

McKinley is not applicable in this case. Further, the issue of Choice of Law/Forum was not raised at trial and also should be considered waived.

RECOMMENDATION:

For the reasons stated above it is respectfully recommended that the Petition for Reconsideration be **DENIED**.

Date: August 10, 2023

Laura Mendivel
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION
FACTUAL BACKGROUND

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.

EVIDENTIARY ISSUES

Applicant objected to Exhibit C on the basis of relevance. Defendant contends that the issue for trial is subject matter jurisdiction and the contracts contain a choice of law, choice of forum selection clause, which require the applicant to file claims in Wisconsin. Moreover, the fact that the applicant did file claims in Wisconsin is relevant to whether this Court should exercise subject matter jurisdiction over this claim. Applicant's objection is **OVERRULED**. Exhibit C is hereby **ADMITTED** into evidence.

DISCUSSION

WHETHER THERE IS SUBJECT MATTER JURISDICTION OVER THIS CLAIM

Labor Code §5305 reads, in pertinent part, as follows:

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. Any employee described by this section, or his or her dependents, shall be entitled to the compensation or death benefits provided by this division. (emphasis added)

As such, the issue at hand turns to whether the applicant was a resident of the state of California and that the contract for hire was also made in this state.

The Court assessed the applicant during trial testimony and found him to be credible and therefore, considers his testimony unimpeached and reliable.

The applicant testified that he interviewed for various teams. The Green Bay Packers was one of the teams. The members that were present during the applicant's interview was the head coach, Mike McCarthy; Dom Capers; Joe Whitt, Jr.; Ted Thompson, the general manager; and he was pretty sure Russ Ball was there as well (MOH/SOE 04/05/2023, page 4, lines 22-25). The interview process was long. He did not consider this a normal meeting because of how extensive it was. It was as if they knew that they were going to draft him. The Green Bay Packers talked about how impressed they were with him. They intended on drafting him (MOH/SOE 04/05/2023, page 5, lines 1- 4).

On Draft Day, the applicant was back home in Palmdale, California. Prior to being selected, Coach Mike McCarthy called the applicant to tell him that they were going to draft him. The draft was then announced on television. During the phone 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).

Shortly after the draft, the applicant received a fax that had been sent to his agent. On the fax cover sheet there were two names, Russ Ball and Ken Zuckerman. Mr. Zuckerman was the

applicant's agent. The applicant understood this to mean that he was officially a Green Bay Packer at that time (MOH/SOE 04/05/2023, page 5, lines 19 - 22). Applicant's Exhibit 4 is a fax cover sheet dated May 2, 2011, addressed to Ken Zuckerman, the applicant's agent. The fax number has an 818 area code which is a California area code. The fax was from Russ Ball "Vice President of Football Administration/Player Finance." The second page of Exhibit 4 is a letter that reads as follows:

Davon House 2225 Carolyn Drive Palmdale, CA 93551

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

Here, pursuant to the un rebutted testimony of the Applicant and evidentiary evidence, the applicant was a resident of California at time of telephone call with Coach McCarthy on Draft Day.

Therefore, the question then turns to where the contract for hire was made. Was the contract for hire made orally during the telephone call with Coach McCarthy or when the applicant actually signed the contract? The Applicant testified that in order to play, the applicant had to sign the actual contracts (MOH/SOE, page 6, lines 18-19). When he was under contract with the team, he was a member of the NFL Players Association, and the rules of the collective bargaining agreement were in place (MOH/SOE, page 6, lines 20- 21). It is possible that the applicant was in Green Bay on July 29, 2011, when the contract was signed (MOH/SOE, page 6, lines 23-25).

In general, in order for a contract to be formed there must be an offer, acceptance and consideration, here, the offer was made during the telephone call between the applicant and Coach McCarthy. The applicant accepted the offer and he believed he knew how much he would be paid, which is the consideration of the oral contract. The offer, acceptance and the consideration was confirmed via the fax sent to the applicant's agent (Exhibit 4). A contract of hire, in the workers' compensation context departs from the common law of contracts. In workers' comp, a contract is formed where the acceptance of the offer physically takes place. The physical location of the person accepting the employer's offer is crucial to the determination of whether the contract of hire was formed in this state. An employment contract is deemed to have been made in California

if the act of acceptance takes place in California (*Reynolds Electrical & Engineering Co., Inc. v. WCAB (Egan)* 1966 31 CCC 415.) Here, an oral contract consummated over the telephone on Draft day between the applicant and Coach McCarthy.

California can assert subject matter jurisdiction over a team because the terms of the contract were agreed to in California and the applicant's signing of the formal documents were a condition subsequent. *The Travelers Insurance Co. v. WCAB, (Coakley)* (1967), 68 Cal. 2d 7, 64 Cal. Rptr. 440, 434 P.2d 992); *Bowen, v. WCAB*, (1999), 73 Cal. App. 4th 15.

The applicant signed the contract in order to play, it was signed on July 29, 2011 and this was the condition subsequent to the terms of the oral contract that was made on Draft Day when the applicant was in his home in California.

Defendant contends that the issues of contract formation is precluded by Federal law. This was not an issue raised with specificity at the time of trial and therefore, appears to have been waived. This argument was first raised in Defendant's trial brief. On the other hand, this may fall under the broader category of jurisdiction and whether this Court does in fact have the power to hear the issues presented in this case. Thus, the Court will address Defendant's contention and will not consider it waived.

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.

Defendant 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