STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board
CASE NUMBER: ADJ8180232

HUBERT OLIVER **-vs.-** **INDIANAPOLIS COLTS, HOUSTON OILERS CKA TENNESSEE TITANS; TRAVELERS DALLAS, ESIS CHATSWORTH, CIGA GLENDALE;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Tien Nguyen**

OPINION ON DECISION

BACKGROUND

Trial on 4/25/17

Hubert Oliver, applicant, claimed to sustained injury arising out of and in the course of employment during the continuous trauma period from 5-12-1981 through 9-7-87 while employed as a Professional Athlete by the Philadelphia Eagles, Indianapolis Colts, and Houston Oilers to the head, neck, back, spine, bilateral shoulders, bilateral elbows, bilateral hands, bilateral wrists, bilateral legs, bilateral ankles, bilateral feet, internal organs, ENT/TMJ conditions, neurological/psyche conditions, hearing loss, vision loss, sleep problems and in the form of chronic pain.

At the time of the injury, the employer's workers' compensation carrier was ACE/ESIS for the Philadelphia Eagles, from 7-1-1981 through 7-1-1984; Home Insurance for the Philadelphia Eagles, from 7-2-84 through 9-11-85; Home Insurance for the Indianapolis Colts, from 5-9-86 through 8-15-86; Travelers for the Indianapolis Colts, from 8-15-86 through 11-21-86; Home Insurance for the Houston Oilers, from 12-12-86 through 9-7-87. Home Insurance Company was in liquidations, and administered by California Insurance Guarantee Association (CIGA).

At the trial on 4/25/17, it was stipulated that 1. Applicant was employed by the Philadelphia Eagles from 5-12-81 through 9-11-85; for the Indianapolis Colts, two periods of employment, from 5-9-86 through 8-27-86 and from 10-21-86 through 1-21-86; for the Houston Oilers from 12-12-86

through 9-9-87; and, 2. Applicant played two games in California on 8-13-83 and 9-3-83 for the Philadelphia Eagles, in the total of 80 games that the applicant played over his professional athlete career; 3. At the time of the injury, the employee's earnings were $1,730.77 per week, warranting indemnity rates at $224 per week for the year 1987 (and at $1,153.85 at the present time), and for permanent disability, $140 under the 1987 rate; 4. The carrier/employer has adequately compensated for a period of TD to the present.

The issues for trial: 1. Injury arising out of and in the course of employment; 2. Parts of the body injured; 3. Permanent and stationary date. Employee claims he was permanent and stationary on 12-7-1987, based on the report of Dr. David Kim, dated 7-15-16; 4. Permanent disability; 5. Apportionment; 6. Need for further medical treatment; 7. Liability for out-of-pocket expenses in the form of travel expenses incurred by Rosalyn Wade who traveled with the applicant, in the amount of $1,122; 8. Attorney fees; 9. Other issues: (a) California jurisdiction; (b) The date of injury under Labor Code §5412 and the limitation of liability under Labor Code §5500.5; (c) Statute of limitation defense; (d) Whether or not the applicant's permanent disability should be rated under the 1997 old schedule or the 2005 new schedule; (e) Admissibility of Dr. Kim's report obtained in duplication of the report of Dr. Elias; and, (f) CIGA contends there was no "covered claim" under Insurance Code §1063.1 et seq.

Trial on 6/8/17

At the trial on 6/8/17, applicant requested admission into the evidence of The Brain SPECT Study dated 6/7/2017 from Daniel Amen, M.D., identified as Applicant's Exhibit 18; The Brain SPECT Imaging Report for the applicant dated 6/7/2017 from Dr. Daniel Amen, M.D., identified as Applicant's Exhibit 19; The Self Administered Gerocognitive Examination dated 6/7/17, identified as Applicant's Exhibit 20; and, Curriculum Vitae of Dr. Daniel Amen dated June 2017, identified as Applicant's Exhibit 21. Applicant contended that these were treatment medical reports. Defendant contented that they should be excluded from the evidence because they were obtained after discovery cutoff at the MSC.

At the side bar discussion, it was suggested that if the medical reports were obtained for the purpose of medical treatment, they are admissible into the evidence. Defendants will be accorded with opportunity to obtain rebuttal QME reports. It was further suggested that for judicial economy the parties might consider the use of an AME in the field of neurology instead of procuring dueling

QME reports. The parties were requested to file a brief on the issue of admissibility. This discussion assumed a finding of California jurisdiction because treatment and med-legal reports are relevant on the issue of the nature and extent of the injury.

However, the side bar discussion on the issues of admissibility of the treating medical reports and development of the record turns out to be unnecessary based on the threshold finding of no California jurisdiction after careful review of the witness testimony and the admitted evidence. Below is the discussion on this decision:

Statement of the Law

California jurisdiction over applicant's industrial injury claim pursuant to LC § 5305 may be established by showing that applicant's employment contract was made in California, Ramonda Walker v. WCAB (2016) 81 CCC 461, Second Appellate District, writ denied, Anthony Johnson v. San Diego Chargers 2012 Cal. Wrk. Comp. P.D. Lexis 354 [On the issue of California jurisdiction for out of state injuries under whether LC §5305, it was proper for California to deny jurisdiction to applicant, football player, out of state injury based on the facts that applicant was not a California resident, he accepted the job offer and signed the contract of hire outside of California and the only connection with California was his agent's office location].

First, burden of proof rests on the party asserting the issue, San Francisco USD v. WCAB (Cardozo) (2010) 75 CCC 1215, 38 CWCR 289. Second, applicant's motivation to prevail in his case does not automatically render his testimony questionable. When applicant's evidence has been not contradicted or impeached, it must be accepted as true unless there is some other rational basis for disbelieving it, Braewood Convalescent Hospital v. WCAB (1983) 48 CCC 566, California Supreme Court en banc. Third, substantial evidence means "relevant evidence as a reasonable mind might accept as adequate to support a conclusion… It must be reasonable in nature, credible and of solid value…," Braewood, supra. Fourth, court must give fair consideration to all parts of a witness testimony – not just a portion of it, Rosas v. WCAB (1993) 16 Cal.App.4th 1692, 1702; State Comp. Ins. Fund v. WCAB (2007) 146 Cal.App.4th 1311, 1315. Finally, court may find that applicant has not met the burden of proof on an issue, if it finds that he is not credible, Sullivan on Comp (2017) at Section 16.17 – Evidence at Trial – Witness Testimony.

In the instant case, applicant contends that California has jurisdiction over the injury because 1. His agent was in San Diego, California, during his entire football career. The agent had full

authority to negotiate and accept all contract offers. He accepted the offer for the contracts of hire in California; 2. Applicant signed the contracts of hire at his agent home in San Diego, California.

Following is the summary of applicant's trial testimony on the issue of California jurisdiction:

Summary of Applicant's Testimony

Direct Examination

Applicant met Mr. Lewis Muller, his agent, from California while he was in Arizona. Mr. Muller represented applicant from 1981 through 1987. Mr. Muller negotiated all the contracts for him. When applicant was drafted in 1981, Mr. Muller was in San Diego. Mr. Muller represented applicant throughout his career. Applicant visited Mr. Muller in California about one or two times per year throughout his career, (MOH/SOE, Trial on 4/25/17 at page 10).

As to the first contract with the Philadelphia Eagles, applicant was directed to Applicant's Exhibit No. 3, a newspaper article. Applicant recalled that he was drafted on 4-30-81. The article corroborated his contention that Mr. Muller was in San Diego during the time of the draft. He signed the first contract with the Philadelphia Eagles in May of 1981in San Diego, at Mr. Muller's house, where Mr. Muller had an office. The contract was for three years: 1981, 1982, and 1983.

Mr. Muller also negotiated the second contract for the applicant for another three years, 1984 through 1987 in San Diego, California, (MOH/SOE, Trial on 4/25/17 at page 11). Applicant reviewed Exhibit No. 12, Bates No. 000045, a document from Muller Enterprises, Ltd., dated 2-24-84. The last sentence reads: "The weather is great if you'd like to come out here and get this settled quickly." It was signed by Lewis Muller. Applicant believes that this document was consistent with his recollection that the contract was negotiated in California. Applicant does not recall the exact date when he signed the contract. After review of Exhibit No. 12, Bates No. 000064, a document bearing the letterhead of Muller Enterprises, Ltd., dated June 30, 1984, applicant testified that he discussed the contract terms with Mr. Muller in California. (MOH/SOE, Trial on 4/25/17 at page 11).

He reviewed Exhibit No. 3, page 4. He read the following paragraph: "The Eagles agree that Oliver deserves a raise. Lynn Stiles, the Eagles' executive director of player personnel, has been negotiating with Oliver's agent, Lew Muller of San Diego. Both sides hope to work something out by the season opener." Applicant testified, as far as he knows, Mr. Muller was in San Diego while he

negotiated the contract for applicant. He was again shown Exhibit 3, an article from The Philadelphia Inquirer dated 8-19-84. He read the following paragraph, "Stiles bristles at this accusation, saying he has not signed Oliver because Oliver's agent, Lew Muller of San Diego, has yet to pay a visit to Philadelphia. Stiles also said he had made Oliver a salary offer that would apply regardless whether Oliver was injured." Based on the article, applicant confirmed that Mr. Muller was in California on 8-19-84, (MOH/SOE, Trial on 4/25/17 at page 12).

Mr. Lewis Muller accepted the contract with the Philadelphia Eagles in California. Mr. Muller had the authority to bind the contract. Applicant never rejected a contract negotiated by Mr. Muller. Applicant feels that he could never reject a contract because he believed that "a deal was a deal." He would not reject the contract negotiated by Mr. Muller because it was Mr. Muller's responsibility to negotiate on his behalf, (MOH/SOE, Trial on 4/25/17 at page 12).

Applicant believed he signed the contract with the Philadelphia Eagles on 8-24-1984. There was a game between the Philadelphia Eagles and the Cleveland Browns in Philadelphia on 8-23-84. Applicant did not play in that game because he was in California, (MOH/SOE, Trial on 4/25/17 at page 12).

The contract with the Philadelphia Eagles was a big deal because it offered him more money. That was the highest contract that Mr. Muller had negotiated for anyone so it was important for him to be with Mr. Muller to sign the contract. Applicant was in California when he signed the contract, (MOH/SOE, Trial on 4/25/17 at page 12).

Applicant reviewed the record of the Philadelphia Eagle at page 31 (Bates No. 000258) (Applicant's Exhibit 12) with the entry dated 7-21-84. Applicant believed that he received medical treatment every single day except for the day on August 24, 1984. That was because he was in San Diego on that day, (MOH/SOE, Trial on 4/25/17 at page 13).

Applicant remembers that he was in California signing the employment contracts because he and his wife were with his attorney going through newspaper articles and logs the day before the trial. They spent a lot of time. Additionally, he and Mike Douglass, a linebacker for the Green Bay Packers, had the same agent. He would work out with Mr. Douglass in the off-season. Mr. Douglass lived in San Diego, California. The association with Mr. Douglass helped applicant remembers that he was in San Diego in 1981 and 1984 when he signed the contracts, (MOH/SOE, Trial on 6/8/17 at page 20).

Applicant believes that his agent had binding authority from him. His agent negotiated

endorsement contracts. His agent accepted the endorsement contracts. His agent did not call the applicant requesting authority to accept the contracts, (MOH/SOE, Trial on 6/8/17 at page 20).

Applicant was diagnosed by Dr. Kenneth Nudleman of having chronic traumatic encephalopathy or CTE, and by defense neurologist, Dr. Rosabel Young with Dementia, Class II. The symptoms of CTE involves speech problems, memory loss, confusion, motor dysfunction and dementia. He has problems with articulating himself. Since the last examination with a neurologist in 2013, his symptoms of CTE has worsened. He believes his condition since 2013 has evolved into dementia, (MOH/SOE-Trial on 6/8/17, at page 5).

His neurological issues has gotten worse since 2013. Applicant has memory problems. He has problems remembering what his wife told him. He has problems remembering people's first names. He has problems remembering the name of his fiancée. At the first trial, applicant testified that he had problems with his memory occasionally. At the second trial, his memory problem developed into a constant issue (MOH/SOE-Trial on 6/8/17, at page 6). He has problems making judgment and decisions. He needs help from his fiancée for travel to and from medical examinations, (MOH/SOE-Trial on 6/8/17, at page 10).

Cross Examination

At cross examination, applicant essentially testified that when Mr. Muller contacted him regarding the terms of the offer, applicant was at his home in Ohio. Throughout his professional football career, he lived in Ohio but never in California. Even though he had the ultimate decision to accept or reject an employment contract, he gave Mr. Muller the authority to accept or reject it. The authority was by the terms of his agreement with Mr. Muller, but Mr. Muller always asked applicant before acting on an offer. It was applicant's sole discretion to agree to play for a particular team, (MOH/SOE, Trial on 6/8/17 at page 11).

As to the first contract, applicant was drafted in April 1981 in Arizona. He signed the contract with the Philadelphia Eagles at his agent's house in California in a cookout. Also present at the cookout was a friend named Mike Douglas. About a month later, he participated in the minicamp in Philadelphia, (MOH/SOE, Trial on 6/8/17 at pages 11-12).

In the deposition in 2012, applicant denied remembering if he signed a contract with the Philadelphia Eagle in California, (MOH/SOE, Trial on 6/8/17 at page12 – Also the deposition transcript taken on 9/13/12 at page 42 confirmed that he did not recall signing any contract with any

team while physically in California or where he was physically present at the time he signed the contract with the Philadelphia Eagles (Defendant's Exhibit T). Nevertheless, he testified at the trial in 2017 that the contract was signed in California since he thought about it and now came to the belief that it was really what had happened. His memory four years ago was wrong, and the present recollection is correct. He has thought about it. His memory came back when he prepared for the trial. He talked to people. His ex-wife and relatives were helpful for him to remember, (MOH/SOE, Trial on 6/8/17 at pages 11-12).

He was referred to Exhibit 2, Bates No. 93, records of the Philadelphia Eagles. He recognized his signature but uncertain if the handwriting for the date May 12, 1981 was his. He confirmed that he signed the documents at his agent's house in California, (MOH/SOE, Trial on 6/8/17 at page 13.

Applicant reviewed Exhibit Q, a newspaper article entitled Draftees, Free Agents in Eagles' Camp Today. He believes that he could have appeared at the minicamp for the Philadelphia Eagles on May 14, 1981, but he does not recall it. He signed the first contract with the Philadelphia Eagles on May 12, 1981 in San Diego. Applicant does not remember that two days later he participated in the minicamp in Pennsylvania. He does not remember how long he stayed in California, (MOH/SOE, Trial on 6/8/17 at page 13).

The second contract with the Philadelphia Eagles was on August 24, 1984. Applicant does not remember he was under contract with the Philadelphia Eagles for the 1984 preseason. He does not remember that he played any preseason games for the Philadelphia Eagles in 1984, (MOH/SOE, Trial on 6/8/17 at page 13). Applicant acknowledged that he previously testified he received medical treatment from the team trainer after the document was shown to him. He could have been involved with the Philadelphia Eagles' 1984 preseason. However, he stopped medical treatment on August 23, 1984 because he needed to fly to California to be with his agent, (MOH/SOE, Trial on 6/8/17 at page 13).

Applicant does not remember whether he had a game with the Cleveland Browns on August 23, 1984. He was shown Defendant's Exhibit R, a box score from the *Hattiesburg American* newspaper, dated August 24, 1984. In the section at the bottom of the box score entitled Individual Statistics, there was a notation with the name Oliver 5-18. Applicant has no idea whether the statistics are correct. He does not believe that he was in Philadelphia on August 24, 1984, (MOH/SOE, Trial on 6/8/17 at page 14).

Applicant was then shown a number of pages identified as Exhibit S, entitled Game Summary. The pertinent portion of the first page of the document contained "Date: August 23, 1984. Starting time: 7:00 p.m. Visitor: Cleveland Browns vs. Home: Philadelphia Eagles at Veterans Stadium." Under the section entitled Lineups under the Home Offense column was the name Hubie Oliver. Applicant does not remember if he played that game, (MOH/SOE, Trial on 6/8/17 at page 14).

Applicant was then shown Exhibit S, page 3, entitled Final Individual Statistics. Under the heading Rushing, there was a statistic that applicant has a 5-18 score. The statistic corroborated with the fact that applicant played in the game against the Cleveland Browns on August 23, 1984. He admitted that the document appeared to be what it was, unless it was falsified, (MOH/SOE, Trial on 6/8/17 at page 14). There was no other player with the last name of Oliver playing for the Philadelphia Eagles in the game on August 23, 1984. He now believes he was not in California at the time of the game on August 23, 1984 according to the record, (MOH/SOE, Trial on 6/8/17 at page 14).

Applicant reviewed Exhibit 2, Bates No. 24. Applicant acknowledged the signatures on August 24, 1984 as his and of Lynn Stiles, the Director of Player Personnel. Even though the document does not show his home address, his permanent address was in Ohio. Applicant confirmed he signed the document in California, (MOH/SOE, Trial on 6/8/17 at page 15).

Applicant does not remember how long he stayed in California when he signed the contract. Applicant does not have an answer as to why he still believes he was in California and missed a game on August 23, 1984. He did testified that he missed the preseason game to fly to California to be with his agent, (MOH/SOE, Trial on 6/8/17 at page 15). The date August 23, 1984 was memorable to him because it was the day he was recognized as an excellent player and the Philadelphia Eagles offered him a new contract for which he felt as fair, (MOH/SOE, Trial on 6/8/17 at page 15).

Applicant does not recall that he engaged in the preseason games and practiced in 1984, (MOH/SOE, Trial on 6/8/17 at page 15). Applicant was then shown Exhibit 12, Bates No. 258, the Philadelphia Eagles' Daily Treatment Records showing that he was present in the preseason game on July 21, 1984 through August 14, 1984. Now, he became uncertain in the belief that he was in California on August 23, 1984, (MOH/SOE, Trial on 6/8/17 at page 16).

Applicant was shown a rough transcript of his testimony at the last trial on 4/25/17 at pages

31, 35 and 36. Here, he denied memory of playing the game on August 23, 1984 between the Philadelphia Eagles and the Browns because he was in San Diego, California, on August 24, 1984, (MOH/SOE, Trial on 6/8/17 at pages 16 and 17).

Applicant remembers some part of his deposition in 2012. He believes that his memory got worse over time. He is not sure if the deposition testimony in 2012 is better than his testimony today, (MOH/SOE, Trial on 6/8/17 at page 19). Applicant was directed to his deposition testimony at page 44, lines 16 through 22. He testified that Mr. Muller could not accept a contract without consulting him. Applicant admitted that he cannot remember the deposition testimony, (MOH/SOE, Trial on 6/8/17 at page 21).

Applicant admitted that his agent did not negotiate any endorsement contract for him. He had endorsement contracts with Nike and Puma, (MOH/SOE, Trial on 6/8/17 at page 21).

Discussion

Applicant lived in Ohio throughout his professional football career. He played 2 games in California between 1981 through 1987. He never lived in California. He contended that California has jurisdiction for the injury because 1. His California agent had full authority to bind him in the employment contract with the out-of-state football teams; and, 2. He signed the employment contracts at his agent's house while in San Diego, California. There was no representation contract between him and his agent. There was no documentary evidence on the disputed question where applicant signed the contracts of hire. Even though there were some circumstantial evidence in the forms of newspaper articles and team records, there was no direct proof on the issues except applicant's testimony.

It is undisputed that applicant suffered from memory and judgment problems. He diagnosed by Dr. Nudleman of having chronic traumatic encephalopathy or CTE, and by defense neurologist, Dr. Rosabel Young with Dementia, Class II with symptoms of speech problems, memory loss, confusion, motor dysfunction and dementia. . Since the last examination with a neurologist in 2013, his symptoms of CTE has worsened. He believes his condition since 2013 has evolved into dementia. He has memory problems all the times. He has problems remembering what his wife told him, people's names and even the name of his fiancée. He has problems making judgment and decisions. He needs help from his fiancée for travel to and from medical examinations.

He testified at trial that Mr. Muller, his agent, accepted the contracts with the Philadelphia

Eagles in San Diego, California. Mr. Muller had the authority to bind the contracts. However, he was contradicted by his deposition testimony on 9/13/12 at page 44, lines 16 through 22, that Mr. Muller could not accept a contract without consulting him. Other than employment contracts with the football teams, his agent negotiated and accepted endorsement contracts without having to call him before accepting them. But at cross examination, he admitted that his agent did not negotiate endorsement contracts for him, even though he had such contracts with Nike and Puma.

Applicant testified at trial that he signed the first contract with the Philadelphia Eagles in May of 1981 in San Diego, at Mr. Muller's house, where Mr. Muller had an office. He signed the second contract with the Philadelphia Eagles on 8/24//84 in California. These events came to his memory independently because 1. As to the first contract with the Eagles, he remembered the cookout at his agent's house in San Diego, where his friend, Mike Douglass – a linebacker for the Green Bay Packer was also present; 2. As to the second contract, the contract was a big deal for him because it was the highest amount negotiated by his agent. He also received help from external sources for recollection by talking to his ex-wife, relatives and after he and his fiancee spent a lot of time with his attorney going through newspaper articles and logs the day before the trial. However, this testimony was undermined by his deposition testimony on 9/13/12 at page 42 where he testified he did not recall signing any contract with any team while physically in California. He did not recall where he was physically present at the time he signed the contract with the Philadelphia Eagles (Defendant's Exhibit T).

Applicant originally testified that after the first contract with the Philadelphia Eagles on May 12, 1981 in San Diego, he participated in minicamp a month later in June of 1981. However, Defendant's Exhibit Q, a newspaper article entitled Draftees, free agents in Eagles' camp today showed that he participated in the minicamp with the Eagles on May 14, 1982. The article casted doubt on his memory on the length of his stay in California after the first contract with the Eagles.

Applicant does not remember he was under contract with the Philadelphia Eagles for the 1984 preseason. He does not remember that he played any preseason games for the Philadelphia Eagles in 1984. However, he was contradicted by Exhibit 12, Bates No. 258, the Philadelphia Eagles' Daily Treatment Records showing that he was present in the preseason game on July 21, 1984 through August 14, 1984.

Applicant testified that he missed the preseason game with the Cleveland Browns on 8/23/1984 because he flew to California to be with his agent. After confronted with the Eagles' team

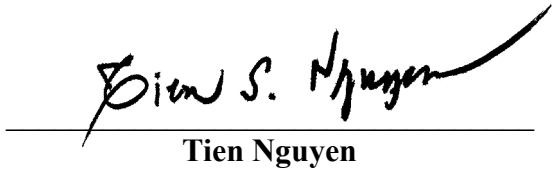
record, he became uncertain that he was in California on August 23, 1984. At one point, he agreed that he was not in California at the time of the game on August 23, 1984 based on the team record.

Conclusion

Based on the above discussion, it was found that applicant's testimony on the two core factual issues: 1. Whether his agent, Mr. Muller, had full authority to bind the employment contracts; and, 2. Whether applicant signed the contracts in San Diego, California was unreliable due to various inconsistencies and lack of independent recollection. Thus, it is concluded that there was no substantial evidence to support a finding of California jurisdiction.

Having found no California jurisdiction for the claim of continuous trauma injury from 5-12-1981 through 9-7-87 while employed as a Professional Athlete by the Philadelphia Eagles, Indianapolis Colts, and Houston Oilers to various orthopedic body parts, internal organs, ENT/TMJ conditions, neurological/psyche conditions, hearing loss, vision loss, sleep problems and in the form of chronic pain, all other issues are moot and will not be addressed.

DATE: 6/29/17



Tien Nguyen
WORKERS' COMPENSATION JUDGE

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