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Professional sports challenge to California's liberal workers' compensation system nearing resolution

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In light of the evolving controversy surrounding professional athletes who file for workers' compensation benefits in California and new legislation aimed at reducing that liability for sports teams, it may be instructive to step back and examine how this has escalated into a fount of litigation.

In comparison with other states, California historically has maintained a relatively generous workers' compensation system with respect to benefits provided injured employees, claim provisions and definition of injury. Notably, a key point of difference is that California recognizes both acute injuries (in which a specific incident produces an injury) and cumulative trauma (CT) injuries, pursuant to California Labor Code Section 5500.5.

CT injuries involve situations where an employee may have incurred an ongoing injury during the duration of employment, such as carpal tunnel syndrome for data entry personnel. Under the statute, liability for these injuries falls upon the employers within the last year of injurious exposure.

Expanding cumulative trauma theory

Over the years, attorneys representing injured athletes have succeeded in expanding the CT injury theory for athletes who suffer "wear and tear" over the course of their careers. In addition, they expanded California's jurisdiction to extend beyond athletes playing for California teams to include those playing for out-of-state clubs that may play only one game in California a year, or even fewer than that, such as one game in an entire career.

The expanded CT theory was based upon California Labor Code Section 5305, which grants California workers' compensation courts jurisdiction over all claims "*arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract for hire was made in this state.*" In practice, the interpretation of this clause has been expanded to determine the existence of any nexus between the applicant's employment activities and the state of California.

One would think the statute of limitations would apply to these cases – especially for athletes who last played in the 1980s and are only now filing claims. However, there's a wrinkle. Under California law, employers must provide notice to injured athletes regarding their workers' compensation rights before the statute of limitations clock begins to run [Reynolds v. WCAB (1974) 12 Cal. 3d 726]. In many cases, athletes were not advised they may have rights to pursue workers' compensation benefits in California; consequently, the statute of limitations cannot be used as a defense.

As a result, teams lacking a clear understanding of their potential exposure now face numerous claims for which athletes may collect disability benefits. The benefits are calculated based on medical reporting and a complicated scale that allocates funds depending on the level of disability designated by percentage points. Those with a higher level of disability (70 percent or higher) are entitled to a lifetime pension, a weekly benefit paid for the remainder of their lives. Most importantly, under California law, the injured athletes would be entitled to future medical care, including multiple surgeries required during their lifetime, for all body parts injured throughout their careers.

By contrast, some states specifically exclude professional athletes, though the teams may purchase workers' compensation insurance to prevent those athletes from seeking recovery in the civil courts. Other states where athletes might file claims are not as generous as California in the calculation and rates of disability payments. Further, some states do not recognize the CT theory of injury; instead, they recognize only acute injuries in which a specific incident caused the disability and complaints. Finally, nearly all other states have a strict statute of limitations;

thus, by the time athletes retire from their professional careers, they are likely to be barred from filing a claim due to the passage of time.

As more athletes file claims in California and succeed in collecting benefits, there has been resistance from the professional leagues, especially for those claims involving athletes who have retired 10 to 20 – or even as long as 30 – years ago. While the teams and leagues may have contemplated and calculated the costs of workers' compensation when assessing their liability, they are unlikely to have anticipated that such old claims would pop up or that injured athletes would engage in "forum shopping" to file claims in California.

While defenses are available to liability, most involve jurisdictional arguments where the CT liability is shifted back to a team that cannot assert the defense. The nature and extent of the injuries will be further examined and disputed with medical evaluations. In addition, the level of disability can be adjusted, with apportionment allowed as a credit for injuries that may not be related entirely to wear and tear over a career. However, the apportionment applies only to disability payments; future medical care cannot be apportioned.

Substantial legal defense costs

The costs related to defending these claims are significant. An athlete's career could span multiple teams over the years: Each team will need to retain counsel to defend and litigate these claims. Discovery must be conducted by each team and counsel, including the subpoena of reams of records, scheduling medical-legal evaluations with physicians in multiple specialties, conducting depositions of the athlete and possibly the physicians. Some doctors demand diagnostic tests, such as X-rays, MRIs, brain scans, which add up when required for multiple body parts. Additionally, as many of the athletes reside out of state, they will have to be flown to California for depositions and medical appointments, at the team's expense.

Athletes have argued they should be entitled to file claims in California, based upon the games played there because they are bound by the schedules imposed by the leagues. In addition, all athletes who play a game in California are subject to a local income tax (or "jock tax") for any games they play in California. Furthermore, athletes, in particular those in the National Football League, have argued that these workers' compensation benefits were contemplated in the recent collective bargaining agreements and are supposed to come out of the players' portion of revenue.

Legal challenges at multiple levels

Nonetheless, sports teams and leagues have resisted these workers' compensation claims, raising their challenges at three levels – in various state courts, at the federal level, and in California's State Legislature.

First, the California Workers' Compensation Appeals Board (WCAB) has issued recent decisions in which it declined to exercise the state's jurisdiction over a claim based upon the terms of the contract signed by the athlete. Notably, this was the decision in Dennis McKinley v. Arizona Cardinals: Mr. McKinley's contract with the Arizona Cardinals had a forum selection clause, stipulating he could file a workers' compensation claim only in Arizona. The court ruled it may decline to exercise jurisdiction when there is a reasonable mandatory forum selection clause, with a four-pronged test to analyze those clauses. Mr. McKinley's attorney has appealed this and the case is currently before the California Supreme Court, after the California Court of Appeals continued to find in favor of the teams.

The courts have also looked to California Labor Code Section 3600.5(b), which limits the ability of "temporary" employees to file a claim in California if their home state has coverage and allows for reciprocity with California. In Wesley Carroll v. Cincinnati Bengals, the court held that Ohio's temporary employee and reciprocity statutes met the requirements; therefore, the team is exempted from provisions of California's workers' compensation laws. There is a strict standard of evidence required to allow the defining of a professional athlete as "a temporary employee." Some states aside from Ohio may have applicable provisions and the courts are weighing them at this time, including Maryland, Tennessee, and Nevada. Other states, in response to these claims filed by athletes, have recently passed or are passing legislation to allow for this temporary employment and reciprocity defense, such as Florida and Arizona.

At the federal level, the sports teams have argued to enforce the choice of law provisions present in some contracts. In the case of Bruce Matthews, the National Football League argued there are choice of law provisions in the contracts so workers' compensation claims should be filed in the state designated by the contract. While these contractual provisions have been raised in multiple workers' comp cases, the Matthews case went to arbitration, where the federal arbitrators have sided with the teams in enforcing the contract.

When the case was brought to the United States 9th Circuit Court of Appeals, the Appellate Court sided with the arbitrator. However, the unique nature of American federalism has complicated matters, and it remains to be seen whether the California courts will honor the ruling of a federal judge on their ability to adjudicate the state workers' compensation benefits.
At present, the National Football League has a stay agreement with the National Football League Players Association over a number of these cases. Discovery was on hold for a time, but a settlement was tentatively reached between the parties, with a number of claims filed by former

athletes to be withdrawn against certain teams, while others will be allowed to proceed to litigation. Among those proceeding are: claims with a specific injury suffered in the game played in California; claims filed by California residents; or claims involving team contracts signed by former athletes in California.

Pending legislation provides clarity

Finally, a bill has been moving through the California State Legislature that will have a significant impact on the ability of out-of-state athletes to file workers' compensation claims in California. AB1309 passed the State Assembly and is currently in committee with the Senate. If passed by the Senate as written and subsequently approved by the Governor, the bill will amend current laws with respect to athletes regarding CT injuries, their status as temporary employees, and the statute of limitations.

Specifically, the bill will define athletes as temporary employees with amendments made to California Labor Code Section 3600.5(b) if workers' compensation benefits are available in the home state and reciprocity is allowed by the home state. CT claims will be re-defined with a definite ending date of the last day while employed as a professional athlete. The statute of limitations will only be barred as a defense if the athlete is mentally incompetent.

There will be an exception to these restrictions for athletes who played a certain percent of their career or a certain number of years with a California team, known as the "Joe Montana" exception. Originally set at 80% and 8 years, proposed changes may be as low as 20% and 2 years.

Finally, the legislation was originally drafted to be retroactive, applying to all pending claims. While this has been (and is being) vigorously challenged by the athletes' representatives, this may be changed so that the new legislation will apply to all cases filed on or after the date the bill is enacted. Due to this possible change, many athletes are currently filing workers' compensation claims in California before the bill is enacted, so their cases may be "grandfathered" in.

A retroactive ban will not be unprecedented. Prior to 1981, college student-athletes were considered "employees" for purposes of workers' compensation benefits and permitted to file and collect such benefits. However, the California Legislature amended California Labor Code Section 3352 in 1981, adding clause "k," which specifically excluded college student-athletes as employees. This was also retroactive in nature, stopping all claims in litigation at the time.

Advocates for professional sports teams and leagues are anticipating changes in laws involving professional athlete workers' compensation claims within the next year. The California courts have already begun to rule against the players regarding jurisdictional issues. The defenses of

temporary employment and reciprocity with others states will likely be fought over and decided. Finally, if enacted , the proposed changes in AB1309 will limit the ability of many players from filing claims in California and will reduce the complexity associated with investigating and administrating these claims.

Citations:

Bruce Matthews v. National Football League Management Council, Tennessee Titans (2012) 688 F.3d 1107

Dennis McKinley v. Arizona Cardinals, The Travelers Indemnity Company (2013) 78 Cal. Comp. Cas. 23

Wesley Carroll v. Cincinnati Bengals, PSI, New Orleans Saints, Louisiana Workers' Compensation Corporation, Travelers Insurance (2013) 78 Cal. Comp. Cas. 655

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