WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WESLEY CARROLL, ***Applicant,*** **vs.** **CINCINNATI BENGALS, Permissibly Self-Insured; NEW ORLEANS SAINTS; LOUISIANA WORKERS' COMPENSATION CORPORATION; TRAVELERS INSURANCE,** ***Defendants.***	**Case No. ADJ2295331 (ANA 0397551)** **OPINION AND DECISION AFTER RECONSIDERATION (En Banc)**

INTRODUCTION

Defendant Cincinnati Bengals (Bengals) petitioned for reconsideration of the January 24, 2011 Findings of Fact, Award, and Order of the workers' compensation administrative law judge (WCJ). The WCJ found that applicant, Wesley Carroll, incurred cumulative industrial injury to numerous body parts while employed as a professional football player by the New Orleans Saints (Saints) from July 14, 1991 through August 30, 1993, and by the Bengals from September 1, 1993 to April 12, 1994, causing 46 percent permanent disability and a need for future medical treatment. The WCJ further found that the "Bengals are not exempt from workers' compensation laws of the State of California, with respect to this case, by operation of Labor Code § 3600.5(b)."

The Bengals' petition was granted to allow further study of the issues. 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

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on important legal issues presented. (Lab. Code, § 115.)[1]

Based upon our review of the relevant statutes and case law, we hold that an employee and his or her employer are exempted by Labor Code section 3600.5(b)[2] from the provisions of the California workers' compensation law when the employee was hired outside of California and all of the following apply:

> (1) The employee is temporarily within California doing work for the employer,
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> (2) The employer furnished coverage under the workers' compensation or similar laws of another state that covers the employee's employment while in California,
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> (3) The other state recognizes California's extraterritorial provisions, and
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> (4) The other state likewise exempts California employers and employees covered by California's workers' compensation laws from the application of its workers' compensation or similar laws.

In this case, the Bengals established at trial that applicant was hired outside of California and that he was only temporarily in California doing work for the Bengals when the team played one game in the state in 1993.[3] The Bengals further showed that as a permissibly self-insured employer under the workers' compensation laws of the state of Ohio it furnished workers' compensation coverage that covered applicant's employment while in California. Ohio law recognizes the extraterritorial provisions of other states, including California, and likewise exempts out-of-state employers and employees who are temporarily doing work within Ohio from the provisions of its workers' compensation statutes. In light of the above, we conclude that applicant and the Bengals were exempted from the provisions of

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[1] 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).) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

[2] Further California statutory references are to the Labor Code.

[3] The Saints did not seek reconsideration of the WCJ's January 24, 2011 decision and we only address applicant's employment by the Bengals in this decision.

California's workers' compensation law by section 3600.5(b) when applicant was temporarily in the state for the Bengals in 1993.

The WCJ's January 24, 2011 decision is rescinded and an order is entered dismissing the Bengals as a defendant. The case is returned to the trial level for a new decision by the WCJ regarding applicant's claim.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant testified at the trial on December 2, 2008, that he was born in Cleveland, Ohio, and has never been a resident of California. He played college football first in Mississippi and then for the University of Miami in Florida. He continued to reside in Florida after his college football career ended. Applicant was hired outside of California in 1991, when he signed a three-year employment contract with the Saints to play professional football.

Applicant was employed by the Saints during the stipulated period from July 14, 1991, through August 30, 1993. During the two seasons applicant was employed by the Saints, the team played 5 of its 32 football games in California.[4]

Applicant was released by the Saints in August 1993, but his employment contract was assigned to the Bengals and he was employed by that team during the stipulated period September 1, 1993 to April 12, 1994. During the 1993-1994 season when applicant was employed by the Bengals, the team played 1 of its 16 games in California.[5] Applicant played no more football games in California following his release from the Bengals in April 1994. After that, he was employed briefly by the Indianapolis Colts and then by the Kansas City Chiefs in 1994 and in 1995, but he did not make their final teams and played

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[4] We express no opinion on whether applicant presented substantial medical evidence of a causal connection between his temporary employment in California by the Saints and his claimed cumulative injury. (*LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16] [a decision by the WCAB must be supported by substantial evidence in light of the entire record].)

[5] We take judicial notice that the Bengals played the San Francisco 49ers in San Francisco on December 5, 1993, losing the game 8-21. (Evid. Code, § 452(h).) We take further notice that during the 1993-1994 season the Bengals played eight games at their home field in Cincinnati, and eight games at other locations, including one game in Cleveland, Ohio, against the Cleveland Browns. Seven games were played in other states. In addition to California, the Bengals played in Pennsylvania (Pittsburg Steelers), Missouri (Kansas City Chiefs) Texas (Houston Oilers), New Jersey (New York Jets), Massachusetts (New England Patriots) and Louisiana (New Orleans Saints). The Bengals came in last place in its division for the 1993-1994 season and did not play in any post-season games.

in no games. After working a short time in the Canadian Football League, applicant decided in 1996 that his career as a professional football player was over and he obtained other employment and started a business in Florida where he now resides.

Applicant testified at trial that in the summer of 2006, a former teammate told him about the possibility of filing a workers' compensation claim of cumulative injury in California and referred him to an attorney. The Application for Adjudication of Claim in this case was filed shortly thereafter.

Issues concerning applicant's claim for California workers' compensation benefits initially were tried on December 2, 2008. On March 17, 2009, the WCJ issued a Findings of Fact and Award, finding that applicant incurred cumulative industrial injury to several body parts in the course of his employment by the Saints and Bengals, causing 46% permanent disability. The Bengals' petitioned for reconsideration of the WCJ's decision, and reconsideration was granted. On May 24, 2010, the Appeals Board panel issued its Opinion And Decision After Reconsideration (May 24, 2010 panel decision), in which it rescinded the WCJ's earlier March 17, 2009 decision, "because the evidence on the issue of section 3600.5(b) is incomplete." The case was returned by the panel to the trial level for development of the record on that issue.

Further proceedings were conducted by the WCJ on October 26, 2010, regarding the potential application of section 3600.5(b) to the Bengals and applicant. Along with briefs from the parties, the WCJ received into evidence copies of the following documents from the Bengals:

> (1) A "Certificate of Employer's Right to Pay Compensation Directly" issued by the Ohio Bureau of Workers' Compensation (BWC or OBWC) showing that the Bengals were lawfully self-insured for workers' compensation under Ohio law from August 1, 1993 through August 1, 1994 (Defendant's Ex. M);
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> (2) A certificate issued by the Cincinnati Insurance Company showing that the Bengals carried excess workers' compensation reinsurance for the period March 1, 1993 to March 1, 1994 (Defendant's Ex. N);
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> (3) An October 22, 2009 letter by Tom Woodruff, Director of the Self Insured Department of the BWC, verifying that the Bengals have been authorized by the BWC to operate as a self-insured employer under Ohio law since July 1, 1968 (Defendant's Ex. O);

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(4) A November 4, 2009 letter by James Barnes, Chief Legal Officer and General Counsel of the BWC, stating that the Bengals' self-insurance provided the same coverage for injuries occurring outside of Ohio as provided by the BWC (Defendant's Ex. P); and

(5) A copy of Ohio Revised Code section 4123.54, which is similar to California's section 3600.5(b) in likewise exempting out-of-state employers and employees who are temporarily working in Ohio and who are covered by their state's workers' compensation laws from the provisions of the Ohio workers' compensation laws (Defendant's Ex. Q).

Notwithstanding the additional evidence presented by the Bengals regarding its lawfully self-insured status with extraterritorial coverage and the Ohio workers' compensation statute that is similar to section 3600.5, the WCJ found in his January 24, 2011 decision that the Bengals were not exempted by section 3600.5(b) from the provisions of California's workers' compensation law, and awarded applicant California workers' compensation benefits against both the Bengals and the Saints.

DISCUSSION

1. APPLICANT WAS TEMPORARILY IN CALIFORNIA DOING WORK FOR THE BENGALS

The WCAB has jurisdiction to hear and determine all claims for workers' compensation based upon work-related injuries occurring within California. (Lab. Code, §§ 3600, 3600.5, 5300, 5301, and 5500.5.) However, the WCAB's jurisdiction is subject to the express exemption created by the Legislature in section 3600.5(b), which provides in pertinent part 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 workmen's compensation insurance coverage under the workmen's 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 workmen's compensation insurance or similar laws of such other state. The benefits under the Workmen's 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." (Emphasis added.)

It has been recognized by the Appeals Board and by the Court of Appeal that an employee hired outside of California and his or her employer are exempted from the provisions of California's workers' compensation law if the conditions expressed by the Legislature in section 3600.5(b) are satisfied. (*McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23, 29 (Appeals Board en banc) (*McKinley*) ["[S]ection 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." (emphasis in original)]; cf. *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 addressing whether applicant was "temporarily" within California as described in section 3600.5(b), it is important to note that the fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289] (*DuBois*).) "When interpreting any statute, it is well-settled that we begin with its words because they generally provide the most reliable indicator of legislative intent." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575, 578] (*Smith*) [internal quotation marks omitted].) "We are required to give effect to statutes according to the usual, ordinary import of the language employed … ." (*DuBois*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 289].) "If the language is clear and unambiguous, there is ordinarily no need for judicial construction…we presume the Legislature meant what it said and the plain meaning governs."

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(*Smith*, Cal.4th at p. 277 [74 Cal. Comp. Cases at p. 578] [internal quotation marks omitted]; see also *DuBois*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289].)

The plain meaning of the word "temporary" compels the conclusion that applicant was only "temporarily" doing work in California for the Bengals within the meaning of section 3600.5(b) when he was in the state for one game while employed by that team in 1993.

The Merriam-Webster Dictionary defines "temporary" as "lasting for a limited time," and other dictionaries likewise define it as referencing something that is "transitory" and "not permanent."[6] During the 1993-1994 season when applicant played for the Bengals, the team played seven games outside of Ohio as part of their regular NFL schedule. However, each of those away games constituted just 1/16th of the team's regular schedule. By contrast, more than one-half of the Bengals' games during the 1993-1994 season were played in Ohio. In addition, an examination of the entire scope of applicant's employment duties shows that his presence in California for two days in 1993 to participate in one football game was only temporary. Applicant's work duties with the Bengals included training and practice in Ohio, and a significant part of those duties occurred in Ohio during the off-season. The substantial majority of applicant's work duties with the Bengals was performed in Ohio.

When applicant entered California with the Bengals in 1993, he knew and intended that it be for a temporary period of about two days to work in a football game. When applicant and the Bengals entered California they both expected and intended to leave the state when that work was done. As such, applicant's presence in California in 1993 was transitory and not permanent, and he was only "temporarily within this state doing work for his employer" at that time, as described in section 3600.5(b). (See *Hardy v. Proctor & Gamble Co.* (2011) 2011 Ohio 5384, ¶ 23 (*Hardy*) ["In determining whether an out-of-state employee was 'temporarily in Ohio' for purposes of workers' compensation coverage in this state, we look only at the length of time the employee was expected to be in this state at the time of the industrial injury. In this case, the undisputed evidence reflects that Hardy was in Ohio for

[6] Merriam-Webster Dictionary website <http://www.merriam-webster.com/dictionary/temporary> and World English Dictionary website <http://dictionary.reference.com/browse/temporarily?s=t> at Dictionary.Com, both as of March 27, 2013.

a two-day seminar at the time she was injured. Under these circumstances, we cannot conclude that the trial court erred in granting summary judgment to P&G on the basis that Hardy, a Colorado resident who was receiving workers' compensation benefits under Colorado law, was 'temporarily within the state' at the time of her injury, and therefore, was precluded from seeking Ohio workers' compensation benefits under R.C. 4123.54(H)."[7]]; *Davis v. Administrator, Ohio Bureau of Workers' Compensation* (1996) 110 OhioApp.3d 57 (*Davis*) [Determination of whether a particular claimant is "temporarily in Ohio" depends on the length of time the claimant has been or is expected to be in Ohio at the time of the accident]; see also Storke & Sears, *Reciprocal Exemption Provisions Of Workmen's' Compensation Acts* (1958) 67 Yale L.J. 982 (Storke & Sears) [authors describe Ohio employee sent by Ohio employer to California to perform work duties for one week as example of being "temporarily within this state" as described in section 3600.5(b)].)

In arguing that his claim should be adjudicated by the WCAB, applicant relies upon cases in which the WCAB exercised jurisdiction over claims of cumulative industrial injury when a portion of injurious exposure occurred within this state.[8] However, all the cases cited by applicant were "writ denied" decisions,[9] and none of them involved the presentation of evidence that supports application of the section 3600.5(b) exemption from the provisions of California law, as occurred in this case. (*Injured Workers' Ins. Fund of Maryland v. Workers' Comp. Appeals Bd.* (*Crosby*) (2001) 66 Cal.Comp.Cases

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[7] The court in *Hardy* construed the word "temporarily" in Ohio Revised Code section 4123.54(H) with reference to The American Heritage Dictionary (4th Ed. 2000) 1781 definition of "Temporary" as "lasting, used, serving, or enjoyed for a limited time." (2011 Ohio 5384, ¶ 23.)

[8] Section 3600.5 was enacted in 1955, before the concept of cumulative injury was recognized by the Court of Appeal in *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592 [24 Cal.Comp.Cases 274]), and before the Legislature enacted section 3208.1(b) in 1968, which defines a "cumulative" injury as one "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment."

[9] "Writ denied" cases are citable because they concern prior holdings of the Appeals Board, but they are not binding precedent on any WCJ or Appeals Board panel and have no stare decisis effect. (E.g., *Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd*. (*Sanchez*) (2002) 104 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745].) Moreover, Appeals Board panel decisions may be overruled by the Appeals Board acting en banc. (Cal. Code Regs., tit. 8, § 10341; *Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338, 1344 (Appeals Board en banc).)

923 (writ den.) [no evidence presented regarding section 3600.5(b) exemption]*; Rocor Transportation v. Workers' Comp. Appeals Bd.* (*Ransom*) (2001) 66 Cal.Comp.Cases 1136 (writ den.) [same]; *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.) [same]; *Washington Wizards v. Workers' Comp. Appeals Bd.* (*Roundfield*) (2006) 71 Cal.Comp.Cases 897 (writ den.) [same]; *San Francisco 49ers v. Workers' Comp. Appeals Bd.* (*Green*) (1996) 61 Cal.Comp.Cases 301 (writ den.) [section 3600.5(b) found not to apply because applicant was never in California with out-of-state team].)[10]

By contrast, the Bengals have consistently contended in this case that section 3600.5(b) exempts it and applicant from the provisions of California's workers' compensation laws, and it presented evidence establishing the conditions required for the statutory exemption to apply.

In his Report and Recommendation on Petition for Reconsideration (Report), the WCJ correctly observes that the section 3600.5(b) exemption applies only to an injured worker who was "temporarily employed" in California. The WCJ then concludes in his Report that applicant was "regularly employed" in California as described in section 3600.5(a), which provides:

> "If *an employee who has been hired or is regularly employed in the state receives personal injury* by accident arising out of and in the course of such employment *outside of this state*, he, or his dependents, in the case of his death, *shall be entitled to compensation according to the law of this state*." (Emphasis added.)

The WCJ then states in his Report:

> "It is the opinion of the undersigned that the essential issue in this case is whether the applicant's employment within the State of California while employed by the Cincinnati Bengals is considered 'regularly employed,' as set forth in *Labor Code § 3600.5(a)…*

[10] California has jurisdiction over a claimed injury if the contract of hire was made here (Lab. Code, §§ 3600.5(a), 5305) and California jurisdiction over claims by professional athletes has also been found when the employment contract was made within the state regardless of whether any games were played in the state. (See e.g. *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15 [64 Cal.Comp.Cases 745]; *New York Yankees v. Workers' Comp. Appeals Bd.* (*Montefusco*) (2001) 66 Cal.Comp.Cases 291 (writ den.).) In this case, however, there is no assertion that applicant's contract of hire was made in California.

> "A professional football player in the NFL, such as Mr. Carroll, regularly engages in his employment away from his home city and state. Typically, each NFL team plays one-half of their regularly scheduled games in their home city. The other half are played in the various other states and cities, including California, where other NFL teams are domiciled. Thus, the players on each NFL team, such as Mr. Carroll, play one-half of the regular football season away from their home city and quite often outside of their home state. As applicant's counsel points out in his trial brief (page 5, lines 6-16) the applicant's employers must adhere to the schedule of games established by the NFL. If a team such as the Saints and Bengals are scheduled to play in California, they must travel to California and participate in the scheduled game…
>
> "The applicant testified that the State of California collected personal income tax from him for his earnings as a professional football player in when playing in California. This testimony was not refuted. Thus, the applicant's employment in California was deemed significant enough to warrant the collection of personal income tax on his earnings. To now deny him access to the California Workers' Compensation Appeals Board to adjudicate a claim for benefits arising out of injuries occurring while he was so employed is, in the opinion of the undersigned, contrary to sound public policy…
>
> "[I]t remains the opinion of the undersigned that Mr. Carroll's employment with the Bengals while he was in the State of California was regular employment per *Labor Code § 3600.5(a)*" (Emphasis in original.)

As analyzed by the WCJ, applicant was "regularly employed" in California under section 3600.5(a) because the Saints and Bengals played football games in the state as part of their regular season NFL schedule and because California income tax was deducted from the portion of applicant's salary attributed to the games he played in California. We do not find that either point precludes application of the section 3600.5(b) exemption to applicant and the Bengals.

We first note that the WCJ's reliance on section 3600.5(a) is misplaced because that subdivision only addresses employees who are *hired or regularly employed in California* and who are injured while "outside of this state." Here, the record establishes that applicant was *not* hired in California, and he was only temporarily in this state in 1993, as discussed above. Thus, section 3600.5(a) by its own terms does not apply in this case.

In addition, applicant does not contend that he is covered by the provisions of California's workers' compensation laws because he was injured "outside of this state" as provided in section 3600.5(a). To the contrary, he contends that the WCAB should adjudicate his claim because a portion of

his claimed cumulative injury occurred within California. As discussed herein, that contention is irrelevant with regard to the Bengals because the record shows that the team and applicant were exempted from the provisions of California's workers' compensation law by section 3600.5(b) when they were temporarily in California to play one game in 1993.

Moreover, even if it is assumed for purposes of argument that applicant regularly played football outside of Ohio while employed by the Bengals, that does not change the fact that he was only "temporarily" in California with that team in 1993 within the meaning of section 3600.5(b), as discussed above.

We are also not persuaded that applicant's payment of California income tax on the earnings attributable to his one game with the Bengals in California in 1993 somehow converted his temporary presence in the state at that time into something else, as suggested by the WCJ. As the Appeals Board wrote in *McKinley*:

> "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. *However, the Legislature has established the basis for the WCAB's jurisdiction, 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. *The fact that applicant paid income tax on earnings attributable to the game he played in California does not change our finding that he was only temporarily within California doing work for his employer when he played in that game*." (*McKinley, supra*, 78 Cal.Comp.Cases at 31-32, emphasis added, citations deleted.)

The Legislature establishes the extent of California's workers' compensation laws. (Cal. Const., Article XIV, § 4 ["The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability…"].) In section 3600.5(b) the Legislature created an exemption from the provisions of the state's workers' compensation law when an employee hired outside of the state is temporarily within California doing work for the employer and the

other statutory conditions are met. Payment of California income taxes by an employee has not been identified by the Legislature as a condition that stops the section 3600.5(b) exemption from applying.

2. THE BENGALS FURNISHED WORKERS' COMPENSATION UNDER THE LAWS OF OHIO THAT COVERED APPLICANT'S EMPLOYMENT WHILE IN CALIFORNIA

We agree with the WCJ's statement in his Report that "The Cincinnati Bengals have submitted credible documentary evidence to this Court that they are self-insured pursuant to the applicable statutes of the State of Ohio, where they are domiciled."

As part of the earlier May 24, 2010 panel decision in this case, the panel determined that there was a need to develop the record because the parties' stipulation to self-insurance was not sufficient to demonstrate that the Bengals were permissibly self-insured under Ohio law with *extraterritorial coverage*. When further proceedings were conducted before the WCJ on October 26, 2010, the Bengals placed into evidence a "Certificate Of Employer's Right To Pay Compensation Directly" from the Ohio Bureau of Workers' Compensation (BWC), for the time period from August 1, 1993 to August 1, 1994, which covers the stipulated period of applicant's employment from September 1, 1993 to April 12, 1994. (Defendant's Exhibit M.) This certificate constitutes prima facie evidence of insurance coverage under the second paragraph of section 3600.5(b), which provides as follows:

> "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."

The Bengals proved extraterritorial coverage by presenting the prima facie evidence described in the above-quoted paragraph of section 3600.5(b). However, *that is not the only way that such extraterritorial coverage can be proven.* Instead, it is necessary to consider the entire evidentiary submission of a party claiming the exemption in order to determine if the element of extraterritorial coverage has been shown.

Along with the certificate, the Bengals placed into evidence a copy of an October 22, 2009 letter by the Director of the Self Insured Department of the BWC, Tom Woodruff (Defendant's Exhibit O),

to "provide verification that ... Cincinnati Bengals, Inc., has been authorized to operate as a self insuring employer, for Ohio workers' compensation purposes, since July 1, 1968." This further demonstrates that the Bengals were continuously lawfully self-insured for workers' compensation under Ohio law during the entire stipulated period of applicant's employment from September 1, 1993 to April 12, 1994.[11]

The Bengals' showed that its workers' compensation self-insurance covered applicant's employment while he was temporarily in California in 1993, because Ohio law requires a self-insured employer to provide the same extraterritorial coverage as insured employers. (Ohio Rev. Code, § 4123.46(B) ["All self-insuring employers … shall pay the compensation to injured employees … as would have been paid and furnished by virtue of this chapter under a similar state of facts by the bureau out of the state insurance fund if the employer had paid the premium into the fund"]; cf. Ohio Rev. Code, § 4123.54(A) ["[E]very employee, who is injured or who contracts an occupational disease…*wherever such injury has occurred* or occupational disease has been contracted…is entitled to receive…from the employee's self-insuring employer…the compensation for loss sustained…," emphasis added].)

Extraterritorial coverage was also affirmed by the November 4, 2009 letter by the BWC Chief Legal Officer and General Counsel James A. Barnes (Defendant's Exhibit O), who wrote as follows:

> "As a self-insured employer in the state of Ohio, *the Cincinnati Bengals will cover, pursuant to the Ohio Workers' Compensation Act, injuries to players which occur in games located outside of the state of Ohio.* Such workers' compensation coverage would be pursuant to the Ohio Workers' Compensation Act.
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> "Additionally, *BWC provides such coverage for state fund employers with employees working temporarily outside of Ohio. As a self-insured employer, the Cincinnati Bengals are required to provide the same coverage* in those circumstances under [Ohio Revised Code] 4 123.46(B)." (Defendant's Exhibit O, emphasis added.)

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[11] The workers' compensation system in Ohio requires employers to provide workers' compensation coverage through the BWC unless lawfully self-insured. (Ohio Rev. Code, § 4123.56(C).) Ohio's workers' compensation statutes also provide an exclusive remedy for the payment of benefits to industrially injured workers, including professional athletes. (Ohio Rev. Code, § 4123.56(C); *Farren v. Baltimore Ravens, Inc.* (1998) 130 OhioApp.3d 533, 720 N.E.2d 590.)

In sum, the evidence submitted at the renewed trial on October 26, 2010, established that the Bengals furnished workers' compensation coverage under the laws of Ohio that covered applicant's employment while he was temporarily performing work duties for the team in California in 1993.

3. OHIO RECOGNIZES THE EXTRATERRITORIAL PROVISIONS OF OTHER STATES

The WCJ wrote in his Report that he found that "the State of Ohio recognizes the extraterritorial provisions of the California Labor Code as it relates to workers' compensation and insurance, Division 4 of the Labor Code of the State of California." We agree.

In the earlier May 24, 2010 panel decision, the panel explained that reciprocity and recognition of California's extraterritorial provisions are demonstrated by Ohio Revised Code section 4123.54, which provides in division (H)(3) as follows:

> "Except as otherwise stipulated in division (H)(4) of this section, if an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death."

Division (H)(4) of Ohio Revised Code section 4123.54 provides in turn as follows:

> "Division (H)(3) of this section does not apply to an employee described in that division, or the employee's dependents, unless both of the following apply:
>
> (a) The laws of the other state limit the ability of an employee who is a resident of this state and is covered by this chapter and Chapter 4123 of the Revised Code, or the employee's dependents, to receive compensation or benefits under the other state's workers' compensation law on account of injury, disease, or death incurred by the employee that arises out of or in the course of the employee's employment while temporarily within that state in the same manner as specified in division (H)(3) of this section for an employee who is a resident of a state other than this state, or the employee's dependents;
>
> (b) The laws of the other state limit the liability of the employer of the employee who is a resident of this state and who is described in division (H)(4)(a) of this section for that injury, disease, or death, in the same manner specified in division (H)(3) of this section for the employer of an employee who is a resident of the other state."

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Under the above-quoted provisions of Ohio law, a non-resident employee who is insured under the workers' compensation laws of a different state is not entitled to receive compensation or benefits under Ohio law for an industrial injury "while temporarily within" Ohio, provided that the laws of the other state likewise limit the ability of an Ohio employee to receive workers' compensation benefits for an injury incurred while "temporarily" within the state in the same manner as specified in Ohio law. (Ohio Rev. Code, § 4123.54(H); *Hardy, supra*; *Davis, supra*; *Wartman v. Anchor Motor Freight Co.* (1991) 75 OhioApp.3d 177, 181 (*Wartman*) ["Pursuant to R.C. 4123.54, an employee is not entitled to receive compensation or benefits for an injury when that employee (1) is a resident of a state other than Ohio, (2) is insured in a state other than Ohio, and (3) is only temporarily in Ohio"].)

Applicant argued to the WCJ that the Bengals did not furnish workers' compensation insurance covering his employment while in California as required by section 3600.5(b) because the Ohio statute of limitations has run on his injury claim and he presently does not have a workers' compensation remedy in Ohio.[12] Under applicant's argument, section 3600.5(b) would not apply if for any reason the claimed industrial injury is not compensable under the other state's workers' compensation laws *at the time the claim is filed in California*.

Applicant's proffered construction of section 3600.5(b) is taken out of context. Within the entirety of section 3600.5(b), the condition that an employer must have, "furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state," is properly read to require only that the employer have such extraterritorial workers' compensation coverage *at the time the employee is temporarily working in California*. With that proper construction, it does not matter if Ohio's statute of limitations would now render applicant's claimed injury non-compensable in Ohio.

[12] Under Ohio law, an injured worker has two years from the date of injury to file a workers' compensation claim and that limitation period may be tolled under certain circumstances. (Ohio Rev. Code, §§ 4123.84(A), 4123.28.) However, it appears Ohio does not toll its limitations period if an employer fails to give the employee notice of his workers' compensation rights, in contrast to California law that estops an employer from asserting the statute of limitations if the employee is not provided the required notices. (*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768]; *Galloway v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.App.4th 880 [63 Cal.Comp.Cases 532].)

Instead, the question is whether the Bengals provided workers' compensation coverage under the laws of Ohio that covered applicant's work while he was temporarily in California in 1993. The answer to that question is yes, as discussed above.

Nothing in section 3600.5(b) requires that the procedural provisions of the other state's workers' compensation laws be identical to the California statutes. Instead, section 3600.5(b) only requires that extraterritorial coverage be provided at the time the work is performed. Applicant's failure to timely file a workers' compensation claim in Ohio does not mean that the Bengals' self-insurance did not cover his employment while he was temporarily working in California. Nor does it mean that he is precluded on a jurisdictional or quasi-jurisdictional basis from filing a claim in Ohio.[13] It only means that he did not timely file a claim in Ohio.

4. OHIO LIKEWISE EXEMPTS CALIFORNIA EMPLOYERS AND EMPLOYEES COVERED BY CALIFORNIA'S WORKERS' COMPENSATION LAWS FROM APPLICATION OF ITS WORKERS' COMPENSATION LAWS

The reciprocity provisions contained in Ohio Revised Code section 4123.54(H)(3) and (4) as quoted above have the same effect as the section 3600.5(b) conditions that, "the extraterritorial provisions of this division are recognized in such other state," and that, "employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state." (See, Storke & Sears, *supra* [Ohio and California identified as having reciprocal statutes, and an example is provided]; Nagle, *Workers' Compensation: Injury By Accident: Insurance Costs To Employer: Denial Of California Benefits To Employees Temporarily In State* (1956) 44 Cal. L.Rev. 387 [listing California and Ohio along with Colorado, Maryland, Mississippi, Nevada, New Mexico, North Dakota, Ohio, Rhode Island, Utah, and Wyoming as eleven states with "the type of reciprocal legislation contemplated" by section 3600.5(b) at that time];

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[13] See, *Wartman*, *supra*, 75 OhioApp.3d at 181 [Ohio statutory exemption applies unless preclusion "on a jurisdictional or quasi-jurisdictional basis (e.g., situs of injury, length of stay, place of hire and/or state of residence) results in the employee not being 'insured' in other state…"].

9-143 *Larson's Workers' Compensation Law*, § 143.01[3] [listing Florida, Nevada, Oregon and New York as having provisions "similar" to section 3600.5(b)].)

Our conclusion that Ohio law recognizes the extraterritorial provisions of California law is further supported by Ohio Administrative Code section 4123-17-23(C), which states as follows:

> "The bureau of workers' compensation respects the extraterritorial right of the workers' compensation insurance coverage of an out-of-state employer for its regular employees who are residents of a state other than Ohio while performing work in the state of Ohio for a temporary period not to exceed ninety days. However, if the laws of the state of coverage do not provide this same exemption to Ohio employers and their employees working temporarily in that state, the out of state employer must obtain Ohio coverage and report to the bureau the remuneration of its employees for work performed in Ohio."

Notwithstanding the extraterritorial provisions in Ohio's statutes and regulations, applicant argues that the requisite reciprocity does not exist between California and Ohio, citing evidence discussed in the earlier Appeals Board panel decision in *Cavaliers Holdings Co. v. Workers' Comp. Appeals Bd.* (*Shelton*) (2009) 74 Cal.Comp.Cases 516 (writ den.) and the Ohio case of *State of Ohio ex rel. Kilbarger Construction, Inc. v. Industrial Com. of Ohio* (2007) 2007 Ohio 4311 (*Kilbarger*). However, neither of those cases addressed the issue of reciprocity.

In *Shelton*, the BWC specially appeared to contest personal jurisdiction by seeking reconsideration of an August 8, 2008 decision of the WCJ, who found that the applicant sustained an industrial cumulative injury while employed as a professional basketball player by the Cleveland Cavaliers and entered an award against the BWC. In arguing that there was no personal jurisdiction over it, the BWC noted that under Ohio law it could not be held liable for an award of workers' compensation benefits made in California because its statutory coverage of Ohio employers precludes liability for awards made outside of Ohio. The Appeals Board panel accepted that argument, noting that the BWC is not an insurer duly authorized to write compensation insurance in California. For that reason, the panel granted reconsideration and amended the WCJ's decision by dismissing the BWC as a defendant.

In its decision, the panel in *Shelton* discussed the evidence offered by the BWC, noting first that the attorney for the BWC acknowledged that there was "coverage for a claim of injury outside of the state of Ohio as long as the claim is brought in the state of Ohio pursuant to the Ohio Workers'

Compensation Act." The testimony in *Shelton* is described in the Appeals Board's decision as follows:

> "Defendant offered the testimony of Michael Glass, the director of underwriting for OBWC. He testified that OBWC is a state run agency which does not market or solicit insurance business outside the State of Ohio. He further testified that OBWC is not authorized to conduct business outside the state. *All Ohio employers must obtain workers' compensation insurance from OBWC or be self-insured.* Employers do not receive a paper insurance policy, as the terms of the policy are contained in the Ohio Workers' Compensation Act. OBWC does not offer insurance coverage for claims adjudicated, or awards made, outside the State of Ohio. *OBWC will adjudicate and pay claims for injuries that occur outside the state by employees of Ohio employers.*" (Emphasis added.)

The testimony presented in *Shelton* only addressed the Ohio statutory limits on the BWC's authority to pay a workers' compensation award issued by another state. It did *not* establish that Ohio does not recognize the extraterritorial provisions of the California workers' compensation laws as urged by applicant. To the contrary, the testimony shows that Ohio, like California, applies its own law to claims filed within the state. (See, *Pac. Emplrs. Ins. Co. v. Industrial Acc. Com.* (1939) 306 U.S. 493 [4 Cal.Comp.Cases 65].)

Similarly, *Kilbarger* does not address section 3600.5(b) or the issue of reciprocity between Ohio and California. Instead, the Ohio employer in *Kilbarger* was attempting to obtain a writ of mandate to challenge the BWC's denial of reimbursement of benefits paid by the employer pursuant to a Pennsylvania workers' compensation award. The court affirmed the BWC's determination that the Ohio Constitution and statutes do not require or authorize the BWC to hold an Ohio employer harmless against claims adjudicated in Pennsylvania, which did not have reciprocity provisions like Ohio's Revised Code section 4123.54 or California's section 3600.5(b). The extraterritorial provisions of Ohio and California law and the issue of reciprocity are simply not addressed in *Kilbarger*.

CONCLUSION

Applicant was hired outside of California and the evidence presented by the Bengals proved that it furnished workers' compensation insurance coverage for applicant while he was temporarily doing work within California in 1993 by self-insuring under the workers' compensation laws of Ohio. The record further shows that Ohio recognizes the extraterritorial provisions of other states like California, and likewise exempts California employers and employees from the provisions of Ohio's workers'

compensation law when they are temporarily working in that state. The record establishes that the Bengals and applicant met all the necessary conditions of section 3600.5(b), and they were exempted from the provisions of California's workers' compensation law in 1993, when applicant was temporarily in the state doing work for that employer.

Accordingly, the WCJ's January 24, 2011 decision is rescinded and an order is entered dismissing the Bengals as a defendant. The case is returned to the trial level for further proceedings and decision by the WCJ.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc), that:

1) The January 24, 2011 Findings of Fact, Award, and Order of the Workers' Compensation Administrative Law Judge in this case is **RESCINDED;**

2) The Bengals are dismissed as a defendant in this case;

3) The case is **RETURNED** to the trial level for further proceedings and decision by the

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workers' compensation administrative law judge.

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

I DISSENT
(See attached Dissenting Opinion)

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

6/18/2013

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

WESLEY CARROLL
NAMANNY, BYRNE & OWENS
PETERSON & COLANTONI
GRAY & PROUTY
WALL, MCCORMICK & BAROLDI

JFS/abs

DISSENTING OPINION OF COMMISSIONER SWEENEY

I would affirm the decision of the WCJ. There is no question that section 3600.5(b) must be construed as intended by the Legislature. However, that cannot be done by considering the statutory language in isolation. Instead, it is also necessary to "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." (*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831, quoting *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [internal quotation marks and citations omitted]; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1, 22] ("The words of the statute must be construed in context … and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.").)

To properly construe section 3600.5(b) in this case it is necessary to consider its relationship to section 3600.5(a), which was enacted at the same time in 1955, as well as how it should apply in light of subsequent amendments to section 5500.5 that allocate liability for a "cumulative" injury as found by the WCJ in this case. Ambiguities in section 3600.5(b) also need to be addressed in order to assure that the jurisdictional exemption it allows is construed in conformity with the entire statutory scheme and does not lead to unintended consequences. These concerns are discussed in turn.

DISCUSSION

1. SECTION 3600.5(b) MUST BE CONSTRUED IN CONFORMITY WITH SECTION 3600.5(a)

Section 3600.5(a) was enacted by the Legislature to establish WCAB jurisdiction over all out-of-state industrial injuries to employees hired or "regularly employed" in California. (*Bundsen v. Workers' Comp. Appeals Bd.* (1983) 147 Cal.App.3d 106, 108, fn. 2 [48 Cal.Comp.Cases 473]; *King v. Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15 [64 Cal.Comp.Cases 745].)

For many years, section 3600.5(a) has been construed by panels of the Appeals Board to provide WCAB jurisdiction over claims of out-of-state cumulative and specific industrial injuries by employees who routinely and regularly come into California to perform work duties for temporary periods of time.

This includes several decisions of the Appeals Board finding interstate truck drivers to be "regularly employed" in California as described in section 3600.5(a) even though most of their work was performed outside of the state. (See, e.g., *Koleaseco, Inc. v. Workers' Comp. Appeals Bd.* (*Morgan*) (2007) 72 Cal.Comp.Cases 1302 (writ den.) [husband and wife truck drivers hired in Michigan by employer in that state and injured in Illinois were "regularly employed" in California under section 3600.5(a) because most of their runs were to this state where they resided and stored materials for the employer]; *Rocor Transportation v. Workers' Comp. Appeals Bd.* (*Ransom*) (2001) 66 Cal.Comp.Cases 1136 (writ den.) [truck driver for Oklahoma employer who died because of cumulative injury was "regularly employed" in California as described in section 3600.5(a) because he made "regular" runs to the state and notwithstanding that only 9.2% of his total driving was in California]; *Rocor Transportation v. Workers' Comp. Appeals Bd*. (*Hogan*) (1999) 64 Cal.Comp.Cases 1117 (writ den.) [California resident truck driver for Oklahoma employer who was injured in Alabama was "regularly employed" in California under section 3600.5(a) notwithstanding that less than one-half of his total workdays were in California because his regular presence in the state was of economic benefit to employer]; *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd*. (*Patti*) (1999) 64 Cal.Comp.Cases 98 (writ den.) [truck driver employee of Utah employer who was injured in Ohio was "regularly employed" in California under section 3600.5(a) when 10% of his total miles and 15% of his total workdays were in California where he resided]; *Dick Simon Trucking Co. v. Workers' Comp. Appeals Bd.* (*Keller*) (1998) 63 Cal.Comp.Cases 1527 (writ den.) (truck driver for Utah employer who was injured in Pennsylvania found to be "regularly employed" in California under section 3600.5(a) because the home facility where he picked up and returned loads was in the state, and 15% of his driving time was in the state); *John Christner Trucking v. Workers' Comp. Appeals Bd*. (*Carpenter*) (1997) 62 Cal.Comp.Cases 979 (writ den.) [California resident truck driver for Oklahoma employer who alleged cumulative injury was "regularly employed" in California under section 3600.5(a) because at least 32% of his work time was in California]; *CNA Ins. Co. v. Workers' Comp. Appeals Bd*. (*Foote and Huckins*) (1987) 52 Cal.Comp.Cases 439 (writ den.) [Oregon resident truck drivers injured in Wisconsin were "regularly employed" in California under section 3600.5(a) because they made regular runs to California even though there was a "transitory element to it."].)

Section 3600.5(a) expressly provides that an employee who is "regularly employed" in this state is "entitled to compensation according to the laws of this state" if injured "outside the state." In this case, applicant routinely came into California to participate in pre-scheduled games as part of his regular work duties for the Saints and the Bengals. This is in contrast to an employee who temporarily enters the state on a single, brief occasion with no expectation of returning on a regular or routine basis.

Even if applicant's presence in the state was "temporary" as contemplated in section 3600.5(b) when he played in one game for the Bengals, that does not mean that he was not also "regularly" employed in California as described in section 3600.5(a) because his presence in the state was part of his regular, routine and scheduled duties as a professional football player, as evidenced by the additional five games he played in California while employed by the Saints. Thus, the majority's application of section 3600.5(b) in this case creates an anomalous situation where the Bengals are exempted from WCAB jurisdiction while at the same time section 3600.5(a) appears to extend that jurisdiction to cover the portion of the cumulative injury incurred by applicant while employed by the Bengals outside of California.

The exemption from California jurisdiction allowed by section 3600.5(b) should be narrowly construed and not be applied to employees to whom WCAB jurisdiction is extended by section 3600.5(a) because they are "regularly employed" in the state.

2. SECTION 3600.5(b) MUST BE CONSTRUED IN CONFORMITY WITH SECTION 5500.5

Construing the section 3600.5(b) exemption to apply only to employees who are temporarily in the state for a single occasion with no expectation of returning on a regular or routine basis and who incur specific injury while in California also harmonizes the jurisdictional exemption with section 5500.5, which addresses "cumulative" injuries like the one involved in this case. Section 5500.5 was amended by the Legislature in 1973 to place liability for cumulative injuries on the injured worker's employers during a specified period of liability and to establish a separate proceeding for the

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employers to allocate that liability among themselves.[14] (See also *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592 [24 Cal.Comp.Cases 274].) Those provisions of section 5500.5 are of particular concern in this case because the way section 3600.5(b) is being applied is in conflict with what the Legislature intended when it amended section 5500.5 to extend those provisions to cases involving cumulative injuries.

As originally enacted in 1951, section 5500.5 codified the earlier rule announced by the Supreme Court for cases involving progressive occupational diseases. (*Colonial Ins. Co. v. Industrial Acc. Com.* (*Pedroza*) (1946) 29 Cal.2d 79 [11 Cal. Comp. Cases 226] (*Pedroza*); *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322 [44 Cal.Comp.Cases 212] (*Flesher*).) In *Pedroza*, the Court reasoned that "the more workable and fairer rule" in cases involving progressive occupational diseases was to allow the employee the option to obtain an award for the entire disability against any one of several successive employers even though that particular employment was not the sole cause of the disability. The Court further reasoned that the successive employers would then be in a better position to carry their burden of obtaining apportionment of the liability to other employers and to adjust the share each would bear by producing evidence in an independent proceeding. (*Pedroza, supra*, 29 Cal.2d at 82.)

In 1973, the Legislature amended section 5500.5 to adopt that same process for allocating liability for cumulative injuries. (*Flesher, supra*.) The importance of regularly allocating liability for cumulative injuries as provided in section 5500.5 was addressed by the Court in *Flesher*, as follows:

> "**The purpose of these amendments was to provide greater certainty to insurers** in anticipating costs and necessary reserves, **to simplify the proceedings by reducing the number of employers and insurers required to be joined** as defendants, **and to reduce the burden placed on the entire system** by the former procedures. The insurance industry favored these amendments and reasoned that the total burdens and benefits upon employers and insurers would more or less even out, for **while they might be required to assume a larger liability in some cases, they would also be absolved of liability in other cases.**" (23 Cal.3d at 325-326, citation deleted, emphasis added; cf. *Torrance v. Workers' Comp.*

[14] As originally amended in 1973, section 5500.5 provided for a liability period of four years that was reduced over time to one year. Section 5500.5(a) now provides that liability for cumulative injury claims filed after January 1, 1981, "shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

Appeals Bd. (1982) 32 Cal.3d 371, 374-375 [47 Cal.Comp.Cases 963]; *Graphic Arts Mut. Ins. Co. v. Time Travel Intern., Inc*. (2005) 126 Cal.App.4th 405, 410-411 [70 Cal.Comp.Cases 184].)

Exempting the Bengals in this case from all liability for applicant's cumulative injury pursuant to section 3600.5(b) may effectively impose all liability upon applicant's other employer during the one-year liability period described in section 5500.5.[15] This is contrary to the policy of the law as expressed by the Supreme Court in *Pedroza* and *Flesher*, and it is contrary to the intent of the Legislature when it amended section 5500.5 to provide that liability for a cumulative injury be allocated to all employers during the specified period with their respective liabilities to be determined in a separate contribution proceeding. (Lab. Code, § 5500.5(e); cf. *Royal Globe Ins. Co. v. Industrial Acc. Com.* (*Lynch*) (1965) 63 Cal.2d 60 [30 Cal.Comp.Cases 199] [separate proceeding required in cumulative injury case to apportion liability for temporary disability indemnity among employers].)

3. AMBIGUOUS LANGUAGE IN SECTION 3600.5(b) MUST BE PROPERLY CONSTRUED

In addition to harmonizing section 3600.5(b) with the provisions of sections 3600.5(a) and 5500.5, there is also a need to construe its ambiguous language. Unfortunately, this is an issue of first impression because there are no published court decisions construing any of the provisions of section 3600.5(b) notwithstanding its enactment in 1955.

A. What Constitutes Being "Temporarily" In California?

Section 3600.5(b) provides that an employee hired outside of California and his or her employer are "exempted" from the provisions of California's workers' compensation law, subject to four conditions. However, the language describing those four conditions is ambiguous and uncertain. This is exemplified by the first condition that the employee must be "temporarily" within this state in order for the exemption to apply. Referencing the dictionary definition of "temporary" as meaning "for a limited

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[15] The majority does not address whether application of the section 3600.5(b) exemption it describes will trigger the provision of section 5500.5(a) that extends the liability period for cumulative injury beyond one year when no employer during that one year period is "insured for workers' compensation coverage or an approved alternative thereof." (See *Western Village Hotel v. Workers' Comp. Appeals Bd.* (*Lim*) (2003) 68 Cal.Comp.Cases 1279 (writ den.); *Utica Nat'l Ins. Co. v. Workers' Comp. Appeals Bd.* (*Garcia*) (2002) 68 Cal.Comp.Cases 96 (writ den.).) Thus, it is unclear if liability will fall upon earlier employers or if the employee of an exempt employer will have no remedy in California.

time" adds nothing of substance to how this provision should be construed in the context of the state's entire workers' compensation law because that definition encompasses any period of time that could be called "limited," from less than one hour to one year or more.

Moreover, as discussed above, working in California for a "limited time" does not preclude a finding that the employee is "regularly employed" in California as described in section 3600.5(a) when that "limited time" in California is part of the employee's ongoing, routine and/or regular work duties for the employer, as found by the WCJ in this case. The section 3600.5(b) exemption should not be construed to apply to employees who are "regularly employed" in this state as described in section 3600.5(a).

B. What "Insurance Coverage" Is Required To "Cover" Temporary Employment In This State?

This case also raises a question about the proper construction of the section 3600.5(b) requirement that the employer furnish "*insurance coverage* under the workmen's compensation insurance or similar laws of a state other than California, *so as to cover such employee's employment while in this state*." (Italics added.)

Defendant admits that it had no insurance policy and that it is not an insurance company. Thus, it can be fairly questioned whether it ever could provide "insurance coverage" as required by section 3600.5(b). But even if it is assumed that the "self-insurance" the Bengals provided was a kind of "insurance coverage" allowed by section 3600.5(b), it was found to qualify as the requisite "insurance coverage" without first determining whether that coverage and Ohio's laws meet the minimum requirements of California law for self-insured employers in this state. (Lab. Code, §§ 3700(b) et. seq.; Cal. Code Regs., tit. 8, §§ 15200-15499.5.)

The self-insurance "insurance coverage" the Bengals provided pursuant to Ohio law was substantively different than what California law mandated for workers' compensation insurance coverage in this state at that time. Those differences in coverage are not limited to benefits, but also include the jurisdictional scope of each state's workers' compensation statutes and the statutory protections afforded employees.

While "similar laws of a state other than California" may not require identical statutory systems

or identical benefits, California's workers' compensation system embodies certain fundamental public policies for the protection of employers and employees alike. California requires that employees file prompt and timely injury claims upon knowledge that they have sustained a work-related injury or illness. (Lab. Code, §§ 5400, 5404; *Honeywell v. Workers' Comp. Appeals Bd.* (*Wagner*) (2005) 35 Cal.4th 24, [70 Cal.Comp.Cases 97, 107] ["...The employer's duty under section 5401 arises when it has been notified in writing of an injury by the employee (§5400) or has 'knowledge' of the injury or claim from another source..."].) Similarly, employers with knowledge that an employee may have an industrial injury or condition are charged with providing notice to the employee of his rights. (*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 729 [39 Cal.Comp.Cases 768] ["The clear purpose of these rules is to protect and preserve the rights of an injured employee…"]; *Buena Ventura Gardens v. Workers' Comp. Appeals Bd.* (*Novak*) (1975) 49 Cal.App.3d 410 [40 Cal.Comp.Cases 434].) It is not unreasonable to expect that the "insurance coverage" provided under the laws of the other state would provide that same protection by requiring notice of rights.

Applicant notes in his answer that a claim by him in Ohio is barred by that state's statute of limitations, but it is not barred in this state because he was not provided required notice of his rights. This difference in the procedural protections provided under the laws of Ohio and California shows that the "insurance coverage" provided by the Bengals did not "cover such employee's employment while in this state" to the same extent that a California employer would have been obligated to provide "insurance coverage" under California law. In that regard, the statute of limitations that precludes applicant from pursuing a workers' compensation claim in Ohio appears to be the kind of "quasi-jurisdictional" bar that the Ohio Appellate Court held to forestall application of that state's "exemption" provision for employees "temporarily" in that state as provided in Ohio Revised Code section 4123.54 (R.C. 4123.54). (*Wartman v. Anchor Motor Freight Co.* (1991) 75 OhioApp.3d 177 (*Wartman*).)

In *Wartman*, the employee of a Michigan employer was injured in a traffic accident in Ohio while driving an empty company truck from his home in Kentucky to the employer's dispatch terminal in Michigan. The laws of Michigan and Kentucky did not allow him to file a workers' compensation claim in either of those states, and his claim for workers' compensation in Ohio was initially disallowed

because he was only "temporarily" in that state when he was injured.

Upon appeal, the court in *Wartman* scrutinized the phrase "insured under the workers' compensation law of another state," and held that the Ohio law exempting employees injured while "temporarily" in that state should not be construed to defeat a claim for workers' compensation when the injured worker was foreclosed on a "jurisdictional or quasi-jurisdictional basis" from being "insured" in another state as required by the Ohio statute. This led the court to construe the ambiguous word "insured" as used in the Ohio statute, and to write as follows:

> "[T]he preliminary issue for this court is whether appellant was, at the time of his injury, '*insured* under the workers' compensation law' [] of another state. This issue, in turn, involves the threshold question of whether preclusion from participation under the workers' compensation law of another state on a jurisdictional or quasi-jurisdictional basis [] results in the employee not being 'insured' in another state as that term is used in R.C. 4123.54…
>
> "**The term 'insured' is ambiguous**, however, because, as used in R.C. 4123.54, it is unclear whether it is meant to preclude an employee from receiving benefits in Ohio: (a) merely because a policy of workers' compensation insurance has been secured in another state by the injured workers' employer; or (b) only when the application of the law of the other state would permit actual recovery under the facts of the case; or (c) only when the claimant's employer is required to maintain coverage on his behalf in another state, *i.e.*, amenability; or (d) only when the laws of the other state do not deny its agencies and courts the power to entertain a claim for benefits on the merits, *i.e.*, bestows subject-matter jurisdiction.
>
> "The General Assembly could have, but did not, pursuant to the nonresidency provision contained in R.C. 4123.54, preclude entitlement to benefits to a nonresident solely on the basis that he is temporarily in Ohio. Instead, it imposed the additional condition that, **to be precluded, the nonresident employee who is temporarily in Ohio must be 'insured' under the workers' compensation laws of another state. We believe that this evidences legislative concern that a remedy be available somewhere to the nonresident employee**." (*Wartman*, *supra*, 75 OhioApp.3d at 181-184, italics in original, bolding added.)[16]

[16] The court in *Wartman*, however, was careful to note: "This court is not unmindful of the possible extraterritorial application of this finding to a case in which a nonresident employee is injured outside of Ohio. Whether such a case requires application of the nonresidency provision of R.C. 4123.54, application of the test for sufficient contacts, or some other test, or a combination of tests, is not within the purview of this opinion. The present opinion is limited to the facts of this case in which a nonresident employee is injured in Ohio. We otherwise do not decide today whether or not the term 'insured,' as used in R.C. 4123.54, encompasses a situation in which the nonresident employee has been or would be denied compensation and benefits in another state as a result of the application of that state's substantive or procedural law to the facts of the case." (*Wartman*, *supra*, 75 OhioApp.3d at 183 footnote 2, citations omitted.)

In this case, as in *Wartman*, the injured worker may[17] have no workers' compensation remedy if the "insurance coverage" requirement in section 3600.5(b) is construed to allow less "insurance coverage" than what California law required employers in this state to provide. In this case, unlike *Wartman,* the majority is finding that there is "insurance coverage" as required by section 3600.5(b) based upon the foreign state's definition of insurance coverage, without considering whether that coverage satisfies California's constitutional requirement of adequacy. (Cal. Const., art. XIV, § 4 ["A complete system of workers' compensation *includes adequate provisions* for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support *to the extent of relieving from the consequences of any injury or death* incurred or sustained by workers in the course of their employment, irrespective of the fault of any party"].)

Such a construction is contrary to public policy and the directive in section 3202 that the workers' compensation statutes be "liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (See, *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; cf. *Wartman*, *supra* [similar Ohio statutory directive applied by court in that case].) It also means that employees performing the same work in this state during the same time periods, such as players on the same football team, will have different rights and benefits available to them depending upon when and where their present and past employers had workers' compensation insurance coverage.

Allowing out-of-state employers to provide less insurance coverage than employers in California creates a disadvantage for California employers who are held to a higher coverage standard than those out-of-state competitors. California employers and out-of-state employers who regularly send their employees to work in California should have a level and predictable playing field for workers' compensation claims in California, and this will occur only if the out-of-state employers are held to comparable standards of insurance coverage.

[17] It is unknown at this time if applicant will have a workers' compensation remedy because the case is returned to the trial level for further proceedings involving the remaining parties.

The Legislature's intent in enacting section 3600.5(b) could not have been to stop injured workers from obtaining workers' compensation benefits or to place California employers at a competitive disadvantage. Instead, it appears section 3600.5(b) was intended to eliminate the need for an employer with employees temporarily working in California to obtain separate insurance coverage in this state by deferring workers' compensation claims to another state if the employer furnished insurance coverage for the employees' work in California under the similar laws of that other state. (See Nagle, *supra*.)

Construing the "insurance coverage" condition of section 3600.5(b) to require substantially the same "insurance coverage" that California employers must have for their employees in this state would assure that covered employees and California employers obtain equal protection under the law and are provided "substantial justice" by the Appeals Board in furtherance of our Constitutional mandate. (Cal. Const., art. XIV, § 4.)

C. Does Ohio Law Recognize The "Extraterritorial Provisions" Of Section 3600.5(b) And "Likewise" Exempt California Employers?

Lastly, there is a concern that Ohio Revised Code section 4123.54 does not "likewise" exempt California employers and employees from the application of Ohio law for work performed in Ohio because it is not fully reciprocal with "the extraterritorial provisions" of section 3600.5(b), as that section requires.

Ohio Revised Code section 4123.54(H)(1) provides in part that when a contract of employment is entered into outside of Ohio and some portion of the work is to be performed in a state other than Ohio, "the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed."[18]

Authorizing the employer and employee to designate the law of Ohio as applying to future workers' compensation claims regardless of where the injury occurred is inconsistent with the section

[18] Under California law, an employer and employee have a limited ability to contractually preselect another state as the forum for workers' compensation claims. (*McKinley v. Arizona Cardinals* (2013) 78 Cal.Comp.Cases 23 (Appeals Board en banc); *Alaska Packers Assn. v. Industrial Acc. Com.* (*Palma*) (1934) 1 Cal.2d 250 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [20 I.A.C. 326].

3600.5(b) requirements that the law of another state should apply, and that all California "employers and employees" are "likewise exempted" from the Ohio law. It is also unclear from the face of the Ohio statute if the agreement authorized by Ohio Revised Code section 4123.54(H)(1) is a necessary condition for the reciprocal exemption to apply, as suggested by early commentators, and no Ohio court case has been found that addresses the issue. (Storke & Sears, *supra*.) In the absence of a showing by defendant that Ohio law is fully reciprocal with the provisions of section 3600.5(b) the jurisdictional exemption allowed by that statute should not be found to apply.

CONCLUSION

Both the language of section 3600.5 and the substantial connection between the business of professional football and this state supports the application of California law for the benefit of professional football players who are regularly employed and foreseeably injured here. Over the past 50 years, more NFL regular season games have been played in California than in any other state, and the annual Super Bowl and Pro Bowl games have been played in this state 34 times. (*National Football League et. al. v. Fireman's Fund Insurance Company et. al.* (May 28, 2013, B245619) __ Cal.App.4th __ [2013 Cal. App. LEXIS 414].)

It is also important to recognize that the impacts of this case are not limited to the NFL or to professional football. To the contrary, the full consequences of the holding in this case are unknown. It is unknown how many injured workers in other occupations will be left without a claim for workers' compensation benefits even though they were injured in California and would otherwise be entitled to claim benefits in this state but for the construction of section 3600.5(b) that is being applied in this case. It is unknown how many states have laws that will be construed in the same manner that Ohio's law has been construed to meet the section 3600.5(b) exemption requirements, and it is unknown how many employers from those states will be exempted from California's workers' compensation laws by the holding in this case.

/ / /

Section 3600.5(b) should be construed so that it does not limit the WCAB's jurisdiction over employees "regularly employed" in this state pursuant to section 3600.5(a). It should be construed in

harmony with section 5500.5 so as not to disrupt the allocation of liability and separate proceedings intended by Legislature when it amended that section to apply to cumulative injuries. It should not be construed to exempt Ohio and potentially other out-of-state employers from all liability for cumulative injuries when those employers are not held to the same insurance coverage standards that apply to California employers. The ambiguous language in section 3600.5(b) should be construed in a way that does not eliminate, reduce or provide disparate workers' compensation benefits for employees injured in this state. The holding in this case does not accomplish any of these goals and is contrary to the policies underlying California's workers' compensation laws.

The decision of the WCJ should be affirmed.

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

6/18/2013

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

WESLEY CARROLL
PETERSON & COLANTONI
NAMANNY, BYRNE & OWENS
GRAY & PROUTY
WALL, MCCORMICK & BAROLDI

JFS/abs