WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENNIS MCKINLEY, ***Applicant,*** **vs.** **ARIZONA CARDINALS; THE TRAVELERS INDEMNITY COMPANY,** ***Defendants.***	**Case No. ADJ7460656** **(Santa Ana District Office)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

INTRODUCTION

We previously granted reconsideration of the August 7, 2012 Finding and Order of the workers' compensation administrative law judge (WCJ) in order to allow further study of the issues regarding applicant's claim of cumulative injury while employed by defendant Arizona Cardinals as a professional football player from 1999 to 2003.[1] Thereafter, the Chairwoman of the Appeals Board upon a majority vote of its members assigned this case to the Appeals Board as a whole for an en banc decision in order to secure uniformity of decision in the future on the important legal issues presented.[2] (Lab. Code, § 115.)

Based on our review of the relevant statutes and case law, we hold 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'

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[1] The earlier October 22, 2012 Opinion and Order Granting Reconsideration erroneously states that defendant petitioned for reconsideration of the August 7, 2012 decision of the workers' compensation administrative law judge. In fact, applicant is the party that sought reconsideration, and that clerical error is hereby corrected nunc pro tunc. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145] [clerical error may be corrected by Appeals Board nunc pro tunc at any time without further proceedings].)

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit.8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

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. A party challenging the validity of a mandatory forum selection clause shall bear the burden of showing that the clause is unreasonable.

In this case we affirm the WCJ's decision to decline to exercise jurisdiction over applicant's injury claim. Applicant's employment contracts were made in Arizona and the parties included within them a reasonable mandatory forum selection clause specifying that claims for workers' compensation would be filed in Arizona. There is limited connection to California with regard to the employment and the claimed cumulative injury, consisting of a five-day training camp and seven games. By contrast, applicant resided in Arizona where the Cardinals were based during his four years of employment, and he regularly performed most of his work duties in that state where the team played half of its games during that time period.

OVERVIEW

Applicant played professional football for four years with the Arizona Cardinals (Cardinals) from 1999 to June 24, 2003. The Cardinals are a National Football League (NFL) team based in Arizona, where the players regularly train and practice for games. During the four years applicant was employed by the Cardinals, the team played a total of 80 games; 40 of them in Arizona and the remainder in 16 other states, including 7 games in California. (Applicant's Exhibit 7.)

According to the May 8, 2012 Minutes of Hearing (Minutes), applicant testified that in the summer of 2010 he heard from another former NFL player, Michael Jameson, that he could file a workers' compensation claim of cumulative industrial injury in California and he "called his attorney a few weeks later." (Minutes 9:19-20.). On September 14, 2010, applicant filed an Application for Adjudication of Claim, alleging that he incurred industrial injury to multiple body parts as a result of "cumulative injury" incurred while playing and practicing for the Cardinals during the four year period ending in 2003.

Applicant's claim proceeded to hearing before the WCJ on May 8, 2012. One of the issues identified in the Minutes is "jurisdiction." The Cardinals contend that the California Workers' Compensation Appeals Board (WCAB) should decline to hear applicant's workers' compensation claim

because each of the three employment contracts he signed with the Cardinals contains an identical forum selection clause as follows:

> "This Contract has been entered into in the State of Arizona and in no other state, and the parties acknowledge that the Player's principal place of employment shall be within the State of Arizona and in no other state. *Claims for workers' compensation shall be filed with the Industrial Commission of Arizona*, and the parties agree that they shall be subject to the workers' compensation laws of the State of Arizona and of no other state." (Joint Exhibits X, Y, Z; emphasis added.)

In his August 7, 2012 decision, the WCJ found that the WCAB "has jurisdiction over applicant's claim," but that "Applicant's contacts with California are not sufficient to warrant exercising the Board's jurisdiction in light of applicant's contractual agreement with his employer to file his workers' compensation claims in Arizona." Based upon those findings the WCJ further ordered that applicant "take nothing" on his claim for California workers' compensation benefits, which is tantamount to dismissal of the claim.

Applicant petitioned for reconsideration of the WCJ's August 7, 2012 decision, contending that the WCAB has jurisdiction to adjudicate his claim, that his connection with California is sufficient to support a claim for workers' compensation benefits in California, and that the forum selection clause in his employment contracts is not enforceable under California law.

DISCUSSION

I. THE WCAB HAS JURISDICTION TO DETERMINE IF IT WILL ADJUDICATE APPLICANT'S WORKERS' COMPENSATION CLAIM

A. California Has Personal Jurisdiction Over The Defendant.

Due process requires that a defendant have certain minimum contacts with a state so that the maintenance of an action in the state does not offend traditional notions of fair play and substantial justice. (*International Shoe Co. v. Washington* (1945) 326 U.S. 310 [66 S. Ct. 154, 90 L. Ed. 95].) In this case, defendant purposefully availed itself of the privilege of conducting business in California by taking deliberate action to play games in California and has created continuing obligations to residents of the state by scheduling future games in the state. California has personal jurisdiction over the Cardinals. (*Martin*

v. Detroit Lions, Inc. (1973) 32 Cal.App.3d 472 [Michigan professional football team conducted sufficient economic activity within California for the trial court to have personal jurisdiction over it in football player's suit for contractual salary]; *Ballard v. Savage*, 65 F.3d 1495 (9th Cir. 1995).)

B. The WCAB Has Jurisdiction To Determine If It Is The Proper Forum To Adjudicate Applicant's Workers' Compensation Claim.

We do not reach the question of whether applicant's claimed cumulative injury is sufficiently connected with California to support the exercise of jurisdiction by the WCAB because we act in accordance with the parties' reasonable mandatory agreement that claims for workers' compensation shall be filed with the Industrial Commission of Arizona. (See, *Matthews v. National Football League Management Council* (9th Cir. 2012) 688 F.3d 1107, 1114 [77 Cal.Comp.Cases 711] (*Matthews*) ["Matthews may be correct, as a matter of fact, that every game (or at least most games) contributed to his cumulative injuries, but it is not clear that, as a matter of California law, this means he falls within the category of employees to whom California extends workers' compensation coverage."]; *Chicago Bears Football Club, Inc. v. Haynes* (2011) 816 F.Supp.2d 534 [no reason to consider California public policy when construing NFL player's employment agreement made in Illinois where team is located and the agreement was "substantially performed" because agreement provides that Illinois law governs its construction]; *Atlanta Falcons v. The National Football League Players Association* (N.D.Ga. Nov. 5, 2012, Civ. A. No. 1:12-CV-753-TWT) 2012 U.S. Dist. Lexis 158057 ["The Players have not shown an 'explicit, well-defined, and dominant public policy' in California against arbitral awards enforcing agreements to seek workers' compensation benefits in Georgia instead of in California when the Players only have a limited connection with California."]; but see *Miami Dolphins, Ltd. v. Newson,* 783 F.Supp.2d 769 (W.D. Pa. 2011) [no basis to enjoin former NFL player for Florida team from pursuing claim for workers' compensation in Pennsylvania]; *Cincinnati Bengals, Inc. v. Khalid Abdullah* (S.D. Ohio Apr. 28, 2010, Case no. 1:09-cv-738) 2010 U.S. Dist. Lexis 54102 [no basis for injunction because merits of Bengals' legal challenges to be determined by California tribunals].)

Under California's workers' compensation law, benefits are to be provided for industrial injuries sustained in California when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4;

Lab. Code, §§ 3600 et. seq., 5300 and 5301.) The statutes establishing the scope of the WCAB's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244], cert den., 362 U.S. 928 [80 S.Ct. 753, 4 L.Ed.2d 746] (1960) ["The [California Workmen's Compensation] Act applies to all injuries whether occurring within the State of California, or occurring outside the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California."] (*King*).)

The jurisdiction of the WCAB extends not only to "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 of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592 [24 Cal.Comp.Cases 274].)

In this case, applicant argues that his workers' compensation claim should be adjudicated in California because some portion of the injurious exposure said to have caused the claimed injury occurred during the five-day training camp and in the seven football games the Cardinals played in California during his four years of employment.

In earlier cases that did not involve a forum selection clause, the WCAB exercised jurisdiction over claims of cumulative industrial injury when a portion of the injurious exposure causing the cumulative injury occurred within the state. (See, e.g., *Rocor Transportation v. Workers' Comp. Appeals Bd.* (*Ransom*) (2001) 66 Cal.Comp.Cases 1136 (writ den.) [WCAB jurisdiction over California resident truck driver's claim of cumulative trauma injury]; *John Christner Trucking v. Workers' Comp. Appeals Bd*. (*Carpenter*) (1997) 62 Cal.Comp.Cases 979 (writ den.) [same]; *Portland Trailblazers v. Workers' Comp. Appeals Bd.* (*Whatley*) (2007) 72 Cal.Comp.Cases 154 (writ den.) [WCAB jurisdiction over professional athlete's claim]; *Washington Wizards v. Workers' Comp. Appeals Bd.* (*Roundfield*) (2006) 71 Cal.Comp.Cases 897 (writ den.) [same]; *Injured Workers' Ins. Fund of Maryland v. Workers' Comp.*

Appeals Bd. (*Crosby*) (2001) 66 Cal.Comp.Cases 923 (writ den.) [same].)[3]

Moreover, even if jurisdiction over an injury claim is not exercised, the WCAB has jurisdiction to determine if it is the proper forum to adjudicate an injury claim. (*Scott v. Industrial Acc. Com.* (1956) 46 Cal.2d 76 [21 Cal.Comp.Cases 55]; *La Jolla Beach & Tennis Club v. Industrial Indem. Co.* (1994) 9 Cal.4th 27 [59 Cal.Comp.Cases 1002].)

Consistent with the above, we conclude that the WCAB has jurisdiction to determine if it is the proper forum to adjudicate applicant's claim for workers' compensation and we accept the WCJ's finding of jurisdiction, albeit without specific reference to Labor Code section 3600.5(b) which is cited in the finding.[4]

In his August 7, 2012 decision, the WCJ found that the WCAB "has jurisdiction over applicant's claim pursuant to *Labor Code* §3600.5(b)." (Italics in original.) However, section 3600.5(b) does not confer jurisdiction over an injury claim. Instead, the WCAB generally has jurisdiction to adjudicate a claim of industrial injury when there is sufficient connection with California, as noted above. (Lab. Code,

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[3] The WCAB has also exercised jurisdiction over specific industrial injuries occurring outside of California's territorial boundaries in cases where the injured worker had more than limited connection with the state. (See, e.g., *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15 [64 Cal.Comp.Cases 745] (*Bowen*) [California resident injured while playing professional baseball for minor league Florida team under contract made in California]; *Koleaseco, Inc. v. Workers' Comp. Appeals Bd.* (*Morgan*) (2007) 72 Cal.Comp.Cases 1302 (writ den.) [California resident husband and wife truck drivers' runs were mostly to the west coast and most of those to California]; *Rocor Transportation v. Workers' Comp. Appeals Bd*. (*Hogan*) (1999) 64 Cal.Comp.Cases 1117 (writ den.) (significant portion of California resident truck driver's workdays were within state]; *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd*. (*Patti*) (1999) 64 Cal.Comp.Cases 98 (writ den.) [California resident truck driver's home terminal within the state and he drove within the state]; *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd.* (*Keller*) (1998) 63 Cal.Comp.Cases 1527 (writ den.) [California resident truck driver regularly picked up and returned loads to home facility in California)].)

[4] Further statutory references are to the Labor Code. Section 3600.5(b) provides in full as follows:

"Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of such other state. The benefits under the Workers' Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

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

§ 5300; *King*, *supra*; footnote 3, *supra*.) Within that context, section 3600.5(b) provides that an employee who has been hired outside of this state and his employer shall be *exempt* from California's workers' compensation laws *if* all of the following four conditions are satisfied: (1) the employee was only temporarily working in California; (2) the employer furnishes workers' compensation insurance under the workers' compensation or similar laws of another state; (3) the other state's workers' compensation or similar laws cover the employee's temporary 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. (See, *Dailey v. Dallas Carriers Corp.* (1996) 43 Cal.App.4th 720, 727 [61 Cal.Comp.Cases 216] ["California law does not apply to a foreign worker if the worker is covered by insurance from the other state, the extraterritorial provisions of California law are recognized by the other state, and California workers and employers are exempted from the other state's workers' compensation laws."].)

In short, section 3600.5(b) *exempts* certain employers and employees from coverage under California's workers' compensation statutes and does *not establish* jurisdiction over applicant's claim, as the WCJ's August 7, 2012 finding might be read. However, the finding is ambiguous in addressing the effect of section 3600.5(b), and it may also be construed to mean that the record does not support a conclusion that applicant's claim is exempt from WCAB jurisdiction pursuant to section 3600.5(b). In fact, the latter construction appears to be what the WCJ intended with the finding, as shown by his discussion of section 3600.5(b) in his Opinion on Decision (Opinion) in pertinent part as follows:

> "Labor Code §3600.5(b) exempts such claims from California jurisdiction only if several specific requirements are met, and it is the employer's burden to show the requirements were met. In the present case, defendant did not offer any evidence on any of the conditions that would allow it to escape jurisdiction under §3600.5(b)."

The WCJ concluded that defendant did not prove the conditions specified in section 3600.5(b) that are necessary to exempt an injury claim from WCAB jurisdiction, and we affirm that finding. We further affirm the WCJ's implicit conclusion that the WCAB has jurisdiction to determine if it is the proper forum

to adjudicate applicant's workers' compensation claim of cumulative injury in light of the parties' agreement that all workers' compensation claims would be filed in Arizona.

In addressing the issue of jurisdiction it is important to note that during applicant's four years of employment by the Cardinals the team played 40 of its games in Arizona and 40 of its games in 16 other states, including California, Colorado (Denver Broncos), Florida (Miami Dolphins and Jacksonville Jaguars), Georgia (Atlanta Falcons), Illinois (Chicago Bears), Maryland (Washington Redskins), Minnesota (Minnesota Vikings), Missouri (Kansas City Chiefs and St. Louis Rams), North Carolina (Carolina Panthers), New Jersey (New York Jets and New York Giants), Ohio (Cincinnati Bengals), Pennsylvania (Philadelphia Eagles), Texas (Dallas Cowboys), Washington (Seattle Seahawks) and Wisconsin (Green Bay Packers). (See, Applicant's Exhibit 7.)

Thus, under applicant's theory that each and every game in which he played contributed to the injurious exposure that caused his claimed cumulative injury, at least 16 other states besides California could have concurrent jurisdiction over the claim for workers' compensation.[5]

In that there are 16 other states that could potentially exercise jurisdiction over applicant's cumulative injury claim for workers' compensation, we carefully consider whether that claim is properly adjudicated in California. The answer to that question also implicates the exclusive remedy aspect of workers' compensation that is part of California law and the similar laws of most states. (Lab. Code, § 5300; *Shoemaker v. Myers* (1990) 52 Cal.3d 1 [55 Cal.Comp.Cases 494]; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148 [52 Cal.Comp.Cases 27]; *Castro v. Fowler Equip. Co.* (1965) 233 Cal.App.2d 416 [30 Cal.Comp.Cases 145]; 6-100 *Larson's Workers' Compensation Law,* § 100.01 and Digest § 100.01D[1] n. 2 (LexisNexis 2012); see generally, Roquemore, *Creating A Level Playing Field: The Case For Bringing Workers' Compensation For Professional Athletes Into A Single Federal System By Extending The Longshore Act* (2011) 57 Loy. L. Rev. 793.)

[5] We recognize that some states may not allow a workers' compensation claim of cumulative injury or may not allow a workers' compensation claim by a professional athlete. However, this does not change the fact that only a small portion of applicant's claimed injurious exposure occurred in California and numerous other states could potentially assert concurrent jurisdiction over applicant's claim for workers' compensation benefits under the concept of cumulative injury.

II. THERE IS LIMITED CONNECTION WITH CALIFORNIA WITH REGARD TO THE EMPLOYMENT AND CLAIMED CUMULATIVE INJURY

Applicant contends in his Petition For Reconsideration that the WCAB should hear and decide his claim for workers' compensation because he participated in a five-day training camp in La Jolla, California and played in seven football games in the state during his four years of employment by the Cardinals. In view of this limited connection with California, and in light of the Arizona forum that applicant and the Cardinals reasonably identified in their employment contracts, we decline to exercise jurisdiction over his claim for workers' compensation.

Applicant's primary connection during his four years of employment by the Cardinals was with the State of Arizona. The Cardinals' home base is in Arizona and that is where the team is headquartered. Applicant regularly trained and practiced at the team's facility in Tempe, Arizona, and he spent the substantial majority of his work time in that state. This is evidenced by applicant's testimony at trial, as follows:

> "During the season, he was also required to workout with weights two days per week, for an hour-and-a-half to two hours per day. This work included bench pressing anywhere from 325 to 400 pounds. He would also participate in sled drills, which was the primary way to practice blocking without involving live opponents. He would participate in these drills three days per week.
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> "He was also required to workout during the off season. He would take about four weeks off after the NFL season, then begin his off-season workouts. This would include more full body workouts, and sled drills. These would occur primarily at the Cardinals facility in Tempe." (Minutes 7:13-20.)

By contrast, applicant was not a resident of California when he contracted to play football for the Cardinals and his contracts of employment were made in Arizona. The majority of applicant's work duties were performed in Arizona where he regularly practiced and where the Cardinals played 40 of their 80 games during the period of his employment. In addition, 33 of the other 40 games were played in states other than California. In short, there was limited connection with California with regard to applicant's employment by the Cardinals and his claimed cumulative injury. In our view, that limited connection is

insufficient for the WCAB to exercise jurisdiction over his claim for workers' compensation in derogation of the Arizona forum he and the Cardinals reasonably identified in their employment contracts as the place where any claim for workers' compensation would be filed.

Applicant argues that because he paid California income tax for games that were played in the state he has a due process right to have his workers' compensation claim adjudicated by the WCAB. (Petition, p. 13:23-15:11.) We do not agree. 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. (*Wilson v. Franchise Tax Bd.* (1993) 20 Cal.App.4th 1441, 1447-1448.) However, the Legislature has established the basis for the WCAB's jurisdiction (Lab. Code, §§ 3600 et. seq., 5300 and 5301), 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. (See, *Readylink Healthcare v. Jones* (2012) 210 Cal.App.4th 1166.) The fact that applicant paid income tax on earnings attributable to games played in California does not change our decision that the parties' forum selection agreement is properly enforced by the WCAB declining to exercise jurisdiction over his claim for workers' compensation.

III. THE FORUM SELECTION CLAUSE IN THIS CASE IS ENFORCEABLE

A. Applicant's Employment Contracts Were Not Made In California.

Applicant contends that the forum selection clause in his employment agreements is unenforceable, citing the case of *Alaska Packers Assn. v. Industrial Acc. Com.* (1934) 1 Cal.2d 250 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [55 S.Ct. 518, 79 L.Ed. 1044, 20 I.A.C. 326] (*Palma*). Before addressing applicant's public policy arguments based on that case, we first note that the specific reason California had jurisdiction over the employment contract and injury claim in *Palma* is not present in this case because applicant's employment agreements were not made in California.

In *Palma*, a nonresident alien entered into a contract of employment *in California* with the Alaska Packers Association while aboard a ship in the harbor of San Francisco. The agreement provided that the

employee would work for the petitioner in the territory of Alaska during the salmon canning season. The Alaska Packers Association agreed to transport Mr. Palma to Alaska and then back to San Francisco at the close of the season. He was to be paid on return to San Francisco at a monthly rate, less any advances made. The contract, which was signed by Mr. Palma and approximately fifty other workers, included a choice of law provision stating that the Alaska workers' compensation statutes would be their "exclusive remedy" for all industrial injury claims as a result of their temporary work in Alaska.

In affirming the California Supreme Court's decision upholding the exercise of jurisdiction over Mr. Palma's workers' compensation claim, the United States Supreme Court emphasized that California had jurisdiction because the employment contract was made within the state, writing as follows:

> "[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation and its sanctions are subject, in some measure, to the legislative control of the state. The fact that the contract is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise…
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> "We cannot say that the statutory requirement of California, that the provisions for compensation shall extend to injuries without the state when the contract for employment was entered into within it, is given such an unreasonable application in the present case as to transcend constitutional limitations." (*Palma*, *supra*, 294 U.S. at 540-542.)

In this case, unlike in *Palma*, the employment contracts were not made in California and that jurisdictional basis for legislating the terms of the employment agreement and hearing the workers' compensation claim is not present. However, we find other compelling reasons for declining to exercise jurisdiction in this case. As discussed below, forum selection clauses are now presumed valid under the law and they are enforced under contract principles unless they are unreasonable or contrary to a fundamental public policy.

B. A Forum Selection Clause Is Now Presumed To Be Valid.

When *Palma* was decided in 1934, forum selection clauses were not favored and many courts declined to enforce them on the grounds that jurisdiction is prescribed by law and it cannot be increased or diminished by contract. (See, e.g., *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285, 289 ["The

rules to determine in what courts and counties actions may be brought are fixed upon consideration of general convenience and expediency by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law, and interfere with such convenience."]; *Beirut Universal Bank v. Superior Court* (1969) 268 Cal.App.2d 832, 843.)

However, the negative view of such clauses changed in 1972 following the United States Supreme Court decision in a maritime case, in which the Court held that a "forum clause should control absent a strong showing that it should be set aside," and described four grounds that could overcome the presumption of validity, as follows: (1) the clause was the product of "fraud or overreaching," (2) "enforcement would be unreasonable and unjust," (3) proceedings "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."[6] (*M/S Bremen v. Zapata Off-Shore Co*. (1972) 407 U.S. 1, 15 [92 S. Ct. 1907, 32 L. Ed. 2d 513] (*Bremen*); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614 [105 S.Ct. 3346, 87 L.Ed.2d 444]; Rest.2d, Conf. of Laws, § 80 ["The parties agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."].)

The presumption in favor of enforcement of a forum selection clause has been regularly applied by the California courts in the years following the *Bremen* decision. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491 (*Smith*) ["No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length"]; *Nedlloyd Lines B.V. v. Superior Court* (1992)

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[6] In *Bremen* an American oil exploration company solicited bids for the towing of an ocean-going oil rig. A German firm won the bid and submitted a contract with a forum selection clause designating the London Court of Justice. After the rig was damaged in a storm the American firm sued in federal court in Florida. The Court ultimately concluded that the parties reasonably identified the United Kingdom as the proper forum notwithstanding its limited connection to the parties. Following *Bremen* Congress enacted 28 U.S.C. 1404(a), which provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." (See *Stewart Organization, Inc. v. Ricoh Corp*. (1988) 487 U.S. 22, 31 [108 S.Ct. 2239; 101 L.Ed.2d 22] ["The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a)."].)

3 Cal.4th 459 (*Nedlloyd*) [clause enforced]; *Furda v. Superior Court* (1984) 161 Cal.App.3d 418 [clause enforced]; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490 [clause enforced] (*Lu*); *Bugna v. Fike* (2000) 80 Cal.App.4th 229 [clause enforced]; *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666 [clause enforced]; cf. *Trident Labs, Inc. v Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147 (*Trident*) [defendant waived rights under clause by litigating case for 19 months in California]; *Aral v. EarthLink Inc.* (2005) 134 Cal.App.4th 544 (*Aral*) [clause not enforced because it unreasonably required California consumer to travel 2000 miles to pursue small amount of money].)

Enforcement of a forum selection clause is based upon principles of contract, and for that reason the analysis of its enforceability is different than the analysis of a forum non conveniens motion that asks a court to exercise its equitable power by deferring to another court's jurisdiction. (*Strangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744 (*Strangvik*) ["Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere."]; *Berg v. MTC Electronics Technologies Co., Ltd.* (1970) 61 Cal. App. 4th 349 (*Berg*) ["The factors that apply generally to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause."]; *Lu*, *supra*; *Trident*, *supra* [Although both issues are raised pursuant to Code of Civil Procedure sections 410.30 and 418.10, "the principles governing enforcement of a forum selection clause are not the same as those applicable to motions based on forum non conveniens" because the forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement would be unreasonable under the circumstances of the case]; *Great Northern Ry. Co. v. Superior Court* (1970) 12 Cal.App.3d 105 (*Great Northern*) [list of 25 factors to consider in connection with a forum non conveniens motion based on equity].)

Our consideration of the factors that are relevant to the validity of a forum selection clause leads us to the conclusion that the parties' forum selection clause in this case is valid.

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C. The Forum Selection Clause Was Not The Product Of Fraud Or Overreaching.

There is no evidence that the forum selection clause in this case was the product of fraud or overreaching. To the contrary, applicant testified at trial that he was represented by an agent in the negotiation of his three employment agreements with the Cardinals. (Minutes, 10:15-20.) Although he further testified that he did not read the contracts in their entirety before signing them, that is not a requirement for enforcement of a forum selection clause as long as the clause itself provided adequate notice that applicant was agreeing to the jurisdiction cited in the contract. (*Carnival Cruise Lines v. Shute* (1991) 499 U.S. 585, 590-595 [111 S.Ct. 1522, 1525-1528, 113 L.Ed.2d 622] [forum selection clause is enforceable even though passenger did not read it]; *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 559 [same]**;** *Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908.)

In this case, the forum selection clause in the employment contracts unambiguously sets forth a mandatory requirement as follows: "Claims for workers' compensation *shall* be filed with the Industrial Commission of Arizona, and the parties agree that they *shall* be subject to the workers' compensation laws of the State of Arizona and of no other state." (Joint Exhibits X, Y, Z; emphasis added; cf. *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196 [A mandatory forum selection clause will be given effect without regard to convenience and the only question is whether enforcement of the clause would be unreasonable] (*Intershop*); *Berg, supra* 61 Cal.App.4th at 358-360 [same].)

Applicant's testimony that he did not review the forum selection clause before signing the contracts is not evidence of fraud or overreaching by defendant. Instead, it shows that applicant authorized his agent to address that detail while he only concerned himself with "the dollar figures and length of time of the contracts," as he testified at trial.[7] (Minutes 9:21-23.) If anything, applicant's testimony shows that he was free to accept or reject the contracts, and that he accepted them without undue influence or fraud.

D. The Parties Reasonably Selected Arizona As Their Workers' Compensation Forum.

[7] The forum selection agreement appears to be supported by adequate consideration. The agreed compensation for 1999 through 2002 is not legible on the copies of the contracts available to us in EAMS, but the agreed compensation shown on the contract for the 2003 season was $530,000 and for the 2004 season was $535,000. (Joint Exhibit Z.) Applicant did not complete his employment with the Cardinals in 2004 because he was terminated on or about June 24, 2003, following his arrest on felony charges, for which he later served 20 months in prison. (Minutes 11:1-2; 13:24-25.)

The second ground described in *Bremen* also does not apply because the selection of Arizona as the forum state for claims for workers' compensation is neither unreasonable nor unjust. Arizona has a substantial and material connection to applicant's employment and his claim for workers' compensation. The Cardinals home base is in Arizona and applicant resided in that state during the time of his employment. (See *Nedlloyd, supra* [substantial relationship and reasonable basis tests are met when one of the parties is domiciled in the chosen state].) The activities claimed to have caused applicant's cumulative injury also primarily occurred in Arizona. Moreover, it was also objectively reasonable to identify Arizona as the forum state for workers' compensation claims in light of the number of other states where the Cardinals play games and the potential for jurisdictional conflicts among those forums in the absence of such a selection clause, as discussed above.

Applicant urges that it would be unreasonable for the WCAB to enforce the forum selection clause because the statute of limitations has run on any workers' compensation claim he may have filed in Arizona.[8] In making this argument, applicant relies upon one of the factors that might influence how a court would address a forum non conveniens motion based upon equity. (See e.g. *Great Northern*, *supra*.) However, as discussed above, a forum non conveniens analysis based upon equity is different than determining whether a contractual forum selection clause should be enforced. 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. (*New Moon Shipping Co. v. MAN B&W Diesel AG* (2d Cir. 1997) 121 F.3d 24, 33 ["[C]onsideration of a statute of limitations would create a large loophole for the party 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."]; *General Elec. Co. v. G. Siempelkamp GmbH & Co.* (S.D. Ohio 1993) 809 F. Supp. 1306, 1314 ["The unreasonableness exception to the enforcement of 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."].)

[8] Applicant presented no evidence in support of this contention, but it is not disputed by defendant. In the absence of evidence, we will not presume that the claim is now time barred in Arizona because of something beyond applicant's control, such as delayed knowledge of injury that may affect the analysis of California's public policy interest, instead of because of lack of diligence or a conscious decision not to file a claim in that state.

When a defendant seeks to enforce a forum selection clause, the burden of proof is on the applicant to show that the clause and selected forum are unreasonable, and the factors involved in a traditional forum non conveniens analysis do not control. (*Intershop, supra* 104 Cal.App.4th at 198; *Trident*, *supra*.) Instead, 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. For example, in *Trident Labs, supra*, 200 Cal.App.4th at p. 154, the Court of Appeal said that a "forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case" and "[a] forum selection agreement reached through arm's-length negotiation between experienced and sophisticated business people should be honored by them and enforced by the courts, absent some compelling and countervailing reason for not enforcing it." (Internal citations and quotation marks omitted.) Similarly, in *Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1633, the Court said that "[a] forum selection clause … is presumed valid; the party opposing its enforcement bears the 'substantial' burden of proving why it should *not* be enforced." (Italics in original; accord: *Aral, supra,* 134 Cal.App.4th at 561 ["a heavy burden"]; *Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, 1149 ["a heavy burden"]; *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354 ["a substantial burden"].) Here, applicant did not meet that heavy and substantial burden.

When a person freely agrees that a claim will be filed in an identified jurisdiction, the logical conclusion is that he intended the law of that jurisdiction to apply to the claim. (*Nedlloyd*, *supra*, 3 Cal.4th at 469; *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 58.) Here, applicant expressly agreed that he would file any claim for workers' compensation in Arizona and he agreed that the law of Arizona would apply. The effect of that reasonable agreement is not diminished simply because applicant may not have timely filed a workers' compensation claim in Arizona.

E. Arizona Is A Convenient Forum For Applicant

Similarly, the third ground for overriding an agreed forum as set forth in *Bremen* does not apply in this case because there is no evidence that it would have been gravely difficult or inconvenient to file a

workers' compensation claim in Arizona. Instead, it appears applicant filed his claim in California in order to have it adjudicated under California law. (See, *Pac. Employers Ins. Co. v. Industrial Acc. Com.* (1939) 306 U.S. 493 [59 S. Ct. 629, 83 L. Ed. 940, 4 Cal.Comp.Cases 65] [The WCAB applies California law in adjudicating workers' compensation claims filed within the state, and is not required to give full faith and credit to the workers' compensation laws of other states].)

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.

F. The Forum Selection Clause In This Case Is Not Contrary To California Fundamental Public Policy.

Applicant asserts that the forum selection clause in his employment agreements violates a fundamental public policy of California, citing the decision in *Palma*, *supra*, and section 5000, which provides in pertinent part that "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division."[9] As discussed above, the basis for California jurisdiction over the contract in *Palma* is not present in this case because the employment agreement in *Palma* was made in California whereas the employment contracts in this case were all made in Arizona. In addition, we find that enforcement of the forum selection clause based upon the current record in this case is not contrary to California fundamental public policy.

In *Palma*, the California Supreme Court concluded that the choice of law provision in the employment contract made in California in that case was an invalid effort by the employer to exempt itself from liability under California law and, as such, violated the predecessor statute to section 5000. The Court

[9] When *Palma* was decided by the California Supreme Court in 1934, section 27(a) of the California Workers' Compensation Act provided in pertinent part that, "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act. . . ."

further noted that upholding the provision would "seriously interfere" with the policy of California's workers' compensation act, which is "to charge to the industry those losses which it should rightfully bear, and to provide for the employee injured in the advancement of the interests of that industry," as well as to provide a "certain and prompt recovery commensurate with his loss and, in so doing, lessen the burden of society to care for those whom industry has deprived, either temporarily or permanently, of the ability to care for themselves." (*Palma*, *supra*, 1 Cal.2d at 258.)

In affirming the decision of the California Supreme Court, the United States Supreme Court further discussed the state's interest that would be affected if the provision was enforced, as follows:

> "The meagre facts disclosed by the record suggest *a practice of employing workers in California for seasonal occupation in Alaska, under such conditions as to make it improbable that the employees injured in the course of their employment in Alaska would be able to apply for compensation there.* It was necessary for them to return to California in order to receive their full wages. They would be accompanied by their fellow workers, who would normally be the witnesses required to establish the fact of the injury and its nature. *The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska,* and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and *there was the danger that they might become public charges, both matters of grave public concern to the state.*
>
> "California, therefore, had a legitimate public interest in controlling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee, and in providing a remedy available to him in California. *In the special circumstances disclosed, the state had as great an interest in affording adequate protection to this class of its population as to employees injured within the state*." (294 U.S. at 542-543, emphasis added.)

It is immediately apparent that the fundamental public policy considerations identified 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. (See

footnote 7, *supra*.) 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."

In the special circumstances of this case, we conclude that California has a stronger public policy interest in following the parties' forum selection clause than it does in exercising jurisdiction over applicant's claim for workers' compensation.

California courts have recognized that decisions involving forum selection have an impact upon the delivery of justice in the forum state. (*Strangvik*, *supra* 54 Cal.3d at 751 [California has an interest in "avoidance of overburdening local courts with congested calendars … [in] cases in which the local community has little concern."]; *Appalachian Ins. Co. v. Superior Court* (1984) 162 Cal.App.3d 427 [California will not allow forum shopping to burden its courts where it has no interest in the lawsuit].) As the California Supreme Court wrote in *Price v. Atchison, T. & S. F. Ry. Co.* (1954) 42 Cal.2d 577, 583-584:

> "[We] 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."

Our concern about court congestion and the overburdening of already strained judicial resources is not based upon abstract speculation. The NFL consists of 32 teams playing in 23 states and occasionally in foreign countries.[10] Each club is allowed a maximum of 53 players on their roster. Because three NFL teams are domiciled in California, players from all of the 29 other teams could potentially claim that they incurred some portion of a cumulative industrial injury in California merely because they played one or more games in the state. In fact, numerous claims have been filed in California by professional football players and other professional athletes, and those claims impose a substantial burden on the WCAB's limited resources.

By contrast, Arizona has a materially greater interest than California in determining the workers'

[10] We take judicial notice of these facts. (Evid. Code, § 452(h); see e.g. <http://www.nfl.com/> as of December 21, 2012.)

compensation benefits due an Arizona resident, who contracted for employment in Arizona, was employed by an employer based in Arizona and who performed most of his work duties in Arizona.[11] As the court observed in *Matthews*, *supra*, "The California Supreme Court concluded [in *Palma*] that the choice of law clause was unenforceable…but only after finding that the employment relationship in question *had sufficient contacts with California to apply California's workers' compensation law*." (*Matthews*, *supra*, 688 F.3d at 1112, emphasis added.) As discussed above, there is limited connection between California, and the employment and the claimed cumulative injury in this case.

We have identified no California fundamental public policy that requires the WCAB to devote its limited resources to the claim in this case.

The WCJ's August 7, 2012 Findings and Order is affirmed.

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For the foregoing reasons,

[11] These facts distinguish this case from the recent decision of the Supreme Court of Maryland, wherein that court concluded that a clause in the employment agreement of a former NFL player for the Washington Redskins that identified the state of Virginia as the forum for workers' compensation claims was not controlling because the team was incorporated in Maryland and played all of their home football games in Maryland and that substantial connection to the state allowed the Maryland Workers' Compensation Commission "the ability to exercise jurisdiction." (*Pro-Football, Inc. v. Tupa* (Md. 2012) 428 Md. 198, 51 A3d 544.)

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board (en banc) that the August 7, 2012 Findings and Order of the workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

1/15/2013

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

DENNIS MCKINLEY
RONALD J. MIX, ESQ.
WALL MCCORMICK BAROLDI GREEN & DUGAN
SHAW JACOBSMEYER CRAIN CLAFFEY & NIX

JFS/bgr