at that time and also made a general appearance. "Instead, they merely requested time to get back up to speed on the case after rejoinder, implying some level of acquiescence or at the very least no objection."

The Redskins also belatedly raised the issue of their being rejoined to the case without AA filing a Petition and without being afforded a hearing on the issue. The WCAB said this may have been a valid objection if it had been timely raised or asserted, but it was not raised by the Redskins until 10/19/17. To compound matters even further, while this issue was listed on the PTCS, it was not listed in the Minutes of Hearing and Summary of Evidence or in the Redskin's post-trial brief. The Board found that under these facts the Redskins waived this issue also.

Comment and suggested practice pointers:

If there is attempt to rejoin any party defendant that has been previously dismissed with prejudice, the involved named party must **immediately** file and serve a verified written objection in the form of a pleading. It is suggested that the pleading be entitled "Objection to Rejoinder after Prior Order of Dismissal with Prejudice." The verified objection must also expressly indicate that a "special appearance" is being made to object to the rejoinder.

Failure to make a special appearance via pleadings or at any appearance on the case may constitute waiver in and of itself.

A party may receive notice of the attempted rejoinder by various methods such as via Petition, letter, Notice of Intention from a WCJ, or an actual Order of Rejoinder issued by a WCJ. If the Petition seeking rejoinder is not verified, this can also be a separate basis to object to rejoinder.

In drafting an "Objection to Rejoinder after Previous Order of Dismissal with Prejudice" consider the following guide:

1. The objection pleading must be verified. Attach and prepare a verification.

2. Make sure your Objection pleading is based upon, but not limited to the following grounds:

    A. The prior Order of Dismissal With Prejudice is res judicata and bars any rejoinder.

    B. There is a lack of both personal and subject matter jurisdiction to rejoin the named party.

    C. Make sure that in your Objection pleading you expressly indicate and include the wording that you are making a "Special Appearance" to object to rejoinder under the case title and again in the body of the pleading.

    D. If an Arbitration Award or agreement is one basis for seeking rejoinder, you should attach to your objection a copy of any favorable arbitration award or agreement and other related documents and request judicial notice.

    E. If the Petition for Rejoinder is not verified, also include that as an independent ground to object to rejoinder.

If any appearance is necessary, you must expressly indicate in the Minutes of Hearing that defendant is making a "special appearance" contesting the personal jurisdiction of the WCAB to set aside the prior final Order of Dismissal With Prejudice.

In light of *Noble*, a party that has been previously dismissed with prejudice can no longer simply assume that an Order of Dismissal with Prejudice that relates only to an individual party as opposed to the entire action or entire case is not subject to challenge or an attempt to set it aside for alleged good cause. In order to avoid any issue of waiver, the party subjected to the rejoinder action must take action **immediately** to oppose any attempt to rejoin any party defendant that has been previously dismissed with prejudice.

Booty v. New York Giants **2014 Cal. Wrk. Comp. P.D. LEXIS 167 (WCAB panel decision)**

Issue: Whether it was improper for a WCJ to dismiss a co-defendant with prejudice even though there was no objection, when there had been no Compromise and Release entered into between the applicant and the dismissed co-defendant.

Holding: Since there had been no Compromise and Release entered into between the co-defendant that had been dismissed with prejudice and the applicant, it was error on the part of the WCJ to prematurely dismiss the co-defendant since there were still triable issues including potential contribution rights among one or more remaining non-dismissed co-defendants.

Factual & Procedural Overview: The applicant filed a cumulative trauma claim against a number of teams and their carriers including the New York Giants, Arizona Cardinals, New York Jets, and the Philadelphia Eagles. In 2011, applicant entered into a proposed Compromise and Release agreement with the Arizona Cardinals and their carrier. However, within a short period of time, the assigned WCJ issued an order suspending action on the proposed Compromise and Release based on a lack of medical reports being filed with the WCAB. The WCJ's order suspending action was maintained at a hearing in the same month. The WCJ indicated she would not approve the proposed Compromise and Release between the applicant and the Arizona Cardinals since there was lack of information to explain the partial settlement involving only one defendant. However, the WCJ dismissed one of the four co-defendants, the Philadelphia Eagles and their carriers based on a joint request by applicant and the Eagles in 2012. No other co-defendant objected to the dismissal.

In late 2013, applicant filed a Petition to Dismiss the Arizona Cardinals and their carrier with prejudice. The Petition was served on all parties of record including co-defendant the New York Giants. The Giants along with the other remaining co-defendants did not object to the dismissal of the Arizona Cardinals. A newly assigned WCJ issued an order dismissing the Arizona Cardinals and their carrier with prejudice. That order was issued on January 12, 2014. There was a hearing scheduled three days later on January 16, 2014, were the parties who appeared learned of the Order of Dismissal with Prejudice had already issued and the case was taken off calendar. Although counsel for the New York Giants was present there was no objection interposed at the hearing to the dismissal of the Arizona Cardinals with prejudice. However, shortly thereafter, co-defendant the New York Giants filed a Petition for Reconsideration indicating the WCJ had erred in dismissing the Arizona Cardinals with prejudice.

In her report on reconsideration the WCJ recommended that reconsideration be denied since the Giants did not timely object to applicant's request to dismiss the Cardinals and its carrier and fact failed to object timely on two occasions. The primary argument raised by co-defendant the New York Giants, was that since no Compromise and Release had been approved between applicant and the Arizona Cardinals, there were still triable issues including dates of injurious exposure and potential contribution.

The WCAB granted the Giants' Petition for Reconsideration and while indicating the WCJ was correct in issuing the Dismissal, the Order of Dismissal should have been without prejudice as opposed to with prejudice.

The WCAB was careful to distinguish a scenario or situation where there was an approved Compromise and Release agreement between the applicant and the Cardinals and it's insured in which case a dismissal with prejudice may have been appropriate. However, in the instant case, there was no Compromise and Release between the Cardinals and the applicant and therefore, there were still potential issues related to the contribution rights of at least one of the remaining co-defendants the New York Giants under Labor Code §5500.5. The potential right of contribution would have been significantly impaired by a dismissal with prejudice. (See also, *Rutledge v. New York Giants* 2013 Cal. Wrk. Comp. P.D. LEXIS 581 (WCAB panel decision) ("informal" dismissal of co-defendants did not bar later re-joinder when there was never a "formal" order of dismissal.)

15. Legislative Developments

Cheerleaders for California based professional sports teams now classified as employees

On July 15, 2015, Governor Brown signed into law AB 202 adding section 2754 to the Labor Code.

It requires that "cheerleaders" for California based professional sports team that play a majority of their games in California be classified as employees for purposes of wage and hour requirements, workers' compensation, as well as California's Fair Employment and Housing Act (FEHA). A California based professional sports team is defined as either a minor or major league team in the sports of baseball, basketball, football, ice hockey, or soccer.

Also, a "cheerleader is specifically defined as an individual who performs acrobatics, dance, or gymnastic exercises on a recurring basis." However, this definition expressly does not include or apply to an individual who is not otherwise affiliated with a California-based professional sports team and is used or utilized during its exhibitions, events, or games no more than one time in a calendar year.

It is also important to note that the new law applies to "cheerleaders" used by California based sports teams whether they are hired directly by the California based team or through a labor contractor or employment agency.

(revised 1/13/19)