Suicide Squeeze—An Overview of Pa. Workers' Comp and the Pro Athlete

The Legal Intelligencer
October 29, 2018
By Anthony Natale III

During the dog days of summer in 1920, the Cleveland Indians visited the famed New York Polo Grounds to clash with the Yankees in a division duel. Carl Mays, a "submariner" pitcher was on the mound facing the Tribe's superstar short stop, Ray Chapman. It was an overcast day and the game ball was tarnished brown with tobacco juice and virtually invisible. Chapman took a fast ball to the temple and became the only Major League Baseball player to date, to be killed by a pitched ball during a game. The "spit ball" was outlawed in major league play and the rules changed so that new, white balls would be continually pumped into a game for visibility purposes. Very little has been reported on whether Chapman's dependents were protected under the laws governing workers' compensation (which were in the infancy stages) at the time.

Flash forward nearly 100 years and sports injuries still garner the news headlines. Except now, with the advent of the internet, we are inundated with information about professional athletes—where they workout, what they eat, when they visit the doctor, with whom they socialize and even their political views. Amidst this free flow of information, there still seems to be a void in understanding how workers' compensation laws interact with professional athletes and professional sports teams.

The Pennsylvania Workers' Compensation Act (the act) is a complex piece of legislation compared to general law and has become somewhat of a niche practice. Compensation claims made by professional athletes are covered under the act but the litigation of those claims is far from mundane. At first blush, there are common misconceptions attorneys must deal with when involved in these cases. The assertion that all professional athletes are extremely well paid through long-term guaranteed contracts and are protected from disabling injuries based on their high earnings is patently false. In Pennsylvania, many workers' compensation claims stem from farm club, minor league or practice squad members making far less than the statewide average weekly wage. Moreover, contrary to popular lore, sports teams through their workers' compensation insurers accept and pay (without litigation) a majority of claims filed by professional athletes within the confines of the act and the collective bargaining agreements. The erudite defense attorney understands that the standard players contract and the collective bargaining agreement are indispensable tools which can limit receipt of workers' compensation benefits and answer questions as to jurisdiction, average

weekly wage, borrowed employees and course and scope of employment.

Some state statutes are silent as to coverage of professional athletes. Pennsylvania has dedicated a section to the act designed not to exclude athletes from coverage, but to limit the scope of partial disability that a disabled, higher-paid "professional athlete" can collect. The act defines a professional athlete as an individual under contract of hire or collective bargaining agreement by a franchise of the NFL, NHL, NBA or MLB "whose wages … are more than eight times the statewide average weekly wage," 77 P.S. Section 565. If an athlete meets this requirement two things occur: the average weekly wage for the purposes of calculating the partial disability rate is fictionally set to twice the statewide average weekly wage (so three-quarters of the high-paid athlete's wages are cut down for the purposes of determining their partial benefit rate); and partial disability is further reduced by the after-tax amount of any wage continuation, disability insurance or injury protection payments funded by the employer under the contract for hire or collective bargaining agreement. While claimants argued this section of the act was unconstitutional, it has withstood such challenges, see *Lyons v. Workers' Compensation Appeal Board (Pittsburgh Steelers Sports)*, 803 A.2d 857 (Pa. Commw. 2002).

One unique challenge in this line of litigation is jurisdiction considerations. Professional athletes, by virtue of schedules and season length, have a jurisdictional nexus with many states. Some states have better workers' compensation laws than others for athletes. It is the claimant attorney's job to understand and implement jurisdictional choices for the injured athlete and this is not an easy task. The act holds that injuries occurring within Pennsylvania fall within the scope of the act regardless of the place where the contract of hiring was made, renewed or extended. If a player sustains a compensable injury in Philadelphia or Pittsburgh or anywhere in between, there is jurisdiction under our act. Additionally, Pennsylvania recognizes extra-territorial jurisdiction whereby certain factors, if met, will allow an athlete injured outside of Pennsylvania to claim jurisdiction status in the commonwealth.

Pennsylvania is also one of the few states where aggravations of pre-existing conditions and repetitive trauma claims are compensable. Considering that the statute of limitations can easily bar a claim not filed timely, the viability of the aggravation or repetitive trauma theory makes Pennsylvania an advantageous venue for pro-athlete claims. Unfortunately, as is seen all too often in the workers' compensation arena, an advantageous portion of the law can bring out some unintended consequences—in this case, forum shopping. By way of example, in California, the workers' compensation law allowed for repetitive trauma claims with a burden of proof even more liberal than Pennsylvania. As a result, California became inundated with professional athlete claims for injuries spanning previous decades. Some of the claims arose out of working in the Golden State one time in their entire career. Teams have tried to fight forum shopping with choice of forum/forum waivers in the collective bargaining agreement.

In Pennsylvania, while the efficacy of forum waivers has not been totally rebuked, our district court has made it clear that absent a

"clear and unmistakable waiver" an injured athlete with Pennsylvania jurisdictional nexus can proceed with a workers' compensation claim petition in Pennsylvania regardless of its violation of forum choice in the collective bargaining agreement, as in *Miami Dolphins v. Newson*, 783 F. Supp. 2d 769 (W.D. Pa. 2011). It is submitted that choice of forum is no doubt something a claimant attorney must engage in when zealously representing a professional athlete. What needs to be avoided is pushing the envelope and "inventing" an absurd jurisdictional nexus where none exists in the hopes of filing a claim in a truly unavailable venue.

Sometimes specific classes of injury can negatively affect how the insurer determines compensability. In Pennsylvania, over the last several years, a growing number of concussion and post-concussion claim petitions unrelated to professional sports have been filed. It has progressed to the point that any case involving the slightest bump on the head results in the allegation of post-concussion syndrome. A major component of the diagnosis is made through subjective complaints—headaches, vision disturbances, hypersensitivity to light and cognitive impairments. Unfortunately, these same complaints can be manufactured in a claim petition setting. While it is undeniable that many post-concussion claims are genuine, it is equally true that some cases are fabricated (surveillance does not lie).

This propensity has caused some workers' compensation insurers to challenge specific cases of alleged traumatic brain injury even in the professional athlete context. However, those cases are rare in the scheme of overall claims and for the most part (based on my experience) insurers accept many more claims than they deny. The burden of proof is no different than any other workers' compensation case: the athlete must sustain an injury during the course and scope of employment which is related to the employment. Head contact traditionally has been an every day occurrence in the NFL and NHL as well as some of the less aggressive sports. Insurers are hard-pressed to deny claims if the factual and medical investigation support an injury and disability. However, if the facts and medical report do not support the claim then the team and the insurer have every right to—and should—deny the claim and vigorously defend it.

A new cause of action arising out of brain trauma could find its way in the workers' compensation forum. Chronic Traumatic Encephalopathy (CTE), a degenerative brain disease, has been medically linked to professional athletes with history of major concussive episodes. This brain deterioration has been further linked to depression and even suicide. A physical injury leading to a mental disorder such as depression is compensable in Pennsylvania. Suicide, on the other hand, is excluded by the act as a compensable condition unless a claimant can prove that a compensable injury caused the claimant to be dominated by a disturbance of the mind so severe as to override normal rational judgment leading to the self-inflicted death, *see McCoy v. Workers' Compensation Appeal Board (McCoy Catering Services)*, 518 A.2d 883 (Pa. Commw. 1986). As with most degenerative conditions, this disease takes a long time to develop and claims may be squeezed by the relevant statute of

limitations. Nevertheless, the sports industry is standing up to take notice, implementing concussion protocols and eliminating head-to-head contact where applicable.

Anthony Natale III is a shareholder in the workers' compensation department at Marshall Dennehey Warner Coleman & Goggin. He has focused exclusively on the defense of workers' compensation claims since 1995 and he actively represents the National Hockey League and the National Basketball Association in regard to workers' compensation matters. He may be reached at apnatale@mdwcg.com.