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## INJURY TIME-OUT: JUSTIFYING WORKERS' COMPENSATION AWARDS TO RETIRED ATHLETES WITH CONCUSSION-CAUSED DEMENTIA\*

### I. INTRODUCTION

On December 17, 2009, Cincinnati Bengals wide receiver Chris Henry was tragically killed in an automobile accident.<sup>1</sup> When researchers performed an autopsy on his brain, they discovered that Henry suffered from Chronic Traumatic Encephalopathy (CTE), a disease associated with repeated traumatic head trauma.<sup>2</sup> CTE is strongly associated with later-life brain deterioration, especially dementia.<sup>3</sup> Such a finding in Henry's brain shocked researchers for two reasons. First, Henry was only twenty-six years old at the time of his death.<sup>4</sup> Prior to the Henry case, CTE was found only in much older football players' brains.<sup>5</sup> Second, Henry had never reported a head injury or concussion during his four years of active play in the National Football League (NFL), or during his years at West Virginia University.<sup>6</sup>

The finding of CTE in Henry's brain has added to an increasing concern among medical professionals and NFL players over the link between concussions and cognitive decline. A handful of former players have already been diagnosed with CTE, and scientific studies have been published linking NFL-related head trauma with dementia.<sup>7</sup> The NFL's policy regarding concussion safety is under intense criticism from many fronts.<sup>8</sup> Seemingly every week, a fresh news story breaks about concussions

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1. Joe Kay, *Emotional Bengals Take Death Hard*, PITT. POST-GAZETTE, Dec. 18, 2009, at D1.

2. *Experts Say Chris Henry's Brain Was Damaged by the Game*, W. VA. UNIV. HEALTHCARE (June 28, 2010), <http://www.wvuhealthcare.com/newsreleases/news-details.aspx?ID=1515> [hereinafter WVU HEALTHCARE].

3. See *infra* Part II.B.1 for an overview of the studies linking CTE with cognitive degeneration.

4. Alan Schwarz, *Ex-Bengal is First in N.F.L. Known to Play with Brain Trauma*, N.Y. TIMES, June 29, 2010, at B10.

5. WVU HEALTHCARE, *supra* note 2. Other players diagnosed with CTE at their time of death include Andre Waters (aged forty-four), Terry Long (aged forty-five), Mike Webster (aged fifty), and Justin Strzelczyk (aged thirty-six). Dale Robertson, *Pro Football Players Accept Risk of Injuries to Head*, HOUS. CHRON., Nov. 15, 2009, at 1. Waters and Long both committed suicide, each suspected to be strongly linked with CTE and brain damage. Gary Mihoces, *Concussions Command NFL's Attention*, USA TODAY, June 19, 2007, at 1C.

6. WVU HEALTHCARE, *supra* note 2.

7. See *infra* Part II.B.1 for an overview of the studies linking CTE with cognitive degeneration.

8. The criticism has even developed into legal action. A class action lawsuit was filed against the NFL in the summer of 2011, alleging negligence on the part of the NFL for training players to hit with their heads, failing to treat them for concussions, and denying a causal link between head injuries and concussions. *Players*

in football.<sup>9</sup> Considering the impact of the new collective bargaining agreement between the NFL and the Players' Association signed in 2011,<sup>10</sup> this development is certainly one of the more significant and polarizing issues in the world of American professional sports.

This Comment examines the feasibility of a retired professional football player's workers' compensation claim against the NFL for dementia resulting from head injuries sustained while playing football. Such a claim will be novel in United States workers' compensation history, but an initial representative suit has already been filed in California and is awaiting hearing.<sup>11</sup> Although such a case seems extraordinary, given the typical workers' compensation claim, this Comment will show that a professional athlete who suffers head injuries during his employment with the NFL can, and should, be entitled to workers' compensation.

Part II provides an overview of the basic concepts in workers' compensation that will be addressed in a retired professional athlete's dementia claim. Part II.A reviews the purposes and function of workers' compensation, how state statutory systems can affect professional athletes' claims, and the procedural limitations which may function as a check on dementia claims. Part II.B discusses current studies and cases that either show, or refute, a causal link between NFL head injuries and later-life cognitive impairment. The fierce battle between independent medical researchers, NFL-sponsored scientists, and the official NFL disability plan is of particular importance. Lastly, Part II concludes with a brief glance at the pending California workers' compensation case for dementia against the NFL.

Part III offers an argument for the success of a retired professional athlete's workers' compensation claim for dementia. Part III.A focuses on how athletes can overcome the seemingly difficult burden of proving causation between decades-old concussions and current symptoms of dementia. Part III.B promotes a flexible classification of dementia—as either a discrete injury or an occupational disease—in

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*Accuse NFL of Negligence*, ESPN (Aug. 19, 2011), [http://espn.go.com/nfl/story/\\_/id/6874906/jim-mcmahon-other-players-sue-nfl-concussions](http://espn.go.com/nfl/story/_/id/6874906/jim-mcmahon-other-players-sue-nfl-concussions).

9. Consider the tragic story of former Chicago Bears safety Dave Duerson. Duerson shot himself in the chest in February 2011, leaving a suicide note that requested that his brain be donated to CTE researchers. *Dave Duerson Had Brain Damage*, ESPN (May 3, 2011), <http://sports.espn.go.com/chicago/nfl/news/story?id=6465271>. A few months later, Center for the Study of Traumatic Encephalopathy announced that Duerson's brain showed signs of moderately advanced CTE. *Id.* Duerson sustained at least ten concussions during his career in the NFL. Cliff Brunt, *Corwin Brown has NFL-Related Brain Trauma, Family Says*, THE JOURNAL GAZETTE (Aug. 16, 2011), <http://www.journalgazette.net/article/20110816/SPORTS0302/110819646/1087/BL OGS02>. In August 2011, former NFL player and Notre Dame football defensive coordinator Corwin Brown held police in a seven-hour standoff before shooting himself. *Id.* His family has publicly announced that they suspect he was suffering from CTE. *Id.*

A quick survey of the sports section of most newspapers will turn up recent articles about concussions in football at all levels. The concerns are present even at the collegiate and high school levels. *E.g.*, Lizzy Collins, *Confronting Concussions: Head Injuries in Football Cause Great Concern*, STAN. DAILY (Oct. 6, 2010), <http://www.stanforddaily.com/2010/10/06/confronting-concussions-head-injuries-in-football-cause-great-concern>; Janice Lloyd, *High School Athletes Face Serious Concussion Risks*, USA TODAY, May 5, 2009, at 7D.

10. See *infra* notes 186–89 and accompanying text for an overview of the NFL Collective Bargaining Agreement.

11. The suit has been filed on behalf of Ralph Wenzel and is discussed *infra* Part II.B.4.

order to promote the inclusion of the broadest range of claimants. Part III.C challenges notions that professional athletes should not be covered by state workers' compensation. Part III.D advocates for the recognition of future medical expenses as reasonable compensation. Part III.E draws attention to the inadequacies of the NFL disability plan to deal with retired professional football players suffering from dementia. Finally, Part III.F refutes meritless equitable arguments that the NFL may make in order to avoid liability.

## II. OVERVIEW

### A. *Treatment of Professional Athletes in Workers' Compensation Systems*

When professional athletes get injured on the field, at practice, or in training camp, they sometimes look to collect under workers' compensation, just like any other employee.<sup>12</sup> However, due to the unusual features of employment as a professional athlete—including the prevalence of collective bargaining agreements, intricate employment contracts, the violence of the sport, and sometimes, huge salaries—these men and women are treated markedly different under state workers' compensation statutes.<sup>13</sup> Accordingly, in determining how best to deal with the emerging issue of workers' compensation availability to retired players suffering with dementia, it is important to first examine what sort of successful claims an employee may file. In particular, a retired professional football player suffering from dementia will need to file an appropriate claim as either a permanent injury or an occupational disease.<sup>14</sup>

After determining what sort of claim a retired athlete may bring, additional challenges remain, as professional athletes are treated extraordinarily under various state statutes.<sup>15</sup> Some states even specifically exclude professional athletes from workers' compensation coverage.<sup>16</sup> Finally, a retired athlete must comply with procedural and jurisdictional limitations that restrict a finding for any employee filing under the workers' compensation statutes.<sup>17</sup> If, and only if, a retired professional athlete suffering from dementia can surpass the many potential obstacles that exist to quell his claim, then he may be entitled to workers' compensation.

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12. *E.g.*, *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126 (Mo. Ct. App. 2007).

13. See *infra* Part II.A.2 for a detailed discussion of the different state systems that permit or disallow professional athletes from bringing workers' compensation claims.

14. See *infra* Parts II.A.1.b–c for an overview of the injury and occupational disease requirements.

15. Compare FLA. STAT. ANN. § 440.02(17)(c)(3) (West 2011) (excluding professional athletes from workers' compensation), with 77 PA. CONS. STAT. ANN. § 565 (West 2010) (including professional athletes but limiting amount of compensation available).

16. See *infra* Part II.A.2 for the requirements of different state systems.

17. See *infra* Part II.A.3 for the procedural and jurisdictional bars that may operate to hinder a dementia claim.

## 1. Purposes and Functions of Workers' Compensation

Workers' compensation systems are founded on the notion that employees are entitled to compensation for injuries arising out of the course of their employment.<sup>18</sup> Any finding of tort negligence or liability, including assumption of the risk, is irrelevant.<sup>19</sup> Only employees are eligible to collect workers' compensation, which generally includes wages and medical expenses.<sup>20</sup> Workers' compensation systems also require an employee to waive tort causes of action for injuries that could be covered by the workers' compensation statute.<sup>21</sup> Several requirements and provisions of a typical state's workers' compensation statute present unique hurdles for professional athletes.<sup>22</sup>

### *a. Classification as Employee and Scope of Employment*

For an individual to be eligible to receive workers' compensation benefits, the individual must be an "employee" of the employer against whom the cause of action is asserted.<sup>23</sup> A workable and generally accepted definition of "employee" is provided in the RESTATEMENT (SECOND) OF AGENCY § 220: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."<sup>24</sup>

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18. ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (2010). Workers' compensation systems arose during the Industrial Revolution to both protect workers from on-the-job injuries, as well as insulate employers from large negligence tort awards. SANDY D. MOORE, UNDERSTANDING WORKERS' COMPENSATION INSURANCE 3-4 (2009). Wisconsin was the first state to adopt a workers' compensation system; by 1948, every state had some form of the system in place. *Id.* at 3.

19. LARSON, *supra* note 18, § 1.01; *see also* *Costa v. Flintkote Co.*, 42 Haw. 518, 530 (1958) (finding that workers' compensation is meant to protect "regardless of negligence by the employee or lack of negligence by the employer"); *Barnette v. Doyle*, 622 P.2d 1349, 1352 (Wyo. 1981) (observing that tort defenses are unavailable and employers are immune from common-law liability).

20. LARSON, *supra* note 18, § 1.01. Most, if not all, states have codified provisions allowing for collection of both wages and medical benefits. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 9-602 (West 2011) (permitting wage-loss payments); *id.* § 9-660 (permitting collection of employee's medical expenses).

21. 2 MODERN WORKERS COMPENSATION § 102:1 (2011); *see, e.g.*, *Mendes v. Tin Kee Ng*, 507 N.E.2d 1048, 1051 (Mass. 1987) (recognizing that employee cannot resort to tort cause of action if claim is covered by workers' compensation).

22. *See infra* Part III for an application of such provisions to an athlete asserting a dementia-related workers' compensation claim.

23. 82 Am. Jur. 2d Workers' Compensation § 120 (2011); *see also* *Hollen v. Workmen's Comp. Appeal Bd.*, 321 A.2d 733, 735 (Pa. Commw. Ct. 1974) (indicating that courts generally look to a common understanding of "employee").

24. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958). To distinguish between employees (compensable under workers' compensation) and independent contractors (non-compensable under workers' compensation), a non-exhaustive list of factors should be considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the

Every workers' compensation statute defines "employee," but typically an "employee" can be identified as "one who works for, and under the control of, another for hire."<sup>25</sup>

In order to recover under workers' compensation systems, the employee's injury must be "arising out of and in the course of employment."<sup>26</sup> Workers' compensation systems are not intended to cover all injuries or medical issues of an employee; rather, they cover employment-related injuries arising out of the employment relationship without requiring a showing of fault.<sup>27</sup> The phrase "in the course of employment" refers to the "time, place, and circumstances under which the accident occurred."<sup>28</sup> It also requires that the injury resulted from the risks inherent in the employee's job or while the employee was engaged in work duties or incidental activities.<sup>29</sup> An employee must also show that the injury was proximately caused by the employment activities.<sup>30</sup>

In the case of professional sports, the nature of the job includes traditionally "recreational" activities, which may not be covered under general "course of employment" provisions.<sup>31</sup> Professional athletes who suffer injuries during games or practice are commonly compensable, unless expressly excluded by statute.<sup>32</sup> The violent nature of professional sports, especially professional football, is considered to

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work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

*Id.* § 220(2).

25. JACK B. HOOD ET AL., *WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS* 29 (4th ed. 2005).

26. LARSON, *supra* note 18, § 1.01. For an overview of different interpretations or formulations of this general doctrine, see generally 82 AM. JUR. 2D *Workers' Compensation* § 242 (1992) (detailing interpretations of both factors).

27. HOOD ET AL., *supra* note 25, at 41.

28. Stone & Webster Constr., Inc., v. Lanier, 914 So. 2d 869, 875 (Ala. Civ. App. 2005). The court also noted that "arising out of" is a requirement of a causal relationship between the injury and the nature of the employment. *Id.*

29. Zoucha v. Touch of Class Lounge, 690 N.W.2d 610, 614–15 (Neb. 2005). An example of such a commonly recognized "incidental" activity is the coffee break. See Misek v. CNG Fin., 660 N.W.2d 495, 501–02 (Neb. 2003) (holding an employee who slipped on a grassy hill on the way to a convenience store to get coffee was due compensation). Thus, even when an employee is off-premises and suffers an injury unrelated to her job duties, it may be considered to be in the course of her employment. See LARSON, *supra* note 18, § 13.05 for an overview of the "premises rule" as applied during lunch and coffee breaks.

30. City of Long Beach v. Workers' Comp. Appeals Bd., 23 Cal. Rptr. 3d 782, 789 (Cal. Ct. App. 2005). Generally the burden is on the employee to prove proximate causation. *Id.* at 790. However, in some cases, states will recognize a presumption of causation in certain jobs, including "industrial causation" claims for public employees who provide "vital and hazardous services." *Id.* at 789.

31. LARSON, *supra* note 18, § 22.04(1)(b). The general standard is that the recreational activity that causes the injury is "in the course of employment" if it serves a business function for the employees. See Gazette Commc'ns, Inc. v. Powell, No. 10-0017, 2010 WL 3894609, at \*2–3 (Iowa Ct. App. Oct. 6, 2010) (finding that an employee bowling outing is not in the course of employment, even if organized by the employer); Williams v. Time Warner Cable, No. 25014, 2010 WL 1689807, at \*2–4 (Ohio Ct. App. Apr. 28, 2010) (denying claim for injury arising out of off-site company-endorsed marathon); Orcutt v. Lloyd Richards Pers. Serv., 239 P.3d 479, 482 (Okla. Civ. App. 2010) (upholding provision that excluded a claim for a basketball injury sustained on a work break, on business premises, after employer encouraged participation).

32. See, e.g., McGlasson v. Workmen's Comp. Appeal Bd., 557 A.2d 841, 842 (Pa. Commw. Ct. 1989) (permitting compensation for a Pennsylvania football player). For a discussion of those states that exclude professional athletes from workers' compensation systems, see *infra* Part I.B.3.

be in the scope of employment of professional athletes; assumption of the risk may not be asserted by an employer to justify withholding compensation.<sup>33</sup> Unintentional injuries occurring on the field, which commonly occur, are generally considered to be “arising out of” and “in the course of employment.”<sup>34</sup>

*b. Classification of Disabilities*

Workers’ compensation systems generally provide for four classifications of employee disability according to duration and severity: temporary partial, temporary total, permanent partial, and permanent total.<sup>35</sup> Temporary partial disability indicates that an employee is able to work with a temporary decrease in wage-earning capacity.<sup>36</sup> It can also be used to classify an employee as incapable of performing certain pre-injury job duties.<sup>37</sup> For temporary partial disability, a claimant should be able to show an actual impairment of earnings.<sup>38</sup> Temporary total disability is measured by different tests in different states. It can be measured by the inability to return to any employment during recovery from the injury,<sup>39</sup> the inability to perform work for which the claimant is reasonably suited,<sup>40</sup> or the inability to perform the job duties required when the injury occurred.<sup>41</sup>

Permanent partial disability occurs when no further medical treatment can improve the injury.<sup>42</sup> Permanent partial disability is, obviously, less than total disability.<sup>43</sup> This type of disability usually refers to the loss of a bodily member,<sup>44</sup> but

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33. LARSON, *supra* note 18, § 22.04(1)(b). *But see* Palmer v. Kansas City Chiefs Football Club, 621 S.W.2d 350, 356 (Mo. Ct. App. 1981) (finding that a football injury is not an “accident” of employment as contemplated by statute).

34. *E.g.*, Swift v. Richardson Sports, Ltd., 620 S.E.2d 533, 533, 536 (N.C. Ct. App. 2005). Although North Carolina’s provision requires an “injury by accident,” the court found that the player’s leg and ankle injuries were a result of other players falling on his leg, which was sufficient to find an “injury by accident.” *Id.* at 537. I would posit that, considering the court’s wide acceptance of the “accidental” nature of injuries in football, almost any injury occurring in-game would be compensable.

35. HOOD ET AL., *supra* note 25, at 90–91.

36. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:7; Pioneer Constr. v. Conlon, 780 P.2d 995, 997 (Alaska 1989).

37. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:7; *see also* IOWA CODE ANN. § 85.33(2) (West 2011) (defining temporary partial disability as “not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee’s disability”).

38. Albrecht v. Indus. Comm’n, 648 N.E.2d 923, 925 (Ill. App. Ct. 1995). The court reasoned that the purpose of the state provision was to “compensate the injured employee for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation.” *Id.*

39. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:8; Herring v. Yellow Freight Sys., Inc., 914 S.W.2d 816, 820 (Mo. Ct. App. 1995), *overruled by* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).

40. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:8; Sherwood v. Gooch Milling and Elevator Co., 453 N.W.2d 461, 468 (Neb. 1990). Even if the worker is not disqualified from all employment, it is enough that “he cannot now do what he was last doing” for a finding of temporary total disability. *Id.*

41. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:8; N.M. STAT. ANN. § 52-1-25.1(A) (West 2010).

42. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 200:9.

43. *See* CAL. LAB. CODE § 4452.5 (West 2011) (defining partial as “less than 100 percent” disability).

can also refer to permanent loss of a bodily function.<sup>45</sup> In contrast, classifying a disability as permanent and total means that the disability is unlikely to improve, even with medical treatment.<sup>46</sup> The classification is meant to compensate for physical loss as well as loss of future earning capacity.<sup>47</sup> Oregon has even ruled that permanent total disability benefits are a “lifetime wage replacement” intended to restore employees to “economic self-sufficiency.”<sup>48</sup>

*c. Occupational Disease*

Workers' compensation systems also cover occupational diseases, which are essentially diseases caused by work-related duties.<sup>49</sup> Occupational diseases can arise out of the employment environment or result from a discrete injury.<sup>50</sup> Such diseases, to be compensable, must arise from the nature of the employment or be a natural consequence of an employment-related risk.<sup>51</sup> Kansas has codified a usable method for determining if an occupational disease arises from the nature of the employment: the employment must involve “a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general.”<sup>52</sup> This introduces a causal element such that the occupational disease must be caused by an activity inherent in the employment. Generally, an employee must prove a direct causal link between the employment conditions and the disease.<sup>53</sup>

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44. *E.g.*, WASH. REV. CODE ANN. § 51.08.150 (West 2011) (including loss of a foot, leg, hand, arm, eye, finger, or toe as permanent partial disability).

45. *See* N.H. REV. STAT. ANN. § 281-A:2 (2011) (defining permanent partial disability as “of such seriousness as to constitute a hindrance or obstacle to obtaining employment”); Puget Sound Energy, Inc. v. Lee, 205 P.3d 979, 988 (Wash. Ct. App. 2009) (defining permanent partial disability as measured by loss of a bodily function).

46. *Benson v. Workers' Comp. Appeals Bd.*, 89 Cal. Rptr. 3d 166, 172 (Cal. Ct. App. 2009); *see also* FLA. STAT. ANN. § 440.02 (West 2011) (defining permanent impairment as loss after date of maximum medical improvement).

47. *Benson*, 89 Cal. Rptr. 3d at 172.

48. *Koskela v. Willamette Indus., Inc.*, 15 P.3d 548, 558 (Or. 2000). In defining the scope of compensation for permanent total disability, the court looked to the private interest of the claimant in being compensated adequately and reasonably. *Id.*

49. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 109:1. The burden of proving a causal link between the employment exposure and the resulting occupational disease is on the employee. *Id.* § 109:6. For an overview of the more lenient standard imposed on employees in mixed causes cases, *see infra* notes 54–59 and accompanying text.

50. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 109:1. The classification of a claim as either an injury or an occupational disease will affect the statute of limitations. *See infra* Part II.A.3 for a discussion of the limitations periods on compensable claims. For a system that allows for a flexible classification of the cause as either an injury or an occupational disease, *see infra* notes 60–73 and accompanying text.

51. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 109:2. It can also be regarded as a result of exposure occasioned by the employment, or as a manifestation consistent with those resulting from exposure attributable to the employment. *Id.*

52. KAN. STAT. ANN. § 44-5a01(b) (West 2010).

53. 2 MODERN WORKERS COMPENSATION, *supra* note 21, § 109:6. Generally, an employee will need expert medical testimony to link the symptoms of the occupational disease with the employment exposure. *See, e.g.*, *Pino v. Wyoming ex rel. Wyo. Workers' Safety and Comp. Div. (In re Pino)*, 996 P.2d 679, 685

Where an employee brings a claim for an occupational disease, an employer-defendant will often argue that the disease is attributable to factors other than the employment environment. For example, in *Fiore v. Consolidated Freightways*,<sup>54</sup> the New Jersey Supreme Court decided to what extent an employee's personal risk factors for a disease were responsible for the employee's heart problems. In cases that involve such "dual causation," *Fiore* held that the controlling question is whether the employment exposed the worker to greater risks than his daily life.<sup>55</sup> A related case from Arizona further elucidated this standard. In *Ford v. Industrial Commission of Arizona*,<sup>56</sup> the Arizona Supreme Court held that an employee need not prove that the employment exposure was the sole cause of the occupational disease.<sup>57</sup> For example, the worker in *Ford* was exposed to industrial irritants but also suffered from a preexisting pulmonary condition.<sup>58</sup> All that the employee was required to prove was that the employment exposure was a contributing risk that materially affected the severity or onset of the disease.<sup>59</sup>

Construing a claim as either an occupational disease or an injury may affect the vitality of the employee's claim.<sup>60</sup> New Jersey has adopted a unique and flexible classification system that allows for certain eligible claims to be classified as either occupational diseases or injuries depending on the circumstances of the claimant. *Brunell v. Wildwood Crest Police Department*<sup>61</sup> was the consolidation of two similar cases dealing with a police dispatcher and a police officer seeking workers' compensation benefits stemming from post-traumatic stress disorder with delayed onset (PTSD-DO).<sup>62</sup> The symptoms of PTSD-DO did not manifest themselves until four and six years, respectively, after the initial traumatic events.<sup>63</sup> Both claimants maintained

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(Wyo. 2000) (ruling that causation is satisfied if expert testifies causation is more probable than not); *Olson v. Fed. Am. Partners*, 567 P.2d 710, 713 (Wyo. 1977) (holding that expert must testify to medical certainty of causation). Predictably, this leads to a battle of the experts. *See, e.g., Fitzgerald v. BTR Sealing Sys.*, 205 S.W.3d 400, 404 (Tenn. 2006) (relying on expert testimony that injury could or might have been the cause of symptoms).

54. 659 A.2d 436 (N.J. 1995).

55. *Fiore*, 659 A.2d at 448.

56. 703 P.2d 453 (Ariz. 1985).

57. *Ford*, 703 P.2d. at 462.

58. *Id.* at 455.

59. *Id.* at 462.

60. This is because many states use the "date of injury" as starting the limitations period for discrete injuries that can be tied to a specific date (e.g., a broken bone). *See, e.g., Travelers Ins. Co. v. Helstrom*, 351 S.W.2d 321, 323–24 (Tex. Civ. App. 1961) (finding date of injury to be the date on which claimant broke wrist). In contrast, occupational diseases are not attributable to one specific date (e.g., asbestosis). *See, e.g., Childs v. Haussecker*, 974 S.W.2d 31, 37–38 (Tex. 1998) (applying "discovery rule" to asbestos date of injury). In many cases, occupational disease symptoms do not manifest themselves until years after exposure. *See, e.g., id.* at 37 (observing that some occupational disease symptoms "do not manifest themselves for two or three decades"). Therefore, if a court were to rule that the statute of limitations begins running on the date of exposure, many occupational disease claims would be effectively time-barred.

61. 822 A.2d 576 (N.J. 2003).

62. *Brunell*, 822 A.2d at 578–80.

63. *Id.* In the first case, the police dispatcher sent an officer to a vehicle stop where he was murdered, and later called for medical assistance, consoled the department, and arranged for his widow to be notified. *Id.* at 578–79. Four years later, she began suffering emotional problems that were diagnosed as PTSD-DO. *Id.* at



that PTSD-DO was properly classified as an occupational disease, which would toll the statute of limitations until the employee became aware of his or her injuries.<sup>64</sup>

The *Brunell* court recognized that pure injury claims are traceable to a definite time, place, occasion, or cause.<sup>65</sup> This means that an injury is a single definite event that gives rise to an identifiable claim for workers' compensation. In contrast, an occupational disease is characterized such that "attached to that job [is] a hazard that distinguishes it from the usual run of occupations."<sup>66</sup> In addition, rather than involving an unanticipated and discrete injury-producing event, an occupational disease can be expected, in that the risk of developing the disease is known in the field that the employee works.<sup>67</sup>

Next, *Brunell* looked to the Diagnostic and Statistical Manual of Mental Disorders for support that PTSD-DO was a recognized mental disease.<sup>68</sup> The court found support in both academia and relevant case law for compensating *mental* diseases triggered by *mental* stimuli.<sup>69</sup> The *Brunell* court held that PTSD-DO was classified as an injury when "a single traumatic event . . . generated immediate symptoms and was not caused by the peculiar conditions of the employment."<sup>70</sup> It is also classified PTSD-DO as an occupational disease when "recurrent traumatic events [were] experienced by policemen, firemen and rescue workers, the conditions of whose employment compelled regular exposure to such traumas with expectable consequences."<sup>71</sup> The court ultimately reasoned that a strict statutory classification as either an injury or an occupational disease, with no flexibility for individual circumstances, would unfairly deny coverage for a certain class of employees affected with PTSD-DO.<sup>72</sup>

*d. Compensation Available*

The benefits available under workers' compensation include wage-loss payments as well as medical expenses.<sup>73</sup> Compensation under such systems, in contrast with tort compensation, is "made not for physical injury as such, but for 'disability' produced by

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579. In the second case, the police officer witnessed his partner dying from a gunshot wound. *Id.* Six years later he experienced a "trigger incident," the sound of a balloon "pop," which triggered flashbacks and emotional disturbances. *Id.* at 579–80. Both claims were initially dismissed for failure to file a timely claim. *Id.*

64. *Id.* at 581.

65. *Id.* at 583.

66. *Id.* at 584. Montana has illustrated that the difference between an injury and an occupational disease is dependent on "unexpectedness" and "time-definiteness." *Bremer v. Buerkle*, 727 P.2d 529, 531 (Mont. 1986). The mere fact that an employee's symptoms are "so very gradual in onset" classifies the ailment as an occupational disease. *See id.* (quoting *McMahon v. Anaconda Co.*, 678 P.2d 661, 663 (Mont. 1984) (finding claimant's allergy to auto paint nine years after initial exposure was an occupational disease).

67. *Brunell*, 822 A.2d at 584.

68. *Id.* at 585–88.

69. *Id.* at 587–89.

70. *Id.* at 588–89.

71. *Id.* at 589.

72. *Id.*

73. *See supra* note 20 and accompanying text for typical state provisions that provide for wage-loss and medical payments.

such injury.”<sup>74</sup> Calculating wage-loss payments is predicated on a finding of future impairment of earnings. Average weekly wage is generally the measurement used in computing wage-loss payments. Actual post-injury earnings are not necessarily useful in making this calculation because they may not reflect earning power absent the injury in question.<sup>75</sup>

Medical benefits are the second major form of compensation recoverable under workers’ compensation. In forty-five states, medical benefits are statutorily unlimited as to duration and amount.<sup>76</sup> Future medical expenses, in contrast, are not always awarded. In cases in which a future medical procedure is anticipated, courts have been reluctant to grant monetary awards.<sup>77</sup> In some cases, where future treatment is necessary for the duration of the claimant’s life, however, courts have been known to grant extraordinary expenses.<sup>78</sup>

## 2. Treatment of Professional Athletes Under State Statutory Systems

Each state’s workers’ compensation system is unique, and thus the treatment of the professional athlete varies greatly from state to state. Because of the diverse treatment that professional athletes may encounter from state to state, it is important for the athletes, as well as their insurers, to be aware of the applicable state laws. It is possible to place the various state systems into six different categories that consider the professional athlete as either included in, or excluded from, workers’ compensation coverage.<sup>79</sup> These approaches include: silence, specific inclusion, specific exclusion, election, set-off, and in-state exclusion.<sup>80</sup>

### a. Silence<sup>81</sup>

The majority of state statutory workers’ compensation provisions do not explicitly mention how to treat professional athletes. Courts are therefore required to interpret the

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74. LARSON, *supra* note 18, § 80.02; *see, e.g.*, Fisher v. K Mart Corp., 436 N.W.2d 434, 436 (Mich. Ct. App. 1989) (holding that existence of an injury by itself does not create compensable disability).

75. *See, e.g.*, Ragland Brick Co. v. Campbell, 409 So. 2d 443, 446–47 (Ala. Civ. App. 1982) (rejecting test comparing actual pre- and post-injury earnings as accurately measuring ability to earn).

76. LARSON, *supra* note 18, § 94.01. Such states include Alaska, Arkansas, and New Jersey. ALASKA STAT. ANN. § 23.30.097 (West 2010); ARK. CODE ANN. § 11-9-508 (West 2011); N.J. STAT. ANN. § 34:15-15.

77. LARSON, *supra* note 18, § 94.01; *see, e.g.*, Hales v. Van Cleave, 429 P.2d 379, 384 (N.M. Ct. App. 1967) (noting that no statutory text suggests that “the injured employee may presently recover . . . for medical expenses which may at some time in the future prove necessary”).

78. *See, e.g.*, Platzer v. Burger, 144 So. 2d 507, 508–09 (Fla. 1962) (awarding medical expenses where care is necessary for an “indefinite period of time,” as long as “the nature of the injury or the process of recovery may require”).

79. Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers’ Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 104 (1995). Carlin and Fairman identified five systems; I include a sixth system, “in-state exclusion,” to highlight Kentucky’s unique provision that does not neatly fall into any of the other five enumerated systems. *See infra* Part II.A.2.f for a discussion of Kentucky’s provision.

80. Carlin & Fairman, *supra* note 79, at 104–12. I would like to credit Carlin & Fairman for creating the first five subsections. Their research and contribution to the subject have been indispensable to me.

81. This category of statutory provision, like the next four, is a term and idea courtesy of Carlin and Fairman. *Id.*

statutes to determine if athletes can recover benefits or if they are limited to those included in their contracts or collective bargaining agreements. In most cases, the courts have concluded that athletes are “employees” under state statutory language.<sup>82</sup> Workers’ compensation acts are read with a “broad and liberal construction” so as to give effect to the “beneficial purposes of the act.”<sup>83</sup>

In *Pro-Football, Inc. v. Uhlenhake*,<sup>84</sup> the Virginia Court of Appeals determined whether professional athletes were covered under the Virginia workers’ compensation statute. The employer argued that since injuries resulting from the sport of professional football are foreseeable, and participation is voluntary, such injuries are not within the scope of the statute.<sup>85</sup> The court reasoned that allowing a consideration of the risks associated with employment in a professional sports league would reintroduce an assumption of the risk doctrine into workers’ compensation, which it declined to do.<sup>86</sup> Rather, the “business of Pro-Football is to engage in the activity of professional football,” and its employees are expected to work in an environment that carries the risk of substantial injury.<sup>87</sup> Therefore, the court recognized that professional athletes were within the purview of the state’s workers’ compensation provision.<sup>88</sup>

In other states, courts have implicitly acknowledged professional athletes’ statuses as employees. For example, in *Smith v. Richardson Sports Ltd.*,<sup>89</sup> the North Carolina Court of Appeals noted that the state workers’ compensation statute did not have a provision “specifically addressing highly paid professional athletes.”<sup>90</sup> Although not overtly stating that professional athletes were included in North Carolina’s workers’ compensation system, the court found that post-injury payments and benefits paid to the football player were not creditable against owed workers’ compensation payments.<sup>91</sup> Thus, the court implicitly recognized that athletes were eligible to claim workers’ compensation.<sup>92</sup>

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82. See *infra* notes 84–92 and accompanying text for a discussion of various cases holding that professional athletes are employees eligible for workers’ compensation.

83. *Meridian Prof'l Baseball Club v. Jensen*, 828 So. 2d 740, 744–45 (Miss. 2002); see also *Chausse v. Lowe*, 35 F. Supp. 1011, 1013 (E.D.N.Y. 1938) (holding that federal workers’ compensation act is remedial and should be given broad construction). See generally 99 C.J.S. *Workers’ Compensation* § 52 (2010) (providing background case law for the broad construction of workers’ compensation statutes).

84. 558 S.E.2d 571 (Va. Ct. App. 2002).

85. *Pro-Football*, 558 S.E.2d at 574.

86. *Id.* at 576.

87. *Id.*

88. *Id.*

89. 616 S.E.2d 245 (N.C. Ct. App. 2005).

90. *Smith*, 616 S.E.2d at 248.

91. *Id.* at 258.

92. Post-injury credits are meant to offset any subsequently or currently due workers’ compensation payments. LARSON, *supra* note 18, § 82.01. Therefore, by ruling that the post-injury credits were not deductible against any owed workers’ compensation benefits, the court implicitly recognized that professional athletes *may* be due workers’ compensation.

*b. Specific Inclusion*

Some states specifically include professional athletes in their workers' compensation provisions. Pennsylvania includes athletes, but limits the amount of compensation they can receive.<sup>93</sup> Computation of wages for professional athletes is limited to twice the amount of the state's average weekly wage.<sup>94</sup> In 2002, a professional football player challenged this limitation on constitutional grounds, arguing that athletes are treated disparately by receiving fewer benefits than similarly situated workers in other professions.<sup>95</sup> The court upheld the provision, holding that it passed the rational basis test.<sup>96</sup>

Kansas, the District of Columbia, Iowa, Michigan, and Washington also include professional athletes in their workers' compensation systems. Kansas specifically includes professional athletes in its definition of "employee."<sup>97</sup> The District of Columbia likewise includes athletes,<sup>98</sup> but limits their recoverable compensation and the calculation of their life expectancy.<sup>99</sup> Iowa seems to include professional athletes not by including them in a definition of "employee," but by delimiting the amount they can recover.<sup>100</sup> Similarly, Michigan limits the computation of professional athletes' benefits.<sup>101</sup> Like Iowa and Michigan, Washington's system does not include athletes in its definition of "employee," but the Attorney General of Washington has endorsed the notion that professional athletes are "workers" under the state provisions.<sup>102</sup>

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93. 77 PA. CONS. STAT. ANN. § 565 (West 2010). Partial disability compensation is reduced by (1) the wages payable by an employer under contract or collective bargaining agreement; (2) the payments by an employer under "self-insurance, wage continuation, [or] disability insurance;" and (3) any "[i]njury protection or injury benefits payable by employer." *Id.*

94. *Id.*

95. *Lyons v. Workers' Comp. Appeal Bd.*, 803 A.2d 857, 861 (Pa. Commw. Ct. 2002). Lyons was a tight end for the Pittsburgh Steelers and was injured in 1999 on a kick-off return. *Id.* at 858. At the time of his injury, his weekly wage was \$8,075.90. *Id.* at 859. Lyons' payment rate was calculated at \$1,176.00 per week—twice the average weekly rate—for his partial disability benefits. *Id.* He unsuccessfully argued that professional athletes were being disadvantaged for the benefit of team owners. *Id.* at 861.

96. *Id.* at 861–62. The Pennsylvania court found a Florida case persuasive in its reasoning, which considered a similar Florida statutory provision. See *infra* Part II.A.2.c for a discussion and analysis of the Florida case.

97. KAN. STAT. ANN. § 44-508(b) (West 2010).

98. D.C. CODE § 32-1501 (2011).

99. *Id.* §§ 32-1508(3)(W), 32-1501(17C). The statute also requires a finding of when the claimant's employment as a professional athlete would have ended. *Id.* § 32-1508(3)(W).

100. IOWA CODE ANN. §§ 85.33(6), 85.34(6) (West 2011). When an employee suffers a permanent partial disability, his employer is liable for wage-loss payments from the date of injury until the athlete is able to return to substantially similar employment. *Id.* § 85.34(1). However, for professional athletes, "substantially similar" employment is defined as "other occupations the individual has previously performed." *Id.* § 85.34(6).

101. MICH. COMP. LAWS ANN. § 418.360 (West 2011). A professional athlete is entitled to wage-loss payments in Michigan only when his average weekly wage at time of injury is less than 200 percent of the state average weekly wage. *Id.*

102. Applicability of Industrial Insurance Act to Certain Athletes, 1984 Op. Att'y Gen. Wash. 5 (Feb. 14, 1984), available at <http://www.atg.wa.gov/AGOPinions/opinion.aspx?section=topic&id=7566>. The Attorney General reasoned that all employees are covered under the statute unless specifically excluded; Washington has no exclusionary provision. *Id.* The Opinion also found that athletes who were employed by a team that is domiciled in another state were nonetheless covered by Washington's workers' compensation system. *Id.*

c. *Specific Exclusion*

Whereas some states include professional athletes in their statutory systems, others specifically exclude them, including Florida, Massachusetts, and Wyoming. Florida's workers' compensation statute excludes professional athletes from coverage.<sup>103</sup> This provision was challenged on constitutional grounds in 1983, when players on the Miami Dolphins claimed that the statute violated the Fourteenth Amendment.<sup>104</sup> The court supported its ruling against the players on the grounds that professional football players (1) often sustain serious injuries, (2) are well-paid, (3) hold themselves out as well-skilled, and (4) effectively assume the risk of a violent employment.<sup>105</sup> Due to these factors, the court concluded that the statute bears a reasonable relationship to a legitimate state purpose, and is not arbitrary or unequally applied among the class of professional athletes.<sup>106</sup>

Similarly, Massachusetts's definition of "employee" under its workers' compensation statute excludes professional athletes.<sup>107</sup> In the definition, professional athletes are excluded only if their contracts provide for a separate benefits system.<sup>108</sup> Wyoming also excludes professional athletes under its definition of "employee."<sup>109</sup> However, employers are individually required to provide coverage for athletes under the statute.<sup>110</sup>

d. *Election*

Because a professional athlete's contract or collective bargaining agreement may provide for workers' compensation coverage, the conflict between such provisions and state compensation statutes has arisen in two states: West Virginia and Texas. In West Virginia, the athlete's employer retains the right to choose, via a specific election, whether to subscribe to the state system or to decline to do so.<sup>111</sup> All other employers, except those specifically excluded, are required to subscribe to the state compensation fund.<sup>112</sup>

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103. FLA. STAT. ANN. § 440.02(17)(c)(3) (West 2011).

104. Rudolph v. Miami Dolphins, Ltd., 447 So. 2d 284, 291 (Fla. Dist. Ct. App. 1983).

105. *Id.* at 291–92. Considering that workers' compensation is intended to do away with any assumption of the risk analysis, see *supra* notes 18, 32–33, the fourth factor in the court's analysis was misplaced.

106. *Id.*

107. MASS. GEN. LAWS ANN. ch. 152, § 1(4) (West 2011).

108. *Id.*

109. WYO. STAT. ANN. § 27-14-102(a)(vii)(F) (West 2010).

110. *Id.* § 27-14-108(q). The provision goes on to state that "[f]or the purpose of determining employer contributions under this act, all professional athletes . . . are deemed to be paid . . . the average monthly wage most recently computed pursuant to [WYO. STAT. ANN.] § 27-14-802(b)," which dictates that such computations be made quarterly. *Id.*

111. W. VA. CODE ANN. § 23-2-1(b)(6) (West 2011). Carlin and Fairman identified West Virginia and Texas as election states in 1995, and they remain the only states to adopt such a method. Carlin & Fairman, *supra* note 79, at 110–11.

112. W. VA. CODE ANN. § 23-2-1(a). States have the right to require employers to contribute to a state insurance fund for workers' compensation payments. See generally 100 C.J.S. *Workers' Compensation* § 647. For a historical look at how such compulsory payments originated, see Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 312–

In contrast, Texas requires a professional athlete to choose between receiving compensation from the state system or from provisions contained in the athlete's contract or collective bargaining agreement.<sup>113</sup> The athlete cannot collect benefits under both the state system and the private contract. Presumably, this provision allows the athlete to claim compensation under the system that will provide the most benefits.

*e. Set-Off*

According to Stephen Cormac Carlin and Christopher M. Fairman, under a set-off, professional athletes are included in state systems, but "employee benefits are reduced on a dollar for dollar basis by any contract benefits paid to the injured athlete."<sup>114</sup> Missouri's provision allows employers of professional athletes to offset any wages or benefits paid after the injury against any statutory workers' compensation benefits.<sup>115</sup> Ohio has also enacted a set-off; any payments made to an athlete during the disability are considered an advance payment of workers' compensation.<sup>116</sup> In addition, the employer is later reimbursed for the advance payments out of the compensation award.<sup>117</sup> Notably, Louisiana adopted a set-off provision in 1993 that mandated that compensation be decreased by any wages or benefits paid to the athlete.<sup>118</sup> In 2004, that provision was repealed.<sup>119</sup>

*f. In-State Exclusion*

Kentucky has codified a unique provision that excludes professional athletes from the Kentucky workers' compensation system if they are employed by an employer (i.e., team or league) that is domiciled outside Kentucky.<sup>120</sup> Even if a player is injured within Kentucky in the course of his employment, he is prohibited from filing a Kentucky workers' compensation claim if his employer has obtained insurance coverage in its domicile.<sup>121</sup> In such a case, the benefits of the domicile state are the exclusive remedy for the professional athlete.<sup>122</sup> This provision in effect excludes workers' compensation claims by athletes of other states' teams that are playing a game within the borders of Kentucky.

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14 (1998). The contribution requirement has been upheld against a range of constitutional attacks. *See, e.g.*, *Mountain Timber Co. v. Washington*, 243 U.S. 219, 246 (1917) (rejecting due process and unreasonable and arbitrary arguments); *State v. Clausen*, 117 P. 1101, 1115 (Wash. 1911) (rejecting equal protection argument).

113. TEX. LAB. CODE ANN. § 406.095(a) (West 2009).

114. Carlin & Fairman, *supra* note 79, at 111.

115. MO. ANN. STAT. § 287.270 (West 2011).

116. OHIO REV. CODE ANN. § 4123.56(C) (West 2011).

117. *Id.*

118. Carlin & Fairman, *supra* note 79, at 112. The provision was originally located at LA. REV. STAT. ANN. § 23:1225(D) (1998).

119. 2004 La. Sess. Law Serv. 561 (West).

120. KY. REV. STAT. ANN. § 342.670(4) (West 2010).

121. *Id.*

122. *Id.*

### 3. Limitations on Employee Claims

Even when a professional athlete is statutorily eligible to claim workers' compensation, he may be barred by one or more procedural limitations. These limitations are codified in each state's workers' compensation system, and apply with equal force to all employees bringing claims under the statute.<sup>123</sup> However, while every employee is subject to these limitations, there are several other bars that sometimes function to limit courts' acquiescence in granting workers' compensation to professional athletes.

Every workers' compensation system is governed by a statute of limitations which determines when an injured employee may bring a claim. There are two limitation periods that bear on a claim: limitation on the notice of injury and limitation on a claim for compensation.<sup>124</sup> First, the employee is required to give notice of the injury to the employer so that the employer can immediately provide medical treatment, as well as begin an inquiry into the injury claimed.<sup>125</sup> In certain cases, the limitations period for notice may begin to run when the employer receives actual notice of the injury, regardless of the source of that notice.<sup>126</sup> Where the employee or employer initially underestimates the severity of the injury, Professor Larson observes that "if the employer . . . [is] aware of the circumstances surrounding the occurrence of the injury . . . , the knowledge will be deemed sufficient even if the employer and employee both underestimate the seriousness of the injury."<sup>127</sup> In addition, the notice limitation may toll until the claimant recognizes the nature or seriousness of the injury under a reasonable person standard.<sup>128</sup>

Second, the claim for compensation is typically limited to a period of one or two years.<sup>129</sup> The compensation claim period does not begin to run until the claim is compensable.<sup>130</sup> This limitation may also be tolled until the claimant recognizes the nature or seriousness of the injury.<sup>131</sup> In the case of occupational disease, most states which have provisions that begin the running of the limitations period at the date of

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123. See *infra* notes 125–38 and accompanying text for a discussion of these limitations.

124. For typical notice and claim provisions, see CAL. LAB. CODE § 5400 (West 2011) (defining notice requirements) and *id.* § 5401 (defining claim requirements).

125. LARSON, *supra* note 18, § 126.01. This period typically lasts no longer than a few weeks or months, and may be codified as "forthwith," or "as soon as practicable." *Id.*

126. *Id.* § 126.03; see, e.g., *Alfonso v. Mac Dinton's Rest.*, 515 So. 2d 243, 245 (Fla. Dist. Ct. App. 1987) (finding that employer hearing an employee exclaim at time of injury was sufficient notice); *Emp'rs. Mut. Liab. Ins. Co. v. Dyer*, 134 S.E.2d 49, 50 (Ga. Ct. App. 1963) (finding that doctor's slip of medical limitation constituted notice).

127. LARSON, *supra* note 18, § 126.03.

128. E.g., JEFFREY JACKSON & MARY MILLER, *ENCYCLOPEDIA OF MISSISSIPPI LAW* § 76:162 (2010).

129. See, e.g., *Bieber v. Keeler Brass Co.*, 531 N.W.2d 803, 804 (Mich. Ct. App. 1995) (citing two-year statute of limitations); *Grenz v. Fire & Cas. of Conn.*, 857 P.2d 730, 731 (Mont. 1993) (mandating one-year statute of limitations).

130. LARSON, *supra* note 18, § 126.10; see also *Shepherd v. Easterling Constr. Co.*, 646 S.W.2d 37, 38 (Ark. Ct. App. 1983) (finding claimant's knee injury did not become compensable until first loss of earnings); *Bailey v. Covil Corp.*, 354 S.E.2d 35, 36 (S.C. 1987) (permitting tolling of statute of limitations when injury caused permanent disability four years after initial discovery of injury).

131. See *supra* note 128 and accompanying text for a typical "discovery rule" provision.

injury have found flexibility in allowing the statute to toll until the employee knows or should know of the nature of the disease.<sup>132</sup> Other states toll the limitations period until the “last exposure”<sup>133</sup> or “date of disablement.”<sup>134</sup>

Choice of law and jurisdictional issues may also bar a workers’ compensation claim. Typically, state statutes apply to injuries that occur within the state boundaries. For example, Pennsylvania’s statute provides that it shall apply to “all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made.”<sup>135</sup> However, choice of law questions, as well as those of jurisdiction, may be complicated if the employee’s or employer’s state of domicile is different than the state in which the injury occurred.<sup>136</sup> Colorado uses a test that requires that the employee’s claim meet two of three conditions: (1) contract was created in-state, (2) employment was in-state under a contract created out-of-state, or (3) there was “substantial” employment in-state.<sup>137</sup> Some states exclude coverage when the employee is injured while working in interstate commerce.<sup>138</sup>

### B. *Concussions and Dementia: Retired Players, Current Problems*

Professional football is inherently violent: the offense surges forward to advance the ball as the defense rushes against it to prevent its progress, both delivering crushing hits. Due to the extremely violent collisions that occur in every game, head injuries

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132. LARSON, *supra* note 18, § 126.10. Professor Larson lists states that contain “date of injury” provisions but comply with equitable tolling as Missouri, North Carolina, Oregon, Texas, and Wyoming. *See, e.g.,* Bryant v. Ireco, Inc., 963 S.W.2d 346, 349 (Mo. Ct. App. 1997) (finding that employee’s carpal tunnel syndrome was not actionable until employee had knowledge of causation); Howard v. Square-D Co., 494 S.E.2d 606, 608 (N.C. Ct. App. 1998) (holding that date of injury is when employee is incapable of earning wages); Wayne-Dalton Corp. v. Mulford, 79 P.3d 894, 896–97 (Or. Ct. App. 2003) (holding that date of injury is when physician informs employee that he has an occupational disease); Childs v. Haussecker, 974 S.W.2d 31, 33 (Tex. 1998) (ruling that date of injury is governed by discovery rule); Zielinske v. Johnson Cnty. Sch. Dist. No. 1 (*In re* Zielinske), 959 P.2d 706, 710 (Wyo. 1998) (applying standard that date of injury is when it is diagnosed).

133. LARSON, *supra* note 18, § 126.10; *e.g.,* Knapp v. City of New London, 691 A.2d 11, 13 n.3 (Conn. App. Ct. 1997).

134. LARSON, *supra* note 18, § 126.10. “Date of disablement” usually refers to the date that a medical professional diagnoses the condition. *E.g.,* Silverman v. Little W. Mfg. Co., 245 N.Y.S.2d 556, 558 (N.Y. App. Div. 1963).

135. 77 PA. CONS. STAT. ANN. § 1 (West 2010).

136. Take, for instance, the situation of a professional athlete. He may have signed with a team domiciled in one state, and sustain an injury in a different state while playing an away game. In such a case, the athlete will be faced with the choice of filing in the state of employment or the state in which the injury occurred. In 2011, retired player Bruce Matthews pursued a workers’ compensation claim in California, despite his playing contract mandating that Tennessee law would govern any future workers’ compensation benefits. Nat’l Football League Players Ass’n v. Nat’l Football League Mgmt. Council, 2011 WL 31068, at \*1 (S.D. Cal. Jan. 5, 2011). An arbitrator initially found that Matthews was precluded from invoking California law. *Id.* A district court found that the contract did not violate California public policy, federal labor law, or the Full Faith and Credit Clause. *Id.* at \*4–8. Therefore Matthew’s claim could proceed in California but was limited to Tennessee law. *Id.* at \*8.

137. Denver Truck Exch. v. Perryman, 307 P.2d 805, 812 (Colo. 1957).

138. *E.g.,* CAL. LAB. CODE § 3203 (West 2011).



have become a significant concern among players.<sup>139</sup> Long-term effects of concussions among retired NFL players have become more concerning as retirees are going public with their injuries.<sup>140</sup>

Specifically, the link between head injuries—often, concussions—and permanent brain damage or the onset of dementia has become an issue of consternation among retired players. One factor potentially establishing a link between concussions and dementia is that head injuries were treated differently, and with less care, in previous eras.<sup>141</sup> The president of the NFL Physicians' Society has reflected that under-reporting of concussions was common in decades past because "concussions seemed to be just part of the game."<sup>142</sup> Mike Singletary, former coach of the San Francisco 49ers, has revealed that during his playing years between 1981–1992, after a blow to the head, medical staff would "hold up two fingers, and you say 2 1/2, and you're close enough."<sup>143</sup> Another factor contributing to the risk of long-term brain damage is the pressure on players to not report symptoms, which would risk playing time and possibly jeopardize a player's job.<sup>144</sup>

In recognition of the increased publicity and the severity of injuries occurring in the League, several studies have analyzed the potential medical link between concussions and later-life cognitive impairment.<sup>145</sup> In particular, these studies have focused on the link between traumatic head injuries suffered in early life and dementia. The NFL's potential recognition of such causal links has shifted policy as well as potential liability for head injuries suffered during NFL games and practices.<sup>146</sup>

#### 1. Studies Linking Concussions to Cognitive Degeneration

In 2005, Dr. Kevin M. Guskiewicz of the University of North Carolina published a study of the links between concussions and later cognitive degeneration in retired NFL players.<sup>147</sup> He found that over sixty percent of retired players had sustained at least one concussion, and twenty-four percent reported having suffered three or more concussions.<sup>148</sup> Over seventeen percent of those players that sustained concussions during their playing days reported that the injuries had a permanent effect on their

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139. See Gary White, *Injuries to Ex-NFL Players' Brains Raise Concern*, LEDGER (Fla.), Aug. 29, 2010, <http://www.theledger.com/article/20100829/NEWS/8295036/1338> (noting NFL players routinely sustain impacts in excess of 100 G-force).

140. See *id.* (detailing NFL retirees coming forward with long-term concussion effects).

141. *Id.*

142. *Id.* Dr. Tucker elaborated that "team physicians and the medical world [did not have] a great appreciation of some for the potential long-term effects of concussions in sports." *Id.*

143. David White, *Concussions Force NFL to Rethink Policy*, S.F. CHRON., Sept. 9, 2010, at A1.

144. *Id.* But see E.M. Swift, *One Big Headache*, SPORTS ILLUSTRATED, Feb. 6, 2007, [http://sportsillustrated.cnn.com/2007/writers/em\\_swift/02/06/scorecard0212/index.html](http://sportsillustrated.cnn.com/2007/writers/em_swift/02/06/scorecard0212/index.html) (reporting NFL Commissioner Roger Goodell's perspective that he does not accept "the premise that [returning too early from concussions] was a common practice" (alteration in original)).

145. For an overview of these studies, see *infra* Parts II.B.1.

146. See *infra* Part II.B.3 for a look at the NFL's dementia Plan.

147. Kevin M. Guskiewicz et al., *Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 719 (2005).

148. *Id.* at 721.

cognitive skills later in life.<sup>149</sup> Dr. Guskiewicz wrote that “retired professional football players were found to have a progressive decline in mental health functioning and a higher rate of memory problems and cognitive decline associated with a history of concussion.”<sup>150</sup> The study concluded that dementia-related symptoms “may be initiated” by concussions.<sup>151</sup>

Two years later, in 2007, Dr. Robert Cantu of the Neurological Sports Injury Center published a study of three deceased NFL players who had suffered concussions decades before their deaths.<sup>152</sup> According to Dr. Cantu, all three players shared symptoms of “sharply deteriorated cognitive function,” including memory loss and “psychiatric symptoms.”<sup>153</sup> All three died from Chronic Traumatic Encephalopathy (CTE), which was directly attributable to concussions suffered years earlier in the NFL.<sup>154</sup> Another study published in the same year by the Center for the Study of Retired Athletes found that over twenty percent of retired football players who reported suffering three or more concussions stated that they suffered depression, which is triple the rate of players who reported sustaining no concussions.<sup>155</sup>

Support of these previous studies was strengthened in 2009 when researchers at the University of Michigan declared that, of players aged thirty to forty-nine, the number that responded affirmatively that they had been diagnosed with Alzheimer’s disease or other cognitive impairment was nineteen times the normal rate in the general

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149. *Id.* One possible critique of the study is that the retirees self-reported their own perceived cognitive impairment. Dr. Guskiewicz did not personally assess the cognitive ability of any of the respondents. The study also included a second questionnaire that was sent to a close relative to gather data not reported by the retiree. *Id.*

150. *Id.* at 722.

151. *Id.* at 723.

152. Robert C. Cantu, *Chronic Traumatic Encephalopathy in the National Football League*, 61 NEUROSURGERY 223 (2007). The players were Andre Waters, a standout safety for the Philadelphia Eagles, Mike Webster, a center for the Pittsburgh Steelers, and Terry Long, a lineman for the Pittsburgh Steelers. *Id.* at 223. Mike Webster’s decline was widely attributed in the press to the multiple concussions he suffered in the 1970s and 1980s. *E.g.*, Frank Litsky, *Mike Webster, 50, Dies; Troubled Football Hall of Famer*, N.Y. TIMES, Sept. 25, 2002, at C19; *see also* Brett Edwin LoVelle, Comment, “Mortal [K]ombat in Cleats”: An Examination of the Effectiveness of the National Football League’s Disability Plan and Its Impact on Retired Players, 36 PEPP. L. REV. 1101, 1127–33 (2009) (chronicling Webster’s challenge for disability benefits for mental health issues before death).

153. Cantu, *supra* note 152, at 223.

154. *Id.* CTE is a result of tau protein building up in individual nerve cells, causing neurofibrillary tangles. *Legal Issues Relating to Football Head Injuries (Part I & II): Hearings Before the H. Comm. on the Judiciary*, 111th Cong. 120 (2010) [hereinafter *Hearings*] (statement of Ann C. McKee, M.D., Assoc. Professor, Neurology and Pathology, B.U. School of Medicine). These tangles prevent the nerve cells from connecting with other nerve cells, eventually leading to their death. *Id.* At this time, CTE is not diagnosable during life, and is only discoverable in autopsy. Cantu, *supra* note 152, at 223.

155. Kevin M. Guskiewicz et al., *Recurrent Concussion and Risk of Depression in Retired Professional Football Players*, MED. & SCI. IN SPORTS & EXERCISE 903, 906 (2007).

population.<sup>156</sup> Of players aged over fifty years, the rate of dementia-related diagnoses was five times the national average.<sup>157</sup>

Finally, the death of Cincinnati Bengals wide receiver Chris Henry offered surprising support to earlier studies.<sup>158</sup> Researchers at West Virginia University found that Henry had CTE, resulting from multiple hits to the head, at the time of his death.<sup>159</sup> Henry was twenty-six years old and had never missed a game or any playing time due to a concussion.<sup>160</sup>

## 2. The NFL's Response

In anticipation of, and in response to, the scientific studies linking concussions and cognitive damage in retired football players, the NFL supported several studies that rebutted a causal link between head injuries and permanent brain damage. Dr. Elliot J. Pellman, former chair of the NFL's research committee on brain injuries,<sup>161</sup> published at least three reports denying or downplaying the effects of concussions on permanent cognitive function.<sup>162</sup> In 2004, Dr. Pellman's study found that fewer than two percent of NFL players' concussions resulted in prolonged post-concussion syndrome, and further found that most recovered from their symptoms and returned healthy to play in the League.<sup>163</sup> Also in 2004, Dr. Pellman noted that players out seven or more days with concussion symptoms did not demonstrate evidence of neuro-cognitive decline after multiple concussions.<sup>164</sup> In 2006, Dr. Pellman published a study that concluded that beyond one week subsequent to a concussion, NFL players did not "demonstrate decrements in neuropsychological performance."<sup>165</sup>

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156. Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 30, 2009, at A1. This study, like others detailing this topic, was based on self-reporting of retirees. Unlike the other studies, this one was based on self-reporting of receiving a doctor's medical diagnosis, in contrast to self-reporting of a retiree's subjective analysis of his own cognitive health. *Id.*

157. *Id.*

158. Sam Farmer, *Special Report: Concussions and the NFL*, L.A. TIMES, Sept. 12, 2010, at Sports 1. Chris Henry died due to injuries immediately stemming from a strange occurrence involving a fall from his pick-up truck. *Bengals WR Dies Tragically*, DETROIT NEWS, Dec. 18, 2009, at B3.

159. Farmer, *supra* note 158; WVU HEALTHCARE, *supra* note 2.

160. Farmer, *supra* note 158.

161. Peter Keating, *Doctor Yes: Elliot Pellman, the NFL's Top Medical Advisor, Claims It's Okay for Players with Concussions to Get Back in the Game; Time for a Second Opinion*, ESPN THE MAGAZINE, <http://sports.espn.go.com/espnmag/story?id=3644940> (last visited Nov. 14, 2011).

162. Daniel J. Kain, "It's Just a Concussion:" *The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697, 725 n.164 (2009).

163. Elliot J. Pellman et al., *Concussion in Professional Football: Injuries Involving 7 or More Days Out – Part 5*, 55 NEUROSURGERY 1100, 1118 (2004).

164. Elliot J. Pellman et al., *Concussion in Professional Football: Neuropsychological Testing – Part 6*, 55 NEUROSURGERY 1290, 1298 (2004). Dr. Pellman also concluded that after multiple concussions there is a "rapid return of neuropsychological function." *Id.* at 1290.

165. Elliot J. Pellman et al., *Concussion in Professional Football: Recovery of NFL and High School Athletes Assessed by Computerized Neuropsychological Testing – Part 12*, 58 NEUROSURGERY 263, 263 (2006).

In accordance with Dr. Pellman's findings, the NFL circulated a press release in 2007 that indicated its position in the ongoing research.<sup>166</sup> The press release, also distributed as a pamphlet to current players, stated that "[c]urrent research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly."<sup>167</sup> It also repeatedly maintained that research into long-term effects of concussions was ongoing, but did not recommend any findings.<sup>168</sup>

Dr. Cantu's study was published at approximately the same time as the NFL's press release.<sup>169</sup> Considering Dr. Pellman's assessments of the effects of concussions—as well as his affiliation with the NFL itself—Dr. Cantu outlined several problematic aspects of Dr. Pellman's studies in his report.<sup>170</sup> First, the NFL studies included only active players from 1996 to 2001, but neglected retired players and players over forty years of age.<sup>171</sup> Second, the studies did not take into account concussions sustained before the study was commenced or at other levels of competition (i.e., high school and collegiate).<sup>172</sup> Third, researchers failed to use a uniform method of concussion evaluation.<sup>173</sup> Finally, the studies did not cover loss of consciousness after concussions and failed to collect data regarding the circumstances of players returning to play in games following a concussion.<sup>174</sup>

After the publication of Dr. Cantu's study and the 2009 University of Michigan study linking concussions to permanent cognitive impairment and dementia,<sup>175</sup> the NFL changed its stance. The League released a poster, to be hung in NFL facilities, that warned of the effects of head injuries.<sup>176</sup> The poster read, "repetitive brain injury, when not managed promptly and properly, may cause permanent damage to your brain."<sup>177</sup> Today, players are no longer permitted to participate in a game if they experience any post-concussion symptoms, including memory loss, dizziness, or headache.<sup>178</sup> In addition, players are only permitted to play or participate in practice if they are cleared by a team doctor as well as an independent medical professional.<sup>179</sup>

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166. *NFL Outlines for Players Steps Taken to Address Concussions*, NAT'L FOOTBALL LEAGUE, <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true> (last visited Nov. 14, 2011).

167. *Id.*

168. *Id.*

169. Cantu, *supra* note 152.

170. *Id.* at 223.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* Dr. Cantu notes that many factors contribute to a player returning to play, including the importance of the player, the importance of the upcoming games, and pressure from team and league officials, media, and other sources. *Id.*

175. Schwarz, *supra* note 156.

176. White, *supra* note 143.

177. *Id.*

178. *Id.* In 2007, the rule was that players were prohibited from playing in a game if they lost consciousness after a concussion. *Id.*

179. *Id.*

There were changes to both the composition and name of the NFL's committee in response to public criticism of Dr. Pellman's studies. In March 2010, the committee's name was changed from the NFL Mild Traumatic Brain Injury Committee to the NFL Head, Neck and Spine Medical Committee.<sup>180</sup> Aside from changing its name, the committee also added two new members while Dr. Pellman resigned from the committee in March 2010.<sup>181</sup> A new member remarked that he disagreed with some of the methodologies, and disparaged the "inherent conflict of interest" that was present in previous studies conducted by Dr. Pellman.<sup>182</sup> The new members of the committee agreed that the previous studies may have been, in their words, "infected."<sup>183</sup>

### 3. The "88 Plan"

The 2006 Collective Bargaining Agreement between the NFL and the NFL Players Association included a new provision designed to address the growing concerns regarding concussions in the sport. The "88 Plan" is named for Baltimore Colts tight end John Mackey, who wore the number on his jersey and is currently suffering from dementia.<sup>184</sup> In May 2006, Mackey's wife wrote a letter to the NFL commissioner that detailed her husband's illness and her opinion that dementia among retired NFL players was a "tragic horror" that affected other retired players and their families.<sup>185</sup> In response, the League and the Players Association established the "88 Plan," which is intended to provide medical benefits to vested players who are determined to have dementia.<sup>186</sup>

Eligible players under the Plan may be reimbursed up to \$100,000 per year for services that include inpatient care, home custodial care, physician services, medical equipment, and medication.<sup>187</sup> An eligible player will not be reimbursed for any

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180. *Batjer, Ellenbogen to Lead Committee*, ESPN, Mar. 16, 2010, <http://sports.espn.go.com/nfl/news/story?id=5000898>.

181. Alan Schwarz, *Concussion Committee Breaks with Predecessor*, N.Y. TIMES, June 2, 2010, at B12.

182. *Id.* Dr. Maroon, neurosurgeon for the Pittsburgh Steelers, has characterized the NFL's reaction to the studies linking concussions with dementia as moving from "active resistance," to "passive resistance," to "passive acceptance," and finally to "active acceptance." Ben McGrath, *Does Football Have a Future?; The N.F.L. and the Concussion Crisis*, THE NEW YORKER, Jan. 31, 2011, at 41, 44.

183. Schwarz, *supra* note 181.

184. James M. Klatell, *John Mackey: From the NFL to Dementia*, CBSNEWS.COM, Feb. 11, 2009, <http://www.cbsnews.com/stories/2007/04/28/eveningnews/main2738666.shtml>. Mackey is a Hall of Fame tight end who played for the Colts in the 1960s and 1970s. *Id.*

185. Alan Schwarz, *Wives United by Husbands' Post-N.F.L. Trauma*, N.Y. TIMES, Mar. 14, 2007, at A1.

186. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2012, art. LVIII, § 2 (2011). The governing board of the Plan determines if a player has dementia as defined by the parties. Note, however, that the 2011 CBA changed key language from the former CBA regarding diagnosis. The 2011 CBA reads that the 88 Plan will reimburse dementia costs "upon the diagnosis made by a physician with experience in the field of treating dementia." *Id.* § 2(a). The 2006–2012 CBA contained no such language. NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, art. XLVIII-D, § 2. However, the 2011 CBA still contains a provision that requires the "88 Board" to find that the player has dementia. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra*, art. LVIII, § 1. It has yet to be determined if a player's physician's diagnosis alone will qualify the player under the 88 Plan. Because the NFL and NFLPA have historically denied a link between concussions and dementia, retired players suffering from dementia have not been able to collect benefits from the NFL's general disability provisions. Schwarz, *supra* note 185.

187. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. LVIII, § 2(a).

injuries sustained prior the date of his application to the Plan.<sup>188</sup> The Plan is funded by all NFL teams but its coverage is limited to those players who qualify during the term of the Collective Bargaining Agreement.<sup>189</sup> According to the NFL, more than \$7 million has been granted to retired players since the Plan's implementation in 2007.<sup>190</sup>

There are certain limitations under the Plan. A player may be eligible even if he is receiving benefits from the total and permanent disability provision of the NFL Retirement Plan.<sup>191</sup> However, the player must be listed as "Inactive" for him to be able to collect under both plans.<sup>192</sup> If the player is deemed "Active Football," "Active Nonfootball," or "Football Degenerative," he is ineligible under the "88 Plan."<sup>193</sup> If the player converts to "Inactive," any benefits paid under the Plan are reduced by any total permanent disability benefits paid under the NFL retirement plan or NFL Supplemental Disability Plan.<sup>194</sup>

#### 4. The Wenzel Case

In the spring of 2010, Dr. Eleanor Perfetto filed a workers' compensation claim in California state court on behalf of her husband, Ralph Wenzel.<sup>195</sup> From 1966 to 1973, Wenzel played as a lineman in the NFL.<sup>196</sup> At the age of fifty-six, Wenzel began to suffer some symptoms of cognitive degeneration; his wife recounted that his symptoms began with losing everyday items and, before being diagnosed, progressed to forgetting entire previous days' worth of coaching his youth football team.<sup>197</sup> At sixty-four, Wenzel was placed in an assisted-living facility because he could not dress, bathe, or feed himself.<sup>198</sup> He has been diagnosed with early-onset dementia.<sup>199</sup>

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188. *Id.* art. LVIII, § 2.

189. *Id.* art. LVIII, § 4. The 2006–2012 CBA required that former players qualify during a salary cap year, but this language was removed in the 2011 CBA. NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, *supra* note 186, art. XLVIII-D, § 4.

190. *Benefit Highlights*, NFL PLAYER CARE, <https://www.nflplayercare.com/Default.aspx> (last visited Nov. 14, 2011).

191. *88 Plan Overview*, NFL PLAYER CARE, <https://www.nflplayercare.com/88PlanOverview.aspx> (last visited Nov. 14, 2011).

192. *Id.*

193. *Id.* "Inactive" disability is non-football related, and has no time limit for when the disability arises. LoVelle, *supra* note 152, at 1115. "Active Football" disability is football-related and causes the player to be totally and permanently disabled within six months of retirement. *Id.* at 1114. "Active Non-Football" disability is not football-related and causes disability within six months of retirement. *Id.* "Football Degenerative" disability is football-related and causes total and permanent disability within fifteen years after retirement. *Id.* For insight into how a player's classification changes the benefits available to him under the NFL Retirement Plan, see generally *Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 504 F.3d 818 (9th Cir. 2007).

194. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. LVIII, § 2(b).

195. Alan Schwarz, *Worker Safety Case on Dementia Tests N.F.L.*, N.Y. TIMES, Apr. 6, 2010, at A1.

196. *Hearings*, *supra* note 154, at 120 (statement of Eleanor M. Perfetto, Ph.D., M.S., wife of Ralph Wenzel, former NFL Player).

197. Michel Martin, *Tell Me More: Former Players Battle Dementia*, NAT'L PUB. RADIO (Apr. 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=125856098>.

198. *Hearings*, *supra* note 154, at 120 (statement of Eleanor M. Perfetto, Ph.D., M.S., wife of Ralph Wenzel, former NFL Player). Dr. Perfetto testified that he "lost his sense of humor, he lost his personality, and he lost his dignity. He lost it all." *Id.*

199. Schwarz, *supra* note 195.

According to Dr. Perfetto, Wenzel's workers' compensation claim will assert causation between concussions that Wenzel suffered during his NFL career and his present dementia.<sup>200</sup> The *New York Times* has reported that Wenzel's insurance company will likely deny causation based on football-related head injuries, and instead emphasize other causes for the dementia, including family history and average rates of dementia in the general population.<sup>201</sup> Although a final judgment will probably not be rendered for several years, the potential liability for the NFL and its insurance coverage carriers is tremendous. Wenzel's medical care has cost approximately \$100,000 per year since 2006.<sup>202</sup> Assuming that "dozens and perhaps hundreds of players" may file similar claims, the NFL and its insurers could potentially confront more than \$100 million in workers' compensation payouts.<sup>203</sup> Even if Wenzel's case is unsuccessful, "a successful one is almost inevitable," according to attorneys who work in athletes' workers' compensation claims.<sup>204</sup>

### III. DISCUSSION: RETIRED PLAYERS SHOULD BE SUCCESSFUL IN BRINGING DEMENTIA CLAIMS

The availability of workers' compensation to athletes suffering from dementia due to past concussions turns on several essential elements that are prerequisites for a successful claim. A claimant must be able to prove a direct link between the past concussions and the current symptoms of dementia; he also bears the burden of showing that professional football as a particular employment exposes athletes to an increased risk of head trauma when compared to daily life.<sup>205</sup> A claimant must persuade a court that dementia should be classified as an occupational disease in order to avoid his claim being barred by applicable state statutes of limitation.<sup>206</sup> He may file for future medical expenses, which would necessitate a court accepting that dementia is analogous to the other limited cases for which future medical expenses have been awarded.<sup>207</sup> If he is eligible for the NFL's disability plan for dementia, he must show that it is in some way inadequate.<sup>208</sup> Finally, a claimant must overcome any equitable considerations that his employer may offer to defeat his claim.

Despite these numerous and onerous obstacles, it is very likely that a claimant in a dementia case, such as Ralph Wenzel, will be successful. Going even further, such a

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200. *Id.* When doctors initially asked Wenzel how many concussions he had suffered during this period, he replied, "too many times to even say." Martin, *supra* note 197. Dr. Perfetto recounted "an incident in Pittsburgh in which [Wenzel] was knocked unconscious, began repeatedly running to the wrong huddle and ultimately had to be helped off the field." Schwarz, *supra* note 195.

201. Schwarz, *supra* note 195.

202. *Id.*

203. *Id.*

204. *Id.* In an article highlighting concussions in the NFL, journalist Ben McGrath mentioned "two groups of lawyers preparing class-action suits" against the NFL for negligence in failing to warn players of the risks associated with head injuries. McGrath, *supra* note 182, at 50.

205. See *supra* notes 49–72 and accompanying text for a discussion of cases that provide a framework for linking an occupational disease with exposures of employment.

206. See *supra* notes 124–34 and accompanying text for the procedural bars that limit recovery.

207. See *supra* notes 76–78 and accompanying text for a brief summary of future medical expenses.

208. See *supra* notes 184–95 and accompanying text for a synopsis of the "88 Plan."

claimant *should* be successful. At first blush these sorts of cases seem extraordinary when compared to the average workers' compensation claim. However, when the elements of the claim are analyzed with respect to recent and accepted state rulings, it is apparent that these cases, as exceptional as they seem, fit squarely within the purview of workers' compensation.

A. *Proving Concussions Cause Dementia*

One of the most, if not *the* most, important factors in a professional athlete's claim for workers' compensation for dementia resulting from head trauma is proving causation. A claimant will have to overcome several obstacles in proving causation. First, he will have to convince the court that despite the League's denial of a causal link between concussions and later-life dementia,<sup>209</sup> recent scientific studies provide persuasive evidence that concussions are a significant causal factor in later-life dementia.<sup>210</sup> Second, he will have to satisfy any causation requirements in his particular state's workers' compensation system. Finally, he must present expert testimony that demonstrates that the employment exposed the worker to greater risks than his daily life; however, he will not have to prove that the employment risk was the sole cause of the injury or disease.

The link between concussions and later-life dementia has been increasingly supported by recent scientific studies. The various studies have found, respectively, that over sixty percent of retired NFL players have suffered at least one concussion; retired players have died from CTE attributable to concussions suffered years earlier in the NFL; a higher percentage of retired players who sustained concussions suffer depression than those who did not sustain concussions; the rate of dementia among retired NFL players is five times the national average; and even very young players can develop CTE from head trauma.<sup>211</sup> Despite the League's continued denial of a link between concussion and dementia,<sup>212</sup> these studies present quite convincing evidence that there is indeed a causal link present.

A claimant will also have to satisfy his state's statutory provision for causation. For example, Kansas's requirement for an occupational disease is that the employment must involve "a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of

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209. See *supra* Part II.B.2 for an overview of the NFL's studies.

210. See *supra* Part II.B.1 for an overview of the scientific studies. Before the U.S. House of Representatives, Dr. Robert C. Cantu, the publisher of several studies linking concussions with degenerative brain disease, stated that "[t]here is no doubt that these injuries do lead to an incurable neurodegenerative brain disease called CTE, which causes serious progressive impairments in cognition, emotion, and behavior control, even full-blown dementia." *Hearings, supra* note 154, at 67 (statement of Robert C. Cantu, M.D., Chief of Neurosurgery Service, and Director, Sports Medicine, Emerson Hospital, Concord, MA).

211. See *supra* Part II.B.1 for an overview of the scientific studies.

212. See *supra* Part II.B.2 and accompanying text for an overview of the NFL's response to studies linking concussions to cognitive degeneration. Ralph Wenzel's wife, Dr. Peretto, has publicly stated that this "denial is disrespectful of the players and the families that are suffering, and it endangers current players and children." *Hearings, supra* note 154, at 121 (statement of Eleanor M. Peretto, Ph.D., M.S., wife of Ralph Wenzel, former NFL Player). It is apparent from the responses from the scientific community, media, and past and current players, that critiques of the NFL's studies are pervasive and significant.



such disease which is in excess of the hazard of such disease in general.”<sup>213</sup> Thus in addition to proving that concussions in general are a causal factor in later-life dementia, a claimant will also have to prove that professional football, as an employment, presents a heightened risk of concussions when compared to other occupations. This will probably not be difficult to overcome, considering the persuasive circumstantial evidence that retired players suffer a rate of dementia often significantly higher than the national average.<sup>214</sup>

One of the challenges facing retired professional athletes claiming workers' compensation is proving that dementia is caused by past repeated concussions, and not from other factors. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) cautions that in diagnosing “Dementia Due to Head Trauma,” clinicians should deduce that the dementia is not a result of other causes, like Alzheimer's or other disorders.<sup>215</sup> Pinning the exact cause of the dementia on past head trauma will be a question for the claimants' medical professional to resolve. However, the League will probably counter with expert testimony that asserts alternate risk factors or causes for the dementia. In such a case, the court will have to resolve a “dual causation” problem.

In *Fiore v. Consolidated Freightways*,<sup>216</sup> the New Jersey Supreme Court found that there was significant disagreement among the parties' experts over the cause of an employee's heart problems.<sup>217</sup> The employee argued that exposure to toxic substances caused his heart problems; the employer insisted that personal risk factors, including his cigarette habit, weight, and family history, contributed to the problems.<sup>218</sup> The court observed that the resolution of the “dual causation” problem involves distinguishing the degree to which each cause contributed to the injury.<sup>219</sup>

*Fiore* made two findings that are pertinent to the claims of dementia among retired professional athletes. First, the court found that the employee must show that conditions characteristic of the employment “substantially contributed in a material way to the disease.”<sup>220</sup> Second, the employee must show by medical evidence that the employment exposure actually contributed to the disease.<sup>221</sup> Additionally, the exposure must have been so substantial that the injury would not have developed to the current extent in the absence of the employment exposure.<sup>222</sup> *Fiore* held that these factors can

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213. KAN. STAT. ANN. § 44-5a01(b) (West 2010).

214. See Alan Schwarz, *Dementia Risk Seen in Players In N.F.L. Study*, N.Y. TIMES, Sept. 30, 2009, at A1. Specifically, the study conducted by the University of Michigan found players age fifty and above have a rate of dementia five times the national average, while players age thirty to forty-nine have a rate nineteen times higher. *Id.*

215. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 162 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

216. 659 A.2d 436 (N.J. 1995). See *supra* notes 54–55 and accompanying text for a discussion of how *Fiore*'s holding influences general causation analyses for occupational diseases.

217. *Fiore*, 659 A.2d at 441.

218. *Id.* at 439–40.

219. *Id.* at 441–42.

220. *Id.* at 446.

221. *Id.*

222. *Id.*

be distilled into the question: did the employment expose the worker to greater risks than his daily life?<sup>223</sup>

These requirements are further elucidated by *Ford v. Industrial Commission of Arizona*.<sup>224</sup> The issue in *Ford* was whether the employee had to prove that the hazards of employment were the *sole* cause of the occupational disease in order for the worker to be compensated.<sup>225</sup> After examining prior law and policy behind the workers' compensation system, the court held that an employee need not establish that a risk inherent in his employment is the sole cause of the injury or disease.<sup>226</sup> Employees are therefore eligible to assert a claim for an occupational disease if they can prove that the employment hazard was a contributing risk that materially affected the severity or onset of the disease.

Considering the above requirements, professional athletes asserting a dementia claim should not confront an insurmountable hurdle in proving causation. Athletes have the weight of recent scientific studies on their side; they also have state statutory requirements of causation that can be satisfied. In contrast, *Fiore* and *Ford* demonstrate that athletes will probably be confronted with medical evidence of other risk factors that could have caused the dementia. However, claimants will only have to prove that the employment involved a specific substantial risk, and that the disease is at its current severity due to the exposure of the claimants' employment. They will not have to prove that head trauma was the *sole* cause of the dementia. These considerations make it probable that a professional athlete can successfully prove causation.

#### B. A Flexible Classification of Dementia

Assuming that causation can be proved, classifying concussion-caused dementia as either an injury or an occupational disease under the workers' compensation statutes will determine if an athlete's dementia claim can survive a motion to dismiss. Claimants for dementia must be very cognizant of the divergent treatment that injuries receive in comparison with occupational diseases. In order to present the court with the broadest array of options of how to classify dementia, claimants should allege both an injury and an occupational disease. This will allow the court to use a flexible approach, permitting a claimant to prove either an injury or an occupational disease, according to the circumstances of the individual's case. This will also allow a court to avoid classifying dementia per se as either injury or disease.

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223. *Id.* at 448.

224. 703 P.2d 453 (Ariz. 1985). *Ford* involved a miner who was exposed to industrial irritants for twenty-two years. *Id.* at 455. The worker filed a workers' compensation claim that was questioned on whether his pulmonary problems were an aggravation of an already existing condition. *Id.* See *supra* notes 56–59 and accompanying text for a discussion of how *Ford's* holding influences general causation analyses for occupational diseases.

225. *Ford*, 703 P.2d at 454.

226. *Id.* at 462. The court also held that occupational disease claims should be filed under the occupational disease provisions of the workers' compensation statute rather than under ordinary single-event injury provisions. *Id.*

An injury, as opposed to an occupational disease, begins the statute of limitations running on the date that the injury occurred.<sup>227</sup> In the case of an occupational disease, the limitations period begins running at the date that the disease manifested itself. Therefore, if concussion-caused dementia is considered an injury under the relevant statutes, most dementia claims will be effectively barred; consider that Ralph Wenzel's dementia did not become apparent until decades after his last playing day in the NFL.<sup>228</sup> A more flexible classification would be to claim concussion-caused dementia as an occupational disease, permitting the statute of limitations to toll until the disease (i.e., dementia symptoms) becomes apparent. This would allow retired athletes like Wenzel to assert a valid claim unbarred by the statute of limitations.

Although there are no state decisions classifying dementia as either an injury or an occupational disease, a court contemplating this classification should find *Brunell v. Wildwood Crest Police Department*<sup>229</sup> to be highly persuasive.<sup>230</sup> Construing PTSD-DO flexibly as an injury or occupational disease allowed the *Brunell* court to avoid both notice and claim statutes of limitation that would have barred recovery.<sup>231</sup> The court recognized that "PTSD and other diseases with a quiescent period . . . remain dormant" until injury notice and claim periods pass.<sup>232</sup> The court went further in holding that:

[I]n the limited class of cases in which an unexpected traumatic event occurs and the injury it generates is latent or insidiously progressive, an accident for workers' compensation filing purposes has not taken place until the signs and symptoms are such that they would alert a reasonable person that he had sustained a compensable injury.<sup>233</sup>

*Brunell* expressly held that this "discovery rule" should not be applicable to all injury cases; in cases involving latent diseases, the statutes of limitation should only toll until the employee knows the nature and seriousness of the disease.<sup>234</sup>

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227. See *supra* Part II.A.3 for a discussion of how limitations periods restrict workers' compensation claims.

228. Schwarz, *supra* note 195.

229. 822 A.2d 576 (N.J. 2003).

230. See *supra* notes 61–72 and accompanying text for the factual history and court's reasoning.

231. *Brunell*, 822 A.2d at 592.

232. *Id.* Arizona has disclaimed any compensable distinction between occupational diseases that are the result of one-time exposure and long-term exposure. *Ford v. Indus. Comm'n of Ariz.*, 703 P.2d 453, 461 (Ariz. 1985). Both types of diseases are equally compensable under workers' compensation statutes. *Id.*

233. *Brunell*, 822 A.2d at 594.

234. *Id.* at 598. Most states use the "discovery rule" for occupational diseases, thereby tolling the statute of limitations until the employee should reasonably know the cause and existence of the disease. See *supra* Part II.A.3 for a brief overview of how most states deal with notice and claim limitations for occupational diseases. For a thorough analysis of the federal treatment of statutes of limitations, equitable tolling, and the "discovery rule," see Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493 (2004).

In general, the justification for a "discovery rule" rather than a strict date of injury rule, in any cause of action, is the "perceived unfairness" to a plaintiff who is barred from asserting an otherwise valid claim because of a latent or unknowable injury that does not produce symptoms until the statute of limitation has run. *Id.* at 497. In 1949, the Supreme Court recognized the "discovery rule" in a federal tort case where the Court permitted the federal statute of limitations period to toll until symptoms were discovered; otherwise, the plaintiff's claim would have been barred solely because of the "unknown and inherently unknowable" lung

A court deciding how to classify dementia should follow the *Brunell* framework. PTSD-DO is similar to dementia in several ways. First, according to the DSM-IV-TR, “Dementia Due to Head Trauma” is a recognized mental disease that can result from a single injury or from repeated injury.<sup>235</sup> Dementia is non-progressive when it is attributed to a single injury, but progressive when resulting from repeated head injury.<sup>236</sup> Therefore, like PTSD-DO in *Brunell*, dementia can result from a single injury or repeated trauma.

Second, *Brunell* also observed that PTSD-DO is an occupational disease when the job is marked by a specific known hazard that has an expected risk of specific injury.<sup>237</sup> In light of the scientific studies that have linked professional football concussions with later-life dementia,<sup>238</sup> it is likely that a court could conclude that the employment of professional football carries with it a specific known risk of head injury that has been linked with dementia. In addition, dementia in the context of repeated head injury diagnoses is not a mental disease triggered by *mental* stimuli, like PTSD-DO.<sup>239</sup> Dementia Due to Head Trauma is attributable to physical damage to the brain of the patient.<sup>240</sup> Where *Brunell* found support in New Jersey state case law for compensating mental diseases caused by mental stimuli, a court analyzing dementia caused by concussions would not have to go that far.

Finally, the flexible approach of *Brunell* would provide the broadest inclusion of dementia sufferers in the workers’ compensation system.<sup>241</sup> Because Dementia Due to Head Trauma can result from either a single injury or repeated trauma, classifying it narrowly as either an injury or an occupational disease would preclude certain employees from asserting valid claims due to the notice and claim statutes of limitation. This is especially true in states that have not adopted the “discovery rule.” Allowing a flexible classification of either an injury or an occupational disease would include the largest number of injured employees within the workers’ compensation scheme, thereby effectuating one of the goals of the remedial nature of the statutes.

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injury whose symptoms “had not yet obtruded on his consciousness.” *Urie v. Thompson*, 337 U.S. 163, 169 (1949). Justice Scalia has expressed his disapproval of the “discovery rule,” except in cases of fraud. *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring). Scalia would rather implement the strict date of injury rule and leave it to Congress to codify the “discovery rule” if it deems necessary. *Id.* at 37–38. Scalia has, in his usual colorful manner, described the Court’s expansion of the “discovery rule” to other contexts as “bad wine of recent vintage.” *Id.* at 37.

235. DSM-IV-TR, *supra* note 215, at 164. Notably, the DSM-IV-TR observes that “[h]ead injury occurs most often in young males and has been associated with risk-taking behaviors.” *Id.*

236. *Id.*

237. See *supra* note 71 and accompanying text for the *Brunell* court’s clarification of when a specific employment results in a heightened risk of an occupational disease.

238. See *supra* Part II.B.1 for an overview of these scientific studies.

239. See *Brunell*, 822 A.2d at 587 (recognizing that PTSD-DO is attributable to mental stimuli).

240. DSM-IV-TR, *supra* note 215, at 164.

241. The court in *Brunell* recognized that workers’ compensation systems are intended to compensate injured employees, and constitute important social legislation. *Brunell*, 822 A.2d at 582. As remedial statutory systems, workers’ compensation provisions should be liberally construed. *Id.* The statutes are to be interpreted in a manner that includes as many cases as possible within coverage. *Id.*

C. *Workers' Compensation Should Include Professional Athletes*

Various states treat professional athletes in different ways, ranging from specific inclusion as employees in the workers' compensation system, to specific exclusion.<sup>242</sup> Before a professional athlete files a workers' compensation claim against his team, it is essential for him to determine his status under the relevant state laws. If professional athletes are specifically excluded from coverage, or if the employer is permitted to elect to forego state coverage, the claimant has no recourse for workers' compensation remedies.<sup>243</sup>

Professional athletes also face unique challenges to compensation stemming from the perception that they do not deserve to recover state-guaranteed workers' compensation. Professor Larson identified several problematic "person-on-the-street notion[s]" that support restricting athletes' coverage.<sup>244</sup> The first is that professional athletes make millions in income annually, and they accordingly do not need extra compensation for injuries.<sup>245</sup> In reality, the average yearly wage for professional athletes is \$79,460.<sup>246</sup> Even if athletes were compensated at a much higher rate than average citizens, workers' compensation systems make no exception for high-salaried employees.<sup>247</sup>

Other concerns regarding professional athletes' compensation revolve around the nature of the employment. The notion that athletes are protected by long-term contracts persuades some to believe that the contracts themselves protect the players' income and offer medical care in the event of injury.<sup>248</sup> Again, this is a misconception; the average length of an NFL player's career is two to four years while the average citizen works approximately forty years.<sup>249</sup> The struggles of post-NFL life have been documented

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242. See *supra* Part II.A.2 for an overview of state treatment of professional athletes. Note also that the 2011 NFL Collective Bargaining Agreement contains a provision that recognizes that some states will exclude coverage for NFL players. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. XLI, § 1. In the event that states exclude coverage, teams are directed to "voluntarily obtain" coverage or "otherwise guarantee equivalent benefits." *Id.*

243. Although it is beyond the scope of the present analysis, it has been persuasively argued that state statutes that exclude professional athletes from workers' compensation coverage are inappropriate. Carlin & Fairman, *supra* note 79, at 119–20. Blanket exclusions and set-offs specifically created for professional athletes are not based on a legal principle, but rather, are the result of special interest groups that have successfully lobbied the state in the interest of the professional sports teams. *Id.* at 120. Carlin and Fairman found that "restrictions on the application of workers' compensation to professional athletes remain unjustified." *Id.*

244. LARSON, *supra* note 18, § 22.04. Carlin and Fairman conclude that efforts to restrict professional athletes' access to workers' compensation are ill-founded. Carlin & Fairman, *supra* note 79, at 126–27. They find that the objectives of the systems—certain, prompt, and reasonable compensation for occupational injuries—would be jeopardized if professional athletes were excluded from the systems. *Id.*

245. LARSON, *supra* note 18, § 22.04.

246. *Professional Athlete*, BUREAU OF LABOR STATISTICS, [www.bls.gov/k12/sports02.htm](http://www.bls.gov/k12/sports02.htm) (last modified Mar. 19, 2010).

247. LARSON, *supra* note 18, § 22.04(1)(b).

248. *Id.*

249. Stan Feldman, *NFL Players Are Not as Well-Off as We Think*, NYUNews.com (Sept. 17, 2010), <http://nyunews.com/sports/2010/09/16/17salaries>.

publicly,<sup>250</sup> and the NFL has taken the initiative to educate, train, and prepare current NFL players for post-NFL careers.<sup>251</sup> Although some of the more famous retired players may find their way into broadcasting or commentating, the large majority of retired players must eventually find their way into the average working sector of the American public.<sup>252</sup>

Also, some manifestation of “assumption of the risk” may come into play.<sup>253</sup> The idea that professional sports—especially football—are inherently violent and so injuries are expected, or natural, or somehow not accidental, may influence one’s thinking. Yet, workers’ compensation systems have replaced “assumption of the risk” analyses present in common-law tort actions.<sup>254</sup> Violent collisions are a part of the job description, and so as long as tackles, sacks, and blocks are in the “course of employment,” injuries resulting from them should be compensable.

#### D. *Future Medical Expenses as Reasonable Compensation*

In general, workers’ compensation includes both wage-loss payments and medical expenses.<sup>255</sup> Because professional athletes suffering from dementia are largely past the age of employment, and the symptoms of dementia do not manifest themselves until later in life, claimants will probably not request wage-loss payments. They do not have current or future employment in mind. The symptoms of dementia manifest in late age, and thereby do not interfere with traditional working years. Instead, athletes will want to collect medical expenses attributable to doctors’ fees, medication, and long-term care facilities that treat dementia.

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250. *E.g.*, Alejandro Bodipo-Memba, *Tackling Life After the Game: Most NFL Pros Find the Adjustment Difficult*, DETROIT FREE PRESS, Jan. 28, 2006, at B1. Many athletes spend years after their last playing days trying to get back in the League, while maintaining their NFL lifestyle. Bodipo-Memba documented the story of Duval Love, who was retired by a knee injury at age thirty-three. *Id.* After retirement, friends persuaded Love to invest in several start-up ventures, all of which failed and depleted his savings. *Id.*

251. The League currently has a Career Development Program that provides professional development training, internships, interviews, and shadowing for NFL players to transition into a second career after football. One specific program that seems popular is the Bank of America Merrill Lynch internship, which trains players to be financial advisors. *Player Development*, NAT’L FOOTBALL LEAGUE, <http://www.nfl.com/playerdevelopment/career> (last visited Nov. 14, 2011).

252. Some players are forced to find “normal” jobs after retirement. Consider the case of Rocket Ismail, a ten-year veteran of the NFL. After retiring, he lost ill-founded investments in a restaurant franchise, movie, music label, cosmetics, telecommunications, and retail shops. Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Mar. 23, 2009, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1153364/4/index.htm>. According to the article, seventy-eight percent of NFL players who have been retired for two years have filed for bankruptcy or are under financial stress. *Id.*

253. *See* *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350, 356 (Mo. Ct. App. 1981) (holding that the violent nature of football precludes a finding of an accidental injury). The decision has been widely criticized for its erroneous holding. *E.g.*, LARSON, *supra* note 18, § 22.04(1)(b); Carlin & Fairman, *supra* note 79, at 106. In addition, Missouri law now encompasses professional athletes. *See* MO. ANN. STAT. § 287.270 (West 2011) (mandating that professional athletes’ employers are entitled to post-injury credits against payments).

254. *See supra* notes 19, 33–34 and accompanying text for arguments rebutting assumption of the risk as a defense.

255. *See supra* note 20 and accompanying text for a typical provision.

Most states do not limit the duration or amount of compensable medical payments.<sup>256</sup> For example, Oregon's workers' compensation system includes payment for medical expenses including surgery, nursing, hospital services, medications, and physical therapy.<sup>257</sup> Under the provision, an employee can collect medical services until treatment is no longer necessary, and medical services can be compensable for the life of the worker.<sup>258</sup> Therefore, if an athlete is successful in asserting a claim, he should be entitled to collect ongoing medical expenses for treatment due to his dementia. Courts should not limit compensation to any number of years after a claim is asserted, nor should they put any statutory limit on the amount compensable.<sup>259</sup>

Claimants may attempt to collect future medical expenses for continuing treatment,<sup>260</sup> considering that Dementia Due to Head Trauma is typically progressively debilitating.<sup>261</sup> Most courts are not comfortable with awarding future medical expenses.<sup>262</sup> However, dementia claims could fall into the exception that some states have created for injuries that require continuing life-long medical treatment.<sup>263</sup> Injuries and expenses that have been judged to justify the future medical treatment exception include continuing prescription medication resulting from heart attack,<sup>264</sup> annual chest scans for work-related exposure to tuberculosis,<sup>265</sup> \$200.00/month for pain management treatment,<sup>266</sup> and treatment for anatomical nerve disability in one arm.<sup>267</sup>

Where courts have found it permissible to award future medical expenses, the injuries share several similar characteristics. First, the courts found that the claimed future expenses were reasonable, and allocated compensation that reflected such anticipated reasonable expenses. Second, and perhaps more important, the treatment of the injury was expected and flowed naturally from the injury. Finally, the future treatment required was consistent on a monthly or yearly basis.

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256. See *supra* note 76 for a list of the states that restrict duration of compensation.

257. OR. REV. STAT. ANN. § 656.245(1)(b) (West 2011).

258. *Id.* § 656.245(1)(a)–(b); see *Miller v. Weyerhaeuser Co.*, 713 P.2d 643, 644 (Or. Ct. App. 1986) (finding that sawmill worker was entitled to collect medical expenses as long as continuing pain resulted from work injury).

259. See *Nat'l Linen Serv./Nat'l Serv. Indus., Inc. v. Parker*, 461 S.E.2d 404, 409 (Va. Ct. App. 1995) (reasoning that a committee that reviewed the reasonableness of medical costs was not binding on final award).

260. See *supra* notes 77–78 and accompanying text for a brief discussion of when future medical expenses are awarded.

261. See *supra* notes 235–40 and accompanying text for the DSM-IV-TR classification of dementia.

262. See *supra* notes 77–78 and accompanying text for cases that would permit such an award.

263. Professor Larson distinguishes future medical treatment that is generally noncompensable from the extraordinary exceptions that could be compensable. LARSON, *supra* note 18, § 94.01(5). He contrasts those expenses such as an operation in the indefinite future that was made necessary by the past injury (generally noncompensable) with “needed medical benefits for life.” *Id.*

264. *Armstrong v. Unit Drilling*, 43 P.3d 383, 385–86 (Okla. 2002). This case, and the next two, are particularly representative examples from Professor Larson's supplementary list of cases for awards of anticipated future medical expenses. LARSON, *supra* note 18, § 94.01.

265. *Cunningham v. Research Med. Ctr.*, 108 S.W.3d 177, 179–80 (Mo. Ct. App. 2003), *overruled by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

266. *Purdy v. Belcher Ref. Co.*, 781 F. Supp. 1559, 1562 (S.D. Ala. 1992).

267. *U.S. Fid. & Guar. Co. v. Morgan*, 795 S.W.2d 653, 656 (Tenn. 1990).

Treatment for dementia can, and should, fall into this scheme. A court considering the issue will have to first find that the relief requested—medication, care facilities, equipment, doctors’ fees—is reasonable in light of available options that are accepted by the medical community as adequate treatment. Second, the court would need to find that the nature of dementia lead to the expected costs for medical treatment. Dementia Due to Head Trauma is progressive by diagnosis, and thus it is expected that symptoms and debilitation will worsen, making continuing treatment necessary.<sup>268</sup> Finally, medical treatment for dementia requires consistent future treatment on a daily, monthly, and yearly basis.<sup>269</sup> According to these factors, dementia is an ideal candidate for satisfying a court’s analysis of future medical expenses.

*E. Interplay with the “88 Plan”*

In the case of an NFL player seeking workers compensation for dementia, the existence and application of the “88 Plan” complicates such a claim.<sup>270</sup> The Plan requires that a player be “vested” in order to qualify, and that he has been previously determined as having dementia.<sup>271</sup> “Vesting” under the Plan requires that a current player play in three or more seasons.<sup>272</sup> Players from Wenzel’s era will need to show four credited seasons to qualify for the “88 Plan.”<sup>273</sup> Therefore, tragically, men who were in the NFL for fewer than four seasons are ineligible for any benefits payable for dementia under the “88 Plan.”

The Plan leaves the determination of whether a player has unequivocally shown that he, in fact, has dementia up to the “88 Board,”<sup>274</sup> which is the same six-member panel that reviews the League’s disability policy—the same panel that does not

268. See *supra* notes 235–40 and accompanying text for the DSM-IV-TR classification of dementia.

269. For instance, Ralph Wenzel was placed in a long-term care facility after his dementia symptoms became too burdensome for his wife to care for him on her own. *Hearings*, *supra* note 154, at 120 (statement of Eleanor M. Peretto, Ph.D., M.S., wife of Ralph Wenzel, former NFL Player).

270. See *supra* Part II.B.3 for an overview of the Plan.

271. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. LVIII, § 1.

272. BERT BELL/PETE ROZELLE NFL RETIREMENT PLAN § 1.34 (Apr. 1, 2007), available at <http://nflretired.baughweb.com/Resources/BertBellPlans/2007Bert%20Bell%20Pete%20Rozelle.pdf>. Players in the League after 1992 need three seasons to be eligible. *Id.* Players without a season after 1992 need four seasons. *Id.* This is a decrease in the requirements; when the Plan was adopted in 1961, players were vested if they accrued five or more seasons beginning in 1959. *Bert Bell/Pete Rozelle NFL Player Retirement Plan*, NFL PLAYERS ASSOCIATION, <https://www.nflplayers.com/Articles/Public-News/Bert-Bell-Pete-Rozelle-NFL-Player-Retirement-Plan/> (last visited Nov. 14, 2011). The 1964 revisions to the Plan included seasons prior to 1959 in a player’s credited seasons. BERT BELL NFL RETIREMENT PLAN art. 7 (Oct. 13, 1964), available at <http://nflretired.baughweb.com/Resources/BertBellPlans/1964Bert%20Bell.pdf>.

273. See BERT BELL/PETE ROZELLE NFL RETIREMENT PLAN, *supra* note 272, § 1.34(b) (dictating requirement that athletes playing before the 1992 season need four seasons for vesting).

274. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. LVIII, § 1. Note that the 2011 CBA changed key language regarding diagnosis. The 2011 CBA reads that the 88 Plan will reimburse dementia costs “upon the diagnosis made by a physician with experience in the field of treating dementia.” *Id.* § 2(a). The 2006–2012 CBA contained no such language. NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, *supra* note 186, art. XLVIII-D, § 2. However, the 2011 CBA still contains a provision that requires the “88 Board” to find that the player has dementia. NFL COLLECTIVE BARGAINING AGREEMENT 2011–2020, *supra* note 186, art. LVIII, § 1. It is yet to be determined if a player’s physician’s diagnosis alone will qualify the player under the 88 Plan.



consider dementia football-related.<sup>275</sup> Ralph Wenzel's wife has criticized this aspect of the Plan for the requirement that the player be diagnosed with dementia before any compensation is available.<sup>276</sup> Since dementia is a slow-progressing disease, medical expenses may arise before a formal diagnosis of dementia is made. Dr. Perfetto has advocated that the League "find players with early signs and symptoms to provide support so their families can better manage the ordeal before them. This is not an academic exercise."<sup>277</sup>

There is another major insufficiency with the League's "88 Plan." The Plan reimburses players and their families for medical costs; it does not provide up-front compensation for future medical expenses.<sup>278</sup> Ralph Wenzel's wife, for instance, has private health insurance that covers many expenses that would otherwise be out-of-pocket.<sup>279</sup> She is concerned that, in her words, other players "won't be able to get long-term-care insurance . . . [a]nd a lot of families don't have the health-care plan that I do. I'm lucky."<sup>280</sup> Even though the Plan reimburses up to \$100,000 per year, these payments initially have to be paid by the players themselves or their families; the burden is quickly compounded where retired players either do not have health insurance, or have insurance that fails to cover the full cost of their medical treatment.

#### F. *Inadequacy of Employer's Equitable Considerations*

Workers' compensation statutes are remedial in nature and should therefore be liberally construed.<sup>281</sup> In applying workers' compensation to claimants, courts attempt to interpret the statutes to include the largest possible class of workers.<sup>282</sup> Also pertinent to any workers' compensation case is the idea that workers' compensation systems were instituted in order to provide injured workers with recompense for work-

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275. Erika A. Diehl, Note, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 115 (2010); see also A. Jason Huebinger, *Beyond the Injured Reserve: The Struggle Facing Former NFL Players in Obtaining Much Needed Disability Assistance*, 16 SPORTS LAW. J. 279, 297 (2009) (showing that the NFLPA does not consider dementia football-related for the purposes of its disability plan). For an evaluation of the fairness of the NFL's disability claim process, see Jeffrey Dahl, *The NFL and ERISA: Disabled Players Thrown for Another Loss*, 13 J. CONSUMER & COM. L. 114, 123-24 (2010).

276. *Hearings*, *supra* note 154, at 121 (statement of Eleanor M. Perfetto, Ph.D., M.S., wife of Ralph Wenzel, former NFL Player).

277. *Id.*

278. NFL COLLECTIVE BARGAINING AGREEMENT 2011-2020, *supra* note 186, art. LVIII, § 2 ("The Plan will reimburse, or pay for, certain costs related to dementia."); see also LoVelle, *supra* note 152, at 1148 n.213 (highlighting reimbursement provision).

279. Schwarz, *supra* note 195.

280. *Id.*

281. *E.g.*, Brunell v. Wildwood Crest Police Dep't, 822 A.2d 576, 582 (N.J. 2003); Faul v. Bonin, 678 So. 2d 627, 630 (La. Ct. App. 1996). See generally 99 C.J.S. *Workers' Compensation* § 52 (2010) (providing an overview of construction and interpretation of statutes).

282. *E.g.*, Atkinson v. Peterson/T & P Found., 962 S.W.2d 912, 916 (Mo. Ct. App. 1998); Re/Max of N.J., Inc. v. Wausau Ins. Cos., 697 A.2d 977, 980 (N.J. Super. Ct. Ch. Div. 1997).

related injuries.<sup>283</sup> With this background in mind, courts should not narrowly analyze any issue that would have the effect of excluding or discouraging potential claimants.

A claim from a retired professional athlete for compensation covering dementia stemming from head injuries sustained during playing years will be a case of first impression for any state court. But such a claim's uniqueness should not influence recoverability. *Brunell* again provides an example of how courts should proceed. Where employees claimed compensation for post-traumatic stress disorder, the New Jersey court examined the remedial nature of the workers' compensation system, the applicable provisions of the statutes, and the medical classification of the disease.<sup>284</sup> Such claims represented New Jersey's first analysis of the unique nature of the disease, but the court construed the statute liberally to make such claims actionable.<sup>285</sup> Dementia claims should be given the same treatment.

An employer could attempt to make an equitable argument if ownership of a team has changed since the injury occurred. Perhaps the team would claim that since the current owners were not a part of the original employer, and not involved in the injury or its attendant circumstances, the current owner and management should not be liable for its predecessor's employment relationships. Such an argument holds no water. The doctrine of successor liability holds that subsequent employers inherit the liability of their predecessors.<sup>286</sup> Because the new ownership or management maintains substantial continuity with the previous ownership or management, with the same type of employees and work force, there is no reason to exempt the new owners or management from liability.<sup>287</sup> The mere fact that new individuals are in charge of what is basically the same team is no defense to workers' compensation liability.

Finally, the athlete may have a compelling equitable consideration on his side. If an athlete suffering from dementia is unable to obtain compensation through league disability plans, he may effectively have no way to collect for his injury.<sup>288</sup> He would have suffered a work-related injury in the course of his employment, but would be unable to collect any compensation from his employer. Acknowledging that a worker would be left to cover such expenses as long-term medical care, medications, and doctors' fees from personal medical insurance or out-of-pocket may influence a court to find for the athlete.

If, for instance, the NFL's "88 Plan" makes it unreasonably difficult for retired athletes suffering from dementia to be compensated, a court would be more likely to consider the claim within the purview of workers' compensation. This argument could proceed under two scenarios. First, as discussed above, the "88 Plan" requires that claimants be "vested" with three to four whole seasons of their career in the NFL prior

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283. See *supra* notes 18–22 and accompanying text for an overview of the purposes and function of workers' compensation provisions.

284. *Brunell*, 822 A.2d at 581–87.

285. *Id.* at 587–90.

286. *E.g.*, 65 CAL. JUR. 3D *Work Injury Compensation* § 60 (2010).

287. *Id.*

288. See *supra* Part III.E for a discussion of the NFL's disability plan and its interaction with workers' compensation claims.

to eligibility.<sup>289</sup> This leaves out players with fewer than three to four seasons of experience in the League. Second, the Plan reimburses medical expenses related to dementia, but does not provide up-front funds for future expenses. For players and their families who do not have adequate health insurance, the Plan could represent an infeasible option for long-term care.<sup>290</sup>

Considering these factors, a court may find it likely that the League's dementia plan is inadequate to serve the needs of many of the potential claimants of medical compensation. If a court were to find the Plan's requirements excessively restrictive in light of the need for compensation, it may find that workers' compensation is a more equitable scheme to effectuate compensation for dementia-related costs.<sup>291</sup> Therefore, although the Plan provides some coverage for dementia-related expenses, workers' compensation may be the more effective means to remedy the past injury and current disease.

#### IV. CONCLUSION

Professional football can be a brutal sport, punishing an athlete's body on a weekly basis. Yet the most fragile and precious body part, the brain, has been the victim of some of the most violent and destructive consequences of a professional football career.<sup>292</sup> Although media exposure on the issue of football concussions has spurred interest and change in the NFL's policies, much less attention has been given to improving the shattered lives of retired players who have been affected with dementia. These men are no longer in the glory of their playing days, and it is imperative that society and the legal system not turn a blind eye on their plight.

This Comment seeks to provide one potential avenue for retired athletes to collect the compensation that they require to manage the disease of dementia. Workers' compensation systems are remedial in nature, and should be construed in a way to include the broadest number of claimants.<sup>293</sup> Although retired athletes' dementia claims seem exceptional, they satisfy the requirements of a standard workers' compensation claim. Not only *can* such a claim succeed, but it *should* succeed. Dementia is a

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289. See *supra* notes 272–73 and accompanying text for a discussion of the “vesting” requirements of the Plan.

290. See *supra* notes 278–80 and accompanying text for a discussion of the impact on players without adequate health insurance.

291. At least some retired NFL players find the League's disability plans to be remarkably insufficient. Brent Boyd, an offensive lineman for the Minnesota Vikings in the 1980s, has publicly denounced the NFL for its “‘delay, deny, and hope they die’ posture” towards retired players. *Hearings, supra* note 154, at 251 (statement of Brent Boyd, disabled retired player, concussion victim of NFL, and Founder, Dignity After Football.org). He stated that retired players “do not have the resources to fight the NFL, whether legally or in the court of public opinion.” *Id.*

292. Contemporary football is no less violent than the game played decades ago. Pittsburgh Steelers safety Troy Polamalu has said that the prevalence of the spread-receiver passing game has led to more space between players, allowing for “more opportunity for these big hits.” McGrath, *supra* note 182, at 47 (emphasis omitted). One weekend in October 2011 has been dubbed “Black and Blue Sunday” due to at least eleven players in the NFL being diagnosed with concussions. *Id.* at 45.

293. See generally 99 C.J.S. *Workers' Compensation* § 52 (2010) (providing an overview of construction and interpretation of workers' compensation statutes).

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progressive disease that requires intensive and prolonged medical care. These retired athletes need and deserve compensation from the repeated injuries suffered during the course of their employment with the NFL.

Ralph Wenzel's case is the first dementia claim to be filed against the NFL by a retired player; regardless of his success or failure, there will likely be more claims to follow.<sup>294</sup> There is little legal recourse for retired athletes afflicted with dementia, yet workers' compensation offers a feasible and appropriate remedy for such claims. The necessary foundational case law exists for a court to follow this Comment's approach to fashioning a suitable compensation award—all that is needed is a court to put the pieces together. It is imperative to remember that players like Ralph Wenzel may have no financial support from the NFL or from private health insurance. Workers' compensation may be the only viable means of addressing their claims.

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294. Schwarz, *supra* note 195. Schwarz has indicated that several lawyers involved in athletes' workers' compensation claims have stated that "a successful [dementia claim] is almost inevitable." *Id.*