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Professional Athletes are "Seeing Stars": How Athletes are "Knocked-Out" of States' Workers' Compensation Systems

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COMMENT: PROFESSIONAL ATHLETES ARE “SEEING STARS”: HOW ATHLETES ARE “KNOCKED-OUT” OF STATES’ WORKERS’ COMPENSATION SYSTEMS

By: Matthew Friede

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I. INTRODUCTION

Professional sports leagues have quickly become one of the most profitable and influential organizations in North America. The United States' four major professional sports leagues—Major League Baseball (MLB), National Basketball Association (NBA), National Football League (NFL), and National Hockey League (NHL)—earn an estimated twenty-three billion dollars annually in total revenue.¹ However, those billions of dollars come at a large physical cost to professional athletes.² Every professional athlete understands that there is a substantial risk of injuries.³ Injuries are a daily occurrence in all sports, but especially in contact sports.⁴

Concussions are one of the most prominent sports-related injuries today.⁵ According to the Centers for Disease Control and Prevention (CDC) yearly estimates, an average of 1.8 to 3.8 million concussions occur annually by athletes at all levels.⁶ Between 5 and 19% of athletes, in all sports and levels, will receive a concussion during a given year.⁷

While concussions are generally acute traumas, they have recently been linked to degenerative brain diseases like chronic traumatic encephalopathy (CTE), Alzheimer's disease, and other dementia-type diseases.⁸ The prominence of CTE and other dementia-related diseases

¹ *Introduction to the Sports Industry*, PLUNKETT RESEARCH, LTD., <http://www.plunkettresearch.com/sports-recreation-leisure-market-research/industry-and-business-data> (last visited Oct. 31, 2014).

² See Ken Belson, *Brain Trauma to Affect One in Three Players, N.F.L. Agrees*, N.Y. TIMES, Sep. 12, 2014, http://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html?_r=0 [hereinafter Belson, *Brain Trauma to Affect One in Three*] (stating that an estimated 33% of professional football players will be affected by a dementia-related disease).

³ Tim Fitzgerald, *Today's Coaches and Trainers are Promoting Safety, Strength, and Conditioning to Protect Players from Disabling Injuries*, HEALTHDAY, <http://consumer.healthday.com/encyclopedia/work-and-health-41/occupational-health-news-507/professional-athletes-648171.html> (last updated Mar. 11, 2015).

⁴ Chana R. Schoenberger, *The Most Dangerous Sports*, FORBES (Nov. 16, 2006, 12:00 AM), http://www.forbes.com/2006/11/15/sports-injuries-fitness-forbeslife_cz_cs_1114 dangersports.html.

⁵ James E. Wilberger & Derrick A. Dupre, *Sports-Related Concussions*, MERCK MANUALS, <http://www.merckmanuals.com/home/injuries-and-poisoning/head-injuries/sports-related-concussion> (last updated Nov. 2013).

⁶ *Concussion Facts*, SPORTS CONCUSSION INSTITUTE, <http://www.concussiontreatment.com/concussionfacts.html> (last visited Oct. 31, 2014).

⁷ *Id.*; Wilberger & Dupre, *supra* note 5.

⁸ Kimberly G. Harmon et al., *American Medical Society for Sports Medicine Position Statement: Concussion in Sport*, 23 CLINICAL J. SPORT MED. 1, 3 (2013); Alan Schwarz, *Case Will Test N.F.L. Teams' Liability in Dementia*, N.Y. TIMES, Apr. 5, 2010, <http://www.nytimes.com/2010/04/06/sports/football/06worker.html?pagewanted=all> [hereinafter Schwarz, *Case Will Test N.F.L.*].

within the sports industry is only beginning to be fully understood.⁹ However, an estimated one in three professional football players will develop a dementia-related disease.¹⁰ Unfortunately, these professional athletes may have little to no recourse, thanks to workers' compensation systems that are less protective of athletes' interests.¹¹

Disabilities incurred by employees during their employment are covered under states' workers' compensation systems.¹² However, professional athletes face more obstacles in getting workers' compensation benefits than most of the United States, assuming they are even eligible at all.¹³ Some states specifically exclude professional athletes from receiving workers' compensation, and others limit the athletes' recovery, leaving many professional athletes with little to no recourse for their work-related disabilities.¹⁴ These limitations and exclusions are courtesy of successful lobbying efforts by team owners.¹⁵ For that reason, a separate federal workers' compensation system is needed for professional athletes.

This comment will explain how states' workers' compensation systems affect professional athletes, the impact of concussions and CTE on athletes' disability claims, and ways to improve the systems to protect athletes' work-related disabilities. Part II will include an overview of workers' compensation systems and their application to professional athletes.¹⁶ Also included in Part II is a brief overview of concussions and CTE, and a look at the scholarly articles to broach the topic of professional athletes and workers' compensation.¹⁷ Part III will explain the solution to cover professional athletes under the federal workers' compensation system.¹⁸

⁹ Michelle L. Modery, Comment, *Injury Time-Out: Justifying Workers' Compensation Awards to Retired Athletes with Concussion-Caused Dementia*, 84 TEMP. L. REV. 247, 262–63 (2011).

¹⁰ Belson, *Brain Trauma to Affect One in Three*, *supra* note 2.

¹¹ See *infra* Parts II.0 & 0 (discussing states' workers' compensation systems and their interplay with professional athletes).

¹² Rachel Schaffer, *Grabbing them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 624 (2000).

¹³ *Id.*

¹⁴ Thomas J. McQueeney, Comment, *Fourth and Long: How the Well-Established System of Workers' Compensation Poses a Substantial Threat to the Financial Stability of the NFL*, 43 U. BALT. L. REV. 307, 321–22 (2014).

¹⁵ Bobbi N. Roquemore, *Creating a Level Playing Field: The Case for Bringing Workers' Compensation for Professional Athletes into a Single Federal System by Extending the Longshore Act*, 57 LOY. L. REV. 793, 798–99 (2011) [hereinafter Roquemore, *Creating a Level Playing Field*]. But see Schwarz, *Case Will Test N.F.L.*, *supra* note 8 (stating that the NFL was unable to lobby for professional athletes' exclusion from receiving disability compensation in California).

¹⁶ See *infra* Part II.0–0.

¹⁷ See *infra* Part II.0–0.

¹⁸ See *infra* Part 0.

II. BACKGROUND

*A. An Overview of Workers' Compensation Systems*¹⁹

Workers' compensation is a system designed to provide benefits for most work-related disabilities suffered by employees.²⁰ Essentially, it is an application for benefits for work-related disabilities or death.²¹ These benefits are statutorily constructed to help expedite compensation for the work-related disabilities, cover expenses for medical treatment of the disability, and provide other benefits to injured employees.²² In return for expedited compensation benefits, employees waive their right to sue the employer for negligence, shielding the employer from large-sum jury verdicts and the time and expense of litigation.²³

1. The History of Workers' Compensation

During the 19th and 20th centuries, at the peak of the Industrial Revolution, the number and severity of workplace injuries increased.²⁴ At that time, the only source of redress for the employee was to sue the employer under theories of negligence or breach of contract.²⁵ However, this process was ineffective, expensive, and a waste of judicial resources.²⁶

¹⁹ This discussion of workers' compensation law is only intended to be a general overview of its application to professional athletes; it is not intended to be a comprehensive discussion of workers' compensation law. See generally JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION I (2d ed. 1989) (providing a more comprehensive explanation of workers' compensation laws).

²⁰ Marjorie A. Shields, Annotation, *Award of Workers' Compensation Benefits to Professional Athletes*, 112 A.L.R.5TH 365, at § 2a (2003). "Worker's compensation is an administrative remedy designed to speed [up] an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial positions." *Id.*

²¹ NACKLEY, *supra* note 19, at 2.

²² Shields, *supra* note 20, at § 2a; see NACKLEY, *supra* note 19, at 1 (employees that sustain work-related physical and mental injuries receive compensation for the disability and medical costs, and, in certain circumstances, rehabilitative expenses).

²³ See Shields, *supra* note 20, at § 2a (the purpose of workers' compensation is "to obviate the uncertainty, delay, expense, and hardship attendant on the enforcement of common-law remedies"); Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 801 (employees' exclusive remedy is a claim for workers' compensation, which bars employees from suing employers for negligence).

²⁴ NACKLEY, *supra* note 19, at 1.

²⁵ McQueeney, *supra* note 14, at 311–12.

²⁶ *Id.*; see also JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 1–5 (5th ed. 2011) (discussing the inadequate options available to injured employees seeking redress for their work-related injuries); State ex rel. Yapple v. Creamer, 97 N.E. 602, 604 (Ohio 1912) (describing the results of a study on the laws of various countries that have passed workers' compensation type laws, and the industrial condition after the laws were enacted).

Employees were often unable to receive any compensation for their work-related injuries, because employers were able to raise contributory negligence, assumption of risk, and fellow servant defenses.²⁷ As a result of these inadequacies, lawmakers throughout the country began enacting workers' compensation statutes.²⁸

In 1908, Congress enacted the first workers' compensation system—the Federal Employees' Compensation Act.²⁹ Three years later, Wisconsin enacted the Workmen's Compensation Act, becoming the first state in the nation with a workers' compensation system.³⁰ By the end of 1948, every state had established a workers' compensation system.³¹

[The report's] conclusions are: [t]hat the system which has been followed in [the United States], of dealing with accidents in industrial pursuits, is wholly unsound; that there is an intelligent and widespread public sentiment which calls for its modification and improvement; that the general welfare requires it; that there has been enormous waste under the present system and that the action for personal injuries by employé [sic] against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism.

Creamer, 97 N.E. at 604.

²⁷ McQueeney, *supra* note 14, at 311–12; Rockwell Thomas Gust IV, Note & Comment, *The California Workers' Compensation Act: The Death Knell of NFL Players' "Concussion" Case?*, 44 U. TOL. L. REV. 245, 247 (2012); *see also* Croke v. Farmers' Mut. Hail Ins. Ass'n, 218 N.W. 513, 514 (Iowa 1928) ("Workmen's compensation statutes grew out of the hazards to employees engaged in modern industry, the consequences of which prior to their enactment by reason of the contributory negligence rule, the fellow-servant rule, and the doctrine of assumption of risks, fell mostly upon those who were least able to bear them, the workmen and their families."). The fellow servant rule was a pre-workers' compensation common law defense that protected employers from having to pay damages for the work-related injuries of an employee when those injuries were the result of the negligence of a fellow employee. Michael A. Bilandic, *Workers' Compensation, Strict Liability, and Contribution in Illinois: A Century of Legal Progress?*, 83 ILL. B.J. 292, 293 (1995).

²⁸ Bilandic, *supra* note 27, at 293; *see also* Guy v. Arthur H. Thomas Co., 378 N.E.2d 488, 490 (Ohio 1978) ("The genesis of workers' compensation in the United States . . . was the inability of the common-law remedies to cope with modern industrialism and its inherent injuries to workers.").

²⁹ Gust, *supra* note 27, at 247; *see also* Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 802 (the Federal Employees' Compensation Act, when it was enacted by Congress in 1908, only covered a small group of federal employees; however, in 1916, it was amended to cover all non-military federal employees). In 1927, Congress enacted the Longshoremen and Harbor Workers' Compensation Act (Longshore Act). *Id.* The Longshore Act extends the federal workers' compensation coverage to select private employees. *Id.* Between 1928 and 1980, the entire District of Columbia jurisdiction was covered by the Longshore Act, until it enacted its own workers' compensation system. District of Columbia Workers' Compensation Act of 1979, D.C. Law No. 3-77, 27 D.C. Reg. 2503 (current version at D.C. CODE §§ 32-1501 to -1545 (2012)); Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 807 n.74.

³⁰ Act of May 3, 1911, ch. 50, 1911 Wis. Sess. Laws 43 (current version at WIS. STAT. §§ 102.01–.89 (2012)); Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 801–02.

³¹ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 802. Mississippi was the last state to enact its workers' compensation system. *Id.* *See generally* Mississippi

Each of the 50 states and the District of Columbia have enacted their own workers' compensation statutes.³² Although there are variations between the states' systems, the majority of systems share similar characteristics, like: (1) types of claims; (2) types of compensation; (3) types of insurance coverage; (4) scope of the insurance coverage; (5) protections afforded to the employers; and (6) procedures and administrative definitions.³³ The states shared three primary purposes for establishing workers' compensation systems: (1) guaranteed compensation to the employee for work-related disabilities; (2) effectuate judicial efficiency and predictability; and (3) enhance safety within the workplace.³⁴

Workers' compensation systems are designed to be a compromise between the employee's interest in compensation for work-related disabilities and the employer's interest in avoiding costly litigation.³⁵ Employees gain swift and reliable compensation for work-related disabilities, but waive their right to sue for the disabilities and limit any recovery.³⁶ Employers gain the benefit of avoiding costly litigation and large jury awards, but waive all common law defenses and are held liable, regardless of fault.³⁷

2. *Employees and Working Within the Scope of Employment*

To receive disability compensation, the injured employee must establish four things: (1) the existence of an employee-employer relationship; (2) a causal connection between the disability and the employment; (3) the employment is covered by the state; and (4) the type of disability is compensable in the state.³⁸

Workmen's Compensation Law, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -129 (2014)).

³² McQueeney, *supra* note 14, at 312.

³³ NACKLEY, *supra* note 19, at 2; McQueeney, *supra* note 14, at 312–13.

³⁴ Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 97–98 (1995); *see also* Shields, *supra* note 20, at § 2a (listing five purposes for workers' compensation acts: (1) to avoid the cost and time of litigation; (2) to place the cost of injuries to be a part of the cost of the goods rather than paid by society; (3) prompt compensation for work-related injuries; (4) to encourage workplace safety; and (5) to shield the employer from tort liability).

³⁵ NACKLEY, *supra* note 19, at 2.

³⁶ *Id.*; Shields, *supra* note 20, at § 2a.

³⁷ Gust, *supra* note 27, at 248. While employers are held strictly liable for the work-related disabilities of their employees, the compensation awards are substantially less than any potential jury awards. *Id.*; *see also* NACKLEY, *supra* note 19, at 45–46 (unlike tort or contract law, workers' compensation awards are not "make whole" remedies, but are merely a statutorily defined amount to grant *some* compensation for the disability).

³⁸ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 804. Roquemore lists the first three requirements; I have added the fourth category because not all states recognize cumulative or repetitive trauma as a form of occupational disease. *See id.* (discussing the elements for establishing a compensable disability); *see also* 4 LEX K. LARSON,

Regardless of jurisdiction, all workers' compensation systems require the individual injured to be an employee of the employer.³⁹ States' workers' compensation statutes have their own definition of "employee;" however, it is essentially "one who works for, and under the control of, another for hire."⁴⁰

For an employee's disability to be compensable, it must have occurred while the employee was working within the scope of their employment.⁴¹ An injury is within the scope of employment when it "occurs within the period of his employment, at a place where he may reasonably be while he is reasonably performing the duties assigned."⁴² The injury arises out of the employment when the employment is the cause of the disability.⁴³

3. Types of Claims

There are three major types of workers' compensation claims.⁴⁴ The first, and most common type of claim is an "accident" or "injury" claim.⁴⁵ While "accident" and "injury" are often used synonymously, they have

LARSON'S WORKERS' COMPENSATION § 52.03 (Matthew Bender & Co. rev. ed. 2014) (analyzing the various states' occupational disease statutes). Compare MINN. STAT. § 176.011(16) (2014) (compensating only work-related injuries and occupational diseases), with CAL. LAB. CODE § 3208.1 (West 2014) (compensating cumulative trauma claims, in addition to injuries and occupational diseases).

³⁹ Modery, *supra* note 9, at 250.

⁴⁰ HOOD ET AL., *supra* note 26, at 90; see, e.g., FLA. STAT. § 440.02(15)(a) (2014) (defining "employee" as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire"); N.J. STAT. ANN. § 34:6A-2(g) (West 2014) (defining "employee" as "any person engaged in service to an employer for wages, salary or other compensation"). It is important to note that some workers' compensation systems specifically include and exclude various professions from their definition of employee, e.g., professional athletes. 1 JON L. GELMAN, MODERN WORKERS COMPENSATION §§ 106:2, :12 (West 2014); HOOD ET AL., *supra* note 26, at 91–103. Compare KAN. STAT. ANN. § 44-508(b) (2014) (including professional athletes in definition of "employee"), with FLA. STAT. § 440.02(17)(c)(3) (stating that "employee" does not include: "professional boxers, wrestlers, baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players, and motorsports teams competing in a motor racing event"), and WYO. STAT. ANN. § 27-14-102(a)(vii)(F) (2014) ("Employee" does not include: . . . (F) A professional athlete.").

⁴¹ 1 LARSON, *supra* note 38, § 1.01; see, e.g., MINN. STAT. § 176.011(16) (stating that a compensable injury is one that "aris[es] out of and in the course of employment").

⁴² Wiregrass Comprehensive Mental Health Clinic, Inc. v. Price, 366 So. 2d 725, 726 (Ala. Civ. App. 1978). See 2–3 LARSON, *supra* note 38, §§ 12.01–28.03 (explaining the meaning of the phrase, "in the course of employment").

⁴³ Wiregrass Comprehensive Mental Health Clinic, Inc., 366 So. 2d at 726. See 1 LARSON, *supra* note 38, §§ 3.01–10.12 (explaining the meaning of the phrase, "arising out of employment").

⁴⁴ NACKLEY, *supra* note 19, at 11.

⁴⁵ *Id.*

different meanings.⁴⁶ For a disability to be an “accident,” the *cause* of the injury must be accidental; however, for an “injury,” it is the *effect* that must be accidental.⁴⁷ For example, an automobile accident or fall is an “accident” because it is unforeseen or unexpected, but a back strain from lifting heavy objects is not necessarily unforeseen or unexpected and would not be an “accident.”⁴⁸ Both accident and injury claims are based on a single work-related incident.⁴⁹

The second type of claim is an occupational disease claim.⁵⁰ Unlike an accident or injury claim, occupational diseases are the result of sustained exposure to toxins or hazards that create a disability over a period of time.⁵¹ The occupational or environmental hazard must be specific to the employment or trade.⁵² Asbestosis is an example of an occupational disease.⁵³

The third type of claim is a cumulative trauma claim.⁵⁴ Similar to an occupational disease, cumulative trauma is the result of sustained exposure to trauma over a period of time.⁵⁵ It is caused by “repeated shocks to the body

⁴⁶ *Id.* at 11–12. The difference between accident and injury is not a difference in claim type, rather it is how restrictive the states’ workers’ compensation statutes are interpreted. *Id.*

⁴⁷ *Id.* Accident claims are more restrictive than its injury counterpart, because it requires the disability to be the result of an unforeseen accident rather than accidental in effect. *Id.*; *see, e.g.*, OKLA. STAT. tit. 85A, § 2(9)(a) (2014) (“‘Compensable injury’ means damage or harm to the physical structure of the body . . . caused solely as the result of [] an accident . . . arising out of the course and scope of employment . . . that: (1) was unintended, unanticipated, unforeseen, unplanned and unexpected.”).

⁴⁸ NACKLEY, *supra* note 19, at 2.

⁴⁹ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 805.

⁵⁰ NACKLEY, *supra* note 19, at 3.

⁵¹ *Id.* at 27–28.

⁵² 4 LARSON, *supra* note 38, § 52.03; NACKLEY, *supra* note 19, at 27–28; *see, e.g.*, KAN. STAT. ANN. § 44-5a01(b) (2014) (defining “occupational disease” as a disease that the specific employment has “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”); N.M. STAT. ANN. § 52-3-33 (2014) (defining an “occupational disease” as “any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment”); *see also* Sibley v. City of Phoenix, 813 P.2d 69 (Or. Ct. App. 1991) (quoting OR. REV. STAT. § 656.802(1)(b) (1987)) (mental illnesses are occupational diseases); Fairfax Cnty. Fire & Rescue Dep’t v. Mottram, 559 S.E.2d 698 (Va. 2002) (Post-Traumatic Stress Disorder (PTSD) is an occupational disease).

⁵³ 2 GELMAN, *supra* note 40, § 109:15; *see e.g.*, N.C. GEN. STAT. § 97-53(24) (2014) (listing asbestosis as one of the compensable occupational diseases); SAIF Corp. v. Johnson, 908 F.2d 1434, 1439–40 (9th Cir. 1990) (holding asbestosis as a compensable occupational disease under the Longshore Act).

⁵⁴ 2 GELMAN, *supra* note 40, § 108:11.

⁵⁵ 2 JAMES T. GRAY, SPORTS LAW PRACTICE § 12.06(07) (Matthew Bender & Co. 3d ed. 2014).

over a period of time resulting in recognizable injury.”⁵⁶ As the court stated in *Beveridge v. Industrial Accident Commission*:

We think the proposition irrefutable that while a succession of slight injuries in the course of employment may not in themselves be disabling, their cumulative effect in work effort may become a destructive force. . . . The fragmentation of injury, the splintering symptoms, into small pieces, the atomization of pain into minor twinges, the piecemeal contribution of work effort to final collapse, does not negate injury. The injury is still there, even if manifested in disintegrated rather than in total, single impact. In reality the only moment when such injury can be visualized as taking compensative form is the date of the last exposure, when the cumulative effect causes disability.⁵⁷

The statute of limitations for an employee to file a claim may vary depending on the type of claim.⁵⁸ The statute of limitations is generally one to two years for accident or injury claims.⁵⁹ Because the disabling event is identifiable, the statute of limitations begins to run on the day of the injury.⁶⁰ Occupational diseases and cumulative traumas may take years for symptoms to manifest, so most states apply the “discovery rule” for statute of limitations purposes.⁶¹ The statute of limitations does not begin to run until

⁵⁶ *Id.*; see also *Am. Maize Prods. Co. v. Nichiporchik*, 29 N.E.2d 801 (Ind. Ct. App. 1940) (holding traumatic concussions from using an air hammer for ten years was a compensable cumulative trauma); *Nittel v. W.C.A.B.*, No. G044580, 2011 WL 2472586 (Cal. Ct. App. June 22, 2011) (holding professional hockey player’s concussions and daily blows to the head resulted in a compensable cumulative trauma).

⁵⁷ *Beveridge v. Industrial Accident Commission*, 346 P.2d 545, 547 (Cal. Ct. App. 1959).

⁵⁸ NACKLEY, *supra* note 19, at 7, 27–28. Many states’ statute of limitations provisions differ depending on the type of disability being claimed, e.g., an accident or occupational disease. *Id.* at 3–4; see, e.g., ALASKA STAT. § 23.30.105(a) (2014) (“The right to compensation for disability . . . is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee’s disability and its relation to the employment However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury.”); MINN. STAT. § 176.151(a), (d) (2014) (limiting claims for injuries to three years from the employer’s written report of injury, but limiting the filing of claims for an occupational disease to “three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability”).

⁵⁹ NACKLEY, *supra* note 19, at 7; see, e.g., IDAHO CODE ANN. § 72-701 (2014) (claim must be filed within one year of the accident).

⁶⁰ NACKLEY, *supra* note 19, at 7, 27–28.

⁶¹ Modery, *supra* note 9, at 254, 273; see, e.g., MO. REV. STAT. § 287.063(3) (2013) (“The statute of limitation . . . shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure.”); MICH. COMP. LAWS ANN. § 418.381(1) (West 2014) (“A claim shall not be valid or effectual for any purpose under this chapter unless made within 2 years after the

the employee knows or reasonably should have known that the symptoms are the result of the employment.⁶²

4. Types of Compensation

There are two main types of compensation. The first type of disability benefit is based on loss of wages and earning capacity.⁶³ “Disability” is the impairment of an employee’s ability to earn a living because of a work-related physical or mental injury or illness.⁶⁴ An administrative law judge or other administrative body decides if an employee has a disability after receiving medical evidence from doctors as to the employee’s “loss of physical or mental function[ing].”⁶⁵ The disability can be rated as a temporary total, temporary partial, permanent total, or permanent partial disability.⁶⁶ The rating is based on the effects the disability will have on the wage-earning potential of the employee, the recovery potential of the disability, and the type of the disability.⁶⁷ The second type of compensation is hospital and other medical expenses that result from the work-related injury.⁶⁸

Temporary total is the most common type of disability compensation because most claims initially start out as a temporary total disability.⁶⁹ This is the acute post-injury period of time when the employee is either unable to work because of total disability, or the employer is unable to find work for the employee within the doctors’ restrictions.⁷⁰

Temporary total claims are relatively straightforward because there is usually direct evidence for any wage losses incurred.⁷¹ Disability benefits are usually paid on a weekly basis, and based on the employee’s wages at the time of injury.⁷² To compensate for lost earnings during the post-injury recovery period, a percentage of the employee’s weekly wage—usually 66.66%—is awarded.⁷³ Many jurisdictions have a statutory maximum

later of the date of injury, the date disability manifests itself, or the last day of employment with the employer against whom claim is being made.”).

⁶² Modery, *supra* note 9, at 254.

⁶³ 6 LARSON, *supra* note 38, § 80.01.

⁶⁴ NACKLEY, *supra* note 19, at 43.

⁶⁵ *Id.*

⁶⁶ 2 GRAY, *supra* note 55, § 12.06(2).

⁶⁷ 8 LARSON, *supra* note 38, §§ 93.01–.04.

⁶⁸ 6 *Id.* § 80.01.

⁶⁹ 2 GRAY, *supra* note 55, § 12.06(2).

⁷⁰ *Id.*; NACKLEY, *supra* note 19, at 48–49.

⁷¹ 6 LARSON, *supra* note 38, § 80.03.

⁷² NACKLEY, *supra* note 19, at 49; Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 814.

⁷³ NACKLEY, *supra* note 19, at 49; *see, e.g.*, S.D. CODIFIED LAWS § 62-4-3 (2014) (compensation is 66.66% of average weekly wage). *But see* ALASKA STAT. § 23.30.185 (2014) (compensation at 80% of weekly wage).

weekly or total accrual rate.⁷⁴ Additionally, most states have a mandatory waiting period before compensation payments begin.⁷⁵ The waiting period is generally between one to two weeks, at which point compensation begins if the employee can show that the disability still exists.⁷⁶

Like temporary total, temporary partial disability is compensation for lost wages during the initial post-injury recovery period.⁷⁷ Whereas temporary total is the result of lost earnings because of the inability to work, temporary partial disability is the reduction in earnings because the employee is working at a lesser paying job or working fewer hours.⁷⁸ Temporary partial disability is more of a “catch-all” provision for claims with a reduction in earnings when the employee is still capable of receiving some form of remuneration—payment for work performed.⁷⁹

Permanent total disability is the permanent disablement of the employee that prevents the employee from being able to find any gainful remunerative employment.⁸⁰ Permanent total disability is designed to compensate the employee for a loss of wage earning capacity.⁸¹ Because the disability is permanent, the compensation lasts for the remainder of the employee’s life, until the employee is able to find gainful employment, or by reaching a statutory maximum.⁸² The compensation continues even if the employee returns to work, so long as the employment is not substantially remunerative.⁸³

It is the employee’s burden to prove that they are permanently and totally disabled; and most states require that the employee exhaust all administrative remedies before they are considered permanently and totally disabled.⁸⁴ However, the employee does not have to prove that they are absolutely certain of never engaging in gainful employment in the

⁷⁴ NACKLEY, *supra* note 19, at 49; *see, e.g.*, MINN. STAT. § 176.101(1)(k), (2)(b) (2014) (“Temporary total disability compensation shall cease entirely when 130 weeks of temporary total disability compensation have been paid;” similarly, “temporary partial compensation may not be paid for more than 225 weeks.”); *Chart of States’ Maximum Workers’ Compensation (WC) Benefits*, SOC. SEC. PROGRAM OPERATIONS MANUAL SYS. (POMS), <https://secure.ssa.gov/poms.nsf/lnx/0452150045> (last visited Apr. 10, 2015) [hereinafter *WC Benefits*] (listing all the states’ maximum weekly benefit amounts).

⁷⁵ 2 GRAY, *supra* note 55, § 12.06(2).

⁷⁶ NACKLEY, *supra* note 19, at 49; *see, e.g.*, KAN. STAT. ANN. § 44-510c(b)(1) (2014) (mandatory one week waiting period). *But see* OKLA. STAT. tit. 85A, § 45 (2014) (five day waiting period).

⁷⁷ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 815.

⁷⁸ 2 GRAY, *supra* note 55, § 12.06(2).

⁷⁹ NACKLEY, *supra* note 19, at 49–50; BLACK’S LAW DICTIONARY 1409–10 (9th ed. 2009).

⁸⁰ NACKLEY, *supra* note 19, at 46. Examples of permanent total disability would be the “loss of both eyes, arms, legs, or the loss of an arm and a leg.” 2 GRAY, *supra* note 55, § 12.06(2).

⁸¹ NACKLEY, *supra* note 19, at 48.

⁸² 2 GRAY, *supra* note 55, § 12.06(2).

⁸³ NACKLEY, *supra* note 19, at 46–47.

⁸⁴ *Id.* at 48.

foreseeable future, rather, they must prove that it is more probable than not that the disability will prevent them from gainful employment in the future.⁸⁵

Permanent partial is the compensation for a loss of use or functioning of a particular body part, and the loss of wages or earning capacity because of the disability.⁸⁶ The policy reasons behind awarding permanent partial disabilities are to encourage injured employees to return to work and to acknowledge the injury endured by awarding quasi-damages.⁸⁷ As a result, the post-injury wages are often not a consideration in the compensation award.⁸⁸ Even though compensation awards may be substantial, they are often less than jury verdicts for the same type of injury.⁸⁹

B. States' Workers' Compensation Statutes and Limitations on Compensation for Professional Athletes' Disabilities

Different states have different workers' compensation laws. Further, some states have categorically barred athletes from workers' compensation awards. This has typically been justified by the misconception of professional athletes' earnings.

There are currently 22 states, the District of Columbia, and five Canadian provinces that have a professional sports team from at least one of the three major professional sports leagues (MLB, NFL, and NHL) with at least one confirmed case of CTE.⁹⁰ In the subsequent subsections, this

⁸⁵ *Id.*

⁸⁶ 2 GRAY, *supra* note 55, § 12.06(2).

⁸⁷ *Id.*

⁸⁸ NACKLEY, *supra* note 19, at 53.

⁸⁹ *Id.* Permanent partial disability is further divided into scheduled and non-scheduled disabilities. Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 816. Scheduled disabilities are statutorily determined compensation amounts, based on the body part(s) affected. NACKLEY, *supra* note 19, at 53. If the disability is a loss of functioning, rather than the complete loss of the body part, the benefits are equally proportionate to the percent loss of functioning of the affected body part(s). 2 GRAY, *supra* note 55, § 12.06(2). For example, Colorado has a loss of a hand scheduled at 104 weeks. COLO. REV. STAT. § 8-42-107(2)(c) (2014). Hypothetically, if the injured employee lost 20% function of his hand, the overall award would be paid at 20% of the scheduled 104 weeks—or 20.8 weeks. Unlike scheduled disabilities, non-scheduled disabilities are difficult to objectively diagnose—such as disabilities affecting the brain, nervous system, back, heart, etc.—as they require a case-by-case determination on the appropriate compensation. 2 GRAY, *supra* note 55, § 12.06(2). Not all states have enacted scheduled disabilities, electing to instead utilize the case-by-case approach of non-scheduled injuries for every disability claim. NACKLEY, *supra* note 19, at 56; *see, e.g.*, MINN. STAT. § 176.101(2a)(a) (2014) (compensation is based on the percentage of the whole body affected by the disability rather than a set compensation amount based on the body part affected).

⁹⁰ *See* Thor D. Stein et al., *Chronic Traumatic Encephalopathy: A Spectrum of Neuropathological Changes Following Repetitive Brain Trauma in Athletes and Military Personnel*, 6:4 ALZHEIMER'S RES. & THERAPY, Jan. 15, 2014, 1, 7 [hereinafter Stein et al., *A Spectrum of Neuropathological Changes*], available at <http://alzres.com/content/pdf/alzrt234.pdf> (listing boxing, football, hockey, rugby, soccer, and wrestling with at least one

comment will discuss the various ways professional athletes are included or excluded from the States' workers' compensation systems.

1. Statutorily Silent

The majority of states do not specifically address professional athletes within their workers' compensation statutes.⁹¹ Of the 22 states, the District of Columbia, and five Canadian provinces with a professional team, fourteen states do not mention professional athletes in their statutes: Arizona, Colorado, Georgia, Illinois, Indiana, Louisiana, Maryland, Minnesota, New Jersey, New York, North Carolina, Tennessee, Washington, and Wisconsin.⁹² Courts have had to decide if the legislature intended for professional athletes to be covered under workers' compensation.⁹³

Most of the statutorily silent states have found that athletes are covered employees for purposes of workers' compensation.⁹⁴ Despite the high risk of physical injuries in professional sports, professional athletes'

confirmed case of CTE); Stephanie Smith & Dan Moriarty, *First Major League Baseball Player Diagnosed with CTE*, CNN HEALTH, <http://www.cnn.com/2013/12/15/health/baseball-ryan-freel-cte-suicide/> (last updated Dec. 15, 2013) (first baseball player with confirmed case of CTE). The states represented within the MLB, NFL, and NHL:

MLB—Arizona, California, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Texas, Washington, Wisconsin, the District of Columbia, and the Canadian province of Ontario;

NFL—Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Washington, Wisconsin, and the District of Columbia; and

NHL—Arizona, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, the District of Columbia, and the Canadian provinces of Alberta, British Columbia, Manitoba, Ontario, and Quebec.

See generally *MLB Teams*, ESPN, <http://espn.go.com/mlb/teams> (last visited Oct. 20, 2014) (listing all 30 MLB teams); *NFL Teams*, ESPN, <http://espn.go.com/nfl/teams> (last visited Oct. 20, 2014) (listing all 32 NFL teams); *NHL Teams*, ESPN, <http://espn.go.com/nhl/teams> (last visited Oct. 20, 2014) (listing all 30 NHL teams).

⁹¹ Carlin & Fairman, *supra* note 34, at 104–05; Modery, *supra* note 9, at 256.

⁹² McQueeney, *supra* note 14, at 316. See generally ARIZ. REV. STAT. ANN. §§ 23-901 to -1104 (2014); COLO. REV. STAT. §§ 8-40-101 to -47-209 (2014); GA. CODE ANN. §§ 34-9-1 to -421 (2014); 820 ILL. COMP. STAT. 305/1–/30 (2014); IND. CODE §§ 22-3-1-1 to -12-5 (2013); LA. REV. STAT. ANN. §§ 23:1021–:1415 (2014); MD. CODE ANN. LAB. & EMPL. §§ 9-101 to -1201 (West 2014); MINN. STAT. §§ 176.001–.862 (2014); N.J. STAT. ANN. §§ 34:15-1 to -142 (2014); N.Y. WORKERS' COMP. LAW §§ 1-444.3 (Consol. 2014); N.C. GEN. STAT. §§ 97-1 to -101.1 (2014); TENN. CODE ANN. §§ 50-6-101 to -921 (2014); WASH. REV. CODE §§ 51.04.010–98.080 (2014); WIS. STAT. §§ 102.01–.89 (2012).

⁹³ Modery, *supra* note 9, at 256–57.

⁹⁴ 2 GRAY, *supra* note 55, § 12.09; see, e.g., *Albrecht v. Indus. Comm'n*, 648 N.E.2d 923 (Ill. App. Ct. 1995) (holding that professional football player was eligible for workers' compensation because he was an employee of the Chicago Bears).

injuries have routinely been considered compensable disabilities.⁹⁵ However, the court in *Palmer v. Kansas City Chiefs Football Club* held that a football player's injury was not compensable because it was not an "accident."⁹⁶ The court reasoned that injuries in an inherently violent sport are not compensable because they are not accidents; the player voluntarily assumes the risks of injuries by participating.⁹⁷ However, the *Palmer* holding is an anomaly.⁹⁸ Only one other court has held that professional athletes' disabilities were not accidents, but it was subsequently overruled in *Pro-Football, Inc. v. Tupa*.⁹⁹

2. Statutorily Included

Some states either explicitly or implicitly include professional athletes within their workers' compensation statutes.¹⁰⁰ Kansas is the only state to explicitly include professional athletes within its definition of employee.¹⁰¹ California implicitly includes professional athletes by placing restrictions on out-of-state athletes filing claims within the state.¹⁰²

⁹⁵ 2 GRAY, *supra* note 55, § 12.09; *see, e.g.*, *Pro-Football, Inc. v. Uhlenhake*, 558 S.E.2d 571, 574 (Va. Ct. App. 2002) ("The nature of the employment and the foreseeability of a potential injury does not determine whether an injury sustained in the ordinary course of an employee's duties is an accident."). The *Uhlenhake* court reasoned that were the court to hold the injury as not an "accident," it would be reintroducing an "assumption of the risk" defense into workers' compensation, which is precisely what the Act precludes. *Id.* at 576. *But see* *Palmer v. Kan. City Chiefs Football Club*, 621 S.W.2d 350, 356–57 (Mo. Ct. App. 1981) (holding that the deliberate physical contact in professional football precludes compensation for injuries that are the direct result of that contact, because the injuries would not be an "accident"). It is important to note that a professional athlete may still be denied disability compensation for other reasons—e.g., the statute of limitations has run, the athlete failed to prove a *prima facie* case for disability benefits, or the injuries were sustained during the offseason. *See, e.g.*, *Adams v. N.Y. Giants*, 827 A.2d 299 (N.J. Super. Ct. App. Div. 2003) (denying compensation for professional football player's injury because it was time-barred by the two year statute of limitations); *Battles v. W.C.A.B. (Pitt. Steelers Sports, Inc.)*, 82 A.3d 477 (Pa. Commw. Ct. 2013) (denying compensation of professional football player's injury because he failed to prove injury was compensable); *Dandenault v. W.C.A.B. (Phila. Flyers, Ltd.)*, 728 A.2d 1001 (Pa. Commw. Ct. 1999) (denying benefits for professional hockey player's injury sustained during offseason training).

⁹⁶ *Palmer*, 621 S.W.2d at 356–57.

⁹⁷ *Id.*

⁹⁸ McQueeney, *supra* note 14, at 320–21.

⁹⁹ *Rowe v. Baltimore Colts*, 454 A.2d 872 (Md. Ct. Spec. App. 1983), *overruled* by *Pro-Football, Inc. v. Tupa*, 51 A.3d 544 (Md. 2012); McQueeney, *supra* note 14, at 320–21.

¹⁰⁰ Modery, *supra* note 9, at 258. While Washington is statutorily silent on professional athletes' inclusion, the Washington Attorney General has specifically included athletes in Washington's workers' compensation system. Applicability of Industrial Insurance Act to Certain Athletes, 5 Op. Att'y Gen. Wash. 1, 2–4 (1984), *available at* <http://www.atg.wa.gov/ago-opinions/applicability-industrial-insurance-act-certain-athletes>.

¹⁰¹ KAN. STAT. ANN. § 44-508(b) (2014).

¹⁰² CAL. LAB. CODE § 3600.5 (West 2014). Prior to the statute's enactment in 2013, California's workers' compensation system would allow professional athletes to file

The other states that include professional athletes in their workers' compensation statutes limit the athletes in some form.¹⁰³ Iowa allows professional athletes to receive compensation, but wages are based on their pre-professional employment.¹⁰⁴ Likewise, the District of Columbia includes professional athletes, but limits their recovery to the length of time their careers would have lasted were the injury not to have occurred.¹⁰⁵

3. Statutorily Excluded

Seven states and five Canadian provinces preclude professional athletes from receiving workers' compensation.¹⁰⁶ Florida has explicitly stated that professional athletes are not considered in the definition of employment.¹⁰⁷ Similarly, Massachusetts excludes professional athletes from

disability claims as long as the athlete played at least one game in the state. McQueeney, *supra* note 14, at 316. *See generally* Act of Oct. 8, 2013, ch. 653, 2013 Cal. Stat. 653 (amending § 3600.5); *Matthews v. NFL Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012) (ignoring the "single game" rule by holding that out-of-state football player lacked significant contacts with California to warrant coverage under workers' compensation for cumulative injuries he sustained during his 19 year career).

¹⁰³ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 810.

¹⁰⁴ IOWA CODE § 85.34(6) (2014). The code states:

[A] determination of the degree of permanent disability of an individual who was injured in the course of performing as a professional athlete shall not be determined based upon employment as a professional athlete but shall be determined based upon other occupations the individual has previously performed or was reasonably suited to perform at the time of the injury.

Id.; *see also* § 85.33(6) (applying the same standards of § 85.34(6) to temporary disabilities). In addition to limiting the basis of compensation to the athlete's pre-professional employment, calculation of weekly earnings is one-fiftieth of the total earnings for the 12 months preceding the work-related disability. § 85.36(12); *see also* *Blue v. Iowa Pro Football, Inc.*, No. 1177295, 1999 WL 33619370, at *2 (Iowa Workers' Comp. Comm'n Aug. 3, 1999) (Hillary, Arb.) (discussing § 85.36(12)).

¹⁰⁵ D.C. CODE § 32-1508(3)(W) (2012). The code states:

The compensation and remuneration payable to a professional athlete claimant . . . shall be determined by referring to the date of the claimant's disability and a date that is not later than the date on which the claimant's employment as a professional athlete would have ended . . . if the disability for which he or she seeks compensation and remuneration . . . had not occurred.

Id.; *see also* *Graf v. Pro-Football, Inc.*, No. 95-346, 2010 WL 3212880, at *1 (D.C. Dept. Emp. Srvs. July 6, 2010) (denying benefits to professional football player because his professional career would have ended regardless of the injury).

¹⁰⁶ 2 GRAY, *supra* note 55, § 12.05(3); Bobbie N. Roquemore, *Comparing Workers' Compensation Coverage of Professional Athletes in Social Insurance Systems Worldwide – and Why a National System for Athletes Could Work in America*, 48 LEX & VERUM 5, 15 (2013) [hereinafter Roquemore, *Comparing Workers' Compensation Coverage*], available at http://www.nawcj.org/docs/newsletters/newsletter_2013-08.pdf.

¹⁰⁷ FLA. STAT. § 440.02(17)(c)(3) (2014); *see also* *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d 284, 291 (Fla. Dist. Ct. App. 1983) (holding that professional football

its definition of an employee.¹⁰⁸ However, the exclusion only applies if the athlete receives wages, paid pursuant to a contract for hire, while unable to play because of the injury.¹⁰⁹ Wyoming, like Florida and Massachusetts, excludes professional athletes from its definition of employee.¹¹⁰ Despite this exclusion, the state requires that professional teams retain private insurance coverage for any work-related disabilities.¹¹¹ Montana only excludes professional athletes that are engaged in contact sports.¹¹² In addition to the various states' exclusions, the Canadian provinces of Alberta, British Columbia, Manitoba, Ontario, and Quebec explicitly preclude professional athletes from receiving workers' compensation.¹¹³

Where states like Florida and Massachusetts explicitly exclude professional athletes, Michigan and Pennsylvania do so through the functionality of their statutes.¹¹⁴ Michigan includes professional athletes in its coverage, but only allows for compensation if the athlete's average weekly wage is less than 200% of the state average weekly wage.¹¹⁵

players' disability claims were barred, because professional athletes are exempt from workers' compensation coverage in Florida).

¹⁰⁸ MASS. GEN. LAWS ch. 152, § 1(4) (2014).

¹⁰⁹ *Id.*; see also 29 LEONARD Y. NASON & CATHERINE WATSON KOZIOL, MASS. PRAC. SERIES, WORKERS' COMP. § 6.10 (3d ed. 2014) (discussing the limitations on disability benefits when the professional athlete is paid wages pursuant to a contractual agreement during the period of disablement).

¹¹⁰ WYO. STAT. ANN. § 27-14-102(a)(vii)(F) (2014).

¹¹¹ *Id.* § 27-14-108(q).

¹¹² MONT. CODE ANN. § 39-71-401(2)(y) (2014). The nonexclusive list of contact sports include: "football, hockey, roller derby, rugby, lacrosse, wrestling, and boxing." *Id.*

¹¹³ Roquemore, *Comparing Workers' Compensation Coverage*, *supra* note 106, at 15. See generally Workers' Compensation Regulation, Alta. Reg. 325/2002, sched. A (Can.) (listing professional athletes as an exempted profession); Workers Compensation Act, Man. Reg. 196/2005, sched. A, s. 3 (Can.) (same); Workers' Compensation Act, R.S.Q., c. A-3, s. 1 (Can.) ("This Act applies to every industry or part of an industry, except . . . sports activities where the worker is a participating athlete."); *Combs v. Teck Cominco Metals Ltd.*, 2014 BCSC 572, para. 71 (Can.) (discussing the Governors of the Board's decision to exempt professional athletes from workers' compensation coverage); WORKPLACE SAFETY & INS. BD., OPM DOCUMENT NO. 12-01-02, EMPLOYER BY APPLICATION (2005) (Can.) (exempting professional athletes).

¹¹⁴ Modery, *supra* note 9, at 259.

¹¹⁵ MICH. COMP. LAWS ANN. § 418.360(1) (West 2014); see also *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. Ct. App. 2008) (holding that Michigan's workers' compensation system was the exclusive remedy for Brocail's disabilities, resulting in Brocail's preclusion from receiving disability compensation for injuries he sustained from the medical negligence of the team physician). For 2014, the state average weekly wage is \$893.44. 2014 *Weekly Benefit Tables*, MICH. DEP'T OF LICENSING & REGULATORY AFFAIRS 1, http://www.michigan.gov/documents/wca/wca_2014_rate_book_441149_7.pdf (last visited Oct. 31, 2014). For a professional athlete to receive compensation, their average weekly wage would have to be less than \$1786.88, or less than \$92,917.76 per year. This is well below the minimum yearly salaries of the MLB, NFL, and NHL. See Tony Dokoupil, *Major League Baseball's 'Working Poor': Minor Leaguers Sue Over Pay*, NBC NEWS: SPORTS (July 15, 2014, 2:59 PM), <http://www.nbcnews.com/news/sports/major-league-baseballs-working-poor-minor-leaguers-sue-over-pay-n156051> (discussing the mandatory minimum salary for MLB is

Similarly, Pennsylvania restricts eligibility of workers' compensation to only those professional athletes not making more than twice the state average weekly wage.¹¹⁶

4. Elective Coverage

There are two forms of elective coverage. The first allows professional sports teams to elect to cover any work-related injuries through the state's workers' compensation system or through private insurance coverage.¹¹⁷ Ohio's system is an example of this type of elective coverage.¹¹⁸ The statute requires that the professional teams submit evidence of external coverage for any work-related injuries in order to avoid coverage through the state's workers' compensation system.¹¹⁹

Where Ohio allows the employer to choose what coverage to receive, Texas gives the professional athlete the power to decide between receiving disability compensation through the state's workers' compensation system and receiving compensation pursuant to an employment contract or collective bargaining agreement (CBA).¹²⁰ However, this election only applies when the contractual benefits are equal to or greater than what the athlete would receive through the state's workers' compensation system.¹²¹

5. Compensation Set-Offs

In a select few states, any wages paid to the athlete during the period of disablement would be reduced from any workers' compensation awards.¹²² The rationale for these set-off provisions is to avoid double-

\$84,000 a month); Marissa Payne, *So You Want to be a Pro Athlete? You Might Not Get Paid Well*, WASH. POST (Oct. 29, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/10/29/so-you-want-to-be-a-pro-athlete-you-might-not-get-paid-well/> (listing starting salary for NFL at \$420,000 per year; NHL at \$550,000 per year).

¹¹⁶ 77 PA. STAT. ANN. § 565(e) (West 2014). The state average weekly wage for 2014 is \$932.00. *2014 Statewide Average Weekly Wage Announced*, PA. DEP'T OF LABOR & INDUS.,

http://www.portal.state.pa.us/portal/server.pt/community/claims_information/10431/statewide_average_weekly_wage/552650 (last visited Oct. 31, 2014). For an athlete to be able to file a claim in Pennsylvania, their yearly salary cannot exceed \$96,928. It is important to note that Pennsylvania only considers an athlete a "professional athlete" if their average weekly wage is more than eight times the state average, or \$3,877,120 per year. § 565(b).

¹¹⁷ Modery, *supra* note 9, at 259.

¹¹⁸ OHIO REV. CODE ANN. § 4123.54(K) (West 2014).

¹¹⁹ *Id.*

¹²⁰ TEX. LAB. CODE ANN. § 406.095 (West 2013); Modery, *supra* note 9, at 260.

¹²¹ Modery, *supra* note 9, at 260; *see also* Gulf Ins. Co. v. Hennings, 283 S.W.3d 381 (Tex. Ct. App. 2008) (holding that when the disability benefits of the workers' compensation system are greater than the contractual benefits, no election of coverage is necessary).

¹²² Carlin & Fairman, *supra* note 34, at 111. Louisiana had a dollar-for-dollar set-off provision until 2004 when it was repealed; now there is no reference to professional

compensation.¹²³ Missouri provides a credit to the professional team for any medical care and benefits provided to the athlete.¹²⁴ Similarly, Ohio and Pennsylvania include set-off provisions for any wages earned during the period of disablement.¹²⁵

6. Extraterritorial Coverage Provisions

Some states have precluded professional athletes temporarily within the state from filing claims within its workers' compensation system.¹²⁶ Rhode Island precludes professional hockey players from the NHL or American Hockey League (AHL)—the NHL's development or minor league—from filing workers' compensation claims within the state if they are employed by a team domiciled in another state.¹²⁷ Where Rhode Island only precludes professional hockey players, Kentucky and Michigan preclude all out-of-state professional athletes from filing workers' compensation claims within their state.¹²⁸ Similarly, California precludes professional athletes from filing workers' compensation claims for injuries while temporarily within the state, as long as the team's home state has an extraterritorial provision.¹²⁹ However, California allows out-of-state professional athletes to file claims for occupational disease or cumulative trauma disabilities, but the athlete must have either played two or more

athletes in its statutes. See LA. REV. STAT. ANN. § 23:1225(D) (2011), *repealed by* Act of Aug. 15, 2004, ch. 561, § 1, 2004 La. Acts 561.

¹²³ Schaffer, *supra* note 12, at 645.

¹²⁴ MO. REV. STAT. § 287.270 (2013).

¹²⁵ OHIO REV. CODE ANN. § 4123.56(C) (West 2014); 77 PA. STAT. ANN. § 565(c)(1) (2014).

¹²⁶ Roquemoire, *Creating a Level Playing Field*, *supra* note 15, at 810.

¹²⁷ R.I. GEN. LAWS § 28-29-15 (2013). Despite Rhode Island being home to a minor league baseball team, the Pawtucket Red Sox (the class AAA minor league affiliate of the Boston Red Sox), as well as an AHL team, the Providence Bruins (the AHL affiliate of the Boston Bruins), the statute does not specifically exclude out-of-state baseball players because minor league baseball players are contractually obligated, per the MLB-MLB Players' Association (MLBPA) CBA, to file workers' compensation claims in the home state of the affiliated MLB team. James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where is Home? Recently Drafted Minor League Baseball Players Are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 575 (2011). See generally *Member Club Information*, AM. HOCKEY LEAGUE, <http://theahl.com/team-directory-s11579> (last visited Mar. 1, 2015) (listing the home locations of all AHL teams); *Teams by Geographical Location*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/geographical.jsp> (last visited Nov. 11, 2014) (listing the minor league baseball teams by state). However, unlike minor league baseball teams, AHL teams (and other professional developmental hockey leagues) can supplement their rosters by contracting with individual players not under contract with an NHL team. See *Agreements*, PROF. HOCKEY PLAYERS' ASS'N, <http://www.phpa.com/site/agreements> (last visited Mar. 1, 2015).

¹²⁸ KY. REV. STAT. ANN. § 342.670 (West 2014); MICH. COMP. LAWS ANN. § 418.360(2), (3) (West 2014).

¹²⁹ CAL. LAB. CODE § 3600.5(b) (West 2014).

seasons for a California team, or the athlete played at least 20% of their total games within California and less than seven total seasons for a non-California team.¹³⁰

C. An Overview of Concussions and Chronic Traumatic Encephalopathy

Concussions and CTE have recently become prominent topics in sports.¹³¹ High-profile athlete suicides and class-action lawsuits have thrust concussions and CTE into the public spotlight.¹³²

I. Concussions

A concussion is a mild traumatic brain injury (TBI) that is usually the result of a forceful blow to the head or neck.¹³³ While all TBIs are serious, concussions are considered to be on the "less severe end of the brain injury spectrum," because they are generally not life threatening.¹³⁴ Concussion symptoms can last anywhere from a few hours to months depending on the severity of the trauma; however, most athletes recover from a concussion within a few days.¹³⁵ Symptoms range from headaches,

¹³⁰ *Id.* § 3600.5(c), (d).

¹³¹ Daniel Gandert & Esther Kim, *The NFL's Headache: Issues with California Workers' Compensation for Continuous Head Traumas in Former Professional Football Players*, 45 U. Tol. L. Rev. 57, 65 (2013).

¹³² See Ashleigh Weinbrecht, Note, *The Connection Between Concussions and Chronic Traumatic Encephalopathy (CTE) in Professional Athletics: A Necessary Change in the "Sports Culture" in Light of Legal Barriers*, 14 J.L. Soc'y 309, 317 (2013) (discussing the recent deaths of former NFL and NHL players and current lawsuits against the NFL). See generally *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2014 WL 3054250 (E.D. Pa. July 7, 2014) (class action settlement between former football players and the NFL); *In re NHL Players' Concussion Injury Litig.*, No. 2551, 2014 U.S. Dist. LEXIS 115398 (J.P.M.L. Aug. 19, 2014) (NHL class action lawsuits consolidated); *Arrington v. NCAA*, 988 F. Supp. 2d 1373 (J.P.M.L. Dec. 18, 2013) (the consolidation of the class action lawsuits against the NCAA, which the NCAA subsequently settled in July); *Mehr v. Fed'n Internationale de Football Ass'n*, No. 14-cv-3879, 2014 WL 4214853 (N.D. Cal. Aug. 27, 2014) (FIFA soccer class action lawsuit).

¹³³ Harmon et al., *supra* note 8, at 3; Ann C. McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy Following Repetitive Head Injury*, 68 J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY 709, 10 (2009) [hereinafter McKee et al., *Progressive Tauopathy*], available at http://www.bu.edu/cte/files/2012/01/McKee_Chronic-Traumatic-Encephalopathy_2009.pdf; see also *Weeks Marine, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, No. 08 Civ. 9878, 2011 WL 3796331, at *12 (S.D.N.Y. Aug. 25, 2011) (stating that "[w]hatever the symptoms of a concussion are, it is beyond dispute that they are caused by trauma").

¹³⁴ Harmon et al., *supra* note 8, at 3; Jarryd Werts, Comment, *Ring the Bell on Concussions: The Rise of Head Injuries and Cognitive Decline in Football Players, and the NFL's Obligation to Improve Safety Measures*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 173, 177 (2012).

¹³⁵ *Concussion: Symptoms*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/concussion/basics/symptoms/con-20019272> (last visited Oct. 31, 2014); see also

dizziness, impaired concentration, confusion, “seeing stars,” or feeling “foggy,” all the way up to unconsciousness, severe vertigo, nausea, vomiting, photosensitivity, seizures, altered mood and behavior, and amnesia.¹³⁶

While most concussions heal within a few days, failure to allow the brain to heal fully can result in permanent brain damage.¹³⁷ Following a concussion, the brain is especially vulnerable to another concussion.¹³⁸ Recurring concussions increase the risk of future cognitive decline.¹³⁹

2. Chronic Traumatic Encephalopathy

Chronic traumatic encephalopathy has received a lot of publicity recently due to the deaths of several high-profile professional athletes from the behavioral impairments associated with the disease.¹⁴⁰ Despite the recent

Harmon et al., *supra* note 8, at 4 (discussing how 80 to 90% of athletes will have symptom resolution within seven days).

¹³⁶ *Concussion & Mild TBI: Recognition*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/concussion/signs_symptoms.html (last visited Oct. 31, 2014). A common misconception is that concussions result in a loss of consciousness, but only about 10% of concussions result in a loss of consciousness. Harmon et al., *supra* note 8, at 4; *Concussion: Definition*, *supra* note 134. Another misconception is that the more forceful the blow, the more severe the concussion, but that is not necessarily the case; a minor concussion may have symptoms that last for weeks or months, while a more severe concussion may have symptoms that last only a few days. Amy Powell, *Concussion*, AM. MED. SOC’Y FOR SPORTS MED., <http://www.sportsmedtoday.com/concussion-va-2.htm> (last visited Oct. 31, 2014).

¹³⁷ Samuel D. Hodge, Jr. & Shilpa Kadoo, *A Heads-Up on Traumatic Brain Injuries in Sports*, 17 J. HEALTH CARE L. & POL’Y 155, 162 (2014).

¹³⁸ Gandert & Kim, *supra* note 131, at 66.

¹³⁹ Hodge & Kadoo, *supra* note 137, at 163.

¹⁴⁰ CTE became a prominent topic in the media after the suicides of Dave Duerson and Junior Seau in 2011 and 2012 respectively. Jeff Fecke, *Nine Football Players Killed By Brain Trauma*, TRUTHOUT (Feb. 3, 2013), <http://truth-out.org/news/item/14314-9-football-players-killed-by-brain-trauma>. While most of the confirmed cases of CTE were found in retired professional athletes (for many, it was years after their retirement), the deaths of eight active athletes (two in high school, one in college, and five in professional leagues) are especially troublesome. *Id.* They are: high school running back Nathan Stiles—17 years old (Stiles died of a brain bleed caused by a hemorrhage in his brain after suffering from a second concussion before the first had fully healed, but he was confirmed to have CTE after an autopsy of his brain was performed); high school football and rugby player Eric Pelly—18; MLB outfielder Ryan Freel—36; NCAA defensive end Owen Thomas—21; NFL linebacker Jovan Belcher—25, and wide receiver Chris Henry—26; and NHL forwards Derek Boogaard—29, and Rick Rypien—27. John Branch, *Hockey Players’ Deaths Pose a Tragic Riddle*, N.Y. TIMES (Sep. 1, 2011), <http://www.nytimes.com/2011/09/02/sports/hockey/deaths-of-three-nhl-players-raises-a-deadly-riddle.html?pagewanted=all>; Fecke, *supra*; Deborah Kotz, *Youth Football Player Had Taken Brain Injury Precautions*, BOSTON GLOBE (Dec. 3, 2012), <http://www.bostonglobe.com/metro/2012/12/03/high-school-football-player-had-taken-brain-injury-precautions/Y4KPbsaTbhQlc55mwjBGeK/story.html>; Nadia Kounang & Stephanie Smith, *Doctor: NFL player who killed girlfriend, self likely had CTE*, CNN HEALTH, <http://www.cnn.com/2014/09/29/health/jovan-belcher-cte/> (last updated Sep. 30, 2014); *Eric Pelly*, SPORTS LEGACY INST., <http://www.sportslegacy.org/v2/research/cte-concussions-sli-legacy-donors/eric-martin-pelly/> (last visited Mar. 1, 2015); Alan Schwarz,

publicity, CTE has been well known within the boxing community since the 1920s.¹⁴¹ However, understanding CTE and its causes has progressed slowly, and diagnostic tools are relatively non-existent.¹⁴² Currently, CTE can only be diagnosed posthumously, but recent advancements may allow for its diagnosis in living athletes in the near future.¹⁴³

CTE is a degenerative brain disease that progresses over the span of many years, often well after the athlete has ceased the injurious activity.¹⁴⁴ CTE results from abnormal "tau" protein deposits in the neocortex of the brain, caused by repetitive traumatic brain injuries.¹⁴⁵ As the disease progresses, cognitive impairments increase and intensify, resulting in dementia-type diseases.¹⁴⁶ Studies suggest that the length of an athlete's

Suicide Reveals Signs of a Disease Seen in N.F.L., N.Y. TIMES (Sep. 13, 2010), http://www.nytimes.com/2010/09/14/sports/14football.html?pagewanted=all&_r=0 [hereinafter Schwarz, *Suicide Reveals Signs of a Disease*]; Smith & Moriarty, *supra* note 90.

¹⁴¹ Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 1. In 1927, researchers Michael Osnato and Vincent Giliberti noted several cases where concussions led to future degenerative changes in boxers; which became known as "punch drunk" syndrome after Harrison Martland's 1928 monograph, *Punch Drunk*. *Id.*

¹⁴² Gandert & Kim, *supra* note 131, at 66.

¹⁴³ Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 7, 9. Researchers at UCLA are currently developing a test that uses an injectable biomarker that clings to tau proteins, making the proteins visible by a positron emission tomography (PET) scan. Ken Belson, *New Tests for Brain Trauma Create Hope, and Skepticism*, N.Y. TIMES, Dec. 25, 2013, <http://www.nytimes.com/2013/12/26/sports/football/new-tests-for-brain-trauma-create-hope-and-skepticism.html> [hereinafter Belson, *New Tests for Brain Trauma*]. While UCLA's experimental test is far from being a definitive diagnostic test for CTE, initial results have been promising. *Id.*; see also Thomas SC Ng et al., *Neuroimaging in Repetitive Brain Trauma*, 6:10 ALZHEIMER'S RES. & THERAPY, Feb. 24, 2014, 1, 2–12, available at <http://alzres.com/content/pdf/alzrt239.pdf>; Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 9 (discussing the advancements being made in developing biomarkers for diagnosing CTE).

¹⁴⁴ McKee et al., *Progressive Tauopathy*, *supra* note 133, at 11; see also Brandon E. Gavett et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 CLINICS SPORTS MED. 179, 183 (2011) [hereinafter Gavett et al., *Concussive and Subconcussive Head Trauma*], available at <http://www.bu.edu/cte/files/2011/11/Gavettetal2011ClinSportsMedCTE.pdf> (stating that the average age of onset of CTE was 42.8 years old and eight years after retirement).

¹⁴⁵ Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 2; *What is CTE?*, BU CTE CENTER, <http://www.bu.edu/cte/about/what-is-cte/> (last visited Oct. 31, 2014).

¹⁴⁶ McKee et al., *Progressive Tauopathy*, *supra* note 133, at 2–3; Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 3. While CTE, Alzheimer's disease, and amyotrophic lateral sclerosis (ALS—also known as "Lou Gehrig's disease") share a lot of the same symptomatology, they are distinctly different degenerative brain diseases. Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 2, 6–7. However, the difficulty in differentiating between them can largely be attributed to their similar etiologies—abnormal tau-deposits in the neocortex. *Id.* at 2. The similarities in these diseases is evidenced by the fact that Lou Gehrig may not have had ALS at all; instead, he may have had CTE that was the result of four concussions he sustained during his professional baseball career. Robert Shmerling, *Brain Disease Deaths High in Pro Football Players*, HARV. HEALTH BLOG (Sep. 7, 2012, 3:30 PM), <http://www.health.harvard.edu/blog/brain->

playing career correlates with the progression of the athlete's CTE.¹⁴⁷ Similarly, there seems to be a correlation between the progression of CTE and the number of concussive and subconcussive blows athletes sustain during their playing careers.¹⁴⁸ In part because of the deaths of Chris Henry and Owen Thomas—neither was diagnosed with a concussion despite being diagnosed with CTE—researchers believe that repetitive subconcussive blows, even in the absence of any concussion diagnoses, may be enough to cause CTE.¹⁴⁹

Early CTE symptoms can include deteriorations of attention, concentration, memory, disorientation and confusion, dizziness, and headaches.¹⁵⁰ As the disease continues to progress, additional symptoms of a lack of insight, poor judgment, overt dementia, progressively slowing of muscular movements, impaired gait, impaired speech, tremors, vertigo, and deafness may become prevalent.¹⁵¹

CTE has now been diagnosed in more than 50 former professional football players, four former professional hockey players, two former professional soccer players, and one former professional baseball player.¹⁵²

disease-deaths-high-in-pro-football-players-201209075281. The neocortex is responsible for higher level functions in humans, such as: sensory perceptions (seeing, hearing, feeling, etc.), motor functions, speech, and balance. *Review of Clinical and Functional Neuroscience – Swenson: Chapter 11—The Cerebral Cortex*, DARTMOUTH MED. SCH., http://www.dartmouth.edu/~rswenson/NeuroSci/chapter_11.html (last visited Oct. 31, 2014). The neocortex has six layers (identified by Roman numerals) with the abnormal tau-deposits predominately occurring in layers II and III for CTE and ALS, and layers V and VI for Alzheimer's. Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 2.

¹⁴⁷ Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 8.

¹⁴⁸ *Id.* at 3. A subconcussive brain injury is essentially the same as an asymptomatic concussion, but it does not rise to the level of a clinically diagnosable concussion. Julian E. Bailes, *Role of Subconcussion in Repetitive Mild Traumatic Brain Injury*, 119 J. NEUROSURGERY 1235, 1236 (2013).

¹⁴⁹ Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 18 (2012) [hereinafter McKee et al., *The Spectrum of Disease*], available at <http://www.bu.edu/cte/files/2009/10/McKee-2012-Spectrum-of-CTE1.pdf>; Alan Schwarz, *Former Bengal Henry Found to Have Had Brain Damage*, N.Y. TIMES, June 28, 2010, http://www.nytimes.com/2010/06/29/sports/football/29henry.html?_r=0; Schwarz, *Suicide Reveals Signs of a Disease*, *supra* note 140. While Henry and Thomas were never diagnosed with a concussion, it is conceivable that they may have suffered from an undiagnosed concussion. See Schwarz, *Suicide Reveals Signs of a Disease*, *supra* note 140 (stating that Thomas' parents acknowledged that "[Owen] was the kind of player who might have ignored the symptoms [of a concussion] to stay on the field"); see also Tom Farrey, *Study: 1 in 27 head injuries reported*, ESPN (Oct. 3, 2014), http://espn.go.com/espn/otl/story/_/id/11631357/study-says-26-27-potential-concussions-unreported-college-football (discussing how a recent study of college football players averaged one concussion diagnosis for every six suspected concussions and twenty-one "dings").

¹⁵⁰ *What is CTE?*, *supra* note 145.

¹⁵¹ McKee et al., *Progressive Tauopathy*, *supra* note 133, at 2–3.

¹⁵² Smith & Moriarty, *supra* note 90. CTE has also been found in a former rugby player, a former professional wrestler, and many military combat veterans. Stein et al., *A Spectrum of Neuropathological Changes*, *supra* note 90, at 7.

D. Scholarly Articles on the Issues Faced by Professional Athletes in Workers' Compensation Coverage

The relationship between professional athletes and workers' compensation has received very little scholarly attention.¹⁵³ Those legal scholars that have broached the topic have been largely supportive of workers' compensation coverage for professional athletes.¹⁵⁴ However, the publicity surrounding highly-paid professional athletes has led some legal scholars to encourage more restrictive workers' compensation statutes.¹⁵⁵

A common misconception that the general public has about professional athletes is that all athletes are paid millions of dollars.¹⁵⁶ In 2000, Rachel Schaffer debunked the myth that all professional athletes are paid handsomely.¹⁵⁷ It is true that a small percentage of professional athletes do make millions of dollars each year; however, the vast majority of professional athletes make less than a million dollars a year, often substantially less.¹⁵⁸ In addition, athletes are making their lifetime's equivalent salary over a span of only a few years.¹⁵⁹ The significance of the general public's misconceptions poisons the equally ill-informed legislatures, resulting in statutory systems that are often detrimental to professional athletes.¹⁶⁰ For that reason, Schaffer argued for mandatory inclusion of professional athletes in all states' workers' compensation systems.¹⁶¹

¹⁵³ McQueeney, *supra* note 14, at 329–30.

¹⁵⁴ *E.g.*, Carlin & Fairman, *supra* note 34, at 118–21; Modery, *supra* note 9, at 269–70; Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 841–56; Schaffer, *supra* note 12, at 650–54.

¹⁵⁵ *E.g.*, Gandert & Kim, *supra* note 131, at 76–79; *see also* Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 180–91 (2013) (encouraging legislatures to force professional athletes to seek disability compensation through CBAs rather than through workers' compensation).

¹⁵⁶ *See Occupational Employment and Wages, May 2013: Athletes and Sports Competitors*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/2013/may/oes272021.htm> (last modified Apr. 1, 2014) (listing the mean average yearly salary for professional athletes as \$79,130 a year). *But see Visualizing the Yearly Salary of Professional Athletes, NBA Players Average \$5+ Million a Year*, HUFFINGTON POST (Jan. 23, 2014, 10:52 AM), http://www.huffingtonpost.com/visualnewscom/visualizing-the-yearly-sa_b_4184716.html [hereinafter *Yearly Salary of Professional Athletes*] (listing the average yearly salary of professional athletes as: MLB—\$3.2 million; NBA—\$5.15 million; NFL—\$1.9 million; and NHL—\$2.4 million).

¹⁵⁷ Schaffer, *supra* note 12, at 626–33.

¹⁵⁸ *Id.*; *see also* Steven Resnick, *Are Professional Athletes Really Overpaid? The Answer May Surprise You*, BLEACHER REPORT (Mar. 28, 2009), <http://bleacherreport.com/articles/146379-are-professionals-athletes-really-overpaid-the-answer-may-surprise-you> (discussing the income earned by professional athletes).

¹⁵⁹ *See Yearly Salary of Professional Athletes*, *supra* note 156 (the average career lengths for athletes in the: MLB—5.6 years; NBA—4.8 years; NFL—3.5 years; and NHL—5.5 years).

¹⁶⁰ Schaffer, *supra* note 12, at 624–25; *see also* Jason Garcia, *Prodded by Pro Sports Teams, Florida Clamps Down on Traveling Workers who Claim Injury*, ORLANDO SENTINEL (May 29, 2011), <http://articles.orlandosentinel.com/2011-05-29/business/os-law->

In 2011, Michelle Modery addressed the issues facing retired professional athletes seeking workers' compensation benefits for concussion-related dementia.¹⁶² Modery acknowledged that professional athletes seeking disability benefits for degenerative brain diseases will have to overcome issues of causation for these types of disabilities.¹⁶³ Modery discussed the issue of causation and four studies that focused on the connection between an athlete's professional career and degenerative brain diseases.¹⁶⁴ Additionally, compensability was another issue because most states do not recognize cumulative trauma claims.¹⁶⁵ Modery suggested that retired athletes argue that their degenerative brain diseases are occupational hazards of playing professional sports.¹⁶⁶ Modery reasoned that other forms of mental disabilities have been held as an occupational disease—PTSD with delayed onset being the primary analogous mental disability—so degenerative brain diseases would likely be compensable as well.¹⁶⁷

and-you-workers-comp-20110529_1_workers-claims-in-other-states-clamps (discussing how the legislature, pushed by the owners of the Florida Marlins (MLB), Orlando Magic (NBA), Tampa Bay Lightning (NHL), Jacksonville Jaguars (NFL) Miami Dolphins (NFL), and Tampa Bay Buccaneers (NFL), enacted the current legislation that excludes professional athletes from workers' compensation); Sheena Harrison, *NFL's Detroit Lions Support Michigan's Proposed Workers' Comp Reforms*, WORKFORCE (Oct. 4, 2011), <http://www.workforce.com/articles/nfl-s-detroit-lions-support-michigan-s-proposed-workers-comp-reforms> (Detroit Lions owner urges Michigan legislature to amend Michigan's workers' compensation statutes).

¹⁶¹ Schaffer, *supra* note 12, at 650–54.

¹⁶² Modery, *supra* note 9, at 249.

¹⁶³ *Id.* at 270–74.

¹⁶⁴ *Id.* at 263–65.

¹⁶⁵ Gandert & Kim, *supra* note 131, at 62–64; Gust, *supra* note 27, at 251.

Compare Castle v. Sullivan Cnty. Sheriff's Dep't, No. E2011-00988-WC-R3-WC, 2012 WL 475644 (Tenn. Feb. 15, 2012) (holding that mental illnesses that result from "gradual events occurring over an extended period of time" are not compensable claims), *and* Pro-Football, Inc. v. Uhlenhake, 558 S.E.2d 571 (Va. Ct. App. 2002) (holding knee disability by professional football player was not compensable because Virginia does not recognize cumulative trauma claims), *with* Nittel v. W.C.A.B., No. G044580, 2011 WL 2472586 (Cal. Ct. App. June 22, 2011) (holding professional hockey player's concussions and daily blows to the head resulted in a compensable cumulative trauma); *and* Am. Maize Prods. Co. v. Nichiporchik, 29 N.E.2d 801 (Ind. Ct. App. 1940) (holding traumatic concussions from using an air hammer for ten years was a compensable cumulative trauma).

¹⁶⁶ Modery, *supra* note 9, at 269–70.

¹⁶⁷ *Id.* at 272–75; *see also* Brunell v. Wildwood Crest Police Dep't, 822 A.2d 576, 588–89 (N.J. 2003) (holding that PTSD may be both an accidental injury and an occupational disease depending upon the facts in each case). *Compare* Sibley v. City of Phoenix, 813 P.2d 69, 70 (Or. Ct. App. 1991) (quoting OR. REV. STAT. § 656.802(1)(b) (1987)) (mental illnesses are occupational diseases), *and* Fairfax Cnty. Fire & Rescue Dep't v. Mottram, 559 S.E.2d 698 (Va. 2002) (PTSD is an occupational disease), *with* Nittel, 2011 WL 2472586 (concussions and other head injuries are cumulative traumas), Hurst v. Sanderson Farms, Inc., 2002-1334, p. 4 (La. App. 1 Cir. 5/9/03); 846 So. 2d 954, 957 (quoting LA. REV. STAT. ANN. § 23:1031.1(B) (2001)) (discussing the exclusion of mental illnesses and other degenerative disorders from the statute's definition of occupational disease), *and* Higgins v. Quaker Oats Co., 183 S.W.3d 264, 270 (Mo. Ct. App. 2005) (depression related to back injuries was a cumulative trauma). PTSD is a mental health disease that occurs after exposure to a traumatic

Also in 2011, Bobbi Roquemore argued for coverage of professional athletes' workers' compensation claims under a federal system.¹⁶⁸ Roquemore suggested creating an extension to the Longshore Act that would apply solely to professional athletes.¹⁶⁹ Roquemore argued that the Act would give uniformity, predictability, and efficiency to professional athletes' workers' compensation benefits.¹⁷⁰ Roquemore does recognize that this solution is not without flaws.¹⁷¹ The flaws in this solution are the Longshore Act's large compensation awards, difficulty in computing benefits based on the short contract lengths of professional athletes, and the public image issue of professional athletes' salaries.¹⁷²

Roquemore created a hypothetical Professional Athlete Workers' Compensation Act as an extension to the Longshore Act.¹⁷³ The Act would cover injuries and occupational diseases that occurred during games, practices, and team-organized activities.¹⁷⁴ Section 2 ensures that the Act is

event. *Post-Traumatic Stress Disorder (PTSD)*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/basics/definition/con-20022540> (last visited Nov. 11, 2014). For PTSD with delayed onset, the symptoms do not occur, or occur but not to the minimum diagnostic threshold for PTSD, until at least six months after the traumatic event. Matthew Tull, *Delayed-Onset PTSD: What Is It and Why Does It Occur*, ABOUT HEALTH, <http://ptsd.about.com/od/symptomsanddiagnosis/a/DelayedonsetPTSD.htm> (last updated June 17, 2014).

¹⁶⁸ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 841–56.

¹⁶⁹ *Id.* See generally Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2012); Defense Base Act, 42 U.S.C. §§ 1651–1717 (an extension to the Longshore Act that Roquemore uses as an example for her proposed Act).

¹⁷⁰ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 848–52.

¹⁷¹ *Id.* at 852–54. Roquemore lists foreign efficiency as a benefit of this system, but this is actually a flaw because it fails to address those athletes playing for Canadian teams. See *infra* text accompanying note 175.

¹⁷² Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 852–54. Compare Division of Longshore and Harbor Workers' Compensation (DLHWC), U.S. DEPT OF LABOR, <http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm> (last visited Apr. 10, 2015) [hereinafter DLHWC] (listing the federal maximum weekly benefit as \$1377.02 for the term from Oct. 1, 2014, to Sep. 30, 2015), with *WC Benefits*, *supra* note 74 (listing all states' maximum weekly benefit payments—only Connecticut, Iowa, New Hampshire, and the District of Columbia had maximum benefit payments higher than the federal maximum under the Longshore Act).

¹⁷³ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 857–59.

¹⁷⁴ *Id.* at 843, 857. The Act applies the Longshore Act's definition of "injury." *Id.* at 857. "The term 'injury' means accidental injury or death arising out of an in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . ." 33 U.S.C. § 902(2). Section 1 of Roquemore's proposed Act states:

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

the exclusive remedy for professional athletes' workers' compensation claims, irrespective of state of residence, employment, contract creation, or choice-of-law.¹⁷⁵ Under § 4, compensation awards would have a maximum

Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 857. *But see* David Yeager, *Ice Hockey Nutrition and Training—How Players Meet Their Goals in the Pros*, 13 TODAY'S DIETITIAN 40 (Mar. 2011) (describing the hockey players' required off-season training regimens as established by the players' NHL team trainers in preparation for the next upcoming season); Alex Marvez, *How Does New CBA Affect Offseason?*, FOX SPORTS, <http://www.foxsports.com/nfl/story/Peyton-Manning-Denver-Broncos-collective-bargaining-agreement-offseason-limits-players-032812> (last updated June 2, 2014) (describing the rules on offseason team-organized activities).

¹⁷⁵ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 858. Section 2 of the Act states:

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

Id. It is important to note that the language used by Roquemore for § 2 is directly from the Defense Base Act's extension to the Longshore Act. 42 U.S.C. § 1651(c). The Defense Base Act covers United States citizens working internationally on a military post or in furtherance of a military objective, but does not cover foreign citizens and residents working on those military posts. *See id.* § 1651(a) (covering United States citizens working for the government or in furtherance of a military purposes); *Army & Air Force Exch. Serv. v. Hanson*, 360 F. Supp. 258 (D. Haw. 1970) (holding that citizen and resident of Philippines is not covered under Defense Base Act for tuberculosis contracted from employment on military post).

amount of not more than the national average weekly wage.¹⁷⁶ Section 5 establishes the wage calculation for retired professional athletes.¹⁷⁷

Not all legal scholars agree that more protections should be afforded to professional athletes' disabilities. In 2013, Daniel Gandert and Esther Kim argued for more stringent standards for brain-related disabilities.¹⁷⁸ Gandert and Kim argued that CTE and other brain disorders should not be covered disabilities, because the medical community has not definitively accepted the connection between CTE and professional sports.¹⁷⁹ Even if there is a connection between concussions and CTE, Gandert and Kim asserted that professional athletes should still be precluded because they assume the risk

¹⁷⁶ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 858. Section 3 of the Act states: "Compensation for disability or death shall be 66.66% of the athlete's average weekly wage, but shall not exceed the amount equal to the national average weekly wage as determined by the Secretary of Labor." *Id.* The national average weekly wage is \$688.51 for the term from Oct. 1, 2014, to Sep. 30, 2015. *DLHWC*, *supra* note 172. At a maximum award amount of \$688.51, only seven states—of which only two are home to a professional sports team from the MLB, NFL, or NHL—would have a maximum compensation award amount lower than Roquemore's proposed cap. *See WC Benefits*, *supra* note 74 (listing Arizona, Arkansas, Delaware, Georgia, Idaho, Kansas, and Mississippi as the seven states with lower compensation maximums); *see also supra* note 90 (listing Arizona and Georgia as having a professional sports team from the MLB, NFL, or NHL). At a maximum award of not more than 150% of the national average weekly wage—\$1032.77—12 states and the District of Columbia would still have a higher maximum award amount than this comment's proposed cap. *See WC Benefits*, *supra* note 74 (listing Alaska, California, Connecticut, District of Columbia, Illinois, Iowa, Massachusetts, New Hampshire, North Dakota, Oregon, Rhode Island, Vermont, and Washington as having a higher maximum compensation amount than this comment's proposed maximum); *supra* note 90 (listing California, Illinois, Massachusetts, Washington, and the District of Columbia as having a professional sports team from the MLB, NFL, or NHL); *see also infra* text accompanying notes 240–243 (discussing the proposed cap of 150% of the national average weekly wage).

¹⁷⁷ Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 858–59. Section 5 states:

- (a) With respect to any claim based on a death or disability due to cumulative trauma or occupational disease, which does not immediately result in death or disability, after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage at the time of injury. The time of injury shall be deemed to be on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship between the employment, disease and the death or disability. . . . (c) Any injury grievance or injury settlement payments would be set off against a future workers' compensation award for cash benefits under this section.

Id. Despite mentioning cumulative trauma in § 5, the definition of "injury" does not appear to include cumulative traumas. *See supra* text accompanying note 174. This is important considering the Longshore Act is to be construed neutrally, not liberally as most states' workers' compensation statutes require. Jon B. Robinson et al., *A Long Way from a New Longshore Act: Critiquing Senate Bill 669*, 11 LOY. MAR. L. J. 51, 58–59 (2012). However, courts have routinely held that cumulative trauma claims are covered under the Act. *Id.* at 60.

¹⁷⁸ Gandert & Kim, *supra* note 131, at 76–78.

¹⁷⁹ *Id.* at 65–67, 76–77.

and are comparatively at fault for their disabilities.¹⁸⁰ In addition, Gandert and Kim encouraged legislatures to enact extraterritorial coverage provisions to preclude professional athletes from filing claims in claimant-friendly states like California.¹⁸¹

III. ANALYSIS

Workers' compensation is a state-law system designed to compensate employees for their work-related disabilities.¹⁸² However, professional athletes are often treated differently than the rest of the United States under the states' workers' compensation laws.¹⁸³ Those professional athletes that are covered employees may still be precluded from receiving compensation, because most states do not recognize claims for cumulative traumas.¹⁸⁴ This is especially problematic for professional athletes seeking disability compensation for CTE and other concussion-related dementias, because they often take years to manifest symptoms and most states would not consider it to be an occupational disease.¹⁸⁵ As a result, many professional athletes are unable to receive any compensation for their work-related disabilities.¹⁸⁶

A. Advantages and Disadvantages of a Uniform Federal Workers' Compensation Act for Professional Athletes

CTE and other concussion-caused dementias create unique issues for professional athletes seeking disability compensation. Unlike the vast majority of professional athletes' disability claims, symptoms associated with CTE are not distinct and easily identifiable, it takes many years for the disease to progress and symptoms to manifest, it often cannot be linked to

¹⁸⁰ *Id.* at 70–73, 78–79. It is well known that sports have an inherent risk of injuries. For that reason, Gandert and Kim argued that athletes assume these inherent risks of injury by choosing to participate; and the athletes are comparatively at fault for their concussion-related disabilities because athletes often hide concussion symptoms to avoid being removed from the game. *Id.*; see also Farrey, *supra* note 150 (discussing how concussions in collegiate athletics continue to go unreported despite increased awareness of potential long-term effects associated with concussions); Michelle Castillo, *Most High School Football Players Would Still Play After Concussion*, CBS NEWS (May 6, 2013, 2:40 PM), <http://www.cbsnews.com/news/most-high-school-football-players-would-still-play-after-concussion/> (discussing how over half of the high school football players surveyed would continue to play despite suffering from symptoms of a concussion).

¹⁸¹ *Id.* at 84–87.

¹⁸² See *supra* Part II.0 (explaining workers' compensation laws).

¹⁸³ See *supra* Part II.0 (discussing how professional athletes are treated by the various states' workers' compensation systems).

¹⁸⁴ See *supra* Part II.0.0 (discussing cumulative trauma claims).

¹⁸⁵ See *supra* Part II.0 (describing concussions and CTE).

¹⁸⁶ See *supra* Part II.0 (discussing the limitations placed on professional athletes in the various states' workers' compensation systems).

any identifiable injurious incidences, and the disease can only be diagnosed posthumously.¹⁸⁷

1. How CTE Creates Additional Obstacles for Professional Athletes Seeking Disability Compensation

The first obstacle professional athletes must overcome in seeking workers' compensation benefits for CTE and other dementia-type diseases are issues with statutes of limitation barring recovery.¹⁸⁸ Unlike most professional athletes' injuries, CTE is not an immediate injury; rather it develops over a span of many years, often after the athletes have ceased the injurious activities.¹⁸⁹ On average, it is eight years after retirement before any symptoms of CTE manifest themselves, but it may not be immediately apparent that the symptoms are related to CTE.¹⁹⁰ While some states' statutes of limitation are tolled until the disability is discovered, other states do not apply the discovery rule.¹⁹¹ Outside of the states that apply the discovery rule, an eight year latency period for CTE results in professional athletes' claims being barred by states' statute of limitations.¹⁹² Even with the discovery rule, some states do not apply the rule to cumulative trauma claims, because the tolling only applies in occupational disease claims.¹⁹³

Assuming professional athletes avoid statute of limitations issues, they may still be barred from receiving compensation because many states do not allow for cumulative trauma claims.¹⁹⁴ The issue of mental disabilities' classification as an occupational disease or cumulative trauma is problematic for professional athletes.¹⁹⁵ Since most states do not recognize cumulative trauma claims, Modery suggested that professional athletes claim their mental disabilities are occupational diseases.¹⁹⁶ Modery reasoned that the

¹⁸⁷ See *supra* text accompanying notes 142–151 (providing an overview of CTE).

¹⁸⁸ See *supra* text accompanying notes 58–62 (discussing the statutes of limitation for various states' workers' compensation systems).

¹⁸⁹ See *supra* text accompanying note 144 (discussing how CTE can take many years before symptoms manifest).

¹⁹⁰ See *supra* note 144 and accompanying text (discussing the average age of CTE symptom manifestation and the average length of time after retirement before the symptoms manifest).

¹⁹¹ See *supra* text accompanying notes 61–62 (discussing the statute of limitations for occupational diseases and cumulative trauma claims).

¹⁹² See *supra* text accompanying notes 58–62 (discussing the statute of limitations for various states' workers' compensation systems).

¹⁹³ See *supra* notes 58–62 and accompanying text (discussing the difference between the discovery rule in occupational disease claims and cumulative trauma claims).

¹⁹⁴ See *supra* text accompanying notes 50–57 (explaining occupational disease and cumulative trauma claims); see also *supra* note 165 and accompanying text (comparing courts' holdings on cumulative trauma claims).

¹⁹⁵ See *supra* text accompanying notes 162–167 (discussing issues facing professional athletes in receiving compensation for mental disabilities).

¹⁹⁶ See *supra* text accompanying note 166 (discussing Modery's suggestion that professional athletes argue their mental disabilities are occupational diseases).

similarities between PTSD and dementia-related diseases would result in similar outcomes—that professional athletes’ claims would be recognized as occupational diseases.¹⁹⁷ However, Modery failed to acknowledge that some states explicitly exclude mental disabilities under their definition of occupational disease.¹⁹⁸ Additionally, the connection between concussions—a traumatic brain injury—and CTE would likely result in courts finding CTE to be a cumulative trauma rather than an occupational disease.¹⁹⁹

Assuming CTE claims are compensable, the next obstacle athletes face in seeking workers’ compensation benefits is proving causation. Despite continuing research, very little is known about the causes of CTE.²⁰⁰ Most researchers agree that repetitive concussive traumas increase the risk of developing CTE, but there are still many questions that remain unanswered: how many concussions does it take to cause CTE; can CTE be caused by a single concussive trauma; can subconcussive traumas cause CTE; etc.²⁰¹ Until further research begins answering many of the unanswered questions, proving causation will be a difficult burden to overcome.

In addition to all the unanswered questions surrounding the causes of CTE, currently CTE can only be definitively diagnosed through an autopsy.²⁰² The lack of any definitive diagnostic tool is problematic for professional athletes seeking compensation for CTE.²⁰³ This is especially true when considering the similarities in symptoms between CTE, Alzheimer’s disease, and ALS.²⁰⁴ Unlike CTE, ALS and Alzheimer’s disease can occur with or without a history of head trauma, but CTE can only occur after trauma to the head.²⁰⁵ While research is currently underway to diagnose CTE without an autopsy, it will be many years from now before a reliable

¹⁹⁷ See *supra* text accompanying note 167 (explaining Modery’s rationale for suggesting that professional athletes argue their mental disabilities are occupational diseases).

¹⁹⁸ See *supra* note 167 and accompanying text (comparing various courts’ holdings on claims for mental disabilities).

¹⁹⁹ See *supra* note 167 and accompanying text (comparing various courts’ holdings on claims for mental disabilities).

²⁰⁰ See *supra* text accompanying note 142 (discussing the limited understanding of what causes CTE).

²⁰¹ See *supra* text accompanying notes 147–149 (discussing the results and suspected correlations between the length of an athlete’s playing career, the number of concussive and subconcussive blows endured, and their correlation with the progression of the athlete’s CTE).

²⁰² See *supra* text accompanying note 143 (discussing current limitations on diagnosing CTE).

²⁰³ See *supra* text accompanying note 142 (discussing the limited diagnostic tools available for diagnosing CTE).

²⁰⁴ See *supra* note 146 and accompanying text (discussing the similarities between CTE, Alzheimer’s disease and ALS).

²⁰⁵ See *supra* note 146 and accompanying text (discussing the differences between CTE, Alzheimer’s disease and ALS).

diagnostic tool emerges.²⁰⁶ As a result, professional athletes face a substantial burden in establishing a disability.

In addition to the CTE specific issues, professional athletes must also endure statutory schemes designed to limit or exclude athletes from workers' compensation coverage.²⁰⁷

2. *Advantages of a Federal Act for Professional Athletes*

The major benefit of incorporating professional athletes into a federal system is uniformity. Currently, professional athletes face a myriad of differing statutory schemes.²⁰⁸ In Florida, professional athletes are completely excluded from workers' compensation coverage.²⁰⁹ In Michigan and Pennsylvania, athletes are theoretically included, but realistically excluded.²¹⁰ Through these cleverly crafted statutes, professional athletes are explicitly included yet excluded because of their earnings.²¹¹ Iowa provides coverage for professional athletes' disability claims, but bases earning capacity on the athlete's employment prior to becoming a professional athlete.²¹² Some states, Minnesota and Wisconsin for example, let the courts decide whether a professional athlete is eligible for workers' compensation benefits.²¹³ Because of the variations between the states' workers' compensation systems, creating a federal workers' compensation act ensures that professional athletes are eligible and adequately compensated for their work-related disabilities while providing team owners with consistent and limited disability awards.

Professional athletes would also benefit from a federal system that permits compensation for cumulative trauma claims. In addition to professional athletes' coverage issues, the types of compensable claims recognized vary between the states.²¹⁴ Most states allow occupational disease claims, but only a small minority of states allow cumulative trauma

²⁰⁶ See *supra* note 143 and accompanying text (discussing the recent advancements in establishing a CTE diagnostic tool for use on living patients).

²⁰⁷ See *supra* Part II.0 (discussing how professional athletes are treated by the various states' workers' compensation systems).

²⁰⁸ See *supra* text accompanying notes 91–130 (analyzing how professional athletes are treated in the various states' workers' compensation systems).

²⁰⁹ See *supra* text accompanying note 107 (explaining Florida's exclusion of professional athletes).

²¹⁰ See *supra* notes 115–116 and accompanying text (analyzing Michigan's and Pennsylvania's workers' compensation statutory limitations on professional athletes).

²¹¹ See *supra* notes 115–116 and accompanying text (analyzing Michigan's and Pennsylvania's workers' compensation statutory limitations on professional athletes).

²¹² See *supra* note 104 and accompanying text (quoting IOWA CODE § 85.34(6) (2007)).

²¹³ See *supra* notes 91–93 and accompanying text (listing the states statutorily silent on professional athletes' inclusion or exclusion).

²¹⁴ See *supra* Part II.A.0 (explaining the various types of compensable claims).

claims.²¹⁵ Additionally, not all states recognize mental disabilities as a compensable disability.²¹⁶ Of the states that do recognize mental disabilities, some consider them cumulative traumas while others consider them occupational diseases.²¹⁷ Rather than require professional athletes to argue that CTE is an occupational disease on a case-by-case basis, a federal act would allow coverage for disability claims for cumulative traumas.

An additional benefit of a federal act would be judicial efficiency. With the numerous class action lawsuits filed recently for concussion-related disabilities, receiving compensation for these disabilities is inefficient and expensive.²¹⁸ This is also true of Modery's suggestion of arguing for dementia-type diseases being classified as occupational diseases.²¹⁹ Professional athletes would be forced to litigate the issue in each of their respective states.²²⁰ Creating a federal act for professional athletes would force athletes to use the federal workers' compensation system for any disability compensation, rather than having to litigate every claim.

3. *Disadvantages of a Federal Act for Professional Athletes*

One of the major disadvantages of a federal system is that compensation awards under the federal workers' compensation system are often higher than in individual states.²²¹ Disability benefits for claims under the Longshore Act are higher than claims under states' workers' compensation systems, because the national average weekly wage is higher than most states' average weekly wage.²²² This is especially problematic considering that some of the least favorable state workers' compensation systems were created to limit professional athletes' compensation awards.²²³ Because of California's large disability awards, owners of various professional teams lobbied their states' legislature to restrict compensation

²¹⁵ See *supra* text accompanying notes 50–57 (explaining occupational disease and cumulative trauma claims); see also *supra* note 165 and accompanying text (comparing courts' holdings on cumulative trauma claims).

²¹⁶ See *supra* note 167 (comparing courts' holdings in claims for mental disabilities).

²¹⁷ See *supra* notes 165, 167 and accompanying text (discussing various courts' holdings on mental disabilities and cumulative trauma claims).

²¹⁸ See *supra* note 132 and accompanying text (listing recent and active class action lawsuits against FIFA, NCAA, NFL, and NHL).

²¹⁹ See *supra* text accompanying notes 162–167 (discussing Modery's recommendations for professional athletes' concussion-caused dementia disability claims).

²²⁰ See *supra* text accompanying notes 162–167 (discussing Modery's recommendations for professional athletes' concussion-caused dementia disability claims).

²²¹ See *supra* text accompanying note 172 (listing large disability awards as a flaw of the federal workers' compensation system).

²²² See *supra* text accompanying note 172 (discussing the average weekly wage).

²²³ See *supra* note 160 and accompanying text (discussing professional teams' owners lobbying state legislatures to enact state workers' compensation laws that restrict or preclude compensation for professional athletes).

for professional athletes.²²⁴ As a result, a workers' compensation system that awards more compensation than most states' systems is not likely to receive much support from owners of professional teams.²²⁵

However, allowing the owners of professional teams and leagues to limit or restrict professional athletes from receiving disability compensation is contrary to the rationale for creation of workers' compensation.²²⁶ Workers' compensation was designed to advance workplace safety by forcing employers to compensate all work-related disabilities, irrespective of fault.²²⁷ The onus should be on the owners of professional teams and leagues to improve the safety of the sport to limit the number of disability claims, rather than allowing them to lobby for more restrictive workers' compensation statutes.

Additionally, Roquemore's proposed federal act would only protect those professional athletes that play for teams located in the United States.²²⁸ Currently, every Canadian province that is home to at least one professional team—Alberta, British Columbia, Manitoba, Ontario, and Quebec—explicitly preclude professional athletes from receiving disability compensation.²²⁹ Seven of 30 teams from the NHL and one of 30 teams from the MLB are Canadian teams.²³⁰ As a result, the majority of MLB and NHL games, as a whole, are played in the United States.²³¹

To provide coverage for professional athletes playing for Canadian teams, the federal act needs a long-arm provision. In the Defense Base Act, United States citizens injured while working overseas in furtherance of a governmental or military purpose are able to file workers' compensation

²²⁴ See *supra* note 160 and accompanying text (discussing professional teams' owners lobbying state legislatures to enact state workers' compensation laws that restrict or preclude compensation for professional athletes).

²²⁵ See *supra* note 160 and accompanying text (discussing professional teams' owners lobbying state legislatures to enact state workers' compensation laws that restrict or preclude compensation for professional athletes); see also text accompanying note 172 (listing large compensation awards as a flaw of a federal workers' compensation system for professional athletes).

²²⁶ See *supra* text accompanying note 34 (listing guaranteed compensation for employee's work-related disabilities as one of the reasons for creation of workers' compensation systems).

²²⁷ See *supra* text accompanying note 34 (discussing the rationale for creating workers' compensation systems).

²²⁸ See *supra* notes 171, 175 and accompanying text (discussing the Act's limitations to coverage for foreign citizens).

²²⁹ See *supra* text accompanying note 113 (explaining that the Canadian provinces, home to at least one professional team, specifically excludes professional athletes from workers' compensation coverage).

²³⁰ See *supra* note 90 and accompanying text (listing the states and provinces with a professional team).

²³¹ See *supra* note 90 and accompanying text (listing the states and provinces with a professional team).

claims under the Longshore Act.²³² Since a majority of the professional sports leagues' teams are in the United States, creating a similar long-arm provision would compensate those professional athletes playing for Canadian teams.

B. Modifications of the Professional Athlete Workers' Compensation Act to Ensure Adequate Coverage of Athletes' Disabilities

Because of the complete lack of consistency between states' workers' compensation coverage for professional athletes and their work-related disabilities, there needs to be a federal workers' compensation act specifically for professional athletes. The act needs to permit recovery for disabilities that result from a single identifiable incident, as well as disabilities that are the result of cumulative traumatic incidents, irrespective of any identifiable traumatic injuries. The best statute would be a modified version of Roquemore's proposed Professional Athlete Workers' Compensation Act.²³³ While Roquemore's Professional Athlete Workers' Compensation Act is good, it still does not adequately compensate professional athletes' disabilities.²³⁴ With this comment's proposed alterations, the Act would ensure professional athletes receive adequate compensation for their work-related disabilities.²³⁵

The first, and most important alteration, would be to ensure that the Act covers professional athletes that play for Canadian teams.²³⁶ Roquemore's proposed Act fails to address the professional athletes that are playing for Canadian teams.²³⁷ Considering all of the Canadian provinces with at least one professional team explicitly preclude professional athletes from receiving disability compensation, the federal act needs a long-arm provision.²³⁸ Without a long-arm provision, professional athletes playing in

²³² See *supra* notes 169–177 and accompanying text (discussing the Longshore Act and the Defense Base Act).

²³³ See *supra* notes 174–177 and accompanying text (discussing the applicable provisions of the Act). See generally Roquemore, *Creating a Level Playing Field*, *supra* note 15, at 858–59 (detailing the provisions of the Professional Athlete Workers' Compensation Act in its entirety).

²³⁴ See *supra* notes 172–177 and accompanying text (discussing the applicable provisions of the Professional Athlete Workers' Compensation Act).

²³⁵ See *infra* text accompanying notes 236–255 (listing and discussing proposed modifications to the Professional Athlete Workers' Compensation Act).

²³⁶ See *supra* note 175 and accompanying text (discussing the coverage of the Defense Base Act and its coverage of United States citizens injured abroad).

²³⁷ See *supra* text accompanying note 175 (discussing coverage for professional athletes).

²³⁸ See *supra* note 175 and accompanying text (discussing the coverage of the Defense Base Act and its coverage of United States citizens injured abroad).

Canada would be precluded from receiving compensation for any work-related disabilities.²³⁹

Second, there needs to be a cap on disability awards while still providing adequate compensation for athletes' disabilities.²⁴⁰ A major reason professional team owners lobbied their respective legislatures for more restrictive workers' compensation statutes was to avoid California's large compensation awards.²⁴¹ Since workers' compensation is intended to be a "compromise" between the interests of employers and employees, a cap of not more than 150% of the national average weekly wage for professional athletes' disability awards would keep the Act in accord with the rationale for workers' compensation.²⁴² However, the cap on disability awards would not apply to medical, hospital, or other treatment expenses.²⁴³

Third, the federal workers' compensation system would need a set-off provision for any medical costs paid by the professional teams and leagues.²⁴⁴ Medical, hospital and other treatment expenses for a professional athlete that are paid by the team or league, while the athlete is under a contract for hire, would be reduced from the athlete's overall compensation award.²⁴⁵ However, the set-off provision does not apply to wages paid to an injured professional athlete as part of the contract.²⁴⁶

Fourth, the coverage for professional athletes' work-related disabilities includes injuries sustained on and off the teams' premises in preparation for a game or practice.²⁴⁷ Professional teams often require athletes to maintain strict strength and conditioning regimens during the "off-

²³⁹ See *supra* note 175 and accompanying text (discussing the coverage of the Defense Base Act and its coverage of United States citizens injured abroad).

²⁴⁰ See *supra* note 176 and accompanying text (discussing Roquemore's and this comment's proposed caps on compensation, and their relation to the states' maximum compensation amounts).

²⁴¹ See *supra* note 160 and accompanying text (explaining how some states' legislatures enacted workers' compensation statutes in response to professional team and league owners' lobbying).

²⁴² See *supra* note 176 and accompanying text (discussing the twelve states, and the District of Columbia, that would still have a higher maximum compensation amount than this comment's proposed maximum award of not more than 150% of the national average weekly wage); *supra* text accompanying notes 34–37 (discussing the rationale for enactment of workers' compensation systems).

²⁴³ See *supra* note 176 and accompanying text (discussing the cap on disability awards, but failing to mention anything about if the cap applies to medical costs).

²⁴⁴ See *supra* note 177 and accompanying text (providing a set-off provision of sorts, but the provision is ambiguous as to its application).

²⁴⁵ See *supra* note 177 and accompanying text (providing a set-off provision of sorts, but the provision is ambiguous as to its application).

²⁴⁶ See *supra* note 177 and accompanying text (providing a set-off provision of sorts, but the provision is ambiguous as to its application).

²⁴⁷ See *supra* note 174 and accompanying text (limiting coverage of injuries sustained during games, practices, and training that occurs on the team's premises or an opponent's premises).

season.”²⁴⁸ Additionally, many professional teams and leagues conduct off-season minicamps and workouts.²⁴⁹ Also, professional teams routinely travel out-of-state for away games.²⁵⁰ Injuries sustained by professional athletes while preparing for a game or season, whether on or off the teams’ premises, and while traveling to or staying in another locale in anticipation of an away game, needs to be compensable under the federal act.²⁵¹ However, for off-season injuries to be compensable, the professional athlete must be under contract with a professional team or league.²⁵²

And sixth, all professional sports teams and leagues would be required to pay a premium for workers’ compensation coverage under the federal act.²⁵³ The premium would be the percent of total revenue of the professional sports league compared to the combined total revenue of all professional sports leagues.²⁵⁴ By requiring all professional sports teams and leagues to pay a percentage-based premium for federal workers’ compensation, premiums would be lower and more stable.²⁵⁵

With the aforementioned improvements to the Professional Athlete Workers’ Compensation Act, the Act would provide adequate compensation coverage for professional athletes, while providing teams and leagues the economic advantages of avoiding litigation.²⁵⁶

²⁴⁸ See *supra* note 174 and accompanying text (discussing the professional hockey players’ off-season training requirements as determined by the team’s strength and conditioning coach).

²⁴⁹ See *supra* note 174 and accompanying text (discussing the NFL’s offseason training regiments).

²⁵⁰ See *supra* notes 91–130 and accompanying text (explaining how states’ workers’ compensation systems differ on the potential for injured out-of-state professional athletes to file a claim within the state; the varying systems allow some athletes to choose between filing a claim in their team’s home state or the state where the injury occurred while simultaneously leaving others without a choice).

²⁵¹ See *supra* note 174 and accompanying text (limiting coverage of injuries sustained during games, practices, and training that occurs on the team’s premises or an opponent’s premises).

²⁵² See *supra* notes 109, 174–176 and accompanying text (requiring professional athletes to be under contract to receive compensation for any disabilities).

²⁵³ See *supra* text accompanying notes 110–111, 117–119 (discussing how professional teams are required to provide separate private insurance coverage to avoid using the states’ workers’ compensation system).

²⁵⁴ For instance, if the NFL’s total revenue was 25% of the total combined revenue of all professional leagues, the total premium payment provided by the NFL would be 25% of the total premium amount, divided up amongst the 32 teams.

²⁵⁵ This is based on the idea that by sharing in the costs associated with coverage and compensation, the overall impact on any one team or league would be substantially reduced.

²⁵⁶ See *supra* text accompanying notes 236–241 (discussing improvements to be made on the Professional Athlete Workers’ Compensation Act).

IV. CONCLUSION

With a combined total revenue of over \$23 billion a year, professional sports play a prominent role in the United States.²⁵⁷ What often gets overlooked, however, are the physical costs professional athletes pay to be a part of this industry.²⁵⁸ Courtesy of the numerous class action lawsuits filed by former professional athletes and the deaths of many high-profile athletes, concussions and concussion-caused dementias—including CTE—have thrust these physical costs into the public limelight.²⁵⁹ These lawsuits spell out a bigger issue, though; that professional athletes are not being adequately compensated by states' workers' compensation systems for the athletes' work-related disabilities.²⁶⁰

Like any other employee, professional athletes are employees of their respective team or league.²⁶¹ Yet, professional athletes are routinely treated differently than other employees by states' workers' compensation systems.²⁶² While some states allow compensation for professional athletes' work-related disabilities, others explicitly exclude athletes from receiving compensation.²⁶³ For that reason, professional athletes need a separate federal workers' compensation act.²⁶⁴ This will ensure adequate compensation for all professional athletes, but especially to those athletes suffering from CTE and other concussion-caused disabilities.²⁶⁵ Utilizing Roquemore's proposed Professional Athlete Workers' Compensation Act, this comment has provided improvements to the Act that will ensure professional athletes are adequately compensated for their work-related disabilities.²⁶⁶

²⁵⁷ See *supra* text accompanying note 1 (stating that the four major professional sports leagues have a combined revenue of \$23 billion a year).

²⁵⁸ See *supra* Part II.0 (discussing concussions and CTE).

²⁵⁹ See *supra* notes 132, 140 and accompanying text (listing recent class action lawsuits filed by former professional athletes and the deaths of many high-profile athletes).

²⁶⁰ See *supra* text accompanying notes 91–130 (discussing the issues faced by professional athletes with regard to states' workers' compensation systems).

²⁶¹ See *supra* text accompanying notes 91–113 (discussing professional athletes' inclusion or exclusion as employees within the states' workers' compensation systems).

²⁶² See *supra* text accompanying notes 91–130 (discussing the issues faced by professional athletes with regard to states' workers' compensation systems).

²⁶³ See *supra* text accompanying notes 91–130 (discussing the issues faced by professional athletes with regard to states' workers' compensation systems).

²⁶⁴ See *supra* Part 0 (discussing advantages and disadvantages of a federal code, and recommended modifications to the Professional Athlete Workers' Compensation Act).

²⁶⁵ See *supra* Part 0 (discussing advantages and disadvantages of a federal code, and recommended modifications to the Professional Athlete Workers' Compensation Act).

²⁶⁶ See *supra* Part 0 (discussing advantages and disadvantages of a federal code, and recommended modifications to the Professional Athlete Workers' Compensation Act).