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Leonard Webster, Applicant v. Montreal Expos, United States Fidelity & Guarantee, Gallagher Bassett Services, Defendants

W.C.A.B. No. ADJ8803924--WCJ Jeremy Clifft (ANA); WCAB Panel: Commissioners Zalewski, Lowe, Deputy Commissioner Newman

Workers' Compensation Appeals Board (Board Panel Decision)

2017 Cal. Wrk. Comp. P.D. LEXIS 78

Opinion Filed February 2, 2017

NOTICE: CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisio23ns are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

DISPOSITION: [*1] The Petition for Reconsideration is *denied*.

HEADNOTES

WCAB Jurisdiction-Professional Athletes-WCAB affirmed WCJ's finding that California had subject matter jurisdiction over applicant's claim for industrial injuries sustained while playing professional baseball for various teams from 8/19/85 through 9/23/2000, and that applicant's last exposure under Labor Code § 5500.5 was

while he was employed by defendant Montreal Expos, when WCAB found that applicant's employment with California team during period of his cumulative trauma was legitimate and sufficient interest justifying California jurisdiction over entirety of applicant's claim, that, contrary to defendant's contention, California jurisdiction was not precluded by fact that applicant's California employment was outside liability period described in Labor Code § 5500.5, and that amendments to Labor Code § 3600.5 setting forth standard for determining whether California has legitimate and substantial interest in employee's claim for purposes of jurisdiction is applicable to claims filed on or after 9/15/2013 and did not apply retroactively to applicant's claim filed on 9/9/2013. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [*2] [3], 21.02, 21.06, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.01[2].]

COUNSEL: For applicant--Shawn D. Stuckey

For defendants--Colantoni, Collins, Marren, Phillips & Tulk

OPINION BY: Commissioner Katherine Zalewski

OPINION

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Katherine Zalewski

I concur,

Commissioner Deidra E. Lowe

Deputy Commissioner Richard L. Newman

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

FACTS AND INTRODUCTION

Leonard Webster was employed as a professional baseball player and alleges he sustained industrial injury as a result of his employment activities during his career. Applicant began his professional career when he was drafted by the Minnesota Twins in 1985. During his employment [*3] with the Twins, applicant was optioned to the Visalia Oaks in March of 1989 who were located in Visalia, California. Applicant traveled to California and signed a contract with the Visalia Oaks when he arrived. (MOH/SOE page 10, line 21) He then played as a catcher for the Visalia Oaks, participating in 63 games in California in addition to team practices. (MOH/SOE page 6) June 11, 1989 was applicant's

last day of employment with the Visalia Oaks. (Exhibit B, page 2) After leaving the Visalia Oaks, applicant played for several other Minor and Major League teams before ending his career with the Montreal Expos on October 31, 2000. (MOH/SOE page 12, line 5) Applicant filed a claim on September 9, 2013 alleging he sustained a cumulative trauma injury during the period August 19, 1985 through September 23, 2000.

The matter proceeded to trial on August 22, 2016 on the issues of jurisdiction, forum non-conveniens, liability under labor code section 5500.0, and date of injury under Labor Code section 5412.

This WCJ issued an Order, Findings, and Opinion on Decision finding that California had subject matter jurisdiction over applicant's claim based upon applicant's employment with the Visalia [*4] Oaks in 1989. It was further found that applicant's last exposure under Labor Code section 5500.5 was while he was employed with the Montreal Expos. The issue of date of injury under Labor Code 5412 was deferred to a subsequent hearing as insufficient evidence was presented on which to make a finding.

Defendant United States Fidelity & Guaranty c/o Gallagher Basset Services, the insurer for the Montreal Expos, is aggrieved of this WCJ's decision and filed a timely and verified Petition for Reconsideration contending that this WCJ erred by finding California has jurisdiction over applicant's claim.

II

DISCUSSION

Petitioner initially argues that California has adopted a governmental interest analysis test for the purpose of resolving issues involving conflict of laws and cites to the case of *Reich v. Purcell* (1l967) 67 Cal.2d 551 This case applies to choice of law issues as to what law is applied. The issue before the Court involves subject matter jurisdiction, not what law is appropriate to apply.

Furthermore, petitioner argues that this WCJ's finding that California had a legitimate and substantial interest in applicant's cumulative trauma injury should be based only upon an analysis as [*5] it applies to that defendant personally and not the entire claim. As the dispute involves subject matter jurisdiction, the finding of a legitimate and substantial interest to invoke subject matter jurisdiction should apply to applicant's entire claim, not select defendants as petitioner argues. As discussed below, this WCJ found that applicant's employment with a California team is a legitimate and sufficient interest for the Court to assert subject matter jurisdiction over the claim.

Petitioner's second argument is that it California should decline jurisdiction where an applicant's California-based employment is outside the last year of liability as determined under Labor Code section 5500.5. They argue that "In the absence of employment by a California-based employer in the "critical year" of cumulative injury under *Labor Code* § 5500.5, California must look to some other measure for determining whether employment by a California based-team outside the last year of CT injury constitutes a reasonable relationship." Petition for Reconsideration, page 9.

Applying petitioner's argument to a hypothetical, an applicant could potentially be employed by a California-based team for 10 years, [*6] then an out of state team for his final 11th year which participates in games in California. Assuming applicant to have suffered a continuous trauma claim beginning with his California employment, under petitioner's argument, applicant would be required to show some other relationship in order to bring his claim in California than his prior regular employment in California.

This WCJ disagrees with petitioner's narrow reading of the *Macklin* decision that would require that applicant's California employment be in the liability period of Labor Code section 5500.5 for the court to assert subject matter jurisdiction.

The Court in *Macklin* stated that "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 de minimis." *New York Knickerbockers v. Workers' Comp. Appeals Bd.*, 80 Cal. Comp. Cases 1141, 1149.

The *Gordon* case also involves an applicant who sustained a cumulative injury, with the Court finding that the "...WCAB has subject matter jurisdiction [*7] over applicant's claim because he was hired and regularly employed in California by one of his employers during the period of cumulative trauma." *Gordon v. New York Jets* (2016) ADJ7394846 The *Gordon* opinion did not require that applicant's employment with a California based team fall in the liability period of Labor Code section 5500.5, as applicant's last year of employment in that case was not with a team located in California.

In *Stinnett*, the Court found that "California has a significant and legitimate interest in applicant's injury and claim because he was regularly employed by Los Angeles [Dodgers], a California-based employer, for a portion of the period of cumulative trauma that caused his injury. *Kelly Stinnett v. Los Angeles Dodgers*, 2015 Cal. Wrk. Comp. P.D. Lexis 644

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 [*8] on a party-by-party basis.

Finally, petitioner argues that Labor Code section 3600.5(d)(1)(a) should be applied to applicant's case. Labor Code section 3600.5 was amended to apply only to claims filed on or after September 15, 2013. The *Johnson* decision stated in footnote 10 of that opinion that "This amendment does not apply retroactively." *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*), 21 Cal. App. 4th 116, 1130 Applicant's claim was filed on September 9, 2013, making the amendment of AB1309 inapplicable to applicant's case.

As the amendment to Labor Code 3600.5(d)(1)(a) was clearly limited to those cases filed after September 15, 2013, petitioner's suggestion that the amendment creates a benchmark for California determining a legitimate and substantial interest in applicant's claim by which jurisdiction can be asserted would effectively work to apply the statute retroactively to applicant's case. This was clearly not intended by the plain language of the statute, and would not conform with the case law cited above.

RECOMMENDATION

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

Jeremy Clifft

Workers' Compensation Administrative Law [*9] Judge

Dated: December 23, 2016