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WORKERS' COMPENSATION NEWSLETTER

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SPORTS LAW CASE SPOTLIGHT: The *Sutton* Decision

By: Katyn Evenson, LFLM Anaheim

In 2013, the California Legislature passed Assembly Bill 1309, the goal of which was to close a legal loophole that allowed many professional athletes to file workers' compensation claims in California, even if they had little to no employment within the state of California.

Around the time the bill was passed, the California Insurance Guarantee Association indicated that they had paid some $42 million in claims to professional athletes since 2002.

The bill was an apparent attempt to help bring California in line with many other states that limit such filings. The bill led to the amendment of Labor Code section 3600.5. Under the new law, professional athletes who are hired out-of-state who are temporarily in the state doing work for his or her employer are barred from filing their claim for industrial injury if in the 365 days prior to their last date of work in the state performed less than 20% of their "duty days" in California. Duty days are defined as any day spent performing activities under the direction and control of the team.

In order for an athlete to be able to file an occupational disease or cumulative trauma claim in California, they must meet the following two-prong test:

1. The player must have played for two seasons for a California-based team or worked more than 20% of his duty days in California or for a California-based team.

AND

2. The player must have worked for less than seven seasons for teams located outside of California.

The law became effective for all pending claims filed on or after September 15, 2013.

As most professional athletes do not play for a single team throughout their professional career, application of this Labor Code section becomes critical for determining which employers are subject to California subject matter jurisdic-

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HOW IS THIS RELATED TO HIS EMPLOYMENT?!

By: Amy Roberts, LFLM Sacramento

We have all had the claim we reviewed and instantly thought, "How is this related to his employment?!" In such instances, it is important to immediately investigate whether we can put forward the defense of injury arising out of and/or occurred during the course of employment. There are several affirmative defenses. This particular article will focus upon Special Errand or Assignment, Recreational Activities, and Horseplay. Each defense is very fact specific but, as will be discussed below, it is important to view the facts in the light of whether the employer benefited from the employee's conduct. If so, it will likely be found to arise out of and/or occur during the course of employment.

Special Errand or Assignment

It is well known that injuries that occur during ordinary travel to and from work are not compensable. An exception to this rule applies when an employee is injured while on a special errand or assignment for the employer.

Similarly, an employee is considered to be within the course of his employment while he eats lunch or takes a rest period at the employer's premises. An employee who leaves the premises does so at his own risk. Compensation is suspended during absence from the premises unless the facts show a special errand for the employer or an activity for the employer during such a period.

To support the existence of a special errand, the underlying activity must be (1) "special", that is extraordinary in relation to the employee's routine duties; (2) within the course of the employee's employment; and, (3) undertaken at the express or implied request of the employer for the benefit of the employer. (*General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal. 3d. 595.)

The Board is primarily looking to see whether the errand or assignment benefitted the employer. For example, when an employee who worked Monday through Friday took work home over the weekend for a special presentation on Monday, an injury sustained while driving home with her work was found compensable as working over the weekend was done for the benefit of the employer. Conversely, an employee injured while driving to a shift she had switched with another employee was found to be not compensable. Switching shifts benefited the employees and was not done to benefit the employer. (*California Dept. of Corrections & Rehab v. Workers' Comp. Appeals Bd.*, (2012) 77 Cal. Comp. Cases 767, unpublished.)

Recreational Activities

Generally speaking, an injury that occurs during the voluntary participation of an off-duty recreational, social, or athletic activity not constituting part of the employee's employment is not within the scope of employment. An exception arises where the recreational, social or athletic activity is: (1) expressly or impliedly required; or (2) a reasonable expectancy of the employment.

To determine whether a recreational, social or athletic activity is a reasonable expectancy of the employment, the court will look to two factors: (1) whether the employee subjectively believed participation was expected; and, (2) whether that belief was objectively reasonable under the circumstances. In determining whether the subjective belief is objectively reasonable, the court will look to the employer involvement, benefit to the employer, and job related pressure to participate. If both factors are present, the recreational, social or athletic activity will likely be found to be within the scope of the employee's employment.

The seminal case, *Ezzy v. Workers' Comp Appeals Board*, (146 Cal. App. 3d 252) involved a law clerk who was injured while playing softball with the company league. Prior to agreeing to play, the injured worker was advised a female player was needed or the team would have to forfeit. She further felt pressure to play as a law clerk who was hoping to gain future employment with the firm. The Court of Appeals ultimately found the injury occurred within the scope of employment based upon the injured workers' subjective belief that she felt pressured to join the softball team and the court's determination that such a belief was objectively reasonable since the employee's participation directly benefited the employer and there was job related pressure to participate.

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HOW IS THIS RELATED TO HIS EMPLOYMENT?

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Conversely, in a case where a car salesman was invited by his supervisor to a weekend river trip with fellow coworkers, an injury resulting from a motor vehicle accident on the way to the river was found to be outside the course of employment. The injured worker testified that he felt pressure to attend the river trip as it was a team building opportunity but further testified that there would be no job related repercussion for not attending. The court looked at the voluntary participation in the weekend trip which had no benefit to the employer nor was there job related pressure to participate outside of building team morale and ultimately found the trip was not within the injured worker's scope of employment. (*Meyer v. Workers' Comp Appeals Bd.* (1984) 19 Cal. Comp. Cases 459.)

Horseplay

"Horseplay" or "skylarking" refers to an innate sense of humor or playfulness which is expressed in a harmful or unproductive way. Injuries resulting from such conduct during working hours are not considered within the course of employment. An exception is made for innocent bystanders or victims who may be injured when such activities occur. (*Pacific Emp. Ins. Co. v. I.A.C.* (1945) 26 Cal. 2d 286.)

An excellent example includes an employee who was cleaning automobile parts with petroleum fluid. While joking around with some coworkers, he ignited the buckets of petroleum fluid and injured himself while putting out his own fire. The injury was found not compensable as it was outside the course of employment. As indicated above, had this horseplay resulted in injury to one of the coworkers, that injury likely would have been found compensable. (*Dalsheim v. Industrial Acci. Com.*, (1932) 215 Cal. 107.)

To the contrary, a bartender was injured while arm wrestling at his place of employment. It was subsequently found that the place of employment encouraged arm wrestling as part of the injured worker's employment as a bartender; therefore, an injury which occurred as a result of the arm wrestling was found to be compensable. (Herlick 8.16)

Conclusion

While only a few are discussed in this article, there are numerous affirmative defenses which may be identified and put forward. The key to successfully arguing an affirmative defense is to identify the possible defenses quickly and immediately begin investigating the facts and circumstances surrounding the alleged injury.

An overarching theme for defending against an affirmative defense is showing there was some benefit to the employer. In putting forward the affirmative defenses, we need evidence to show the act was not done to benefit the employer. A primary form of evidence in those instances would be an employer witnesses who can testify as to the activities at the time of the injury and the normal work environment. Perhaps it is necessary to document the place of employment with photographs. We have the advantage of having access to all that evidence but we need to act fast.

As we all know, employees and witnesses become more forgetful as time goes by. Employees may leave their employment. The environment where the injury occurred may change. The place of employment may move or go out of business. Once that evidence is inaccessible, our likelihood of proving up our fact specific affirmative defense diminishes. Therefore, if we can spot any possible affirmative defense immediately and begin acquiring the necessary evidence, we are more likely to have the facts necessary for a successful defense. ⌘

The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Kay Evenson (Anaheim) and Amy Roberts (Sacramento).

Should you have any questions or comments regarding the Laughlin, Falbo, Levy & Moresi newsletter, or would like to suggest a topic or recent case you think would be of interest, please contact:

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SUTTON DECISION

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tion. Clearly, a player who played for a California-based team will be able to establish subject matter jurisdiction over that team. However, when they played for an out-of-state team which played games within California, a fact-based inquiry is required to determine subject matter jurisdiction over that team.

Since AB1309's passage approximately five years ago, there have been many legal cases brought forth to put AB1309 and Labor Code section 3600.5 as amended, to the test. Unfortunately, many cases are trial level decisions that often seem to contradict one another. While the law was supposed to bring an end to the significant number of out-of-state professional athlete claims, it seems that the law is still shrouded in uncertainty and inconsistency. What's more, many of these trial level decisions have long been on appeal with pending decisions, and there has been very little guidance from the Appeals Board as to the practical application of the new law.

However, the California Workers' Compensation Appeals Board recently issued their Opinion and Decision After Reconsideration in the case ***Ken Sutton v. San Jose Sharks; Federal Insurance Company, c/o CHUBB Group of Insurance Companies, case number ADJ9314776***.

Up until this recent panel decision, the leading cases with respect to jurisdiction as it related to professional athlete workers' compensation claims in California were contained in *Carroll v. Cincinnati Bengals, PSI, et. al., (2013) Cal.Work.Comp. LEXIS 102 (WCAB en banc decision)* and the decision in *McKinley v. Arizona Cardinals (2013) 2013 78 Cal.Comp. Cases 23 (WCAB en banc decision)*.

The Board in the *Carroll* case held that both an employer and applicant are exempt from California subject matter jurisdiction and California workers' compensation laws if the statutory provisions in Labor Code section 3600.5(b) are met. The decision in *Carroll* is distinguishable from that in *McKinley* in that the Board stated that while there was subject matter jurisdiction over the claim, they chose not to exercise it based on the fact that there appeared to be valid and enforceable choice of law/forum clauses in the pertinent employment contracts applicant had with the Arizona Cardinals.

The facts of Mr. Sutton's case are as follows: Ken Sutton was employed as a professional hockey player. He alleged that he sustained a cumulative trauma injury from December 7, 1997 through May 1, 1998 to his head, neck, back, bilateral upper extremities, bilateral lower extremities, neurological, and internal systems. At issue before the trial judge were several threshold issues, including whether or not the WCAB has subject matter jurisdiction over the applicant's claim pursuant to Labor Code section 3600.5(d).

At trial, the parties offered evidence that applicant completed seventeen total seasons playing professional hockey from 1989 to 2006. Other than his time with the San Jose Sharks, applicant was not employed by any other California-based teams. He played for the San Jose Sharks between 12/08/1997 through 08/26/1998). He also played for the Buffalo Sabres, Edmonton Oilers, St. Louis Blues, New Jersey Devils, Washington Capitals, New York Islanders, and German-based team, the ERC Ingolstadt Panthers. He last played for the Ingolstadt Panthers in April 2006.

With respect to whether the WCAB has subject matter jurisdiction over applicant's claim, the WCJ found that statutory provision in Labor Code section 3600.5(d) does not operate independently, and rather because Defendant did not qualify for the exemption in subdivision (c), (d) did not apply in this case. Defendant timely sought reconsideration.

Defendant contends that Labor Code section 3600.5 applies to both California teams and out-of-state teams. The WCAB agreed with Defendant that section 3600.5 may potentially apply to California-based teams, specifically in that if a claim is exempt pursuant to subdivision (d), applicant may not bring a claim in California, regardless of whether the claim involves employment with California based teams.

The WCAB concluded that the WCJ correctly determined section 3600.5(c) cannot be applied to applicant's last employer, the Ingolstadt Panthers, as no time during that employment was spent within California. Defendant had tried to argue that subdivision (c) could be used to find that an entire claim would be exempt under subdivision (d).

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SUTTON DECISION

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The WCAB goes on to state that despite Defendant's argument, "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."

The WCAB found that because applicant was regularly employed by a California-based team, specifically the San Jose Sharks between 1997 and 1998, that is sufficient to allow the WCAB to exercise subject matter jurisdiction under Federal Insurance Co. v. Workers' Compensation Appears Bd. *(Johnson) (2013) 221 Cal.App.4th 1116*.

The WCAB concluded that the Ingolstadt Panthers are not exempt under subdivision (c) as applicant did not work temporarily in the state of California for that team, therefore that cannot be relied upon to trigger the (d) exemption. Therefore, the claim was deemed not exempt under 3600.5(d) and he was allowed to bring his claim for benefits under the California Workers' Compensation system.

However, the WCAB did agree with Defendant in that subdivision (e) does not limit the application for the statute solely to non-California-based teams. The case was remanded so that the WCJ could determine whether (c) could be applied to exempt any other employers other than the Defendant San Jose Sharks and the Ingolstadt Panthers.

In other words, the WCAB concluded that Labor Code section 3600.5 is not limited to out-of-state employers. However, if the employer within the last year of applicant's professional career is exempt under (c), it will not bar the entire claim from subject matter jurisdiction under (d). It would appear that it would not have to be decided whether the other teams applicant played for, prior to the Ingolstadt Panthers, would be exempt under subdivision (c).

An interesting aside is that the Ingolstadt Panthers were a German based-team, and the issue over whether personal jurisdiction could be raised over an international team in a California Workers' Compensation proceeding did not seem to be addressed by the WCAB. It's also important to note that this is a panel decision, and that we are still waiting for an En Banc decision or Court of Appeal to address the issue.

California's Workers' Compensation system is still fraught with out-of-state professional athlete injury claims. While AB1309 was conceived to alleviate the issue, an actual reduction in the number of claims still seems to be a mirage in the desert… the closer we think we are, the further we seem to be from the goal of a predictable and consistently applied statutory scheme that was designed to limit these claims as well as litigation over the tricky world of professional athlete industrial injury claims. ⌘

UPCOMING CONFERENCES

2018 California Workers' Compensation & Risk Conference

September 4 – September 7
Monarch Beach Resort – Dana Point
Conference & Expo: September 5-7, 2018
Charity Golf Tournament: September 4, 2018
Pre-Conference Leadership Forum: September 4, 2018
LFLM is sponsoring the confernece registration bags. Stop by the LFLM Exhibit Space - ***Booth #TT110***.

2018 CAJPA Conference

California Association of Joint Powers Authorities
September 11 – September 14
South Lake Tahoe
Wednesday, September 12 (11am-12:15pm): **Susan Hastings** (LFLM Oakland) will be presenting
"Strategies for Effective Management of Public Safety"
Thursday, September 13 (2:15pm-3:30pm): **Marc Leibowitz** (LFLM San Diego) will be presenting
"Why Can't I Share This With My Other Departments"
Come by to see LFLM at ***Booth #P515*** *or the* ***LFLM Tasting Table during the Thursday (9/13) Night Reception***.

2018 COSIPA Fall Conference

Council of Self Insured Public Agencies
COSIPA North: October 11, 2018
COSIPA South: November 1, 2018
Presentation: "Pitfalls in Managing WC & Disability/RTW Situations"
Speakers: Marc Leibowitz (LFLM San Diego) & Robert Cutbirth

2018 CSIA Fall Educational Conference

California Self Insurers Association
October 26, 2018
Walnut Creek Marriott (Walnut Creek)

2018 National Workers' Compensation & Disability Conference

December 5 – December 7
Mandalay Bay – Las Vegas

2019 PARMA Conference

Public Agency Risk Managers Association
February 10 - February 13
Disneyland Hotel (Anaheim)

2019 DWC Educational Conference

Division of Workers' Compensation
Los Angeles: February 11 - February 12
Oakland: February 29 - March 1

Kids' Chance of California (KCOCA)

Educating Children of Injured Workers

KCOCA is a non-profit organization dedicated to providing need-based scholarships to the children of fatally or seriously injured workers in California. Now in its fifth year since inception, KCOCA has raised more than $480,000 and provided 19 students with scholarships for college and technical school. The organization maintains exhibit booths and speaking opportunities at the various industry conferences throughout California such as CWC, PARMA, DWC Los Angeles and Oakland, as well as CSIA. If you are attending any of these conferences, swing by the KCOCA booth and say hello! Pick up some information on how you can get involved in improving the lives of the children of injured workers.
Make a donation, refer a scholarship or volunteer your time.
Visit kidschanceca.org or call (415) 561-6275.