

DEC 02 2017

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JONATHAN PARKER,

Applicant,

vs.

INDY FUEL HOCKEY; GREAT DIVIDE
INSURANCE COMPANY,

Defendants.

Case No. ADJ10184700
(Santa Ana District Office)

OPINION AND ORDER
DENYING DEFENDANT'S
PETITION FOR
RECONSIDERATION

Defendant Great Divide Insurance Company on behalf of its insured employer Indy Fuel Hockey (Indy) seeks reconsideration of the September 8, 2017 Findings Of Fact of the workers' compensation administrative law judge (WCJ) who found that applicant "met the burden of demonstrating that California's exercise of jurisdiction is reasonable."¹ Applicant claims to have sustained industrial injury to his shoulders while employed by defendant as a professional hockey player by Indy on January 19, 2015.

Defendant contends that the WCAB has no personal jurisdiction over Indy and that the objection to lack of personal jurisdiction was not waived.

An answer was received from applicant.

The WCJ provided a Report And Recommendation Of California Workers Compensation Judge On Petition For Reconsideration (Report) recommending that reconsideration be denied.

Reconsideration is denied for the reasons set forth by the WCJ in her September 8, 2017 Opinion On Decision and Report, both of which are incorporated by this reference, and for the reasons below.

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¹ Quotations herein are converted to lower case and emphasis has been removed.

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DISCUSSION

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2 Applicant is a resident of California. He asserts that he was hired in this state by the Colorado
3 Eagles to play professional hockey during the 2014-2015 season. He was traded to Indy during that
4 season and his employment contract was taken over by that team. Applicant started working for Indy on
5 January 8, 2015. The following day, January 9, 2015, applicant claims he sustained specific injury to his
6 right shoulder while playing for Indy during a game in South Carolina. Applicant filed a claim for
7 workers' compensation with the WCAB in California. Applicant contends that the WCAB has subject
8 matter jurisdiction under Labor Code sections 3600.5(a), 5301 and 5305 because he was hired in this
9 state.²

10 Indy argues that the WCAB has no personal jurisdiction over it and that it has not generally
11 appeared in this case because a December 4, 2015 Notice Of Representation identifying the law firm
12 "retained to represent the interests of defendant" included the statement "special appearance only to
13 dispute jurisdiction," without further specification or reference to "personal" jurisdiction, and on that
14 same date the law firm also filed an answer to applicant's Application for Adjudication of Claim that
15 denied several parts of applicant's claim of industrial injury based upon "lack of jurisdiction," again
16 without further specification or reference to "personal" or "subject matter" jurisdiction.

17 Defendant further argues that its subsequent appearances and actions in the case, including the
18 taking of applicant's deposition on July 18, 2016, did not constitute a general appearance or waiver of an
19 objection to lack of personal jurisdiction because the issue of personal jurisdiction was not finally
20 litigated at the times of those appearances and actions. In support of its argument, defendant cites by
21 analogy to Code of Civil Procedure section 418.10 and to decisions construing that code section.³

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23
24 ² Defendant raised the issue of subject matter jurisdiction before and at trial, but does not challenge that aspect of the WCJ's
finding of WCAB jurisdiction in its petition.

25 ³ Code of Civil Procedure section 418.10 provides in full as follows:

26 (a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good
cause allow, may serve and file a notice of motion for one or more of the following purposes:

27 (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(3) To dismiss the action pursuant to the applicable provisions of Chapter 1.5 (commencing with Section 583.110) of Title 8.

1 Defendant's analogy to Code of Civil Procedure section 418.10 is misplaced because it did not
2 timely bring an objection based upon lack of personal jurisdiction to the WCAB for determination, as
3 required by Code of Civil Procedure section 418.10 and the decisions that have considered its proper
4 application.

5 The purpose of Code of Civil Procedure section 418.10 is "to permit a defendant specially to
6 challenge the court's personal jurisdiction without waiving his right to defend on the merits by allowing a
7 default to be entered against [the defendant] while the jurisdictional issue is being determined." (*In re*
8 *Marriage of Merideth* (1982) 129 Cal.App.3d 356 [1982 Cal. App. LEXIS 1326].) To accomplish that
9 purpose, an objecting defendant must promptly raise the issue of personal jurisdiction for determination
10 by the court.

11
12 (b) The notice shall designate, as the time for making the motion, a date not more than 30 days after filing of the notice. The
13 notice shall be served in the same manner, and at the same times, prescribed by subdivision (b) of Section 1005. The service
14 and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him or her of a written
15 notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's
16 time to plead for an additional period not exceeding 20 days.

17 (c) If the motion is denied by the trial court, the defendant, within 10 days after service upon him or her of a written notice of
18 entry of an order of the court denying his or her motion, or within any further time not exceeding 20 days that the trial court
19 may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require
20 the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file
21 or enter his or her responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the
22 last day of the defendant's time to plead, he or she serves upon the adverse party and files with the trial court a notice that he
23 or she has petitioned for a writ of mandate. The service and filing of the notice shall extend the defendant's time to plead until
24 10 days after service upon him or her of a written notice of the final judgment in the mandate proceeding. The time to plead
25 may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

26 (d) No default may be entered against the defendant before expiration of his or her time to plead, and no motion under this
27 section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation
of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

(e) A defendant or cross-defendant may make a motion under this section and simultaneously answer, demur, or move to
strike the complaint or cross-complaint.

(1) Notwithstanding Section 1014, no act by a party who makes a motion under this section, including filing an answer,
demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the
court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared
until entry of the order denying the motion.

(2) If the motion made under this section is denied and the defendant or cross-defendant petitions for a writ of mandate
pursuant to subdivision (c), the defendant or cross-defendant is not deemed to have generally appeared until the proceedings
on the writ petition have finally concluded.

(3) Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the
issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay
in prosecution.

1 Subdivision (a) of Code of Civil Procedure section 418.10 requires that a defendant “on or before
2 the last day of his or her time to plead” serve and file a motion to quash service of summons that is
3 noticed for hearing “not more than 30 days after” its filing. If that does not occur, subdivision (e)(3)
4 expressly provides that “[f]ailure to make a motion under this section...constitutes a waiver of the issue[]
5 of lack of personal jurisdiction...”

6 In this case, defendant’s law firm wrote on the December 4, 2015 notice of representation that
7 defendant was making a special appearance to dispute “jurisdiction,” but there was no statement that the
8 challenge was to “personal” jurisdiction. Instead, an answer was filed at that time that raised the issue of
9 subject matter jurisdiction. Raising an objection to subject matter jurisdiction without also specifically
10 contesting personal jurisdiction constitutes a waiver of the personal jurisdiction objection. (*Janzen v.*
11 *Workers' Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109, 116-117 [63 Cal.Comp.Cases 9] (*Janzen*).)

12 Defendant did not initiate any action to address WCAB “jurisdiction” in any form until months
13 after the filing of the notice of representation. On August 25, 2016 defendant filed a Declaration of
14 Readiness to Proceed stating that applicant’s claim had been denied “on jurisdictional grounds” and
15 requesting that “this matter” be placed on the trial calendar “to proceed on the threshold issue of
16 jurisdiction.” In filing that declaration, defendant did not specify that it was making a special appearance
17 or that it was objecting to lack of “personal” jurisdiction.

18 Notwithstanding a party’s initial assertion that it is “specially appearing,” a subsequent request by
19 that party for action by the WCAB or by a court on a basis other than lack of personal jurisdiction
20 constitutes a general appearance. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028 [58
21 Cal.Comp.Cases 793] (*Greener*); *Roy v. Superior Court* (2005) 127 Cal.App.4th 337[2005 Cal. App.
22 LEXIS 334] [party waived objection to exercise of personal jurisdiction by making a general appearance
23 through the filing an answer and pursuit of discovery without first moving to quash].)

24 During the more than eight months between the filing of the notice of representation and the
25 filing of the Declaration of Readiness to Proceed, defendant took no action to bring an objection to
26 personal jurisdiction before the WCAB for determination. Instead, defendant took applicant’s deposition
27 and asked questions unrelated to the issue of personal jurisdiction on July 18, 2016, without stating that it

1 was making a special appearance. In addition, the December 1, 2016 pretrial conference statement, the
2 sign-in sheet for the February 8, 2017 conference, the minutes from the February 8, 2017 hearing, the
3 sign-in sheet for the hearing on April 11, 2017, and the minutes of hearing from April 11, 2017, contain
4 no statements that defendant was specially appearing or that it was contesting personal jurisdiction. This
5 is significant because defendant contended during those appearances that the WCAB lacked subject
6 matter jurisdiction to adjudicate applicant's claim, and as noted above, such an action waives an
7 objection to personal jurisdiction. (*Janzen, supra; Greener, supra.*)

8 Defendant concedes in its petition that an objection based upon lack of personal jurisdiction may
9 be waived even if timely raised. (Code of Civ. Proc., § 418.10(e)(3); *Janzen, supra.*) Actions that
10 constitute a general appearance, like engaging in discovery, waive an objection to personal jurisdiction
11 and the effect of the general appearance is not negated by a subsequent objection to personal jurisdiction
12 made by the filing of a motion to quash. (*Factor Health Management v. Superior Court* (2005) 132
13 Cal.App.4th 246 [2005 Cal. App. LEXIS 1363].)

14 Defendant's argument that it was not obligated to promptly raise the issue of personal jurisdiction
15 because the WCAB does not have specific rules concerning the filing of a motion to quash is without
16 merit. Notwithstanding the absence of a specific rule, a motion to quash is a recognized vehicle for
17 raising an objection based upon lack of personal jurisdiction in a WCAB proceeding. (*Greener, supra.*)

18 Moreover, defendant's action in raising the issue of "jurisdiction" in its August 25, 2016
19 Declaration of Readiness to Proceed shows that it had that method of raising the issue available to it.
20 What defendant has not shown is why a Declaration of Readiness to Proceed on the issue of personal
21 jurisdiction was not filed at the time the notice of representation was filed. If defendant had promptly
22 brought the issue of personal jurisdiction to the WCAB for determination at that time, the citation to
23 Code of Civil Procedure section 418.10 by analogy might be relevant. However, defendant did not act to
24 promptly and timely bring the issue of personal jurisdiction before the WCAB for determination, and it
25 cannot now claim that it was free to pursue discovery and litigate subject matter jurisdiction and the
26 substance of applicant's claim without those actions constituting a general appearance.

27 The September 8, 2017 decision of the WCJ is affirmed.

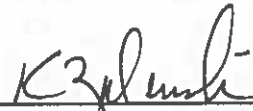
1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for reconsideration of the September 8, 2017
3 Findings Of Fact of the workers' compensation administrative law judge is **DENIED**.

4
5 **SCANNED**

WORKERS' COMPENSATION APPEALS BOARD

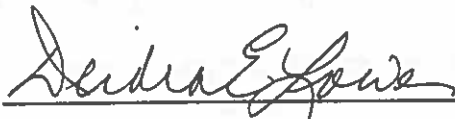
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CHAIR

8 **KATHERINE ZALEWSKI**

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10 **I CONCUR,**

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12 **DEIDRA E. LOWE**

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15 **CONCURRING, BUT NOT SIGNING**

16 **FRANK M. BRASS**



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19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **NOV 29 2017**

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

23 **JONATHAN PARKER**
24 **THOMAS EMPLOYMENT LAW GROUP**
25 **COLANTONI COLLINS ET AL.**

26 **JFS/abs**