WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVON HOUSE*, Applicant*

vs.

GREEN BAY PACKERS; GREAT DIVIDE INSURANCE COMPANY, administered by BERKLEY ENTERTAINMENT*, Defendants*

Adjudication Number: ADJ15657256
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

DAVON HOUSE
PRO-ATHLETE LAW GROUP
BOBER PETERSON & KOBY

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

Defendants have filed a timely, verified Petition for Reconsideration. Petitioner seeks Reconsideration contending it is prejudiced by this Judge's decision of July 3, 2023, finding that Applicant successfully met the burden of demonstrating that California's exercise of jurisdiction is reasonable.

STATEMENT OF FACTS:

Davon House while employed during the period April 1, 2011 through March 19, 2019, as a professional athlete, Occupation Group No. 590, at various cities and states, by the Green Bay Packers from 2011 through 2014 and 2017 through March 19, 2019, and by Jacksonville Jaguars from 2015 through 2016, claims to have sustained injury arising out of and in the course of employment to his head, neck, shoulders, elbows, back, hands, wrists, fingers, hips, knees, ankles, feet, toes, neurological issues, internal issues, psychiatric issues, chronic pain and sleep issues.

At the time of injury, the employer's workers' compensation carrier was Great Divide Insurance administered by Berkley Entertainment.

This matter proceeded to Trial on April 5, 2023. The parties stipulated at the time of Trial that the employer has furnished no medical treatment for the claimed injury. Further stipulations included that no attorney fees have been paid and no attorney fee arrangements have been made.

The sole issue for Trial was whether there is subject matter jurisdiction over this claim. The parties requested, and were allowed time, to file Post Trial Briefs. The Briefs were due on or before April 24, 2023, at which time this matter was submitted for decision.

A Findings of Fact issued on July 3, 2023. Defendants filed a timely, verified Petition for Reconsideration on July 19, 2023. Applicant filed an Answer to the Petition for Reconsideration on July 27, 2023.

DISCUSSION:

Petitioner contends that the Workers Compensation Appeals Board is preempted by federal law from determining when and how a contract of hire is formed with a player in the National Football league. The sole issue for Trial was there is subject matter jurisdiction over this claim. At no time during the trial did Petitioner raise the issue of federal law preemption. Failure to raise an issue at trial with specificity poses a serious question of due process on the party that was not put on notice. Petitioner raised the issue of federal preemption for the first time in its Trial Brief. Respondent was therefore prejudiced because of the lack of opportunity to raise additional issues or present additional evidence on the issue. As such, because Petitioner failed to raise the issue of federal preemption at the time of trial, it should be considered waived.

If however, the WCAB determines that federal preemption is a subcategory of subject matter jurisdiction, this will be addressed as it was in the Findings of Fact. Determination of Subject Matter Jurisdiction is within this Court's purview per statute. Specifically, pursuant to Labor Code §5305, 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 this state at the time of the injury and the contract of hire was made in this state. This case, falls directly under Labor Code §5305 because it involves an issue as whether a contract of hire was made in this state.

Petitioner cites *14 Penn Plaza LLC v. Pyett (2009) 556 US 247, 255*, stating that the "NRA governs federal labor relations law… for the purposes of collective bargaining in respect to rates of pay, wages, hours of employer and other conditions of employment." Conditions of employment refers to cases where employment is established. When the aspects of the employment are sources of contention they then fall within the collective bargaining agreement. Conditions of employment does not involve jurisdictional issues of where the creation of the contract of employment was made. This Court has sole discretion in determining jurisdictional issues in accordance with Labor Code § 5305.

Petitioner mistakenly argues that the Collective Bargaining Agreement (Exhibit F) specifically states that a contract of hire must be in writing. This is not what it says on Page 10

of Exhibit F. It reads as follows:

> "Any agreement between any player and any Club concerning terms and conditions of employment shall be set forth in writing in a Player Contract as soon as practicable." It does not state that a contract of hire must be in writing. Moreover as stated above, this refers to terms and conditions of employment, which does not include contract formation or subject matter jurisdiction. This Court is not persuaded that Federal Law precludes subject matter jurisdiction, specifically contract formation, from being decided pursuant to state law outlined in Labor Code §5305.

Petitioner mistakenly asserts there was no contract offered in the telephone call telling Applicant he was drafted and no contract was accepted. During the telephone call, he was told that he was becoming a Green Bay Packer, and they had his rights; so he could not go with any other team (MOH/SOE 04/05/2023, page 5, lines 12- 14). The applicant agreed to the terms while he was in the state of California (MOH/SOE 04/05/2023, page 8, lines 22- 23), which was during the telephone call. Shortly after the telephone call, the offer and acceptance was confirmed via the fax sent to the applicant's agent (Exhibit 4) and reads as follows:

> Dear Davon: This will serve as notice that pursuant to Article XVI, Section 3 of the CBA, the Club is deemed to have automatically **tendered** you a one year NFL Player Contract with a Paragraph 5 Salary of $330,000. Sincerely, Russ Ball, Vice Present Football Administration Player Finance (emphasis added)

The word "tendered" is used in the confirmation fax. The word "tendered" is defined as "to make a formal written offer." The fax would not have been sent if an offer had not been made during the telephone call, much less if an acceptance was not made. The facts support that an offer and acceptance was made on draft day and an oral contract was formed between Coach Mike McCarthy and the Applicant.

Petitioner argues that pursuant to the En Banc decision in *McKinley v. Arizona Cardinals (2013) 78 Cal. Comp. Cases 23*, the WCAB shall enforce a reasonable mandatory Choice of Law and Choice of Forum Selection Clause contained in a player's contract. As stated in Respondent's Answer, our case differs from *McKinley*. Here, the employment contract was formed in California and the Applicant was a resident of California. In *McKinley*, all of the contracts were formed in Arizona, outside of California's jurisdiction. Thus, the rule in