COMMENTS

CREATING A LEVEL PLAYING FIELD: THE CASE FOR BRINGING WORKERS' COMPENSATION FOR PROFESSIONAL ATHLETES INTO A SINGLE FEDERAL SYSTEM BY EXTENDING THE LONGSHORE ACT*

I. INTRODUCTION

If Facebook offered a status update describing the relationship between the state-based workers' compensation system and professional athletes, it would state, "It's Complicated." After all, the applicability of the workers' compensation systems to professional athletes varies widely, depending on state law. On one end of the spectrum is Kansas, which specifically *includes* professional athletes in its definition

of "'employee' or 'worker'" for purposes of workers' compensation.[1] On the other end is Florida, which, by statute, specifically *excludes* professional athletes from its definition of "employment."[2] In between are states with set-offs,[3] income-based limitations,[4] and outright silence on the issue.[5]

The rocky relationship between workers' compensation and professional athletes has existed since the early 1900s.[6] Yet the topic has not sustained serious interest until the last decade, when American professional sports teams were "hit" with a rash of claims originating under California law.[7] California, which has workers' compensation statutes that have been liberally construed to cover out-of-state workers temporarily doing business in the state, allows athletes who played only one game in the state to establish a claim.[8] Moreover, California's

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1. KAN. STAT. ANN. § 44-508(b) (West 2011).

2. FLA. STAT. § 440.02(17)(c)(3) (West 2011). *See infra* Section II.C.

3. *See infra* Section II.C.

4. MICH. COMP. LAWS. 418.360(1) (West 2012). *See infra* Section II.C.

5. *See* Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 104-12 (1994) (classifying the treatment of professional athletes in state workers' compensation statutes).

6. *See* Hayden Opie & Graham Smith, *Professional Team Sports and Employment Law in Australia: From Individualism to Collective Labor Relations?*, 2 MARQ. SPORTS L. REV. 211, 217 (citing Walker v. Crystal Palace Football Club, [1910] 1 K.B. 87 at 93-94 (Eng.)). In a 1909 case in England, the court of appeal determined that an English soccer player who suffered injury during a match was an "employee" and, thus, was eligible for workers' compensation. *Id.* ("It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work.").

7. A collection of articles written by Alan Schwarz in the New York Times in April 2010 explored the issue of workers' compensation and National Football League teams in depth, with a specific focus on California. However, a 1981 article titled "Mason 'Jarred' the System" in the Evening Independent (St. Petersburg Fla.), as part of a five-part series entitled the "Agony of Athletes," written by Les Layton of the St. Paul Dispatch and Knight-Ridder Newspapers, identified the same "phenomenon" of NFL teams being bombarded with workers' compensation claims in 1981. *See* Les Layton, *Mason 'Jarred' the System*, EVENING INDEP., Aug. 19, 1981, at C1. *See also infra* Section III.B.

8. Injured Workers' Ins. Fund of Md. v. W.C.A.B., 66 Cal. Comp. Cas. 923, 923-24 (Cal. Ct. App. 2001). *See infra* Section III.B.

treatment of cumulative trauma claims and its statute of limitations, which does not begin to run until an athlete is notified of his or her California workers' compensation rights,[9] have opened the door for retired athletes—some of whom have not put on a uniform since the 1970s—to successfully make a California claim.[10]

Professional-sports team "employers," particularly those from the National Football League (NFL), have been vocal in their objections to being subject to California law. In many cases, "employee" athletes have already received workers' compensation under the state law where their team primarily does business or where they have received regular pay under contract, and the team may now face an additional California cumulative trauma claim from the athlete. This can occur in a variety of circumstances—when the athlete is a California resident, the contract between the athlete and the team was signed in the Golden State, or even when, despite having no other business relationship, there was a scheduled contest within California.[11] Consequently, teams are coughing up millions to settle California claims to the tune of $100,000 or more per claim.[12] To address the situation, a California state legislator has threatened action in the 2012 California legislative session against what he called an "abuse or loophole."[13]

Another growing concern is that workers' compensation insurance has become increasingly difficult for professional sports franchises to obtain. Most major insurers, uncertain as to whether, when, and where professional athletes will file claims for workers' compensation, have either shied away from offering workers' compensation insurance or drastically increased their

9. HERLICK'S CALIFORNIA WORKERS' COMPENSATION LAW § 14.01[5] (Bender 2010).

10. Bill Blum, *Fred McNeill's Toughest Game: A Former Minnesota Viking and California Lawyer Becomes a Star Client in Dementia Claims for Workers' Compensation*, CAL. LAWYER, January 2011, http://www.callawyer.com/story.cfm?eid=913366&evid=1.

11. *See infra* Section III.B.

12. Michael Futterman & Jaime Touchstone, *State Workers' Compensation Program Offers Security to Retired NFL Players*, 20 No. 2 CAL. EMP. L. LETTER 1 (2010) (stating that approximately 700 former NFL players are pursuing claims in California and most would be ineligible elsewhere for latent or progressive injuries).

13. *See infra* Section II.B.3; Chris Rizo, *California Workers' Compensation Law Draws Scrutiny with NFL Case*, INS. J., July 5, 2011, http://www.insurancejournal.com/news/west/2011/07/05/205103.htm.

rates.[14] Just two companies, Berkley and Travelers, insure most NFL franchises,[15] whose values range from a low of $725 million to a high of $1.8 billion.[16] Increased rates have forced reorganization of entire leagues. For example, the Arena Football League (AFL) folded in 2009 and re-emerged as a single entity in 2011 due, in part, to concerns over workers' compensation insurance.[17] And the new AFL, based in Tulsa, Oklahoma, limited its presence in California to just one franchise because of insurance issues.[18]

The imbalance of the workers' compensation system does not rest with the teams' pocketbooks and insurance struggles. It also affects athletes. Though athletes may get the short-term benefit of a tax-free, six-figure cash settlement, in the process they may be foregoing long-term benefits for future or undiscovered injuries related to their claims.[19] Most California cumulative trauma claims, for example, end up as cash settlements, covering both disability and future medical needs and releasing the team from

14. *Workers' Compensation Advisory Council Meeting Minutes*, LA. WORKFORCE COMM'N (Mar. 25, 2010), http://www.laworks.net/downloads/owc/minutesadvisorycouncilmarch2510.pdf. As Louisiana lawmakers considered a series of bills in 2010 regarding workers' compensation, Gary Delahoussaye, who handles insurance for the Saints, said that from 2000 to 2009, the Saints workers' compensation premiums increased 387%. *Id.* This was in direct contrast to the national marketplace, which experienced significant reductions in premiums. *See also* discussion *infra* Section II.E.1.

15. Alan Schwarz, *Case Will Test N.F.L. Teams' Liability in Dementia*, N.Y. TIMES, April 5, 2010 http://www.nytimes.com/2010/04/06/sports/football/06worker.html?pagewanted=all [hereinafter Schwarz, *Dementia*].

16. *Special Report: NFL Team Valuations*, FORBES.COM, Aug. 25, 2010, http://www.forbes.com/lists/2010/30/football-valuations-10_NFL-Team-Valuations_Rank.html.

17. Alan Schwarz, *Insurance Costs Keep Arena League Out of State*, N.Y. TIMES, April 5, 2010, http://www.nytimes.com/2010/04/06/sports/football/06arena.html?ref=arenafootballleague [hereinafter Schwarz, *Arena*].

18. Joel Hammond, *The Newest Arena Football League Gets Some Good News*, CRAIN'S CLEVELAND BUS., June 21, 2010, http://www.crainscleveland.com/article/20100621/BLOGS04/100629986; Mark Purdy, *Purdy: SaberCats Ready for Return to Field*, THE MERCURY NEWS, Feb. 27, 2011, http://www.mercurynews.com/mark-purdy/ci_17498805?nclick_check=1. Originally, the reconstituted Arena Football League had no California teams because it could not obtain workers' compensation insurance otherwise. Joshua Clifton, *California's Comp Loopholes: Beyond the Gridiron*, RISK & INS. ONLINE (Nov. 1, 2010), http://www.riskandinsurance.com/story.jsp?storyId=533324482.

19. Recent research has linked concussions to brain injuries, Lou Gehrig's disease, and other serious medical complications. *See infra*, Section III.B.3.

future liability.[20] But research has indicated that some medical concerns, which are not seen until later in life, like brain injuries, may be linked to concussions received during professional play. Thus, athletes may actually be short-changing themselves in the long run by accepting quick settlements. When such an injury manifests, the athlete would be left without a remedy anywhere, even California. Without workers' compensation available, the inevitable next step would be to go outside of workers' compensation and sue in tort. This would not only end the "quid pro quo"[21] relationship between team-owner employers and athlete employees but could financially wreck franchises if successfully litigated.

In light of these concerns, professional sports teams have searched for short- and long-term solutions to ease the financial pain of the unexpected, though lawful, claims. While workers' compensation claims are typically not contested,[22] franchises have fought against California jurisdiction with varying degrees of success.[23] To avoid multistate workers' compensation claims, NFL teams have inserted forum-selection clauses into their players' contracts, limiting claims to the state where a team does business. But players have ignored some of these limitations and

20. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 62 (Quorum Books 1998) (discussing how lump sum payments are against the purpose of workers' compensation).

21. *See infra* Section II.A. Literally, quid pro quo means "an action or thing that is exchanged for another action or thing of more or less equal value." BLACK'S LAW DICTIONARY POCKET EDITION 588 (3d ed. 2006). In the language of workers' compensation, *quid pro quo* refers to the social bargain between employers and employees, where "the employee has given up his right to sue his employer for negligence and receive a greater compensation award, and the employer has surrendered the common law defenses available in negligence actions." JACK B. HOOD, BENJAMIN A. HARDY, JR. & HAROLD S. LEWIS, JR., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 29 (West Group 2005) (1984); LENCSIS, *supra* note 20 at 9-10.

22. LENCSIS, *supra* note 20, at 62; MARGARET C. JASPER, WORKERS' COMPENSATION LAW 32 (Oxford Univ. Press 2008).

23. The NFL's Cincinnati Bengals have experienced success in fighting California jurisdiction. *See* Booker v. Cincinnati Bengals, No. ADJ4661829 (ANA 0401410), W.C.A.B, State of California, Feb. 8, 2012 (unpublished), *available at* http://www.pcllp.net/Vaughan_Booker_v_Bengals.pdf; Carroll v. New Orleans Saints, 2010 Cal. Wrk. Cmp. P.D. LEXIS 176, 13, 16 (2010); s*ee also* discussion, *infra* Section III.B.1-2; Bowen v. W.C.A.B. & Fla. Marlins, 73 Cal. App. 4th 15 (Cal. Ct. App. 1999) (finding jurisdiction for a California resident although he played for an out-of-state employer (not successful)).

filed in California anyway.[24] To ease the burden of multistate workers' compensation claims, teams have wooed state legislatures into passing bills that require athletes to be subject to only that state's workers' compensation law or to match California's reciprocity provision.[25] Meanwhile, the National Football League Players Association (NFLPA), which represents NFL athletes, has said that any issues regarding multistate claims should be addressed in the collective bargaining agreement (CBA) between players and teams.[26] But even if the four major American professional sports leagues—NFL, MLB, NBA, and NHL—and their unionized athletes resolve major concerns among themselves, non-unionized athletes from smaller sports leagues, with drastically less revenue, are left to fend for themselves on a state-by-state basis.

Therefore, the relationship between the workers' compensation system and professional athletes needs a complete overhaul. Professional athletes represent a special class of workers with multistate claims that are not adequately resolved in the current state statutory scheme of workers' compensation and should be dealt with federally. Historically, the federal government has stepped in to regulate workers' compensation schemes for workers that have complicated jurisdictional issues, most notably through the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) in the early twentieth century. This Comment proposes a new jurisdictional home for professional athletes seeking workers' compensation at

24. *See generally* Nat'l Football League Players' Ass'n v. Nat'l Football League Mgmt. Council, 2011 U.S. Dist. LEXIS 865 (S.D. Cal. Jan. 5, 2011).

25. *See* Jason Garcia, *Prodded by Pro Sports Teams, Florida Clamps Down on Traveling Workers Who Claim Injuries*, ORLANDO SENTINEL, May 29, 2011, http://articles.orlandosentinel.com/2011-05-29/business/os-law-and-you-workers-comp-20110529_1_workers-claims-in-other-states-clamps. *See also* discussion *infra* Section II.B.3. In short, when an employer sends a worker to California temporarily, "the employee must go back to his home state to file an injury claim, as long as the home state has a statute which recognizes California's reciprocity provisions." Joshua Clifton, *The Repercussions of Cumulative Trauma,* RISK & INS. (Nov. 1, 2010), http://www.riskandinsurance.com/story.jsp?storyId=533324350. Florida's reciprocity bill, which affects all traveling workers, not just professional athletes, became law in July 2011. FLA. STAT. ANN. § 440.094 (2012); Thomas A. Robinson, *Did Florida Legislature Fumble in Trying to Limit Workers' Compensation Coverage for Pro Football Players?*, 2011 EMERGING ISSUES 5713, at 2-3. The Michigan governor passed a similar bill, which included language specifically targeted toward pro athlete claims in November 2011.

26. *See* discussion *infra* Section III.B.3.

the federal level rather than the state level.

The idea of having workers' compensation for professional athletes administered at the federal level is not new. Gene Upshaw, former executive director of the NFLPA, asked Congress to establish federal standards in 2007 while testifying at a hearing on the NFL retirement system.[27] Congress responded in 2008 with a Congressional Research Service Report on "Former NFL Players: Disabilities, Benefits, and Related Issues."[28] The report stated that federal intervention would be difficult "without additional, detailed information about states' workers' compensation systems or programs" and that "it would be helpful to have an explicit declaration for the scope of the suggestion."[29] This Comment aims to redress those difficulties, not just for NFL players and teams, but also for all professional-athlete employees and team employers.

The majority of this Comment (specifically Sections II and III) explains the backstory that drives the contentious relations between this unique set of employers and employees. Section II provides an overview of workers' compensation law, including its history, purpose, coverage classifications, and the insurance process. It also demonstrates how the major tenets of workers' compensation law have been applied to professional athletes. Section III describes what happens when multiple states have an interest in an employee and how California's laws can apply to remote circumstances, such as when an athlete who has played only one game in California is claiming workers' compensation benefits. Section III also explores the evolution of attitudes toward workers' compensation, both by athletes and team officials. Section IV proposes making the professional athlete worker class subject to federal, as opposed to state, workers'

27. *NFL Retirement System, Hearing Before the Senate Committee on Commerce, Science, and Transportation,* 110 CONG. REC. D1214 (daily ed. Sept. 18, 2007) (testimony from Gene Upshaw), *available at* http://thomas.loc.gov/cgi-bin/query/B?r110:@FIELD(FLD003+d)+@FIELD(DDATE+20070918); s*ee* Mary Clare Jalonick, *NFLPA Seeks Help in Disability Dispute*, WASH. POST, Sept. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091801008_pf.html; s*ee also* Howard Bloom, *The Plight of Former National Football League Players Heads Back to the Senate*, SPORTS BUS. NEWS, Sept. 19, 2007, http://sportsbiznews.blogspot.com/2007/09/plight-of-former-national-football.html.

28. L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 34439, FORMER NFL PLAYERS: DISABILITIES, BENEFITS, AND RELATED ISSUES 118-20 (2008).

29. *Id.* at 120.

compensation law by extending coverage under the LHWCA to professional athletes, similar to the LWHCA extension of the Defense Base Act for civilian workers employed by defense contractors overseas. This Comment concludes with a proposed statute.

II. OVERVIEW OF WORKERS' COMPENSATION[30]

Generally, workers' compensation in the United States combines insurance, industry, and governmental bodies to provide benefits to most workers who suffer work-related injuries and disabilities.[31] Workers' compensation mandates the payment of statutorily defined medical, disability, and other benefits to injured employees without regard to fault.[32] Employers are liable to employees whose injuries arise out of and in the course of employment.[33] In exchange, employees forgo the right to sue the employer for negligence.[34]

The following subsection explains specific concepts of workers' compensation that shed light on how states became the lead actors in the American scheme, key shared attributes of state systems, and how the concepts have been applied to professional athletes. Areas to note include the exclusive remedy provision, coverage classifications, benefits, and the insurance process.

A. HISTORY AND EXCLUSIVE REMEDY

In the early twentieth century, the economic hardship of employees injured or killed on the job aroused the concern of state legislatures in America.[35] Common law remedies, which required the employee to prove that the employer was negligent, were not

30. This description of workers' compensation law is not intended to be comprehensive in nature; rather, it serves to set the groundwork for how workers' compensation law affects professional athletes. For a more comprehensive study of workers compensation law, see LARSON'S WORKERS' COMPENSATION LAW treatise.

31. LENCSIS, *supra* note 20, at 1.

32. *Id.*

33. *Id.*

34. JASPER, *supra* note 22, at 2.

35. HOOD, HARDY, & LEWIS, *supra* note 21, at 6-7. The historical origins of modern workers' compensation can be traced to Germany in the 1800s, and Great Britain's Workmen's Compensation Act of 1897 was the forerunner of the early acts passed in the United States. *Id.*

only costly to pursue but were filled with inequities.[36] In response to the problem, legislatures gradually passed workers' compensation acts. Wisconsin passed the nation's first constitutionally acceptable act in 1911.[37] New York's workers' compensation law, enacted in 1914, became the standard bearer for the nation.[38] Acts sprung up around the nation, and by 1949, all states had enacted statutes.[39]

At the federal level, similar acts were passed in the early twentieth century out of concern for employee safety.[40] In 1908, Congress enacted the Federal Employees' Compensation Act for a limited group of federal employees and, in 1916, expanded the Act to include all non-military federal employees without regard to the hazard of employment.[41] Congress enacted the Longshore Act in 1927 for the benefit of longshoremen and maritime workers on navigable waters in the United States, as well as employees working on piers, docks, and terminals.[42] The Longshore Act has also been expanded to include certain other classes of private industry workers.[43]

The exclusive remedy provision of workers' compensation statutes is a critical aspect of what transpires when professional athletes suffer work-related injuries that occur in the course of

36. HOOD, HARDY, & LEWIS, *supra* note 21, at 8-9. The Wainwright Commission on employers' liability in New York State reported that the common law system "provided insufficient compensation, was wasteful in its resources, caused unsatisfactory delays and was antagonistic in nature." *Id.*

37. JAMES T. GRAY & MARTIN J. GREENBERG, 2-12 SPORTS LAW PRACTICE § 12.02 (Release No. 3, 2010).

38. *Id.* The basic concepts of New York law have remained intact for over a century: (1) Employer provides coverage through private insurance carrier, state insurance fund, or self-insurance; (2) Compulsory coverage: Failure to provide coverage results in penalty and allows for tort remedy; (3) Compensation awarded without fault; (4) Compensation provided on earning power not to exceed a maximum weekly benefit; (5) All medical care provided for injury from first date of accident; and (6) Employee entitled to benefits if engaged in "hazardous employment."
Id.

39. HOOD, HARDY & LEWIS, *supra* note 21, at 10. The last state to adopt a workers' compensation statute was Mississippi in 1949. *Id.*

40. *Id.* at 15.

41. *Id.* at 12-13.

42. LENCSIS, *supra* note 20, at 26; JASPER, *supra* note 22, at 5, 78; HOOD, HARDY & LEWIS *supra* note 21, at 19.

43. *See infra*, Section IV. Additionally, New York law served as a model for the LHWCA. LENCSIS, *supra* note 20, at 27.

their normal duties. This provision goes to the core of workers' compensation, as it is a "social compact" between the employer, employee, and a state (or federal) entity ensuring cooperation in a system designed to efficiently adjudicate an injured worker's claim.[44] What emerges is a "quid pro quo" between the employer and employee, where certain legal rights of the employee and employer are eliminated in exchange for consistency.[45] When a worker suffers a work-related injury, the employer is prevented from raising common law defenses of contributory negligence, assumption of risk, and fellow-servant doctrine in exchange for a limitation on liability,[46] and the employee is prevented from suing for negligence but is guaranteed economic stability during injury.[47] Therefore, the cause of action and compensation provided is the exclusive remedy for the injured employee,[48] and the athlete cannot file suit against the team.[49]

B. COVERAGE: EMPLOYEE STATUS AND CATEGORIES OF INJURY

In each state, workers' compensation is "a statutorily created method of providing lost income, medical care, disability payments and rehabilitation to employees and their families for injuries, diseases, or death sustained in the course of and arising

44. GRAY & GREENBERG, *supra* note 37, at § 12.03.

45. JASPER, *supra* note 22, at 9.

46. HOOD, HARDY & LEWIS, *supra* note 21, at 29, 2-4. The assumption of risk defense was based on the employee voluntarily agreeing to assume the risks and dangers normally associated with work. *Id.* at 4. The contributory negligence defense meant that an employee was required to exercise reasonable care for his own safety, or else any recovery would be barred. *Id.* at 3. The fellow–servant doctrine was the rule that a master or employer was not liable to a servant for the acts of a fellow servant. *Id.* at 2-3.

47. GRAY & GREENBERG, *supra* note 37, at § 12.03; JASPER, *supra* note 22, at 28.

48. GRAY & GREENBERG, *supra* note 37, at § 12.03.

49. *Id.* *See also* Brinkman v. Buffalo Bills Football Club, 433 F. Supp. 699 (W.D.N.Y. 1977). In *Brinkman*, the plaintiff, a professional football player, fractured his left forearm during a 1973 exhibition game. *Id.* at 701. The team physician performed surgery that included the installation of a compression plate, and the plaintiff missed the entire 1973 season. *Id.* He sued the Bills for breaching their contractual obligation under the Standard Player Contract and claimed the team was negligent in providing medical care and treatment for his injury. *Id.* at 702. The Bills stated that his claim was barred by the exclusivity provision of § 11 of New York State's Workmen's Compensation Law, which bars contract and tort actions for injuries arising out of and in the course of employment. *Id.* The district court for the western district of New York called Brinkman's characterization of the cause of action as contractual an attempt "to circumvent public policy as expressed in Workmen's Compensation Law." *Id.* Therefore, workers' compensation was his exclusive remedy. *Id.*

out of employment."[50] Workers' compensation functions as no-fault insurance for employees who are either injured or killed during their employment.[51] Each state has its own rules for determining the level and amount of workers' compensation coverage.

Like any injured worker, professional athletes are not entitled to recover workers' compensation unless they satisfy certain requirements. First, an employer–employee relationship must exist.[52] Second, the personal injury must be causally related to the employment.[53] Finally, the particular state must provide coverage for the type of employment at issue.[54]

To show that an athlete was an employee for the purpose of workers' compensation coverage, the athlete must prove that an employer–employee relationship existed at the time of the injury.[55] An employee is defined as one who works for and is under the control of another for hire.[56] Professional athletes competing on teams in major sports leagues generally fall within this category. However, professional athletes, like boxers and jockeys, who compete as individuals or independent contractors do not qualify.[57] Nevertheless, a liberal construction should be given to the definition of employer and employee because of "the objectives of workers' compensation and the need to make workers' compensation as expansive as possible."[58]

Second, the injury must be causally related to the

50. GRAY & GREENBERG, 2-12 SPORTS LAW PRACTICE § 12.05.

51. *Id.*

52. LENCSIS, *supra* note 20, at 44.

53. JASPER, *supra* note 22, at 23.

54. LENCSIS, *supra* note 20, at 44.

55. The employee–employer relationship includes training camp and the exhibition season. *See* Rudolph v. Miami Dolphins, 447 So. 2d 284, 289 (Fla. Dist. Ct. App. 1983). However, this may vary for athletes not under contract. *See* Gerald Herz & Robert C. Baker Jr., *Professional Athletes and the Law of Workers' Compensation: Rights and Remedies*, *in* LAW OF PROFESSIONAL AND AMATEUR SPORTS § 15.3-15.4 (Gary A. Uberstein et al. eds., 1991).

56. GRAY & GREENBERG, *supra* note 37, at § 12.05.

57. Munday v. Churchill Downs, 600 S.W. 2d 487, 488 (Ky. Ct. App. 1980). Munday was a jockey injured when he fell from a racehorse. *Id.* He was paid as a freelance jockey as opposed to a contract jockey. *Id.* He failed the question of control under the right to control test. *Id. See also* LENCSIS, *supra* note 20, at 44-45.

58. GRAY & GREENBERG, *supra* note 37, at § 12.05; HOOD, HARDY & LEWIS, *supra* note 21, at 41.

employment, or "arise out of and in the course of employment."[59] An injury "arises out of" employment if it is caused by a risk that is closely, directly, or distinctly associated with the employment.[60] The injury must also occur "in the course of" employment, which means while the employee was "engaged in duty of employment, during the hours of employment and at a proper place of employment . . . ."[61]

Accidental injury, or traumatic injury, is a sudden or unexpected occurrence caused by a particular event.[62] It is the most common workers' compensation claim.[63] A personal injury is generally classified as "accidental" in that it results from a specific incident. Occupational disease, on the other hand, is a chronic, physical or mental harm caused by exposure over a period of time to some employment-related substance, condition, or activity.[64] Occupational disease in its pure form is difficult to

59. JASPER, *supra* note 22, at 23. *See* Steve Berkowitz, *Williams Wins Workers' Comp Case*, WASHINGTON POST, B1, May 23, 1991. The Washington Redskins contested the workers' compensation claim of former quarterback Doug Williams, MVP of Super Bowl XXI in 1988, regarding a back injury he sustained in 1989. *Id.* The Redskins contended that Williams' injury, which occurred while working out on a treadmill in his Louisiana home, was not sustained "in the course of his employment." *Id.* In ruling for Williams, the hearings and appeals examiner noted that Williams was using a treadmill the club helped him obtain and that he had received several notices and reminders from the team that specifically advised treadmill running. *Id.* He also had a contractual requirement to remain in "good physical condition." *Id.* Williams was awarded $513 per week and all medical expenses related to the reasonable treatment of his back in the future. *Id.* His annual salary at the time was $1.1 million. *Id. See also* Steve Berkowitz, *Redskins Appeal Williams Decision; Team Says Compensation Excessive for Ex-Quarterback's Injury*, WASHINGTON POST, D1, June 21, 1991.

60. LENCSIS, *supra* note 20, at 36; s*ee also* GRAY & GREENBERG, 2-12 SPORTS LAW PRACTICE § 12.05.

61. LENCSIS, *supra* note 20, at 37. The major battleground for injuries arising out of and in the course of employment occurs not for professional athletes, but for employer-sponsored or employer-organized athletic activities such as golf outings or sports leagues. GRAY & GREENBERG, *supra* note 37, at § 12.05.

62. JASPER, *supra* note 22, at 23.

63. *Id.* Some statutes differentiate injury or accident claims from occupational disease and cumulative injury claims.

64. GRAY & GREENBERG, *supra* note 37, at § 12.06 [8], n.84 (citing *Guide to Workers Compensation (Wisconsin)*). A commonly used formula is the rule that the disease must arise "due to the nature of the employment" as opposed to "arising out of" or "in the course of employment." LENCSIS, *supra* note 20, at 41. Most occupational diseases are contracted from exposure to harmful agents, such as asbestos, over a substantial period of time. GRAY & GREENBERG, *supra* note 37, at § 12.05 [8], n.85; s*ee also* Adams v. N.Y. Giants, 827 A.2d 299 (N.J. Super Ct. App. Div. 2003). In *Adams*, the plaintiff suffered a hip flexor injury during training camp of

prove in athletic context because a disease, unlike an accident, is more subtle in its occurrence.[65]

1. CUMULATIVE TRAUMA

Some states acknowledge the concept of "cumulative trauma," which occurs when a person "suffers from repeated shocks to the body over a period of time resulting in recognizable injury."[66] In *Beveridge v. Industrial Accident Commission*,[67] the court outlined the notion of cumulative trauma regarding the effects of back injuries to an electrician.[68] According to the court, the proposition that successive slight injuries can culminate in a "destructive force," is "irrefutable":

> The fragmentation of injury, the splintering of symptoms into small pieces, the atomization of pain into minor twinges, the piecemeal contribution of work-effort to final collapse, does not negate injury. The injury is still there, even if manifested in disintegrated rather than in a total, single impact. In reality the only moment when such injury can be visualized as taking compensative form is the date of last exposure, when the cumulative effect causes disability.[69]

Most laws on cumulative trauma injuries are treated under a theory similar to occupational disease.[70] To relieve the employee

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the 1986 season that forced him out the entire year. *Id.* at 300. He retired from football in 1991. *Id.* at 301. His hip continued to bother him, and, following unsuccessful hip surgery, Adams filed a workers' compensation claim against the Giants in July 1996. *Id.* at 301-02. Adams claimed that the injury resulted from occupational disease, not accidental injury. *Id.* at 304. However, the court held that Adams' claim did not fit within the limited band of accidental cases as having "latent and insidiously progressive conditions that ordinarily mark an occupational disease." *Id.* at 306 (internal citations omitted). A reasonable person, the court stated, would have connected the work-related 1986 injury to the disability long before 1996. *Id.* at 305.

66. GRAY & GREENBERG, *supra* note 37, at §12.06[7] n.79. Cumulative trauma is also referred to as "continuing trauma," "repetitive trauma," or "cumulative injury." *Id.*

67. 175 Cal. App. 2d 592 (Cal. Dist. Ct. App. 1959).

68. *Id.*

69. *Id.* at 594-595. The court also declared that requiring the employee to file a claim within a limited time from the first exposure would be "unreasonable." *Id.* "After a single exposure, the employee might be totally unable to notice that a deleterious effect has taken place." *Id.* at 596.

70. For instance, Carpal tunnel syndrome, a condition known to be caused by repetitive hand movements, is labeled as occupational disease or cumulative trauma.

of the burden of proving actual causation in fact and in time by a particular employer or employment, liability falls on the employer, (or its insurer) in whose employment the employee sustained the last exposure to the agent that gave rise to the disease.[71] This concept is referred to as the "last injurious exposure rule."[72]

Generally, the statute of limitations for a cumulative trauma injury begins to run only after the exposures constituting the disabling injury have concluded.[73] In *Nugent v. Pro Football, Inc.*, which ironically involved a workers' compensation claim brought by a Washington Redskins player under the Longshore Act due to its District of Columbia jurisdiction,[74] the damage to the player's back was continuing injury. Thus, the court was less concerned with the time of injury for the purposes of the statute of limitations.[75] The real concern about commencement of the statute of limitations arose when the back injury became disabling and thus prevented him from continuing in his employment.[76]

JASPER, *supra* note 22, at 26.

71. LENCSIS, *supra* note 20, at 41.

72. 3-153 LARSON'S WORKERS' COMPENSATION LAW § 153.02 (Bender 2010) ("The 'last injurious exposure rule' in successive injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability."). In some states, that employer or its insurer can seek apportionment of liability from previous employers who were part of the employee's exposure. *Id.*

73. GRAY & GREENBERG, 2-12 SPORTS LAW PRACTICE § 12.06[7].

74. *Id.* Historically, the LHWCA has been modified to include classes of private workers, such as "certain employments" in the District of Columbia prior to July 26, 1982. District of Columbia Workers' Compensation Act, Pub. L. 70-419 (1928), *available at* http://www.dol.gov/owcp/dlhwc/dcwca.htm (last visited Mar. 2, 2012). *Nugent* is an example of such a case. Nugent v. Pro-Football Inc., 82 DCWC 270 (1983) (cited in Herz & Baker, *supra* note 55). Longshore jurisdiction was removed, effective July 26, 1982, and claims filed under the D.C. Act after that date were delegated to the District of Columbia courts. *Authority and Background of the LHWCA*, DEPT. OF LABOR, http://www.dol.gov/owcp/dlhwc/lspm/lspm0-200.htm (last visited March 2, 2012).

75. GRAY & GREENBERG, *supra* note 37, at §12.06[7] n.83; Herz & Baker, *supra* note 55, at § 15-6.

76. GRAY & GREENBERG, *supra* note 37, at §12.06[7]. Nonetheless, several factors weigh in a professional athlete's workers' compensation claim in cumulative trauma cases, most notably the first indication of disease or injury. Other information critical to the determination of a workers' compensation claim for an employee, especially professional athlete, include: accident's case (such as being struck by an object, strain, sprain, etc.); nature of injury (cut, sprain, hernia); part of the body affected (such as finger, lower back, or respiratory system); physical symptoms (such

Finally, to establish coverage, the player must show that the employer was subject to state workers' compensation laws and that the employment is covered by state workers' compensation law. The state legislatures have reached divergent conclusions on the question of whether professional athletes' employers are subject to state workers' compensation laws and whether participation in professional athletics is a covered employment.

C. STATUTORY TREATMENT, OR LACK THEREOF, OF PROFESSIONAL ATHLETES IN STATE WORKERS' COMPENSATION LAWS

State statutes vary significantly in their treatment of professional athletes in workers' compensation laws. The following subsection surveys the interplay between professional athletes and workers' compensation at the state level. While some states single out professional athletes for coverage or non-coverage in statutes, others are silent on the topic. The inconsistent application of workers' compensation law to professional athletes from state to state produces interesting results.

1. SILENCE

In a majority of states, professional athletes are not singled out in the workers' compensation statute.[77] Therefore, it is presumed that the athlete will be treated as any other employee of a qualified employer. A qualified employer can be defined by the number of employees and wages paid.[78] States define "employer" in broad terms such as a "person, partnership, association, or corporation . . . having one or more persons in employment, including the state . . . ."In the rare cases when

as sharp pain, stiffness, lack of motion); duration of the symptoms; all doctors visited, the dates of visit and all money spent on medical treatment (doctors, examinations, medicines, and transportation); and days from work lost because of the injury. *Id.* Cumulative trauma claims available through California are at the heart of the tug-of-war between professional athletes and teams, and will be discussed extensively later in this Comment. *See infra* Section III.B.

77. Carlin & Fairman, *supra* note 5, at 104-05. *See also* Rachel Schaffer, *Grabbing Them by the Balls: Legislatures, Courts and Team Owners Bat Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 640-644 (2000). California, for instance, is silent on professional athletes.

78. GRAY & GREENBERG, *supra* note 37, at § 12.05[3]. Wisconsin is a state that looks at the number of employees. *Id.*

disputes between teams and athletes go beyond the administrative adjudication context and reach the appellate stage, courts have declared athletes to be employees covered by workers' compensation statutes.[79] Whether a high-profile superstar of a major professional sports league or lowly minor leaguer climbing through the ranks, the athlete is treated the same under workers' compensation law. In *Bayless v. Philadelphia National League Club*, the plaintiff, a professional baseball player, attempted to sue in tort rather than recover workers' compensation, arguing that workers' compensation was not designed to cover "high-priced athletes."[80] In holding that Bayless's exclusive remedy was workers' compensation, the Pennsylvania district court sternly disagreed, stating that the Workmen's Compensation Act "applies to all employees, regardless of their earnings. If professional athletes were excluded from coverage, then hundreds and probably thousands of low as well as high priced athletes on Major and Minor league teams would be deprived of the humanitarian benefits that the Act affords."[81]

2. STATUTORY INCLUSION

It is rare for a state to specifically declare that professional athletes are covered by workers' compensation law without any restrictions. The Kansas workers' compensation statute includes "professional athletes" in its definition of a worker, workman, or employee.[82]

3. STATUTORY LIMITATION

Other states include professional athletes in their workers' compensation system but impose strict limitations. A prime

79. Carlin & Fairman, *supra* note 5, at 105.

80. Bayless v. Phila. Nat'l League Club, 472 F. Supp. 625 (E.D. Pa. 1979). Patrick Bayless suffered a back injury while playing in the Philadelphia Phillies' minor league system in 1971. He was given massive doses of painkillers by the team trainer and physician and began to show erratic signs of behavior, and was eventually declared paranoid schizophrenic. Bayless v. Phila. Nat'l League Club, 579 F.2d 37, 38 (3d Cir. 1978).

81. Bayless v. Phila. Nat'l League Club, 472 F. Supp. 625, 631 (E.D. P.a. 1979) ("[P]rofessional baseball club is a business operated for gain or profit within the meaning of a compensation act, so as to entitle one employed as a player by one of the constituent clubs to compensation for injuries sustained in the course of employment.").

82. KAN. STAT. ANN. § 44-508(b) (2009).

example is Michigan. A professional athlete who suffers a work-related injury in Michigan is entitled to weekly benefits only when his or her "average weekly wages of all employments at the time of application for benefits, and thereafter, are less than 200% of the state average weekly wage."[83]

Iowa and the District of Columbia impose restrictions on how workers' compensation benefits for professional athletes are calculated.[84] Kentucky, and now Michigan, has an extraterritorial coverage provision that prevents professional athletes hired by employers from outside the state from making claims from injuries arising while temporarily working in the state if the employer has secured workers' compensation coverage under the law of its state.[85]

4. ELECTION METHOD

An alternative method for determining access to workers' compensation for professional athletes is the election method. In this scheme, the employer, employee, or both agree on whether the professional athlete will participate in the state workers' compensation system. In Texas, a professional athlete from the four major American professional sports leagues (NFL, MLB, NBA, and NHL), along with the International Hockey League and Central Hockey League, can elect to receive benefits under either the workers' compensation system or what is provided for under the respective collective bargaining agreement.[86] The injured

83. MICH. COMP. LAWS SERV. § 418.360(1) (LexisNexis 2012). In 2008, this figure was $1,640.08 ($820.04 x 2). *Professional Athletic Teams*, BLEAKLY, CYPHER, PARENT WARREN & QUINN, P.C., http://www.bcpwq.com/CM/RepresentativeIndustriesClients/Professional-Athletes.asp (last visited Feb. 26, 2012).

84. IOWA CODE §§ 85.33, 85.34, 85.36 (2011); *see also Action in the Legislatures: Workers Comp Stable Major Changes in Fewer States Part 3/5*, BUS. INS. (June 29, 1997), http://www.businessinsurance.com/article/19970629/ISSUE01/10008536. In 1997, Iowa changed its law so that benefits end when the athlete is well enough to perform whatever job he or she was doing before becoming a professional athlete, and bases weekly earning to one-fiftieth of the total for the last year. *Id. See also* D.C. CODE § 32-1501 (LexisNexis 2011) ("'Professional athlete's work life expectancy' means the work life expectancy of a professional athlete that is determined separately for each professional sports franchise in the District by the Office of Workers' Compensation through its rulemaking authority.").

85. KY. REV. STAT. ANN. § 342.670 (LexisNexis 2011); MICH. COMP. LAWS SERV. § 418.360 (LexisNexis 2012). Michigan amended its law in December 2011 to create a similar extraterritorial effect aimed at professional athletes.

86. TEX. LAB. CODE ANN. § 406.09 (West 2010).

athlete must make the election no later than the date of injury, and if no election is made, it is presumed that the athlete elected the option with the higher benefits.[87]

Montana is also among the states that allow employers to elect whether or not a professional athlete receives workers' compensation benefits.[88] Additionally, Montana's law singles out the election method for athletes engaged in a "contact sport," which involves "significant physical contact between the athletes involved."[89]

In 2003, Wyoming added language regarding professional athletes under its heading for "extrahazardous employment" and "optional coverage."[90] The Wyoming statute allows coverage for athletes competing in baseball, basketball, football, hockey, or soccer employed by teams with a principal place of business in Wyoming.[91]

5. SET-OFFS

The set-off method employed by some states allows workers' compensation benefits to be subtracted from any benefit paid under contract. Team owners receive a credit on the payment, the thinking goes, to avoid doubly compensating athletes.[92] In Missouri, employers of professional athletes under contract are entitled to "full credit for wages or benefits paid to the employee

87. 28 TEX. ADMIN. CODE § 112.401 (2011). *See also* 28 TEX. ADMIN. CODE § 112.402 (2011) (laying out rules to determine equivalent benefits for professional athletes). Further, Carlin and Fairman state the Texas statute is "designed to take athletes out of the workers compensation program . . . . The end result is a type of functional exclusion of coverage whenever contract benefits are greater than workers compensation benefits." Carlin & Fairman, *supra* note 5, at 111.

88. MONT. CODE ANN. § 39-71-401 (2010). *See also* W. VA. CODE ANN. § 23-2-1(b)(6) (LexisNexis 2010).

89. MONT. CODE ANN. § 39-71-401(2)(y) (2010). Football, hockey, roller derby, wrestling, and boxing are cited as examples of contact sports. *Id.*

90. WYO. STAT. ANN. §§ 27-14-102 & 27-14-108 (2011).

91. *Id.*

92. Schaffer, *supra* note 77, at 645. Schaffer argues that this is reasonable for temporary disability benefits because the benefits compensate for lost earnings during one's rehabilitation period. Typical professional contracts pay the athlete while injured and, if injured for the entire season, for the remainder of the season. However, Schaffer argues, set-offs are unreasonable for permanent disability limitations because these payments are designed to compensate employees for future limitations and loss of bodily functions. For a discussion of temporary and permanent benefits, *see infra* Section III.D.

after injury, including medical, surgical or hospital benefits."[93]

6. STATUTORY EXCLUSION

Some states, likely under the force of lobbying from team owners, exclude professional athletes from workers' compensation programs altogether.[94] The Florida statute is explicit in its language that "'employment' does not include service performed by or as . . . professional athletes, such as professional boxers, wrestlers, baseball, football, basketball, hockey . . . and motorsports teams competing in a motor racing event."[95] Similarly, the Massachusetts statute excludes "persons employed to participate in organized professional athletics, while so employed, if their contracts of hire provide for the payment of the wages during the period of any disability resulting from such employment."[96] In essence, Massachusetts does not exclude

93. MO. REV. STAT. § 287.270 (2011); s*ee also* 77 PA. CONS. STAT. § 565 (2010) (limiting the definition of a professional athlete to "a natural person employed as a professional athlete by a franchise of the National Football League, the National Basketball Association, the National Hockey League, the National League of Professional Baseball Clubs or the American League of Professional Baseball Clubs, under a contract for hire or a collective bargaining agreement, whose wages as defined in section 309 are more than eight times the Statewide average weekly wage").

94. Some professional sports franchises have historically influenced the limitation or elimination of professional athletes from workers' compensation laws. *See* Garcia, *supra* note 25 ("The legislation, passed unanimously by the Florida Legislature last month, was sought by Florida's professional sports franchises, lead (sic) by the National Basketball Association's Orlando Magic, the National Hockey League's Tampa Bay Lightning and the National Football League's Jacksonville Jaguars."). *See also Athletes May Be Denied Workers' Comp*, OBSERVER REPORTER, May 23, 1992, http://news.google.com/newspapers?id=cqtdAAAAIBAJ&sjid=cV0NAAAAIBAJ&pg=4089,3907540&dq=workers-compensation+athlete&hl=en (discussing the owners of the Pittsburgh Steelers lobbying for changes that would limit Pennsylvania's workers' compensation law for athletes: "Art Rooney II, son of Steelers President Dan Rooney, was at the Capitol this week lobbying for the proposal.").

95. FLA. STAT. ANN. § 440.02 (17)(c)(3) (West 2010); s*ee also* Rich Lord, *Federal Judge Asked to Rule on NFL Player's Injury Case*, PITTSBURGH POST-GAZETTE, Feb. 14, 2011, http://www.post-gazette.com/pg/11045/1125293-66.stm. However, the NFL's Miami Dolphins elect to participate in workers' compensation not through the state system, but the through the NFL Collective Bargaining Agreement. *Id.* The team has "instead promised to pay equivalent benefits, but awarded through arbitration rather than workers' compensation courts." *Id.*

96. MASS. ANN. LAWS ch. 152, § 1 (4) (LexisNexis 2011); c*f.* DEBORAH KOHL, WORKERS' COMPENSATION PRACTICE IN MASSACHUSETTS § 1.9 (Mass. CLE 2010). The emphasis on "*while so employed*" allows for some availability for the payment of workers' compensation benefits, since many professional contracts are for limited periods, thus allowing some availability for the payment of workers' compensation

athletes under all circumstances, only if the professional athlete's contract provides for the payment of benefits when disabled. Rhode Island, meanwhile, is specific in its exclusion, which is limited to employees in the professional hockey field.[97]

D. BENEFITS

Workers' compensation benefits typically fall into four categories: cash benefits; medical benefits; rehabilitation benefits; and death benefits. Cash benefits include both impairment benefits (payment for specific impairments) and disability benefits (impairment plus loss of wages).[98] Medical benefits are typically provided without dollar or time limits.[99] Rehabilitation benefits include both physical or medical rehabilitation and vocational rehabilitation for cases involving severe disability.[100] Death benefits are available for an employee's spouse or children when he or she dies of a work-related injury.[101]

1. CASH BENEFITS AND DISABILITY CLASSIFICATION

The cash basis of workers' compensation benefits is the employee's average weekly wage at the time of injury.[102] For professional athletes, this calculation can include additional

benefits. *Id.* "The litigation in this area generally centers on the duration of the contract and what constitutes the payment of wages." *Id.* Louisiana had a set-off provision for professional athletes, but it was repealed in 2004. Glenn Whittington, *Changes in Workers' Compensation Laws in 2004*, MONTHLY LAB. REV., Jan. 2005, http://www.bls.gov/opub/mlr/2005/01/art2full.pdf.

97. R.I. GEN. LAWS § 28-29-15 (2011) ("Professional ice hockey players, coaches, and trainers employed by a professional ice hockey club . . . shall be exempted from the provisions of chapters 29-38 . . . while that employee is temporarily within this state doing work for his or her employer."). Benefits of the other state shall be the exclusive remedy, against that employer for any injury, not Rhode Island, "while working for that employer in this state." *Id.*

98. GRAY & GREENBERG, *supra* note 37, at § 12.06[1]-[5].

99. JASPER, *supra* note 22, at 36; GRAY & GREENBERG, *supra* note 37, at § 12.06.

100. LENCSIS, *supra* note 20, at 56.

101. *Id.* The benefits may also include funeral expenses, depending on the statute; s*ee also* Metro. Cas. Ins. Co. of N.Y. v. Huhn, 142 S.E. 121 (Ga. 1928). A player and manager of the Augusta Baseball Club were killed in a car accident near Camden, South Carolina, while travelling the circuit in the South Atlantic League, and their widows sued for workers' compensation benefits. *Id.* at 122. Although the men were not performing as "baseball players" at the time of death, they were "engaged in a 'business operated for gain or profit,'" by traveling back and forth to games for competitions, which therefore qualified them under the Georgia workers compensation act. *Id.* at 124-25.

102. GRAY & GREENBERG, *supra* note 37, at § 12.06[1].

expenses beyond salary, such as employer-provided room, board, and training.[103] The average weekly wage does not, however, include signing bonuses.[104]

Disability is generally compensated in two ways: wage loss and loss of wage-earning capacity.[105] Wage loss is retrospective and looks back to what the employee actually lost in wages.[106] Wage-earning capacity is prospective and looks at what an employee could have earned but for the disability.[107]

In considering workers' compensation benefits to replace lost income or earning capacity due to occupational injury or disease, the disability is termed one of four ways: (1) temporary total; (2) temporary partial; (3) permanent total; or (4) permanent partial.[108] An employee who suffers temporary total disability is completely disabled during the period when compensation is paid, but is expected to return to work once recovered.[109] Temporary total disability makes up the vast number of workers' compensation claims.[110] The weekly benefit is a percentage of the employee's salary—typically sixty-six and two-thirds percent of weekly wages—up to a statutory maximum.[111] However, many athletes, especially those in the major professional sports leagues who are operating under a collective bargaining agreement,

103. GRAY & GREENBERG, *supra* note 37, at § 12.06[1]. *See also* Caparotti v. Shreveport Pirates Football Club, 768 So. 2d 186 (2000).

104. McGlasson v. WCAB, 557 A.2d 841, 842 (Pa. Commw. Ct. 1989) ("A contractual obligation should be included in the computation of the average weekly wage. . . . Essentially, the signing bonus is an independent contractual obligation which the (Philadelphia) Eagles satisfied upon payment to McGlasson in May of 1983.").

105. Philip Sudlow and Enrique Vega, *Wage Loss vs. Earning Capacity: Defining the Differences*, PLAINTIFF MAGAZINE 1-2, September 2010, http://plaintiffmagazine.com/Sept10/Sidlow-&-Vega_Wage-loss-vs-earning-capacity_Defining-the-differences_Plaintiff-magazine.pdf.

106. *Id.*

107. *Id.*

108. GRAY & GREENBERG, *supra* note 37, at § 12.06[2]; s*ee also Handbook on Workers' Compensation and Occupational Diseases*, ILL. WORKERS' COMP. COMM'N, 23-32 (Apr. 19, 2011), http://www.iwcc.il.gov/handbook020106.pdf [hereinafter Illinois Handbook].

109. JASPER, *supra* note 22, at 34; s*ee also* GRAY & GREENBERG, *supra* note 37, at § 12.06[2] ("Temporary total disability benefits are paid 1) when the employee is unable to work and has a total loss of wages; or 2) when the employee is still recovering and is able to do some type of work, but the employer is unable to provide work within the restrictions or limitations set by the doctor.").

110. GRAY & GREENBERG, *supra* note 37, at § 12.06[2].

111. JASPER, *supra* note 22, at 34.

continue to receive regular pay from the employer during periods of temporary total disability.[112] Again, in set-off states such as Missouri, the regular payments may be viewed as an advance on future workers' compensation benefits claimed after the contract ends.[113]

Temporary partial disability benefits are a form of wage-loss replacement awarded to an employee who is working at a lesser paying job or is working fewer hours because of the temporary effects of the employment-related accident or disease.[114] The compensation amount is expressed as a percentage of an employee's wages and is calculated as the difference between earnings before the injury and earnings after injury on his current earnings or wage-making ability.[115]

Permanent total disability occurs when an employee sustains a serious injury and is unable to return to any gainful employment.[116] An employee who suffers permanent total disability is generally entitled to a weekly benefit based on his diminished ability to compete in the job market.[117] The weekly benefit continues until the employee returns to gainful employment, dies, or reaches a statutory maximum.[118]

Some courts have observed that employment as a professional athlete is expected to be of limited duration. Therefore, a "permanent total disability" in athletics does not translate into a permanent disability for the rest of one's employment life, as was the case in *Meridian Professional Baseball Club v. Jensen*.[119] Blair Jensen, then 21, was a minor

112. This idea is central to the provision in MASS. ANN. LAWS CH. 152 § 1(4) (2010) (banning an athlete from receiving workers' compensation benefits while under contract).

113. *See supra*, Section II.C(3).

114. GRAY & GREENBERG, *supra* note 37, at §12.06.

115. JASPER, *supra* note 22, at 35; s*ee also* GRAY & GREENBERG, *supra* note 37, at § 12.06[2] (citing Herz & Baker, *supra* note 55, at § 15-7, 15-8) ("Herz and Baker suggest some of these benefits may be helpful to a professional athlete at the end of his career and during the transition period to new employment.").

116. GRAY & GREENBERG, *supra* note 37, at § 12.06[2]. Examples of permanent total disability would include loss of both eyes, arms, legs, or the loss of an arm, a leg, and other extreme conditions. JASPER, *supra* note 22, at 35.

117. JASPER, *supra* note 22, at 35.

118. *Id.* In states with statutory maximums, the amount ranges from between 312 and 500 weeks, or approximately six to 10 years. *Id.*

119. Meridian Prof'l Baseball Club v. Jensen, 99-WC-02093-COA (Miss. Ct. App. 2000); 2000 Miss. App. LEXIS 463.

league baseball player with the Meridian Brakemen who dislocated his shoulder and made a permanent total disability claim.[120] At issue was the idea of "usual employment" and whether Jensen could receive 100% permanent occupational loss of the use of his shoulder as a baseball player.[121] The Mississippi appellate court held against Jensen because, based on his age and education, he could find gainful employment in other fields that did not require "baseball playing" or "overhead lifting."[122] Thus, he was not permanently and totally disabled.

Permanent partial disability benefits are payable both for a loss, or loss of use, of particular parts of the body and loss of earnings or earning capacity resulting from permanent injuries.[123] The idea behind permanent partial benefits is giving workers an incentive to return to work and a "quasi-damage" award for the physical impairment endured.[124] These payments are not based on wage loss, but they are paid for a fixed number of weeks.[125] Wage loss is presumed based on the type of injury suffered.[126] The typical statutory law recognizes two types of permanent partial disabilities: specific or "scheduled injuries," which involve loss of the use of a specific body part; and "nonscheduled" injuries, such as disability caused by injury to the head, back, or nervous system.[127] The permanent partial disability aspect of workers' compensation raises the ire of team management, especially when an athlete appears on the roster of another team shortly after receiving a settlement.[128] Most

120. Meridian Prof'l Baseball Club v. Jensen, 99-WC-02093-COA (Miss. Ct. App. 2000); 2000 Miss. App. LEXIS 463.

121. *Id.*

122. *Id.* at 14. "Jensen," the court added, "has many days ahead of him to seek other jobs and continuing education, and he can learn trades much more efficiently than a person of more advanced age." *Id.*

123. GRAY & GREENBERG, *supra* note 37, at § 12.06[2].

124. *Id.* ("Although these awards can be quite sizable, they seldom approach levels awarded in negligence actions by juries.").

125. *Id.* For instance, in Wisconsin, loss of the hand at the wrist would be 400 weeks of compensation. *Id.* If there was only a partial loss of the use hand, say 10%, the claimant would be entitled to forty weeks, or 10% of 400. *Id.*

126. JASPER, *supra* note 22, at 36.

127. *Id. See also* GRAY & GREENBERG, *supra* note 37, at § 12.06[2] (Non-scheduled injuries are compensated under the wage-loss theory, wage-earning capacity theory, or permanent bodily impairment theory, where non-scheduled injuries are rated as a percentage of total and permanent disability).

128. Mark Brown, *Ex-Bears Lead the League in Workers' Comp*, CHI. SUN TIMES, June 29, 1997, at 20 ("Exhibit A for the defense last year in the case of Shaun Gayle

recently, permanent partial disability claims stemming from cumulative trauma under California law are at the heart of most litigation between professional athletes and teams.

2. MEDICAL BENEFITS

Unlike wage benefits, which are subject to a waiting period, medical benefits are payable immediately.[129] Additionally, there is generally no limitation on duration or cost.[130] Medical benefits are provided even if there has been no lost time from work and no cash benefits paid.[131]

The access to lifetime medical benefits is a primary driver of professional athlete claims,[132] even for athletes not necessarily in dire straits. Joe Montana, once the NFL's highest paid athlete, filed a workers' compensation claim for cumulative trauma in California in 1995 for injuries dating back to 1979.[133] The rationale offered by his attorney in a 1996 Los Angeles Times article was that "Joe is pretty beat up," referring to the ten to fifteen surgeries on his back, knees, and elbows.[134] Montana's attorney claimed that "[t]he biggest concern with Joe is not the money; it is his health and medical care. It could cost millions

v. the Chicago Bears Football Club was a videotape of the former Bears safety returning an interception for a touchdown. In the video, the 11-year Bear veteran was shown in the uniform of his new team, the San Diego Chargers"). A hearing officer determined that Gayle had lost forty-five percent use of the leg, and he was awarded $46,283 in benefits. *Id.* Former Bears quarterback Mike Tomczak received $27,121 (torn rotator cuff in right arm in 1989) and $20,260 (left shoulder injury in 1988) between 1995–96. *Id.* In 1996, Tomczak reportedly earned $700,000 in salary with the Pittsburgh Steelers—more than he ever made with the Bears. *Id.*

129. JASPER, *supra* note 22, at 36.

130. *Id.*

131. *Id. Cf.* GRAY & GREENBERG, *supra* note 37, at § 12.06. Jurisdictions fall in one of three categories: no arbitrary restrictions on duration and time; initial restrictions with provisions for unlimited extensions beyond the initial limits; and a definite upper limit on care. *Id.*

132. Schwarz, *Dementia*, *supra* note 17 ("[T]hey (players) had to participate in just one game in the state to be eligible to receive lifetime medical care for their injuries from the teams and their insurance carriers.").

133. Lonnie White, *Unordinary Joe Can Get Workers' Comp*, L.A. TIMES, Aug. 16, 1996, http://articles.latimes.com/print/1996-08-16/sports/sp-34775_1_joe-montana; *see also* Greg Lucas, *Montana's Pitch for Injured Athletes/He Lobbies Against Bills to Restrict Workers' Comp Benefits*, S.F. CHRON., May 14, 1997, http://articles.sfgate.com/1997-05-14/news/17749140_1_workers-comp-comp-system-sports-injuries.

134. White, *supra* note 134.

later on."[135] Although Montana, a former San Francisco 49ers quarterback, spent most of playing career and thus likely received most of his injuries in California, other professional athletes potentially have access to the same lifetime medical benefits despite having played just one game in California. This concept will be explored further in Section III.

E. INSURANCE AND CLAIMS PROCEDURE

Workers' compensation programs are almost exclusively financed by employers,[136] and the state or federal government entity regulating the programs is usually (to borrow a sports phrase) a "referee" in the process.[137] Most employers consider work-related mishaps a business expense; the cost of protecting workers varies with the risk of the employment involved and determines the level of insurance obtained.[138] Employees, meanwhile, must go through a claims procedure to obtain benefits.

1. EMPLOYER INSURANCE

The majority of states have enacted compulsory workers' compensation laws, which means that employers are statutorily required to maintain insurance for their employees.[139] Employers who fail to maintain coverage may not only be sued by employees but may also incur state penalties.[140] As such, employers generally provide employees with a statement of their workers' compensation rights.[141] States can mandate that employers

135. White, *supra* note 134.

136. JASPER, *supra* note 22, at 9.

137. *Id.* at 7-9. In a minority of jurisdictions, employers are required to obtain insurance through a state insurance fund. Some of these jurisdictions do permit employer self-insurance. *Id.* Ohio is an example of a state-fund jurisdiction that allows self-insurance. *Basics: State-Fund and Self-Insuring Employers*, OHIO BUREAU OF WORKERS' COMP., http://www.ohiobwc.com/basics/guidedtour/providerno/intro/StateSelfInsured.asp (last visited Nov. 9, 2011).

138. JASPER, *supra* note 22, at 9.

139. *Id.* at 7.

140. *Id.* In the few states that have elective workers compensation laws—including New Jersey, South Carolina, and Texas—employers who reject such coverage lose the customary common law defenses of contributory negligence, assumption of risk, and fellow-servant negligence that make up the employer's end of the "quid pro quo" bargain. *Id.* at 8

141. JASPER, *supra* note 22, at 30. In a state like Texas, where coverage is elective, the fact of non-coverage is required to be posted. *Notice to Employees Concerning*

notify employees of their compensation rights under state law.[142] Employers typically fund workers' compensation plans by purchasing insurance. The source of insurance may be through a private carrier or state insurance fund.[143] In addition, an employer may insure itself.[144]

Like most forms of insurance, workers' compensation costs are closely associated with risk.[145] The more likely that a claim will be made, the higher workers' compensation costs will be for the employer. Insurers typically fix rates based on remuneration, or by how much a worker makes, the most common element of which is payroll.[146] Occupational classifications apply to different work exposures and, consequently, different risk exposures.

Professional sports teams, as employers of professional athletes, are obviously in a high-risk category, not only because of the rate of employee injury, but because of employee salaries. Particularly with the NFL, finding insurance is challenging,[147] and, when found, it is expensive.[148] A 2010 New York Times

Workers' Compensation in Texas, TEX. DEPT. OF INS., DIV. OF WORKERS' COMP., http://www.tdi.state.tx.us/forms/dwc/notice5.pdf (last visited Feb. 27, 2012) (explaining that employers in the Texas are required to post notices to their employees as to whether they do or do not carry workers' compensation insurance).

142. *See* ARK. CODE ANN. § 11-9-407 (West 2011) (stating that an employer is required to notify employees that it has secured compensation by posting it in "a conspicuous place.").

143. JASPER, *supra* note 22, at 30. In a minority of jurisdictions, purchasing through a state insurance fund in required, although most jurisdictions allow employers to self-insure. *Id.* For employers that elect private carriers, they are free to choose from whatever private company offers workers' compensation coverage. *Id.*

144. *Id.* Approximately 48 states permit self-insurance. *Id.* The NFL's Cincinnati Bengals and its self-insured plan are at the crux of the *Carroll* case, where California workers' compensation law does not apply if the employer can prove its level of coverage equaled or exceeded California's coverage. Carroll v. New Orleans Saints, 2010 Cal. Wrk. Comp. P.D. LEXIS 176 (2010).

145. JASPER, *supra* note 22, at 9.

146. *The Basics of Workers Compensation Premiums*, ADVANCED MGMT. INS., http://www.cutcomp.com/basics.htm (last visited Feb. 27, 2012).

147. Andrew Bary, *The Insurance Market's Other Maverick*, CLERMONT SPECIALTY MANAGERS, http://www.clermonthid.com/download/The_Insurance_Markets_Other_Maverick.pdf (last visited Nov. 10, 2011) (About Berkley Insurance: "The Greenwich, Conn., company . . . focuses on niche property and casualty markets, insuring the likes of NFL teams, . . . and scuba-diving operations that many *rivals ignore or won't touch*.") (emphasis added).

148. S*ee* Louisiana Workforce Commission, *supra* note 14 (regarding premiums for New Orleans Saints rising 387% between 2000–2009).

article reported that the St. Louis Rams' policy covering California *alone* costs $1 million annually.[149] When a professional sports team is unable to find an insurer to "voluntarily" underwrite the employer's risk, the only alternatives may be to self-insure or obtain coverage from a pool for high-risk employers who share risks, profits, and losses together.[150] The last resort, if in a state like Florida that excludes professional athlete employees from mandatory coverage, is to ditch workers' compensation insurance altogether.[151]

2. PROCESSING A CLAIM

A claim for workers' compensation is not a lawsuit, but rather an application for benefits under an insurance policy for which a premium has been paid by the employer.[152] Since workers' compensation is considered to be no-fault insurance, claims are usually accepted but can be contested by an employer.[153] If the employer decides to contest a claim, a hearing is held before an administrative agency, such as a workers' compensation board.[154]

Settlements are also an option.[155] If the disability is

149. Alan Schwarz, *Teams Dispute Workers' Comp Rights*, N.Y. TIMES, April 6, 2010, http://www.nytimes.com/2010/04/07/sports/football/07bengals.html [hereinafter Schwarz, *Dispute*].

150. Birmingham Hockey Club v. Nat'l Council on Comp. Ins., 827 So. 2d 73, 76 (Ala. 2002). In the voluntary market, an insurer voluntarily agrees to underwrite risk. In the residual market, an employer is assigned a servicing carrier.

151. George Diaz, *Injured Pro Athletes Earn Right to Workers' Comp*, ORLANDO SENTINEL, Aug. 20, 1996, http://articles.orlandosentinel.com/1996-08-20/sports/9608190905_1_professional-athlete-montana-san-francisco-49ers.
According to Orlando Predators minority owner Mick O'Brien, the Predators ditched their coverage because annual premiums rose from $40,000 to an excess of $400,000 per year. *Id.*

152. JASPER, *supra* note 22, at 29; s*ee also* Don Walker, *Paying for Pain: When It Comes to Workers' Compensation, Professional Athletes Are Just Like the Rest of Us*, MILWAUKEE J. SENTINEL, June 25, 2006, at C1. Between 1994 and 2005, 372 cases involving members of the NFL's Green Bay Packers were filed with the Wisconsin workers' compensation division and $5.36 million in indemnity payments were paid out by insurance companies to settle cases. *Id.* For Major League Baseball's Milwaukee Brewers, 134 cases involving members of the Brewers had been filed and $2.9 million in indemnity payments were made. *Id.* The Milwaukee Admirals, a minor league hockey franchise, saw sixty-three athlete claims in which $2.9 million was paid. *Id.*

153. Illinois Handbook, *supra* note 109, at 13.

154. JASPER, *supra* note 22, at 31.

155. Walker, *supra* note 153. From 1994 to 2004, only thirty-seven cases involving

permanent partial, as in the case of most professional athlete claims, the claim can be settled in a lump-sum payment through a "compromise and release."[156] Athletes who select this option are entitled to a lump-sum settlement that indemnifies the athlete and precludes any future claims, including medical claims.[157]

The workers' compensation process is typically straightforward and free of litigation. However, the situation changes drastically when workers' compensation rights stretch across jurisdictional boundaries.

III. WHEN WORKERS' COMPENSATION LAWS CONFLICT

Multiple jurisdictions can have an interest in incidents of injury that are important and relevant to workers' compensation, not just the "local" state where a team has its principal place of business.[158] This Section first looks at the "legitimate interests" a state may have in an injured employee. Subsection B turns specifically to California workers' compensation law, particularly the statutes, administrative decisions, and case law, which open the door for transient employees—including professional athletes—to establish jurisdiction in the state. Despite attempts to address competing workers' compensation interests through CBAs, contract clauses, courts, and legislatures, professional athletes and teams have yet to arrive at an equitable solution.

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the Green Bay Packers and twenty cases involving the Milwaukee Brewers were contested. *Id.* An even fewer number, four for the Packers and two for the Brewers, went to a hearing before an administrative law judge. *Id.*

156. JASPER, *supra* note 22, at 32.

157. *Id.* Settlements are generally reviewed by a workers' compensation judge to ensure fairness for the claimant. *Id. See also Findings and Recommendations on California's Permanent Partial Disability System: Executive Summary*, INSTITUTE FOR CIVIL JUSTICE—RAND, https://www.dir.ca.gov/CHSWC/Reports/PPDFindingsAndRecommendations.pdf. In California, this settlement for permanent partial disability is tax-free. *See* Alan Schwarz, *Two Ex Players Leverage Coverage in N.F.L. Workers' Comp Cases*, N.Y. TIMES, April 7, 2010, http://www.nytimes.com/2010/04/08/sports/football/08lawyers.html?pagewanted=all [hereinafter Schwarz, *Leverage*] ("Benefits are tax free and therefore more valuable than the taxable wages lost to injured workers."). "More than 90 percent of the players represented by (Ron) Mix and (Mel) Owens forgo the extremely likely prospect of lifetime medical care for their football injuries by taking lump-sum settlements." *Id.*

158. LARSON'S, *supra* note 72, at § 142.03(1).

A. "LEGITIMATE INTEREST" RULE

The ability to file a workers' compensation claim is not confined to one state if the employee is employed, even temporarily, in multiple states. Any state having a "more-than-casual interest," or "legitimate interest," in a compensable injury[159] may apply its compensation act without violating the Full Faith and Credit Clause of the Constitution.[160] Among the factors giving rise to a legitimate interest, are: the place where the contract is made; the place of performance; the place of the injury; the employee's state of residence; the place where the industry or employer is localized; and the place whose statute the parties expressly adopted by contract.[161]

Unlike traditional conflicts of law controversies, the theories of "dominant interest" or "most significant relationship" are irrelevant in workers' compensation cases.[162] The conflicts problem in workers' compensation is not normally a choice-of-law question at all since a state can only apply one statute—that of its own state.[163] Thus, the test is not whether the interest of the forum state is *greater* but only whether the interest itself is *legitimate* and *substantial*.[164]

1. INTEREST IN STATE OF CONTRACT

The Supreme Court's unanimous decision in *Alaska Packers Assn. v. Industrial Accident Commission of California*[165] began to develop the general test that asks whether any incidents of the injury that are important and relevant to workers' compensation fall within the local state.[166] In *Alaska Packers*, a non-resident worker from Mexico signed a contract in California for

159. LARSON'S, *SUPRA* NOTE 72, AT § 142.03(1).

160. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, the Effect thereof.").

161. LARSON'S, *supra* note 72, at § 142.01.

162. *Id.* at § 142.03.

163. *Id.*

164. *Id.* (emphasis added) ("The only choice the forum has is to grant relief under its own statute or deny relief altogether. With that pair of alternatives, it's easy to see why *some* substantial interest should suffice, without worrying about relative weight when compared to the interest of foreign states.").

165. 294 U.S. 532 (1935).

166. LARSON'S, *supra* note 72, at § 142.03.

employment entirely within the state of Alaska during the salmon canning season.[167] The contract stated that the parties would be bound by Alaska's workers' compensation law.[168] In August 1932, when the employee returned to California, he filed a California workers' compensation claim and received an award.[169] The employer "assailed" the California statute as invalid under the Due Process and Full Faith and Credit Clauses of the Constitution and insisted that Alaska provided the exclusive remedy for his injury.[170]

The Supreme Court stated that California had enough of a "legitimate public interest" in regulating this employer–employee relationship to justify the application of the California statute.[171] Not only was the Court concerned about the burdens that would be imposed on injured workers by requiring them to travel 3,000 miles to file a claim in Alaska, but also the economic effects on California if the injured workers were not compensated: "Without a remedy in California . . . [injured workers] would be remediless, and there [is] danger that they might become public charges, both matters of grave public concern to [California]."[172] Thus, California had as great an interest in these circumstances with this class of workers as to employees injured within the state—to prevent throwing such injured workers on local charity.[173]

2. INTEREST IN STATE OF INJURY

In addition to the state of contract, the state of injury is also relevant when making a workers' compensation claim. In *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[174] the place of injury was California; every other facet of the

167. LARSON'S, *supra* note 72, at § 142.03.

168. Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 538 (1935). Yet § 27(a) of the California Workers Compensation Act specifically stated "[n]o contract, rule or regulation shall exempt the employer from liability fixed by this act." Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 538 (1935).

169. *Id.*

170. *Id.* at 539. The California courts, the appellant argued, denied full faith and credit to the Alaska statute by refusing to recognize it as a defense to the application for an award under the California statute. *Id.*

171. *Id.* at 542.

172. *Alaska Packers*, 294 U.S. at 542.

173. *Id.* at 543; LARSON'S, *supra* note 72, at § 142.03.

174. *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939).

employment relationship, such as the place of contract, the employee's state of residence, and the employer's principal place of business, was in Massachusetts.[175] The Supreme Court declared that California law, not Massachusetts law, applied to the injury:

> Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in their course of employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.[176]

In *Carroll v. Lanza*,[177] the Supreme Court stated that the state of injury also has an interest in effectuating its policy, and therefore does not need to be subservient to another state under the pretext of the Full Faith and Credit Clause.[178] In *Carroll*, the Court discussed the interplay of between Arkansas and Missouri law, explaining that

> Missouri can make her compensation act exclusive, if she chooses and enforce it as she pleases within her borders. Once that policy is extended into other states, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or, as the *Pacific Employers Insurance Co.* case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be

175. *See generally id.* The employee was sent to California temporarily as a technical adviser, and he filed a workers' compensation claim in California for injuries he received in that state. *Id.*

176. *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 503 (1939). Further, the Court noted, a refusal to apply California law might require California physicians and hospitals to go to another state to collect charges for medical care. *Id.* at 504.

177. 349 U.S. 408 (1955).

178. *See generally id.* An employee of a subcontractor (both based in Missouri) who was injured in Arkansas was awarded workers compensation benefits in Missouri. *Id.* He also filed a tort suit against the general contractor, which was permissible under Arkansas law. *Id.*

> powerless to provide any remedies or safeguards to nonresident employees working within its borders.[179]

Since professional athletes often compete in multiple states throughout their careers, their workers' compensation rights cross state lines as well. Yet California's workers' compensation law is the most emotionally charged, because a single contact in the state has been found to establish a "legitimate interest" that allows an athlete to recover a six-figure sum years later, depending on the circumstances. What has happened in professional sports, especially in the NFL, is that team employers litigate the question of California jurisdiction to avoid claims, and professional athletes cling to access to the California system and whatever other jurisdiction is favorable.[180]

B. HOW CALIFORNIA'S "INTERESTS" BROUGHT THE RELATIONSHIP OF WORKERS' COMPENSATION AND PRO ATHLETES INTO THE SPOTLIGHT

The following subsection summarizes why California is such a friendly state for professional athlete claims, how teams determined to stop these claims respond, and why an overhaul is needed to move the professional athlete out of state workers' compensation laws and into a single federal workers' compensation law system. First, the relevant California workers' compensation statutes and decisions will be examined. Next, the Comment will explore how what started as a handful of athletes making a handful of claims in the 1970s turned into a legal quandary for teams, and how the teams' response, or lack thereof, caught up with them much later. Finally, teams and professional athletes engage in a tug-of-war that involves litigation, legislation, and even arbitration as a means to exploit workers' compensation for their own respective interests.

179. *Id.* at 413-14.

180. *See Block the Lockout Conference Call with Labor/Union/Issue Bloggers*, NFLLOCKOUT.COM (Nov. 17, 2010), http://www.nfllockout.com/2010/11/17/nfl-players-union-help-block-the-lockout-conference-call-with-laborunionissue-bloggers-november-15-2010100-p-m-est/. Kevin Mawae, the president of the NFL Players Association on workers' compensation benefits, stated the following: "Workers' comp is the only way a player can have lifetime medical, and the NFL is fighting us against that. We have cases right now that are being litigated against our players so they can't file in friendly states where they might be able to get a claim for injuries they sustained in the NFL." *Id.*

1. CALIFORNIA LAWS

A confluence of California Labor Code statutes, California Workers' Compensation Appeals Board decisions, and state court decisions has made it possible for the state to establish jurisdiction and accept workers' compensation claims from athletes who played as little as one game in the state.[181] The starting point is California Labor Code § 3202, which was enacted in 1937.[182] Section 3202 states workers' compensation laws "shall be liberally construed by the courts with the purpose of extending benefits" to protect workers injured in the course of employment.[183]

California is among the minority of states that formally recognize cumulative trauma as a basis for a workers' compensation claim.[184] Under California Labor Code § 5412, the date of injury in cumulative trauma cases is the date upon which the employee either knew or should have known the disability was caused by his present or prior employment.[185] Apportionment of liability for an employer in cumulative trauma claims filed or asserted beginning in 1981 is limited to the employers and insurance carriers who employed the employee one year immediately preceding the date of injury or date of last exposure.[186]

The reach of California workers' compensation jurisdiction is expansive to say the least. The law not only applies to all industrial injuries occurring within the state but also to any injury occurring outside the state if the contract was made in California.[187] A contract of employment is deemed to have been made in California where the employee is a resident of

181. Blum, *supra* note 10.

182. CAL. LAB. CODE § 3202 (West 2010).

183. *Id.*

184. Cumulative trauma injury in California differs from "specific" injury, which, under CAL LAB CODE § 3208.1, occurs as the result of one incident of exposure that causes disability or need for medical treatment. Cumulative injury results from repetitive injuries over time. HERLICK'S, *supra* note 9, at § 10.28.

185. CAL. LAB. CODE § 5412 (West 2010); s*ee also* HERLICK'S, *supra* note 9, at § 10.22 ("In cumulative trauma cases, it is not enough to show that the employee performed heavy labor and thereafter noticed the gradual onset of symptoms. There must be adequate medical proof that the labor caused the employee's condition.").

186. HERLICK'S, *supra* note 9, at § 10.29.

187. *Id.* at § 13.01 [2].

California.[188]

If an employee is injured while in California temporarily on behalf of an out-of-state employer, California law applies, and the appeals board may assume jurisdiction.[189] However, California has adopted a "reciprocity measure" in California Labor Code § 3600.5 that exempts the employer from California law, provided *all* of the following conditions are met:

> (1) The employer has furnished workers' compensation insurance under the laws of the other state for the employment in California. A certificate from the workers' compensation division of the other state is prima facie evidence of coverage.
>
> (2) California's extraterritorial provisions are recognized in the other state.
>
> (3) California employers are similarly exempt under the law of the other state.[190]

California Labor Code § 3550 is the notice requirement that renders employers responsible for notifying employees of their California workers' compensation rights.[191] The statute, enacted in 1984, requires every employer to post the name of the insurance carrier and the entity responsible for claims adjustment in a conspicuous location noticeable by employees.[192]

Failure by the employer to give the employee notice tolls, or stops the clock, on the statute of limitations that begins to run upon receiving knowledge of a work injury.[193] In *Reynolds v. W.C.A.B.*,[194] an employee suffered a heart attack in 1968 and then

188. HERLICK'S, *supra* note 9, at § 10.29.

189. *Id.* at § 13.02.

190. Herlick's, *supra* note 9, at § 13.02. *See also* CAL. LAB. CODE § 3600.5 (West 2010). This reciprocity provision has been the focus of litigation in cases such as Carroll v. New Orleans Saints, 2010 Cal. Wrk. Comp P.D. 176, 18 (2010). State legislatures have adopted (Florida), are considering, or have considered adopting (Louisiana) reciprocity provisions with the encouragement of the team's NFL franchises. *See supra* note 25 and accompanying text.

191. CAL. LAB .CODE § 3550 (West 2010).

192. *Id.* The notice must be posted in English and Spanish and must include "[t]he existence of time limits for the employer to be notified of an occupational injury." *Id.* at § 3550 (d)(5). *See also* HERLICK'S, *supra* note 9, at § 14.01[2].

193. HERLICK'S, *supra* note 9, at § 14.01[5]. The clock remains tolled until notice is given to the employee. *Id.*

194. *Reynolds v. W.C.A.B.*, 12 Cal. 3d 726 (Cal. 1974).

filed a workers' compensation claim in 1971.[195] His employer never informed him that he might be entitled to workers' compensation benefits, as required under California Labor Code § 138.4.[196] The purpose of the rules, the court said, is to "protect and preserve the rights" of employees who may be "ignorant of the procedures or the very existence of workers' compensation law."[197] The employer, the court continued, is in a better position to know of the employee's rights and is charged with notifying the employee of those rights.[198]

2. HISTORY OF CALIFORNIA CUMULATIVE TRAUMA CLAIMS AND HOW INITIAL RESPONSE CAUGHT UP WITH TEAMS DECADES LATER

In 1973, the language regarding cumulative trauma and date of injury was added to California Labor Code § 5412.[199] About a year later, former Minnesota Vikings standout running back Tommy Mason, who spent part of his career with the Los Angeles Rams, was informed by a law professor in California that he may have a claim for "continuing trauma" against the Rams.[200] Mason collected $25,000 in permanent partial disability plus unlimited medical care for his knees and shoulders.[201]

In 1981, Mason reflected on his experience and said he was labeled a "turncoat," but defended his actions.[202] "It was a legal right that I had to file (for workers' compensation). . . . The funny thing is, all I was looking for was medical care. If they had offered me $5,000, I would have taken it. But when they just shut the door and tried to ignore me, that made me mad."[203]

Mason's law school classmate, former NFL player George Hill, made workers' compensation for professional athletes the

195. *Reynolds v. W.C.A.B.*, 12 Cal. 3d 726, 728-29 (Cal. 1974).

196. *Id.*

197. *Reynolds v. W.C.A.B.*, 12 Cal. 3d 726, 729 (Cal. 1974).

198. *Id.* Since the employer, Pacific Gas & Electric, was obligated to notify the employee and failed to do so, the statute of limitations provisions of California Labor Code § 5404 and 5405 were not permitted as a defense, and the claim was allowed. *Id.* at 730; s*ee also* CAL. LAB. CODE §§ 5404, 5405 (2010).

199. CAL. LAB. CODE § 5412 (West 2010) (1973 Amendment: (1) added "cumulative injuries").

200. Layton, *supra* note 7.

201. *Id.*

202. *Id.*

203. *Id.*

signature of his practice.[204] As of August 1981, he had not lost in around 200 claims and cited several factors for his success, mainly that "the professional teams didn't notify injured players they might be eligible for workers' compensation."[205] Under California law, these provisions are found in §§ 3550 and 138.4 and were described in *Reynolds*.[206]

The most stunning aspect of this increase in claims, however, was that lawyers such as Hill told teams about the notice requirement, and NFL officials turned a deaf ear.[207] "We are self-insured and really hope we don't have any claims," said Jim Finks, then general manager of the Chicago Bears.[208] "We're not trying to shirk our responsibility as employers, but at the same time, we're not trying to encourage this workers' compensation sham."[209] Finks added that he was warned by the team's legal counsel that "there is no end in sight."[210] Yet teams opted to take their chances instead.

Meanwhile, workers' compensation fever spread to athletes throughout the country.[211] While the earlier cases of the 1970s, such as *Bayless*[212] and *Brinkman*,[213] featured professional

204. Layton, *supra* note 7.

205. *Id.*

206. CAL. LAB. CODE §§ 3550, 138.4 (West 2010); Reynolds v. W.C.A.B., 12 Cal. 3d 726, 728-29 (Cal. 1974).

207. Layton, *supra* note 7. "They're afraid of opening the floodgates," Hill said. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *See Award Made to Player*, HARLAN DAILY ENTER., July 23, 1982, at 4. There is an example regarding the claim made by Billy Perrin, a free agent defensive back with the Bears who filed suit for injuries suffered in 1980: "Workers' compensation industry officials say this is the first time a commission arbitrator has ruled in favor of a professional athlete in Illinois." *Id. See also* Ira Berkow, *Sanders Adapting to a New Way of Life Without Football*, N.Y. TIMES, June 16, 1981, at B15. Another example involves former Lions Running back Charlie Sanders around 1979—just before the two-year statute of limitations expired—for a knee injury after becoming aware of his workers' compensation rights "through the grapevine." *Id. See also* Steve Berkowitz, *Pitcher Wins Workers' Comp From Orioles*, THE WASH. POST, Feb. 2, 1991, at H1. Anothre example involves Baltimore Orioles pitcher Steve Culkar: "The decision . . . is believed to be the first time a professional athlete in Maryland has been awarded compensation for wages lost as a result of an injury caused by the normal performance of his job." *Id.* But the case was said to have limited value of precedent in Maryland because of the nature of Culkar's injury. *Id.*

212. Bayless v. Phila. Nat'l League Club, 472 F. Supp. 625 (E.D. Pa. 1979); s*ee supra* Section II.C.1.

213. Brinkman v. Buffalo Bills Football Club, 433 F. Supp. 699 (W.D.N.Y. 1977);

athletes trying to get *out* of workers' compensation and sue in tort or contract, professional athletes were now seeking to be *in* workers' compensation. Attitudes were changing among athletes who had been fearful of retribution for disclosing injuries that could eventually lead to a claim.[214] Athletes were no longer viewed as "less than a man" for filing a workers' compensation claim.[215] In addition, the NFLPA stepped up its efforts to make players aware of their workers' compensation rights.[216]

By contrast, the attitude of team management and ownership toward workers' compensation claims by athletes vacillated between astonishment[217] and bewilderment. While valid claims exist, Detroit Lions Chief Financial Officer and Vice President of Finance, Tom Leaseau, said in 1999, "I think the way the law is written, it kind of lends itself to people trying to get something out of the system that maybe the system shouldn't be giving up."[218] Of special concern were cases like that of a former Minnesota Vikings center, who was told every year that his knee was deteriorating and that he risked losing his ability to walk in the future if he continued to play.[219] He continued to play, never missing a game, and then turned around in 1980 and filed a successful workers' compensation claim against the Vikings worth approximately $22,000.[220]

Some legislatures, at the behest of powerful team owners,

s*ee supra* note 49 and accompanying text.

214. *See* Jeff Taylor, *Some Athletes Receive Workers' Compensation, Too*, DETROIT FREE PRESS, Apr. 16, 1999. Former Detroit Tigers pitcher Milt Wilcox, whose career ended in 1986, said pitching with a sore arm likely robbed him of pitching years: "You either had to pitch or they sent you back down to the minors. So you don't want to tell them you're hurt, and you go out and hurt yourself even more." *Id.* Wilcox received $115,000 in 1993. *Id.*

215. Peter Alfano, *Fans Aren't Cheering for Unions in Sports*, N.Y. TIMES, Sept. 26, 1982, at Section 5, p. 1 (quoting former NFLPA president Ed Garvey: "Management always kept this information from them. Management made it seem a player was less than a man if he filed for compensation.").

216. Berkow, *supra* note 212.

217. *See Garvey Doesn't Expect a Lockout*, PALM BEACH POST, July 23, 1983, at D3. "I'm disappointed but not surprised," Chicago Bears General Manager Jim Finks said in response to Billy Perrin's claim. S*ee supra* note 212 and accompanying text. "This is one of the problems we have in our society today. It looks to me like our workers' compensation laws that were set out years ago have been abused and confused." *Id.*

218. Taylor, *supra* note 215.

219. Layton, *supra* note 7.

220. *Id.*

pushed through laws specifically designed to limit workers' compensation claims by athletes.[221] Thus, as it became increasingly difficult for athletes to successfully make claims in other states, more players began making cumulative trauma claims in California.

California's cumulative trauma provisions drew major attention in 1996 following NFL Hall of Famer Joe Montana's workers' compensation claim.[222] When California state senator Quentin Kopp introduced a bill in 1997 aimed at eliminating workers' compensation for any out-of-state athlete who played a professional game or signed a contract in California, Montana lobbied hard against its passage.[223] Kopp shelved the bill and conceded that Montana's celebrity status forced his retreat.[224] California law for cumulative trauma claims and eligibility for non-resident professional athletes remained intact.

Until the late 1990s, the typical professional athlete making a California workers' compensation claim spent at least part of his career with a California team, like Mason and Montana.[225]

221. FLA. STAT. § 440.02(17)(c)(3) (West 2011) (enacted in 1989); 77 PA. CONS. STAT. § 565 (West 2010) (enacted in 1993); TEX. LAB. CODE ANN 406.095 (2010) (enacted in 1993).

222. *See supra* Section II.D(2); s*ee also* White, *supra* note 134, and Lucas, *supra* note 134. Montana acknowledged the awkwardness of his claim, which claimed permanent disability from cumulative trauma, but defended himself vigorously. White, *supra* note 134. "It's a little unfair for me to be standing here," Montana said. Lucas, *supra* note 134. "Let's forget about me. This is about all of those guys with an average career of three or four years that ends with an injury." *Id.*

223. *NFL Tackles Benefits*, L.A. TIMES, April 11, 1997, http://articles.latimes.com/1997-04-11/business/fi-47559_1_compensation-benefits. Another bill that same session, introduced by California Sen. Ross Johnson, would have restricted workers' compensation eligibility to athletes making less than $226,000 per year. *Id.*

224. Carl Ingram, *Joe Montana Leads Offense on Workers' Comp Bill,* L.A. TIMES, May 14, 1997, http://articles.latimes.com/1997-05-14/news/mn-58676_1_joe-montana. *Id.* "Celebrities usually have an effect . . . on legislators and the public," Kopp said. *Id.*

225. *See* Hagen v. W.C.A.B, 49 Cal. Comp. Cas. 407 (Cal. Ct. App. 1984). Hagen, a San Francisco 49ers offensive lineman, filed an application for workers' compensation benefits after injuring his right knee in 1979. *See also* Beaver Ins. v. W.C.A.B., 57 Cal. Comp. Cas. 730, 730-31 (1992) (writ denied) (determining date of injury for cumulative trauma claim made by former receiver for the New Orleans Saints (1978-81), San Diego Chargers (1981-1987), and San Francisco 49ers (1988)). *See also* David Hasemyer & Joe Cantlupe, *Some Athletes Have Need of Workers' Comp Help*, THE SAN DIEGO UNION-TRIBUNE, Aug. 14, 1996, at A4 (discussing California claims made by Saladin Martin, a less-famous teammate of Montana's on the San Francisco 49ers 1982 Super Bowl team who last played in 1984 and filed a

Bowen v. W.C.A.B[226] represented a trend in which professional athletes who either resided in California or signed contracts there to work for out-of-state employers, and out-of-state employees doing business temporarily in California with their respective teams began to use California's liberally constructed laws for their advantage. In *Bowen*, California jurisdiction applied to a resident employed in the Florida Marlins minor league system because he signed his contract in California—although he was wholly employed outside of the state.[227] Additionally, the California court invoked *Alaska Packers Association v. Industrial Commission of California* to demonstrate California's interest in this employer–employee relationship.[228]

The stakes were raised even higher in *Injured Workers' Insurance Fund v. W.C.A.B.*,[229] as the case involved neither a California resident nor a California contract.[230] The sole basis for jurisdiction was a single game played in the state.[231] A professional football player filed a claim in 2001 for cumulative trauma based on an injury he received while playing a *single* California game in 1982 as a member of the Baltimore Colts.[232] Injured Workers' Insurance Fund, the Colts' insurer, filed a petition for writ of review to the California court of appeal after the W.C.A.B. upheld the finding of a workers' compensation judge that California had jurisdiction over the Colts because the team proved neither reciprocity under § 3600.5 nor the existence of extra-territorial provisions in Maryland.[233] The writ was

claim in 1991, and 1976 Cy Young Award winner and former San Diego Padres pitcher Randy Jones, who finished his career with the New York Mets in 1982).

226. Bowen v. W.C.A.B. & Fla. Marlins, 73 Cal. App. 4th 15 (Cal. Ct. App. 1999).

227. Bowen v. W.C.A.B. & Fla. Marlins, 73 Cal. App. 4th 15, 27 (Cal. Ct. App. 1999).

228. 294 U.S. 532 (1935). Allowing a contract clause to defeat an employee's claim for benefits, the court said, would not only violate § 5000 prohibiting contracts exempting employers from liability under California law but would "frustrate California's interests in protecting employees hired in California and injured elsewhere." *Id.*

229. 66 Cal. Comp. Cas. 923 (Cal. Ct. App. 2001).

230. *Id.* at 923.

231. *Id.* In fact, it was the only time the athlete ever appeared in an actual game as a professional football player. *Id.* at 923.

232. *Id.* at 923 (emphasis added). The applicant was never a resident of California and none of his football contracts were negotiated nor signed in California. *Id.* at 924.

233. *Id.* at 925-26.

denied.[234]

Like in *Bowen* and *Injured Workers Insurance Fund*, California jurisdiction was established for professional athletes in various circumstances and in creative ways. In addition, the cumulative trauma phenomenon spread to other professional sports leagues beyond the NFL. In *Portland Trailblazers v. W.C.A.B (Whatley)*, a professional basketball player whose claim for cumulative trauma was made in California had his last year of injurious exposure while playing in Lithuania from 1997–1998.[235] Under § 5500.5, California jurisdiction was conferred on the out-of-state employer from the NBA who employed Whatley when he last played in California (1993–1995) instead.[236]

Additional statutes, namely the reciprocity provision of § 3600.5 and the notice provision, which tolls the statute of limitations unless and until an employer can prove he made the employee aware of his California workers' compensation rights, have also caused problems for teams who failed to give notice, whether intentionally (like the Bears' Finks and Minnesota Vikings general manager Mike Lynn in the early 1980s[237]) or unintentionally.[238] Instead, players often receive "notice" of workers' compensation availability from attorneys.[239]

With the odds and California law stacked against them, teams may choose to settle cases to avoid costly litigation. Recent

234. 66 Cal. Comp. Cas. 923, 925-26 (Cal. Ct. App. 2001).

235. Portland Trailblazers v. W.C.A.B., 72 Cal. Comp. Cas. 154 (Cal. Ct. App. 2007). Under CAL. LAB. CODE § 5500.5, liability "shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers' compensation coverage or an approved alternative thereof." The NBA's Atlanta Hawks, who last employed Whatley from 1993–1995, were imposed with liability because that was his place of employment during his last California contact. *Trailblazers*, 72 Cal. Comp. Cas. 154. The fact that he played for three additional pro teams and the Lithuanian team did not matter. *Id.*

236. *Id.*

237. Layton, *supra* note 7. Also, former Minnesota Vikings general manager Mike Lynn had this to say: "I don't know what other teams do, but I sure as hell don't tell them [about workers' compensation]." *Id.*

238. *See* Melinda Deslatte, *Bill Targeting New Orleans Saints Workers Comp Issue Expanded*, INS. J., April 19, 2010, http://www.insurancejournal.com/news/southcentral/2010/04/19/109117.htm?print=1 [hereinafter Deslatte, *Expanded*].

239. Hasemyer & Cantlupe, *supra* note 226 (Martin said he made his claim "only after attorney Ron Mix called him to tell him he was eligible. 'Nobody told me that workers' comp was out there for guys like me.'").

settlements range from $100,000 to $250,000.[240] Meanwhile, the state of California is not very concerned about the system, because the claims come out of the employer's pocket rather than the state's or the taxpayers' pockets.[241] In cases where a team's responsible insurance company is out of business, a common concern in retired athlete claims, a state-operated fund underwritten by businesses already paying workers' compensation pays them. Yet football cases "do no present significant costs to the state."[242]

3. IMPACT OF CALIFORNIA LAW: EMPLOYERS FIGHT BACK AND EMPLOYEES HOLD GROUND

As workers' compensation claims from players not in uniform since the 1980s and beyond started trickling into team offices, the initial response was to grin and bear it. Once the trickle became an avalanche, teams began to fight back to try to avoid the "extreme cost."[243] Now professional sports leagues, namely the NFL, are taking several angles—litigation, legislation, and even arbitration—to combat what they perceive to be a problem.[244] Meanwhile, professional athletes, namely current and former

240. Schwarz, *Dementia*, *supra* note 17; s*ee also* Schwarz, *Leverage*, *supra* note 158. In addition, players readily accept C&R, or compromise and release, agreements because of their "on-field bravado" toward ignoring pain and medical problems. *See* Walker, *supra* note 153 (discussing claims at the individual state level for Wisconsin professional franchises usually coming in at the $10,000 to $50,000 range). California payouts are generally higher because of the state's more generous medical benefits, which thus increases settlement figures. Rizo, *supra* note 13. However, each payment depends on the severity and extent of disability and whether the claim is for temporary or permanent disability.

241. Schwarz, *Dementia*, *supra* note 17.

242. *Id.* Schwarz's information came from Wayne Wilson, executive director of the California Insurance Guarantee Association. *Id. Compare with* Bess Shapiro, *Will the Courts or the Legislature Cross the Line First: National Football League Claims Costly Call*, WORKERS' COMP EXECUTIVE (Jan. 4, 2012), *available at* http://www.pcllp.net/NFL_Workers_Comp.pdf ("Ray Correio, attorney with Pearlman, Borska & Wax says his firm has tried a number of these cases and says that the sports are getting clogged with sports cases in general as players try to take advantage of more generous CT benefits.").

243. Schwarz, *Dispute*, *supra* note 150 ("It was the sheer number of claims that really started to get the attention certainly of the Bengals and, I think, of other clubs as well," said Cincinnati-based lawyer Sam Duran.).

244. While the NFL has taken the lead since workers' compensation affects it the most, other major professional leagues have shown their support of each other's litigation through amici curiae. In Bowen v. W.C.A.B. & Fla. Marlins, 73 Cal. App. 4th 15, 16 (Cal. Ct. App. 1999), the NFL management counsel filed amici curiae in support of MLB's Florida Marlins, the respondent in the case.

employees of NFL teams, are taking up arms to defend their workers' compensation rights by blocking methods of litigation, legislation, and arbitration aimed at them.[245]

The NFL's Cincinnati Bengals are among the teams that have fought California jurisdiction head on.[246] The Bengals, a self-insured team, has contested claims under § 3600.5, California's reciprocity provision.[247] The team first notched a key victory in 2010 in a claim made by former player Wesley Carroll when the WCAB rescinded the WCJ's finding and remanded the case for factual findings on whether California has jurisdiction.[248] Section 3600.5 requires a certificate from the out-of-state employer's place of business as prima facie evidence of reciprocity.[249] In February 2012, the Bengals landed another bonanza when the WCAB determined it did not have jurisdiction over the Bengals in a claim made by former player Vaughn Booker, who played a single California game in his three seasons with the team.[250] The WCAB not only denied jurisdiction based on § 3600.5, but also concluded that "California has no significant interest in the workers' compensation claim of an employee whose contract was not made here, who worked in California for one day in three years, and who otherwise had no significant connection to California."[251]

In January 2011, the International Basketball League managed to get dismissed as a defendant in *Liberty v. Detroit*

245. The NFLPA leading the charge to preserve rights occurs with amici curiae from the players' associations of major professional leagues. Brief of Amici Curiae Nat'l Football League Players Assoc., Nat'l Basketball League Players Assoc., Major League Baseball Players Assoc., and Prof. Hockey Players Assoc. in Support of Respondent's Response to Gulf's Petition for Review, Gulf Ins. v. Hennings, 2008 TX S. Ct. Briefs 202 (Tex. 2008) (No. 08-0202).

246. Schwarz, *Dispute*, *supra* note 150. *Id.* Among the cases litigated in California with the Bengals as a defendant are against former players Eddie Brown and Reinard Wilson. *Id.*

247. Carroll v. New Orleans Saints, 2010 Cal. Wrk Comp. P.D.176, 18 (2010).

248. *Id.* ("Because the evidence on the issue of § 3600.5 is incomplete, we will rescind this matter to the trial level for further development of the record.").

249. *Id.* Ohio does not require any certification for self-insured employer. *Id.* The Bengals contended, and the WCAB agreed, that the presumption of non-coverage was improper. *Id.*

250. Booker v. Cincinnati Bengals, No. ADJ4661829 (ANA 0401410), W.C.A.B, California, Feb. 8, 2012 (unpublished), at p. 2, *available at* http://www.pcllp.net/Vaughan_Booker_v_Bengals.pdf. Booker's game with the Bengals in California was Sept. 30, 2001. *Id.*

251. *Id.* at p.11-12.

Pistons by proving reciprocity in Nevada under § 3600.5.[252] Yet the result is a zero-sum game. While the International Basketball League was able to claim victory, the Detroit Pistons and Denver Nuggets, Liberty's other previous employers, were potentially left to duke out liability for his injury among themselves.[253]

But the California train wreck, or gravy train—depending on whether the view is expressed by management or by athletes—may be altered, if one Golden State legislator has his way. California assemblyman Curt Hagman stated publicly that he found the idea of athletes who never played for California-based teams being able to file a claim under California statutes "ridiculous" and "outrageous" and planned to take action in the 2012 legislative session.[254] Even attorney Ron Mix, a former NFL player who represents athletes, has classified the availability of California workers' compensation for cumulative trauma as a "window" of opportunity that may not be open for much longer because it is "under attack" by teams and insurance companies.[255]

Teams, however, continue to reach out to their state legislatures in hopes of changing state workers' compensation law, mainly through their own state's reciprocity rules. Florida is an example of recent success for employers; a bill limiting a Florida-employed athlete's ability to file a California claim was approved by Florida's governor on June 17, 2011.[256] A portion of a workers' compensation reform bill in Michigan that included a reciprocity provision for athletes who play for teams outside of Michigan was introduced in September 2011.[257] Detroit Lions

252. Liberty v. Detroit Pistons, Case No. ADJ6795613 (WCAB 2011), *available at* http://www.pcllp.net/Liberty_case.pdf; s*ee* HERLICK'S, *supra* note 9, at § 10.29.

253. *See* HERLICK'S, *supra* note 9, at § 10.29.

254. Rizo, *supra* note 13.

255. Jeff Nixon, *Ron Mix—Summary of Workers' Compensation Benefits and Procedure*, FOURTH & GOAL UNITES (Mar. 25, 2011), http://fourthandgoalunites.com/2011/03/25/ron-mix-summary-of-workers%E2%80%99-compensation-benefits-procedure/.

256. *See* Matt Dixon, *NFL Players One Focus of Florida Bill to Tighten Boselli-like Workers Comp Claims*, FLA. TIMES UNION, Feb. 24, 2011, http://jacksonville.com/news/metro/2011-02-24/story/nfl-players-one-focus-florida-bill-tighten-boselli-workers-comp-claims; *CS/HB 723: Reciprocity in Workers' Compensation Claims*, FLA. SENATE, http://www.flsenate.gov/Session/Bill/2011/723. While the Florida bill was aimed at athlete employees, it encompasses all traveling workers. *See also* Robinson, *supra* note 25.

257. *See* Sheena Harrison, *Detroit Lions Support Michigan's Proposed Workers'*

Staff Counsel Jonathan B. Dykema made an impassioned plea to the House Commerce Committee on behalf of his employer: "Until we amend section 360 to comply with the reciprocity provisions of the California statute, former professional athletes will continue to exploit this loophole and minimize the effectiveness of our state's worker's compensation process."[258] The Michigan governor signed the bill, H.B. 5002, in December 2011.[259]

But not all efforts have been successful. For example, the New Orleans Saints pushed a bill by state representative Cameron Henry that would require professional athletes that play for Louisiana teams to be subject to Louisiana law if they were injured in a game or practice.[260] The bill, which came at the height of the Saints' popularity following their 2010 NFL Super Bowl win, was broadened to approve all workers in Louisiana, not just athletes.[261] Weeks later, Henry shelved the proposal.[262] He said that, "[i]t became clear to all of the parties that it would be easier to work this particular issue out through contracts and the collective bargaining process."[263]

Yet CBAs, typically in place in all four major professional sports leagues, leave more questions than answers.[264] The NFL

Compensation Reforms, BUS. INS. (Oct. 3, 2011, 5:06 PM), http://www.businessinsurance.com/article/20111003/NEWS08/111009983 [hereinafter Harrison, *Proposed*].

258. Letter from Jonathan B. Dykema, Detroit Lions, to Members of the House Commerce Committee, Michigan House of Representatives, Regarding House Bill 5002 of 2011, Sept. 26, 2011, *available at* http://michamber.com/files/michamber.com/lions.pdf.

259. *Michigan Governor Signs Workers' Comp reform Legislation*, RISK AND INS. ONLINE, Jan. 5, 2012, http://www.riskandinsurance.com/printstory.jsp?storyId=533344335; MICH. COMP. LAWS 418.360(2)-(3) (2012).

260. *See* Deslatte, *Expanded*, *supra* note 239; *see also* Worker Compensation, H.B. 1097, 2010 Reg. Sess. (Louisiana 2010), http://www.legis.state.la.us/billdata/streamdocument.asp?did=689977.

261. Deslatte, *Expanded*, *supra* note 239.

262. Melinda Deslatte, *Louisiana Lawmakers Shelve Bill on Saints' Workers' Comp Issue*, INS. J. (May 5, 2010), http://www.insurancejournal.com/news/southcentral/2010/05/05/109579.htm?print=1 [hereinafter Deslatte, *Shelved*].

263. *Id.*

264. Besides the NFL, the other major sports leagues and unions are brief in their discussion of workers' compensation in the respective CBAs. The NBA ratified a new collective bargaining agreement with its players union in December 2011, but the new CBA was unavailable in complete form at the time of publication. *NBA Board of Governors Ratify 10-year CBA*, NBA.COM, Dec. 8, 2011,

and NFLPA were embroiled in a lockout for several months in 2011 over issues that included workers' compensation. NFL's new CBA has express language that teams will opt-in for coverage if they are not required to provide workers' compensation to professional athletes just as the previous CBA had, as well as offset provisions.[265] But the ambiguity of California law and the ability to file a California cumulative trauma claim remains the same.[266] The NFL players viewed the preservation of the right to file a workers' compensation claim in California as a major victory.[267]

Another avenue used by teams to stem the tide of California cumulative trauma claims is forum selection and choice of law clauses in player contracts, which have inevitably led to arbitration disputes. In a recent case involving former NFL

http://www.nba.com/2011/news/12/08/labor-deal-reached/index.html. The NBA's previous CBA (on file with the Author) says the following under Section 5: "Except as set forth below, effective the date of this Agreement, and continuing for the duration thereof, the NBA shall provide the following additional benefits to NBA players . . . (b)Workers' compensation benefits in accordance with state statutes." MLB and its players union agreed to a new CBA in November 2011, and it, too, was unavailable in its complete form at the time of publication. Adam Kilgore, *New Collective Bargaining Agreement Ensures Labor Peace for Major League Baseball, MLB Players Association*, THE WASH. POST, http://www.washingtonpost.com/blogs/baseball-insider/post/new-collective-bargaining-agreement-ensures-labor-peace-for-major-league-baseball-mlb-players-association/2011/11/22/gIQAp00ZlN_blog.html. The most recent CBA stated that player medical costs are considered a benefit, but not "any costs reimbursed or paid for through workers' compensation." *Collective Bargaining Agreement*, MLBPLAYERS.MLB.COM, at 90 (2007–2011), http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. The NHL's CBA discusses workers' compensation under the heading of "Miscellaneous" in Article 31, essentially guaranteeing the same as the NFL in requiring teams to opt into coverage for players if not required by their respective state. *Collective Bargaining Agreement*, NHLPA, http://www.nhlpa.com/docs/about-us/nhl_nhlpa_2005_cba.pdf.

265. *Collective Bargaining Agreement*, NFLPLAYERS.COM, at 176-79 (Aug. 4, 2011), https://images.nflplayers.com/mediaResources/files/2011CBA.pdf.

266. Jeff Casale, *NFL Players' Deal Will Allow Workers' Compensation Claims in Other States*, BUS. INS. (July 25, 2011, 12:10 PM), http://www.businessinsurance.com/article/20110726/NEWS08/110729956.

267. *See id.*, as New Orleans Saints quarterback Drew Brees expressed his views on workers' compensation in an e-mail to NFL players in the final days of the lockout: "[We] will never let [the league] restrict our health and safety long term." *See also* Jonathan Berryhill, DRI TODAY (Aug. 4, 2011, 5:34 PM), http://dritoday.org/post/DOWNe280a6SETe280a6SUE!-The-NFL-CBA-Workerse28099-Compensation.aspx ("Ultimately, Drew Brees and the NFLPA were able to run out the clock in the collective bargaining negotiations (the new CBA does not include any restriction of workers' comp claim locations) thus securing what will surely be hailed as an important victory for injured NFL players.").

player Bruce Matthews, a California district court declined to set aside an arbitrator's ruling that Matthews' filing of a claim for workers' compensation in California violated his contract's "Jurisdiction" clause and that he should cease and desist the claim.[268]

Yet the protections of workers' compensation rights by the CBAs of the major sports leagues, however limited, do little for non-unionized athletes in leagues, such as independent baseball and football leagues, not affiliated with major franchises. These athletes are left to negotiate for themselves and often have no protections other than workers' compensation for injuries. If a non-unionized athlete is competing in a state like Florida, which excludes or limits athletes, or where the employer chooses not to "opt-in" to the state system, or without an "opt-in" provision provided by a CBA, these athletes are left without a remedy for work-place injuries. In addition, the smaller leagues in such states are left exposed to tort liability.

Perhaps the most telling impact California workers' compensation law involves the Arena Football League. The indoor football professional league, which had existed for 22 years, abruptly suspended operations in 2008 and filed for bankruptcy in 2009.[269] When the AFL initially emerged again in

268. NFL Players Ass'n v. NFL Mgmt. Council, No., 10CV1671 JLS, 2011 U.S. Dist. LEXIS 865, at *2-5 (S.D. Cal. Jan. 5, 2011). Bruce Matthews, formerly of the Houston Oilers and Tennessee Titans, signed a contract stating that any workers' compensation claims would be governed by "the internal law of Tennessee without resort to choice of law rules." *Id.* He filed in California anyway, and the NFL Management Council (NFLMC) filed a non-injury grievance, as allowed by its collective bargaining agreement, and it went to arbitration. *Id.* The arbitrator sided with the NFLMC, saying that Matthews could file his workers' compensation claim in California but must proceed under Tennessee law as contemplated by the parties in the contract. Since this requires persuading California tribunals to apply Tennessee law, and it may end up that California uses California law, Matthews must cease and desist his California claim unless Tennessee law is used. *Id.* Matthews argued unsuccessfully to have the award vacated, pursuant to the Labor Management Relations Act, 29 U.S.C. § 185. *Id.* The district court ruled that the arbitrator's ruling was not against California public policy and did not violate the Full Faith and Credit Clause. *Id.* at *19. *See also* Chi. Bears Football Club, Inc. v. Haynes, No. 11 C 2668, 2011 U.S. Dist. LEXIS 103766, at *15 (N.D. Ill. Sept. 13, 2011) (discussing Bears players losing the same argument made in the Matthews case).

269. *AFL Cancels 2009 Season*, ESPN (Dec. 15, 2008), http://sports.espn.go.com/espn/print?id=3770637&type=story (last visited Feb. 27, 2012) ("There are 17 different workers' compensation systems in the AFL," said Columbus Destroyers co-owner Jim Rennacci; "Everybody could save money if they

2010 as a single-entity league, as opposed to the former franchise model, no teams were placed in California, in part, to avoid the state's workers' compensation system.[270] The AFL managed to find an investor to reboot the San Jose SaberCats franchise for 2011.[271] Still, the fact that one state's workers' compensation system can impact a thriving sports league illustrates the severity of the law's effect.

Meanwhile, some professional athlete employees see the rise of California cumulative trauma claims as "essentially finding money under a mattress."[272] Another view is that the current barrage of claims, many headed by attorneys and former NFL players Ron Mix and Mel Owens, are steering former athletes in an "assembly line process" in which athletes may not realize the future implications of their actions.[273]

By agreeing to a compromise and release agreement for a lump-sum payment, athletes are gaining six-figure settlements, but are letting teams off the hook for lifetime medical costs in exchange for a mere $60,000 to $100,000 more.[274] Recent research has linked NFL concussions to brain injury later in life, and former NFL player Ralph Wenzel is among the first test cases in California to gain workers' compensation benefits due to dementia.[275] While the disability itself may result in a typical $100,000 lump-sum payment, Wenzel's lawyer predicts that an administrative law judge could grant as much as $1 million for medical care.[276] Thus, younger athletes from the 1990s and even 2000s who are also filing California claims may be acting against their best interests in accepting a quick settlement if brain injury develops much later.[277] In short, these haphazard approaches do little to solve the long-term relationship between professional

just used the same one.").

270. Schwarz, *Arena*, *supra* note 15. AFL Commissioner Jerry Kurz stated: "It's definitely part of the decision-making process. I bring it up in the first conversation I have with anyone interested in bringing a team to California." *Id.* *See also* Hammond, *supra* note 16 ("In addition, the Tulsa-based league will avoid California's high rates: (Gladiators owner Jim) Ferraro said the Los Angeles Avengers paid $1.5 million in workers' compensation premiums, thanks to California's high rates.").

271. Purdy, *supra* note 16.

272. Schwarz, *Leverage*, *supra* note 158.

273. *Id.*

274. *Id.*

275. *Id.* *See also* Blum, *supra* note 10.

276. Blum, *supra* note 10.

277. Schwarz, *Leverage*, *supra* note 158.

athletes and workers' compensation. A new approach is needed to streamline the process.

IV. PROPOSAL: BRINGING THE PROFESSIONAL ATHLETE WORKER CLASS UNDER FEDERAL JURISDICTION FOR WORKERS' COMPENSATION THROUGH THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

Repairing the strained relationship between professional athletes and the current workers' compensation system governed by state statutes is an emotional issue for both employer teams and their athlete employees. From the open-season approach in California to the shut-door approach in Florida, state compensation schemes consume time and resources that could be better spent for both sides and for the states refereeing the issue. In 2008, about 16,500 people held jobs as professional athletes and sports competitors.[278] Most of the attention naturally drifts to high-profile athletes of the four major leagues; however, the minor league affiliates of major professional leagues and smaller, independent professional sports leagues whose athletes will likely never see a major payday but nonetheless suffer work-related injuries, highlight the need for a consistent approach to workers' compensation coverage.

Fortunately, a uniform national system for handling workers' compensation claims already exists at the federal level through the Longshore Act.[279] Originally drafted to solve jurisdictional issues in state workers' compensation for maritime-affiliated workers injured or killed upon navigable waters of the United States, the LHWCA also covers types of employment other than maritime work by way of extensions to the Longshore Act. These extensions include the following: (1) the Defense Base Act (DBA) for civilian employees under contract with the Federal government working on national security-related activities outside of the United States;[280] (2) the Nonappropriated Fund Instrumentalities Act (NFIA) for civilian workers who are compensated to provide "comfort, pleasure, contentment, and

278. *Professional Athlete*, BUREAU OF LAB. & STAT., Mar. 19, 2010, http://www.bls.gov/k12/sports02.htm#jobs.

279. 33 U.S.C.S. §§ 901-950 (2012).

280. 42 U.S.C.S. § 1651 (2012); s*ee also* Defense Base Act, Pub. L. No. 208 (1941) (codified as amended at 42 U.S.C.A. § 1651(a)(4), (b)(1) (2011)) (original *available at* http://www.dol.gov/owcp/dlhwc/dba.htm).

mental and physical improvement of personnel of the Armed Forces";[281] and (3) the Outer Continental Shelf Lands Act (OCSLA) for private workers connected to the exploration of natural resources.[282]

Each act has its own provisions identifying the employees who are permitted to receive compensation, but the individual acts are administered through the system already set up by the LHWCA.[283] The narrow scope of who is covered under the Longshore Act and its extensions, as well as adoption of its substantive law, would bring consistency and predictability in costs and a sense of equity that would finally bring workers' compensation peace to both professional athletes and teams.

This Section proposes a workers' compensation program for professional athletes under a federal law to be called the "Professional Athlete Workers' Compensation Act." First, the history of the LHWCA and its basic provisions, along with extensions such as the DBA, are discussed. Next, a brief explanation of the Commerce Clause shows how Congress can constitutionally intervene in workers' compensation policy. Finally, the benefits and drawbacks of implementing the "Professional Athlete Workers' Compensation Act" are explored and a proposed statute is presented.

A. LHWCA: BACKGROUND, EXISTING EXTENSIONS, AND THE PROPOSED ATHLETE EXTENSION

The LHWCA was a congressional response to the 5–4 Supreme Court decision in *Southern Pacific Co. v. Jensen*.[284] A

281. Nonappropriated Fund Instrumentalities Act, Pub. L. No. 82-397 (1952) (codified as amended at 5 U.S.C.A. § 8171 (2012)) (original *available at* http://www.dol.gov/owcp/dlhwc/nfia.htm). Examples include the Army and Air Force Exchange Service, Army and Air Force Motion Picture Services, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, and Coast Guard exchanges. *Id.*

282. Outer Continental Shelf Lands Act, Pub. L. No. 83-212 (1953) (codified as amended at 43 U.S.C.A. § 1333 (2012)) (original *available at* http://www.dol.gov/owcp/dlhwc/ocsla.htm).

283. DEFENSE BASE ACT AND WAR HAZARDS COMPENSATION ACT HANDBOOK § 1.02 (Roger A. Levy ed., 2010) [hereinafter LEVY, DBA HANDBOOK] ("The Defense Base Act itself contains no substantive provisions; the entirety of the act contains some procedural and definitional provisions specifically tailored to Defense Base Act claims. All of the Defense Base Act's substantive provisions are found in the Longshore Act.").

284. S. Pac. v. Jensen, 244 U.S. 205 (1917); s*ee also* HOOD, HARDY & LEWIS, *supra* note 21, at 17.

worker who fell off a gangplank ten feet from the dock in New York Harbor was deemed not eligible for New York workers' compensation benefits because he was technically in navigable waters, which were within federal maritime jurisdiction established by the Constitution and subject to common law.[285] As a result of the decision, workers who were injured while within maritime jurisdiction but who did not qualify as seamen covered by the Jones Act were left without a workers' compensation remedy.[286] Congress enacted the LWHCA in 1927 to remedy the problem.[287]

Only those workers who satisfy both a status test and situs test qualify for benefits under the Longshore Act.[288] Thus, an employer must get a traditional state workers' compensation policy for non-maritime employees, such as secretaries, security guards, and other purely land-based workers.[289] Otherwise, the main tenets of workers' compensation in the states, such as no-fault liability and providing cash, medical, and death benefits, are the same under the LHWCA.[290] Additionally, the term "injury" in the LHWCA includes occupational disease and, thus, cumulative trauma arising out of employment.[291]

The LHWCA has been amended several times to include additional classes of workers besides those just involved in maritime-related employment to ensure that they, like the worker in *Jensen*, are not left without a workers' compensation remedy. In 1928, Congress extended the LHWCA to District of Columbia workers who are not employees of the federal government.[292] All injuries before July 1982 are covered under

285. LENCSIS, *supra* note 20, at 26.

286. Lencsis, *supra* note 20, at 26.

287. *Id.* The Longshore Act was patterned after New York workers' compensation law. *Id.*

288. LENCSIS, *supra* note 20, at 27. The status test has to do with the work being done. *Id.* It includes longshoremen and any other person engaged in longshore operations such as harbor worker, ship repairman, shipbuilder or ship breaker. *Id.* The situs test concerns the place where the injury occurs, generally "upon the navigable waters of the United States and any adjoining pier, wharf, dry dock, terminal, building way, marine railway." *Id.*

289. HOOD, HARDY & LEWIS, *supra* note 21, at 18.

290. The LHWCA also classifies disability (temporary total, temporary partial, permanent total, and permanent partial) in the same manner as the states. 33 U.S.C.S. § 908 (2011).

291. THE LONGSHORE TEXTBOOK 188 (Steven M. Birnbaum et. al eds., 2005).

292. District of Columbia Workers' Compensation Act, Pub. L. No. 70-419 (1928)

the Act.[293] For instance, the NFL's Washington Redskins faced claims from athletes as an employer subject to the District of Columbia Workers' Compensation Act and, thus, provisions of the Longshore Act, until LHWCA jurisdiction was removed. Another notable extension of the LHWCA is the DBA, which was enacted by Congress in 1941 and amended in 1942 and 1958.[294]

The DBA was originally designed to accommodate employees of American contractors at overseas military bases in the midst of World War II.[295] Congress enacted the DBA to ensure that employees had coverage similar to what they had in the United States and "to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates."[296] The DBA is merely an extension of the LHWCA. It contains no substantive provisions; rather, it has only procedural and definitional provisions tailored to DBA claims.[297] The statutory coverage includes six categories of work for civilian employees connected to military and national defense work.[298]

The Longshore Act and its extensions were enacted by Congress to address a specific need regarding a specific class of private industry workers experiencing concerns about coverage for injury or death. Remedies were inconsistent or simply not available for these workers under traditional state statutory schemes until the federal government intervened. Comparatively, professional athletes are private industry employees who face similar difficulties in gaining consistent access for themselves and equitable application for both

(as amended, S. 3565), *available at* www.dol.gov/owcp/dlhwc/dcwca.htm.

293. Kubin v. Pro-Football Inc., 29 BRBS 117, n.6 (1995) ("The 1982 amendment of D.C. Workers' Compensation Act removed Department of Labor jurisdiction over D.C. claims."). *See also supra*, note 72.

294. 42 U.S.C. § 1651 (2012) (enacted 1941).

295. LEVY, DBA HANDBOOK, *supra* note 284, at § 1.01. The Act was quickly expanded to include works engaged in defense activities but not on military bases following the attack on Pearl Harbor on December 7, 1941 and by 1958 had been converted by Congress from temporary to permanent legislation when it became apparent that the United States' overseas commitments would not diminish in the near future. *Id.*

296. Jeffrey L. Robb, *Workers' Compensation for Defense Contractor Employees Accompanying the Armed Forces*, 33 PUB. CONT. L.J. 423, 425 (2004) (quoting S. REP. No. 77-540, at 1 (1941)); *see also* Matthew R. Kestian, *Civilian Contractors: Forgotten Veterans of the War on Terror*, 39 U. TOL. L. REV. 887, 891 (2008).

297. *Id.*

298. LEVY, DBA HANDBOOK, *supra* note 284, at, § 2.01[1].

themselves and their employers under current state workers' compensation laws. Federal intervention may be appropriate in professional sports to not only set a uniform standard but also prevent abuses of state workers' compensation policy by both employees and employers.

The proposed act would limit workers' compensation coverage to professional athletes in the field of play. This is similar to how the LWHCA covers the longshore or harbor worker only, not the receptionist, as well as the specific employment covered by the DBA. A team would have to get a separate state policy to cover all other employees.[299] Workers' compensation insurance would be mandatory for all employed as professional athletes, as it is for employers under the LHWCA, its extensions, and a majority of states. Teams could choose private insurance, pay a premium to the general fund, or self-insure, just as employers can under the Longshore Act. The procedural aspects of LHWCA, such as an initial hearing, finding by an administrative law judge and appeal to the Benefits Review Board, would apply to workers covered under the "Professional Athlete Workers' Compensation Act."

Technically, the Longshore Act does not provide an exclusive remedy, as a claimant can file for benefits under both the LHWCA and a state system with concurrent jurisdiction.[300] However, the DBA extension contains express language that it is the exclusive remedy for workers' compensation claims and avoids the confusion of LHWCA's land-based or sea-based issue that creates the ability to file both a state and federal claim.[301] The interpretation of the First Circuit Court of Appeals in *Royal Indemnity v. Puerto Rico Cement Corp.* explained the reason behind the exclusivity of DBA:

> Any other construction will contravene the purpose of Congress and the passage of the Defense Bases law and defeat its object, which is to provide a system of workers' compensation both uniform and adequate in all the far-flung places occupied by the United States for military purposes.

299. Coaches and other player personnel travel with the team but are not involved in the actual field of play. Essentially, coverage would stop at the sideline.

300. Sun Ship, Inc. v. Pa., 447 U.S. 715, 722 (1980) (following the 1972 LHWCA amendments).

301. LEVY, DBA HANDBOOK, *supra* note 258, at § 5.04[1]; *see also* 42 U.S.C.S. § 1651(c) (2012).

> The history of the Defense Bases Act clearly shows the intention of Congress to extend the provisions of the Longshoreman's Act to defense bases *without regard to local compensation laws*.[302]

Essentially, stability to a system in disarray could be brought with a congressional vote that extends the procedural and substantive provisions of the LHWCA to professional athletes. Fights across state lines regarding jurisdiction for workers' compensation, notice provisions for one state and not another, $1 million insurance policies for California coverage alone, and similar strains that have separated employers and employees in professional sports for decades could be eliminated with a carefully crafted act extending the LHWCA and establishing a single, uniform workers' compensation system.

B. HOW THE FEDERAL GOVERNMENT CAN INTERVENE

First, Congress would gain authority to address the issue of workers' compensation for professional athletes under the Commerce Clause of the Constitution.[303] The Supreme Court has indicated that professional football,[304] basketball,[305] and baseball[306] are interstate commerce. Additionally, in *United States v. Lopez*, the Supreme Court explained that pursuant to the Commerce Clause, Congress has power to regulate the following: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) economic activities that have a substantial impact on interstate commerce.[307] Clearly, professional sports fit within the third

302. Royal Indem. v. Puerto Rico Cement Corp., 142 F.2d 237, 239 (1st Cir. 1944). *See* DBA HANDBOOK, *supra* note 284, at § 5.04[1] (emphasis added).

303. U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have power . . . [t]o regulate Commerce with foreign Nations and among the several States and with Indian tribes.").

304. Radovich v. Nat'l Football League, 352 U.S. 445, 461 (1957) ("Likewise, the volume of interstate business involved in organized professional football places it within the provisions of the [Sherman Antitrust] Act.").

305. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971) ("Basketball, however, does not enjoy exemption from the antitrust laws.").

306. Flood v. Kuhn, 407 U.S. 258, 282 (1972) ("Professional baseball is a business and it is engaged in interstate commerce."). While the Supreme Court stated that baseball is interstate commerce, it is still exempt from federal antitrust law. *Id.* at 284.

307. Jeffrey B. Tracy, *Examining Congress' Legal Position for Investigating Sports Leagues*, SPORTS LITIG. ALERT ARCHIVES (Mar. 14, 2008), http://www.hackneypublications.com/sla/archive/000607.php (last visited Feb. 27,

category as an economic activity that has a substantial impact on interstate commerce.

Just analyzing the four major sports leagues alone is enough to render professional sports an economic activity that has a substantial impact on interstate commerce. The four major professional sports leagues, the NFL, MLB, NBA and NHL, not including their affiliates, operate in twenty-four states and two countries, the United States and Canada.[308] According to an analysis by Professors Dennis R. Howard and John L. Crompton, the gross revenue of the NFL is $3.5 billion and the league's net worth is $12.8 billion. The MLB's gross revenue is $2.79 billion and net worth is $6.55 billion. The NBA's gross revenue is $2.1 billion and net worth is $6.01 billion, and the NHL's gross revenue is $1.82 billion and net worth is $3.75 billion.[309]

The statistics of sports as a viable part of American life, not to mention the American economy, do not lie. Bloomberg Businessweek estimates that, based on economic impact studies and data provided by the NFL, the direct economic impact on communities of each NFL home game, per franchise, is $15 million.[310] The indirect economic impact of seasonal stadium workers, surrounding restaurants, merchandise sales, and TV advertising, "is four to five times that amount."[311] A study of the NFL's New Orleans Saints prepared for Louisiana by University of New Orleans Professor Timothy Ryan stated that, in 2002, the Saints generated $181 million in direct spending and had a total spending impact on the New Orleans area of $402 million.[312] In addition, the study estimated that the Saints generated "new revenue" of $17.7 million for Louisiana and $8.1 million for local governments.[313] The positive impact is not limited to the four major professional sports leagues. North Carolina's ten minor league baseball teams generated $59.6 million in direct spending,

2012); *see also* U.S. v. Lopez, 514 U.S. 549, 558-59 (1995).

308. Kevin Baxter, *The Taxing Life of a Pro Athlete*, L.A. TIMES, Apr. 12, 2009, http://articles.latimes.com/2009/apr/12/sports/sp-jock-tax12.

309. Tracy, *supra* note 308.

310. Rick Horrow & Karla Swatek, *NFL Labor Armageddon: A Different Kind of March Madness*, BLOOMBERG BUSINESSWEEK, March 3, 2011, www.businessweek.com/print/lifestyle/content/mar2011/bw2011033_664975.htm.

311. *Id.*

312. *Funds & Games: Paying for the Saints*, BUREAU OF GOV'T RES., at 17 (Jan. 2005), http://www.bgr.org/files/reports/FundsandGames.pdf.

313. *Id.*

adding $7 million in value to the state's economy.[314]

C. BENEFITS AND FLAWS OF EXTENDING THE LHWCA TO PROFESSIONAL ATHLETES

1. BENEFITS OF A FEDERAL SYSTEM UNDER THE LONGSHORE ACT

a. Uniformity

A major source of the bitter feelings between professional athletes and teams regarding workers' compensation is the timing and calculation of benefits for cumulative trauma claims. The LHWCA has specific provisions regarding the notice requirement and statutes of limitations that are reasonable. Like most states, including California, an employee under the LHWCA has one year from the date of injury to file a claim not caused by occupational disease.[315] Under the LHWCA's provisions for occupational disease, which does not immediately result in a disability or death, a claim must be filed within two years of the claimant's awareness of the relationship between the employment, the disease, and the death or disability.[316]

The streamlined notice requirements to employees by employers for their injuries under the Longshore Act would eliminate the loopholes used by employers to hide the fact that workers' compensation may be available in a particular state but could also close the loopholes for athletes to gain benefits decades later on procedural grounds. Under § 934 of the Longshore Act, employers who have secured compensation are required to give notice of workers' compensation rights and to post the notice in a "conspicuous place" for employees.[317] Also, § 930 requires an employer to report injuries that cause loss of time at work to the

314. *Minor League Baseball is a Homerun for North Carolina*, INSIDERSPORTSMARKETING.COM, http://www.insidersportsmarketing.com/content/page/title/Minor_League_Baseball_Is_A_Home_Run_for_North_Carolina (last visited Feb. 27, 2012). The Durham Convention & Visitors Bureau computed statewide impact using information provided by all 10 teams. *Id.*

315. 33 U.S.C.S. § 913 (2012).

316. THE LONGSHORE TEXTBOOK, *supra* note 292, at 182. A medical opinion that relates to the employee's medical problems to his employment is not necessarily required to start the running of the § 13 statute of limitations period. *Id.*

317. 33 U.S.C.S. § 934 (2011). The official forms for employers are LS-241 and LS-242, depending on whether the employer has insurance or is self-insured.

Department of Labor.[318] This provision tolls the running of time to file a claim under § 913(a), but a failure of the employer to report injury will not toll the running of the statute of limitation for occupational disease and cumulative trauma injuries.[319]

b. Predictability

Generally, at the state level, a retired employee makes a claim for cumulative injury benefits, the calculation of which is based on his wages at the time of injury and is subject to a cap.[320] The percentage of the weekly wage deemed compensable usually falls between 50%–75%, depending on the state.[321] In the case of professional athletes, especially athletes whose contracts post-date the explosion in salaries due to television deals in the 1990s, they will almost always be subject to the maximum amount of that state.

The LHWCA, however, uses two tests to determine the wage rate in cases of occupational disease or cumulative trauma under § 910.[322] The most relevant test for professional athletes would be for a claimant who is a retiree at the date the cumulative trauma causes impairment. The average weekly wage is based either on 1/52 of the claimant's earnings during the last year he worked if the impairment occurs during the first year of retirement, or if the impairment occurs more than one year after retirement, the national average weekly wage at that time is used.[323] So regardless of when a worker files a cumulative trauma claim, whether two or twenty years after retirement, the basis for the payment calculation will be the same—the national average weekly wage.

The Professional Athlete Workers' Compensation Act can be written to make distinctions from the Longshore Act, similar to

318. 33 U.S.C.S. 930 (2011).

319. THE LONGSHORE TEXTBOOK, *supra* note 292, at 183-84. For all types of injuries, the time for filing a claim for compensation does not begin until one year after the employer ceases to make voluntary compensation payments. *Id.* In the case of professional athlete contracts, especially non-guaranteed contracts, payments continue through the remainder of the season if an athlete is grounded by injury. *Id.* These may be considered "salary continuation benefits" and, therefore, would not be considered payment of compensation to suspend running of the clock. *Id.*

320. LENCSIS, *supra* note 20, at 51-55.

321. *Id.*

322. 33 U.S.C.S. § 910 (2012).

323. *Id.*

the DBA's distinctive features. For instance, there is no "minimum limit" on compensation in DBA as there is under the LHWCA.[324] Also, the exclusivity provision exists in the DBA but not in the regular Longshore Act.[325] Similar adjustments in the manner and method of calculations, especially for the retiree test for cumulative trauma under § 910 of the LHWCA, can be made for the proposed Professional Athlete Act. For instance, the calculation for impairment at the rate of the national average weekly wage can begin immediately, as opposed to two years after retirement. The portion of the Longshore Act that calls for "other cases" in the class of disability not on the list of scheduled injuries as well as payment of medical expenses for permanent partial disability can be capped or paid in proportion to the percentage of permanent disability as opposed to payable "during the continuance of partial disability."[326]

The idea of fixed and limited liability for professional athletes would make workers' compensation insurance attractive to carriers. Currently, approximately 200 insurers are registered and approved by the Department of Labor to offer DBA coverage, and close to 400 are registered and approved by the Department of Labor to offer LHWCA coverage.[327] Meanwhile, the NFL relies on only a handful of insurers, primarily Berkley and Travelers.[328] The fact that insurers are more comfortable insuring workers in the battlefields and streets of the Middle East under the DBA than professional athletes on a football field in the United States indicates that the current system is fundamentally flawed. A stable system would encourage more insurers to take risks in writing workers' compensation insurance policies. The expanded pool of available insurers promotes competition. Not only could

324. 42 U.S.C.S. § 1652(a) (2012).

325. *See supra* Section IV.A; *see also* 42 U.S.C.S. § 1651(c) (2012).

326. 33 U.S.C.S. §§ 907-908 (2011).

327. *Longshore Authorized Carriers and Self-Insured Employers*, DEPT. OF LAB., www.dol.gov/owcp/dlhwc/lscarrier.htm (last visited Feb. 27, 2012). *Cf.* VALERIE BAILEY GRASSO, BAIRD WEBEL & SCOTT SZMENDERA, CONG. RESEARCH SERV., RL34670, THE DEFENSE BASE ACT: THE FEDERALLY MANDATED WORKERS' COMPENSATION SYSTEM FOR OVERSEAS GOVERNMENT CONTRACTORS 8 (2010) (discussing how the scales are not necessarily even in DBA insurance because 79% of DBA cases from Sept. 1, 2001 to Dec. 31, 2009 were processed by AIG subsidiaries, with ACE-USA and CAN next with 9% each).

328. Schwarz, *Dementia*, *supra* note 17. *Cf.* Dykema, *supra* note 259 (indicating that the Detroit Lions are covered by Liberty Mutual Insurance), *and* Schwarz, *Arena*, *supra* note 15 (indicating that the Arena Football League purchased a league-wide policy from AIG as part of its rebirth).

costs be reduced, but a safer workplace—a hot topic in light of the rash of concussions—would make economic sense.

c. Judicial Efficiency

While professional athletes' claims for cumulative trauma from out-of-state athletes represent just a fraction of California's workers' compensation workload, its resources are being used to facilitate the claims nonetheless.[329] In times of limited economic state resources, removing claims for a worker with otherwise no connection to the state except for a game decades ago would be a relief, however small, on California's system. Determining a legitimate public interest by California or any other state would not matter if all professional athletes filed workers' compensation claims under one federally based system.

d. International Efficiency

As American-based professional franchises take their games out of the country, the workers' compensation complications may follow. The MLB, NBA, and NHL have long maintained a presence in neighboring Canada. However, the NFL is poised to take its brand out of North America as it has voted to continue having teams play a regular season game in London through 2016.[330] The current California complications would likely pale in comparison to a franchise trying to decipher a foreign country's workers' compensation provisions. Therefore, like the DBA serves as the exclusive remedy for civilian workers overseas regardless of state workers' compensation laws, the Professional Athlete Workers' Compensation Act would not only stabilize claims across state lines but could serve the same purpose if work-related injuries occur in a foreign country. Of course, it would be contingent on the foreign country recognizing the proposed Act. Nonetheless, a single workers' compensation

329. Schwarz, *Dementia*, *supra* note 17 ("About 700 former N.F.L. players are pursuing claims in California, according to state records . . . ."); s*ee also Former Pro Athletes Wreak Havoc with Workers' Comp System*, 22 WORKERS' COMP. REP. (2011) (Timothy Peterson, managing partner of California-based Peterson, Colantoni, Collins & Davis, a leading workers compensation defense firm for professional sports employers, said his office is handling 700 claims from former athletes, and more than 3,000 cases are open in California alone.).

330. *NFL May Play More Than a Game a Season in Britain*, THE GUARDIAN, Oct. 11, 2011, http://www.guardian.co.uk/sport/2011/oct/11/nfl-games-britain. The NFL has played at least one game in Britain since 2007 and its owners voted in 2011 to keep staging at least one game there through 2016. *Id.*

system that covers all professional sports activity in all states as well as international competition, especially if drawn from a pool of insurers who are already covering civilian employees across the globe through the DBA, could efficiently deal with thorny extraterritorial issues.

2. FLAWS OF A FEDERAL SYSTEM UNDER THE LONGSHORE ACT

The LHWCA and its extensions are not without critics,[331] and those criticisms would extend to the potential Professional Athlete Workers' Compensation Act. Major areas of concern include: the high amount of cash benefits; the difficulty in computing those benefits; and the image problem regarding some athletes' high salaries. At the top of the list is the generous cash benefits provided under the LHWCA.[332] By using the national average weekly wage, LHWCA compensation calculations exceed even California's standards. For a permanent partial disability claim, of which most professional athlete claims (especially for cumulative trauma in California) are made, LHWCA uses sixty-six and two-thirds percent of the employees' average weekly wage, subject to a cap of 200% of the national average weekly wage.[333] From October 2011 to September 2012, the national average weekly wage is $647.60 per week and the maximum rate, or 200% of $647.60, is $1,295.20.[334] By contrast, the maximum compensation rate for California permanent partial disability is capped at $220 per week for rating under 70% and $270 for ratings over 70%.[335]

For unscheduled injuries, LHWCA compensation is sixty-six and two-thirds percent of the difference between average weekly wages and the employee's wage earning potential in the same employment or otherwise, "payable during the continuance of

331. *Call for Reforming the Longshore Act*, BUS. INS. (Mar. 31, 2011, 3:42 PM), http://www.businessinsurance.com/article/20110331/BLOGS02/110339977. Georgia Senator Johnny Isakson introduced legislation to reform the Longshore Act, which has not had significant changes since 1984. *Id.*

332. LENCSIS, *supra* note 20, at 27.

333. 33 U.S.C.S. § 908 (2012). This is in addition to temporary total and temporary partial paid benefits.

334. National Average Weekly Wages Information, DEPT. OF LAB., http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Feb. 27, 2012). LHWCA also has a minimum compensation rate of $321.14 for 2011. *Id.*

335. *California Workers Compensation Claims*, WORKERSCOMPENSATION.COM, http://www.workerscompensation.com/compnewsnetwork/blogwire/california_workers_compensation_claims.html (last visited Feb. 27, 2012).

partial disability."[336] On one hand, it mirrors the wage-earning capacity approach of Mississippi workers' compensation law described in *Meridian Professional Baseball Club v. Jensen*, in which a 21-year-old athlete was not permanently disabled and expected to eventually find alternative suitable employment outside of baseball.[337] Yet not only medical benefits but also potentially cash payments could proceed for life for a claimant. Most states, meanwhile, have a cap. Employers may balk at the level of compensation provided by LHWCA and a potential extension to professional athletes, even if it is more consistent and predictable than the costs of a California claim.

Further, the DBA conforms to the provisions of the Longshore Act in terms of administration but deviates somewhat in the computation of benefits. Unlike the LHWCA, a minimum weekly limit on weekly compensation for disability and a minimum limit on average weekly wages on which death benefits are computed do not apply.[338] This is significant for modern-day DBA employees, who are often engaged in overseas employment in Iraq and Afghanistan for a limited duration and for wages much higher than any wages they earned before or are likely to earn in the future in stateside employment.[339] Professional athletes, who encounter large amounts of salary for short periods of time, encounter the same situation. The Benefits Review Board for LHWCA and DBA has instructed that under specific circumstances, specifically employment under a one-year contract and dangerous working conditions, the claimant's average weekly wage must be based exclusively on the higher wages earned in the job while he was injured overseas.[340]

A new federal act protecting a class of workers already viewed as coddled, even if its intended goal is to stabilize the economics of sport, might be a hard sell in a struggling United States economy.[341] While the national average weekly wage is $647.20, the average salary of an NFL tight end, the lowest paid

336. 33 U.S.C.S. § 908 (2012).

337. Meridian Prof. Baseball Club v. Jensen, 2000 Miss. App. LEXIS 463 (Miss. Ct. App. 2000).

338. LEVY, DBA HANDBOOK, supra note 284, at § 9.02[1].

339. *Id.*

340. *Id.* at § 9.02[2].

341. *Employment Situation Summary*, BUREAU OF LAB. & STAT. (Nov. 4, 2011), http://www.bls.gov/news.release/empsit.nr0.htm. The unemployment rate for October 2011 was 9.0%. *Id.*

position in NFL, is approximately $16,604.12 per week.[342] Although the primary beneficiaries of federal workers' compensation legislation would be geared toward lower-paid professional athletes who are injured and never received a million-dollar contract or retirees who struggle with medical bills, an uphill public relations battle is inevitable for whatever member of Congress can be swayed into introducing it.[343]

3. ANSWERING THE CRITICS

Workers' compensation has been a touchy subject since its inception, and its relationship to professional athletes only magnifies the passions for employers, employees, and lawmakers. Yet if the costs of fielding a team due to high workers' compensation insurance or the extreme difficulties in obtaining insurance persist, team owners might become picky about where they choose to do business.

Bringing professional athletes under federal law for workers' compensation would restore the original intent of workers' compensation acts, which is to provide economic stability to injured employees. What the system has become for many professional athletes filing workers' compensation claims in a state they barely knew twenty years after the fact is a backdoor pension plan that may not protect their long-term interests. The patchwork plans put in place by teams to stop the flow of California claims demonstrate that teams are more concerned with making a statement than assuring the economic health of

342. SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/multimedia/photo_gallery/0807/nfl.average.salaries.by.position/content.11.html (last visited Feb. 27, 2012). Quarterback is the NFL's highest paid position at $1,970,982 per year, or $37,903.50 per week. SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/multimedia/photo_gallery/0807/nfl.average.salaries.by.position/content.1.html (last visited Feb. 27, 2012).

343. *See Senator Kay Bailey Hutchinson on Negotiations: Congressional Involvement Not "Appropriate or Helpful*," NFLCOMMUNICATIONS.COM (Mar. 7, 2011), http://nfllabor.com/2011/03/07/senator-kay-bailey-hutchison-on-negotiations-congressional-involvement-not-%e2%80%9cappropriate-or-helpful%e2%80%9d/ (regarding her reluctance for congressional involvement in the 2011 NFL lockout). *But see Pension Fairness for NBA Pioneers, Hearing Before the Subcommittee on Employer-Employee Relations of the Committee on Education and Workforce*, 105th Cong. (Statement of Chairman Harris W. Fawell). Regarding the 60-80 living, pre-1965 professional basketball players excluded from the NBA players pension plan, Fawell stated, "[t]oday we undertake an examination of a matter limited in scope, but one nevertheless of great significance to those who are affected." *Id.*

their employees. The bad blood that began with professional athletes making basic state-level claims[344] has now boiled over into a national issue that can disrupt the business of sports. A federal law would even the playing field for both employers and employees and would relieve the states of the burden implicated by this highly charged topic. The LWHCA system is already in place to achieve this goal.

Finally, the entire professional athlete class, from minor league athletes on meager salaries to prized All-Stars, stands to benefit from the proposed federal legislation. Unlike a Joe Montana, athletes such as Gery Palmer[345] and Mitchel Bowen[346] may have had unremarkable sports careers but their names live on in workers' compensation legal lore. Yet they represent why there is a need for a uniform workers' compensation for athletes. They were workers, too, who received work-place injuries, and the industry should be able, in a fair system, to bear the burden of their employment. The alternative is for professional athletes without medical coverage to become a potential burden on state resources. But professional sports team employers would benefit from a uniform system that would close what is perceived, rightly or wrongly, as a loophole for former athletes made possible by jurisdictional quirks.

And the workers' compensation quandary does not end at the California border and cumulative trauma claims. Take for instance, the workers' compensation claim by Kendal Newson, a 25-year-old former football player who filed in Pennsylvania even though his employer was based in Florida.[347] His goal was to

344. Professional sports employers, through their insurers, have at times contested even the most obvious workers' compensation claims, such as the one made by former Detroit Lions player Mike Utley. *Frustrated Utley Battles for Benefits; Paralyzed Ex-Lion says Insurance Company balks at Paying for Needed Treatment*, DETROIT NEWS, May 16, 1999, at A1. He became a permanent quadriplegic during a football game in 1991 but reportedly spent years trying to get Liberty Mutual Insurance Company to pay for his rehabilitation. *Id.*

345. Palmer v. Kansas City Chiefs Football Club, 621 S.W. 2d 350 (Mo. Ct. App. 1981).

346. Bowen v. W.C.A.B. & Florida Marlins, 73 Cal. App. 4th 15 (Cal. Ct. App. 1999).

347. Lord, *supra* note 96. Newson was a Georgia resident with a Florida employer whose injury occurred in a single game in Pennsylvania. Now out of football, Newson has applied for the higher benefits available in Pennsylvania system. The Miami Dolphins pursued an injunction that would have stopped his claim while arbitration was pending, but was unsuccessful. Miami Dolphins Ltd., v. Newson, 783 F. Supp. 2d 769, 771 (W.D. Pa. 2011).

gain maximum benefits in worker-friendly Pennsylvania instead of Florida, where benefits are usually unavailable for athletes and the team, the Miami Dolphins, had not opted into the system.[348] The Maryland Court of Appeals granted certiorari in September 2011 to hear a case between the Washington Redskins and former punter Tom Tupa regarding temporary partial disability benefits and the workers' compensation laws of Maryland and Virginia.[349] In 2009, the Minor League Uniform Player Contract included Addendum F, which required minor-league professional baseball players drafted by major-league teams to submit to the jurisdiction and to file a workers' compensation claim in the team's home state or another state that is selected by the club and written in a blank space on the document; the Los Angeles Angels, a California major-league team, filled in "Arizona."[350] Until a singular system exists for workers' compensation, professional athletes engaged in multistate employment will continue to ignore contract provisions and file in the jurisdiction of their choice.

V. CONCLUSION

The complicated nature of state-based workers' compensation as applied to professional athletes could be simplified through the proposed Professional Athletes' Workers' Compensation Act extension to the LHWCA federal workers' compensation program. The LHWCA, with its procedural and substantive provisions already in place, eliminates the need for a costly new agency and would end the wrangling of litigation, legislation, and arbitration at the state level. Bringing the professional athlete class of workers engaged in multi-state employment under a uniform system would bring economic stability and a sense of fairness to a system that at times seems excessive and other times inequitable. Really—It's that simple.

348. Lord, *supra* note 96.

349. Pro Football, Inc. v. Tupa, 14 A.3d 678 (Md. Ct. Spec. App. 2011), *cert. granted*, 21 A.3d 1053 (Md. 2011).

350. James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where Is Home? Recently Drafted Minor League Baseball Players Are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 587 (2011). Masteralexis and Masteralexis connect the Addendum to the Supreme Judicial Court of Maine decision in Cavers v. Houston McLane, Co., 958 A.2d 905 (Me. 2008), where Maine workers' compensation laws were determined to apply to a minor league athlete's employer, the Houston Astros baseball team. *Id.* at 577, 595.

APPENDIX: Proposed Legislation—Professional Athlete Workers' Compensation Act

Professional Athlete Workers' Compensation Act[351]

An Act to make the provisions of the Longshore and Harbor Workers' Compensation Act applicable to professional athletes employed by professional teams engaged in interstate commerce.[352]

The LHWCA shall apply with respect to the disability or death resulting from "injury," as defined in section 2(2) (33 U.S.C.S. 902(2)) of such Act to a professional athlete employee. The term "employee" is defined as a professional athlete engaged in the business of team sports who is engaged in employment with a professional sports franchise or professional sports entity. It does not include professional athletes engaged in work as independent contractors.

Section 1: Coverage

The Act applies to injuries occurring in the field of play during an athletic contest, injuries during a team-organized practice or workout, and injuries during a team-organized activity that requires the use of the employee's physical athletic skills.[353] Compensation shall be payable only if the disability or death of the employee occurs on team-owned or team-leased facilities, or at a location required by the employer for the participation of an athletic contest, practice or workout, or team-organized activity that requires the use of the employee's physical athletic skills.

351. Below are the major tenets of the proposed act. Items such as scheduled injuries, attorney's fees, etc. would be adopted from the Longshore Act and its extensions.

352. Nonappropriated Fund Instrumentalities Act, Pub. L. No. 82-397, 66 Stat. 138 (1952).

353. 33 U.S.C.S. 903(a) (2011). This provision addresses Miles v. Montreal Expos Baseball Club, 379 S.2d 1325, 1326 (Fla. Dist. Ct. App. 1980). An athlete received state workers' compensation benefits in Florida, although athletes are statutorily barred, because the neck injury occurred during a non-athletic activity. *Id.*

This Act is not retroactive.

Section 2: Liability as Exclusive

The liability of an employer (or any subsidiary or affiliate) under this act shall be exclusive and in place of all other liability of such employer (or any subsidiary or affiliate) to his employees (and their dependents) under the workers' compensation law of any state, the territory, or other jurisdiction such as the District of Columbia, irrespective of the place where the contract of hire of any such employee may have been made or entered into.[354]

The liability of an employer (or any subsidiary or affiliate) under this act shall be exclusive and in place of all other liability of such employer (or any subsidiary or affiliate) to his employees (and their dependents) under the workers' compensation law of any state, the territory, or other jurisdiction such as the District of Columbia, irrespective of the place of performance; place of the injury; the employee's state of residence; the place where the industry or employer is localized; and the place whose statute the parties expressly adopted by contract.

Section 3: Compensation

Compensation for disability or death shall be sixty-six and two-thirds percent of the athlete's average weekly wage, but shall not exceed the amount equal to the national average weekly wage as determined by the Secretary of Labor.[355]

Section 4: Computation of Benefits

The minimum limit on weekly compensation for disability, established by 33 U.S.C.S. § 906(b), and the minimum limit on the average weekly wage on which death benefits are computed, established by 33 U.S.C.S. § 909(e) of the Longshore and Harbor Workers' Compensation Act, as amended, shall not apply in computing compensation and death benefits under this act.[356]

Section 5: Determination of Pay—Cumulative Trauma/Occupational Disease

354. Defense Base Act, 42 U.S.C.S. § 1651(c) (2011).

355. This is a departure from the Longshore and Harbor Workers' Compensation Act, where the maximum rate of compensation is 200% of the national average weekly wage. *See* 33 U.S.C.S. § 906(b) (2011).

356. 42 U.S.C.S, § 1652(a) (2011).

(a) With respect to any claim based on a death or disability due to cumulative trauma or occupational disease, which does not immediately result in death or disability, after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage at the time of injury. The time of injury shall be deemed to be on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship between the employment, disease and the death or disability.[357]

(b) For retirees, this determination of pay applies from the day the employee has retired. The provision established in 33 U.S.C.S. 910(d)(2)(A) of the Longshore Act with respect to any claim within one year after the employee has retired and the calculation of 1/52 of the employee's earnings during the preceding 52-week period shall not apply under this Act.[358]

(c) Any injury grievance or injury settlement payments would be set off against a future workers' compensation award for cash benefits under this section.[359]

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357. This would also represent a departure from the 33 U.S.C.S. §§ 910(d) & 910(i) (2011).

358. 33 U.S.C.S. § 910(d) (2011).

359. Unlike the Missouri statute concerning professional athletes, this provision does not include set-offs for previously paid medical benefits, nor for vocational or death benefits. *See* MO. REV. STAT. § 287.270 (2011).