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James McLean Long
12/14/17
UNHO 498

Legal Analysis of NCAA Student-Athletes Worker's Compensation Status

UNHO 498 – Dr. Sharma, Dr. Bemiller & Dr. Cantin

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Background of the Issue

The National Collegiate Athletic Association (NCAA) was founded in 1905 upon the request of President Theodore Roosevelt. Roosevelt was a fan of collegiate football, which by the 1905 season had become unduly dangerous. According to *The Washington Post* (2014), the paper reported President Roosevelt's decision to intervene for football in 1905 because of at least 18 reported deaths on the playing field that year. Safety has improved drastically, and the number of critical injuries has decreased in the 112 years since the formation of the NCAA, but there is still a great deal of risk involved in collegiate sport. Whether an explicit contact sport such as football or a non-contact sport like golf or tennis there is always potential for injury in the undertaking of sport. The decision to deny NCAA athletes the right to claim worker's compensation was a calculated decision that has over time been entrenched into precedent by the courts. These prior decisions against student-athletes claims for worker's compensation benefits have denied these students a fundamental right that employees of any other vocation possess. The escalating money generated by collegiate sport has presented many schools with unique opportunities within athletics; nevertheless, it has also reopened the question of whether or not NCAA student-athletes should be awarded worker's compensation for their injuries.

Worker's Compensation Statutes have become part and parcel of both state and federal law over time. Cornell's Legal Information Institute (2017) defines worker's compensation statutes as laws that,

“protect people who are injured on the job. They are designed to ensure that employees who are injured or disabled on the job are provided with fixed monetary awards, eliminating the need for litigation. These laws also provide benefits for dependents of

those workers who are killed because of work-related accidents or illnesses. Some laws also protect employers and fellow workers by limiting the amount an injured employee can recover from an employer and by eliminating the liability of co-workers in most accidents. State statutes establish this framework for most employment. Federal statutes are limited to federal employees or those workers employed in some significant aspect of interstate commerce.

The Legal Information Institute also points out that there are a number of different laws regarding worker's compensation based on industry, state or region or class of employee. The most important federal law regarding worker's compensation is the Federal Employment Compensation Act, which is an integral piece of legislation for both employers and employees in terms of what is possible to claim, who is eligible for benefits and what is covered under different insurance policies. Cornell (2017) mentions that the Federal Employment Compensation Act provides,

“workers' compensation for non-military, federal employees. Many of its provisions are typical of most workers' compensation laws. Awards are limited to "disability or death" sustained while in the performance of the employee's duties but not caused willfully by the employee or by intoxication. The act covers medical expenses due to the disability and may require the employee to undergo job retraining. A disabled employee receives two-thirds of his or her normal monthly salary during the disability and may receive more for permanent physical injuries or if he or she has dependents. The act provides compensation for survivors of employees who are killed. The act is administered by the Office of Workers' Compensation Programs.”

Another general definition of this idea comes from *Find Law* (2017), and this description defines the basic concept of worker's compensation to be a, "state-mandated program consisting of payments required by law to be made to an employee who is injured or disabled in connection with work. The federal government does offer its own workers' compensation insurance for federal employees, but every individual state has its own workers' compensation insurance program." Worker's compensation is in effect an insurance program for employees no matter the line of work. Employees in dangerous industries including mining and high-risk construction are eligible for worker's compensation the same as a citizen who works in tech support with a low risk of injury. State laws can vary widely on the subject of worker's compensation, but some form of protection for employees exists in all 50 states.

It is generally agreed upon under the law that all employees are entitled to worker's compensation. The threshold issue for NCAA student-athletes is whether they are legally considered employees of the schools that they attend and represent in athletic competition or not. If schools recognize the players as employees and the court system did in turn, then athletes in all sports across differing divisions would be eligible for worker's compensation. It is important to note that worker's compensation benefits for athletes cannot be looked at in a vacuum. The issues of amateurism, commercialism and worker's compensation are all a part of many conflicting interests at the heart of modern college sport. The National Collegiate Athletic Association's website (2017) states that the concept of, amateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second." Amateurism prevents players from claiming salary, still many

student-athletes receive a full athletic scholarship for their abilities and some student-athletes receive cost of attendance stipends as well.

As recently as February of this year CBS Sports (2017) reported that the NCAA is establishing a significant fund for student-athletes who were not eligible for cost of attendance stipends at the time of their playing careers. Cost of Attendance varies by school based on a number of factors, but most of them are between \$1,000-\$4,000 in addition the value of the scholarship. According to CBS Sports (2015), in their updated cost of attendance database, the University of Tennessee led all Southeastern Conference schools with a \$5,666 stipend for cost of attendance. That \$5,666 while helpful for expenses and other costs associated with attending school and playing collegiate sport is not a step closer to the right to claim worker's compensation for student-athletes. The decision to allow student-athletes to receive additional compensation past a scholarship plus room and board is arguably a step in the right direction, but it does not affect the restriction of the right to claim worker's compensation for damages, coverage of medical bills and loss of future earnings. There are other outlets for student-athletes to protect themselves and cover accrued expenses, but unlike almost any other group in American professional life they do not have the opportunity to claim worker's compensation.

Unpacking whether student-athletes at the University of Tennessee and throughout the NCAA as a whole should qualify for the worker's compensation benefits available to an adjunct law professor or assistant basketball coach can be very difficult. The first step in this process is determining the definition of an "employee" and if student-athletes generally fall into that category. For an employment relationship or contract to exist there must first be an employer and employee. The employer-employee may seem cut and dry and easy to legally determine, but that is not always the case. According to Jason Gurdus (2001), "most worker's compensation statutes

do not contain a specific definition of the term ‘employee’. Therefore, the term ‘employee’ ... has probably produced more reported cases than any definition of status in the modern history of law.” The Legal Dictionary (2017) states that the legal definition of an employee is,

“a person who is hired for a wage, salary, fee or payment to perform work for an employer. In agency law the employee is called an agent and the employer is called the principal. This is important to determine if one is acting as employee when injured (for worker's compensation) or when he/she causes damage to another, thereby making the employer liable for damages to the injured party.”

The legal definition of “employee” is both a positive and negative for the student-athletes looking to receive worker’s compensation and the schools and NCAA officials looking to maintain the status quo because it is a very broad term.

Worker’s compensation cases for college athletics go all the way back to the landmark 1953 case of the *University of Denver v. Nemeth*. The Nemeth case and later case precedent became extremely important to this discussion because prior to the 1950s, the NCAA had little jurisdiction and almost no power. According to Branch (2011), “for nearly 50 years, the NCAA, with no real authority and no staff to speak of, enshrined amateur ideals that it was helpless to enforce.” The arrival of Walter Byers changed everything for the NCAA, and began the chain of events that led to student-athletes and the NCAA remaining at odds over worker’s compensation in 2017. Walter Byers took over the NCAA in 1951 with the title of Executive Director. Byers would lead the NCAA for more than three decades and in that time, he transformed the NCAA from a small organization into a bureaucratic power. After the wide-ranging college basketball scandals of the early 1950s broke, Byers had the ammunition he needed to bring the NCAA into

the big leagues. According to Branch (2011), only a year into the job Byers had, “secured enough power and money to regulate all of college sports.” This power allowed Byers to help craft the idea of the student-athlete which enshrined the NCAA’s belief in the concept of amateurism. The NCAA (2017) defines amateurism as a, “bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.”

In the process of building the student-athlete ideal for his organization, NCAA Executive Director Walter Byers also developed a convenient way to deny worker’s compensation to the student-athletes that were a part of his organization. Student-athletes fell in a legal gray area between full-time students and employees of NCAA universities, so their status would be open to interpretation by the courts. Additionally, the NCAA website (2017) states that for student athletes to be eligible they must not sign, “contracts with professional teams”, or accept a, “salary for participating in athletics.” These two stipulations – with some exceptions based on sport, prevent the student-athletes from accepting a wage. Coincidentally, payment from employer to employee is a fundamental aspect of an employment relationship. Without clear proof of payment or the employer-employee relationship it remains difficult for student-athletes to convince a court of law or employment board that they deserve worker’s compensation.

At the time Byers took control of the NCAA, worker’s compensation for student-athletes would have likely bankrupted all of the programs competing in college athletics. To this day, paying worker’s compensation claims could still bankrupt a number of NCAA member institutions, but some schools would likely be able to afford to cover worker’s compensation for some or all of their student-athletes. A number of the most prestigious and well-supported could

definitely afford the expenses for worker's compensation. According to USA Today's Annual Report on NCAA Finances (2017), 28 schools out of the 230 in the survey had revenue of over \$100,000,000. Conversely, a number of schools on the list, including schools out of Division I FBS level, would be put into a situation of financial distress if they were required to cover the full medical expenses and worker's compensation of their student-athletes in all sports.

Nevertheless, the NCAA now allows for schools to pay for cost of attendance – which includes travel to and from school and expenses related to attending school. The NCAA website says that cost of attendance is, “intended to cover the real costs of attending college not covered by the previous definition of a full scholarship, which included tuition, room and board, required fees and books.” The main difference between cost of attendance and a grant-in-aid scholarship is that the value of cost of attendance varies school to school because, “each school distributes the money according to its individual financial aid policies.” The significantly increased valuations of college programs and the amount of money at stake in college sports mean that the NCAA rationale for not being able to afford worker's compensation lies on shakier ground than it did in the past.

The immense sums of money that some of the top college athletic departments now make sheds a critical light on the NCAA's decision to not support worker's compensation for the athletes that take part in collegiate competition. *New York Times* columnist Joe Nocera stated in his article, “The College Sports Cartel” (2011) said he believes that, “the N.C.A.A.'s real role is to oversee the collusion of university athletic departments, whose goal is to maximize revenue and suppress the wages of its captive labor force, a.k.a. the players.” Whether you agree with Nocera and other's view that the NCAA is in fact a money-making machine instead of a vehicle for amateur competition it is important to note what is at stake. Just one example of the true costs

of denying worker's compensation is the case of Kent Waldrep. In 1974, Waldrep was a football player for TCU, when he suffered a severe injury in a game against Alabama. Waldrep was paralyzed from the upper chest down in the hit and has had expensive medical bills for the last 43 years. Waldrep did not file a claim for worker's compensation against the university until 1991-92, but the university stopped paying for Waldrep's care when his original scholarship expired. Waldrep's case eventually made its way to Texas Court of Appeals, but Waldrep still had to find ways to pay for his medical bills including receiving charity and writing a book entitled: "Fourth and Long: The Kent Waldrep Story". In 2014, according to Forgsowar.com, TCU's football program had revenue of \$40,451,397 and the program turned a profit of \$5,796,708. Waldrep's medical bills may have been extensive and accrued over a number of years, but they were just a fraction of the profit that Coach Gary Patterson's program generated three seasons ago. This disparity between modern football revenue and expenses and the ability for a critically injured player to cover the vast array of expenses that result from paralysis leaves the NCAA decision to deny the ability to file worker's compensation claims is one of the onerous realities that have resulted from the massive growth in visibility and money within collegiate athletics.

There are several issues to unpack regarding future worker's compensation for student-athletes in collegiate sport. First, will student-athletes ever be determined to be employees by the courts, on the same footing as professors, executive assistants and even the President? Or will student-athletes remain in legal purgatory as something between full employees and contracted workers for a purpose not unlike seasonal work? Secondly, should players be able to unionize is an important consideration in the future of worker's compensation for student-athletes.

Unionizing would theoretically give student-athletes the right to collectively bargain and being

able to do so would give them much more leverage than they have previously had over their fortunes in terms of compensation and other factors related to employment. Finally, the future of the National Collegiate Athletic Association's structure and classes of member institutions will greatly affect student-athletes. The largest schools under the NCAA umbrella continue to make fabulous sums of money each year and could likely finance worker's compensation, but many smaller schools would likely be bankrupt by providing that insurance without changing the way they currently finance athletics. The future of each division and how schools will choose to classify themselves based on size, reputation and financial clout will affect all student-athletes and collegiate sport as a whole; thereby affecting the possibility of student-athlete worker's compensation.

Defining Worker's Compensation and the Legal Tests for Such Cases

Worker's compensation is an ancient idea, but one that has only really gained acceptance as an important protection for employees of companies in the last century. The Sumerians had a version of worker's compensation in ancient times, but it was in the 19th century that worker's compensation really gained traction as an important workplace consideration. The Prussians and the British had versions of worker's compensation in the late 19th century and that idea eventually spread to the United States around the turn of the century. The passage in Congress of the Employers' Liability Acts in 1906 and 1908 opened the door for many of today's worker's compensation laws to be established and strengthened over time through case law and precedent. The Federal Employers Liability Act of 1908 dealt with the employees of a railroad, but that precedent set over a century ago has had wide ranging effects. The basic effect of the new standard set forth under FELA (1908) is a difference in the way the courts can interpret contributory negligence. This pivotal difference has allowed for the liberalization over time in terms of interpretation of worker's compensation statutes. The International Risk Management Institute states that one of the key differences set forth in FELA (1908) was,

“Under normal tort rules, the injured party must prove negligence on the part of the defendant and the absence of contributory negligence or assumption of risk on his or her own part. Under FELA, the employee need only show that any negligence on the part of the employer contributed to the injury. However, contributory negligence on the part of the employee reduces the recovery in proportion to the negligence attributable to the employee.”

Student-athletes are often termed to be the equivalent of independent contractors with the schools who have neither the power to collectively bargain as a whole nor claim the benefits that other employees are entitled to. This position puts student-athletes in a very difficult legal position and the rules of the NCAA do not provide much leeway either to exert their rights or gain influence. Only five states do not immediately take worker's compensation to the courts and Tennessee happens to be one of those states. That unique difference in the system would affect University of Tennessee student-athletes in the event that they were able to file a worker's compensation claim because it would not follow the system exactly that 90% of other states use and would be commonly understood from an NCAA viewpoint. The other four states, in addition to Tennessee, that do not take worker's compensation claims straight to compensation boards established by the state government are Wyoming, New Mexico, Alabama and Louisiana. Those five states would be unique for the NCAA should the collegiate sport governing body either allow or be court ordered to establish worker's compensation protections for the athletes.

One of the leading cases regarding worker's compensation and student-athletes is *Van Horn v. Industrial Accident Commission* (1963) and that case in the California Court of Appeals called on precedent in California law establishing which types of employment relationships could be eligible for worker's compensation and which were not. For example, in the 1946 case, *Edwards v. Hollywood Canteen* volunteer work was deemed a nonsufficient form of employment to claim worker's compensation in the event of injury. 71 years later most volunteer or at-will employment sites would require a waiver to participate in that relationship. For the NCAA and its student-athletes that waiver is the signing of a letter of intent and then the signing of scholarship papers for each school year. That binding document ties the player to the school, but outside of medical support for the life of the scholarship it does not add additional benefits. The

stark difference between medical and other benefits for the life of scholarship and the ability to file a worker's compensation claim is one of the main issues of protection for NCAA student-athletes.

Worker's compensation not only benefits the employees who work in various fields, it can help protect employers from frivolous and possibly bankrupting lawsuits from injured employees. Typically, worker's compensation is awarded regardless of fault based on its status as an insurance for employees. If an employee is willfully put into danger or another negligent set of circumstances, then they might consider filing a lawsuit against the employer instead of filing for worker's compensation. Worker's compensation was designed to make sure employees would have access to immediate and secure ways to regain lost wages in the event of an injury or illness. According to Find Law (2017), the claim process for worker's compensation is designed to be straightforward with, "specific guidelines for determining whether a certain injury or illness qualifies for compensation, and certain procedures must be followed in order to file a proper claim." Prior to the adoption of worker's compensation laws across the country, in many cases there was no way for employees to recover lost wages or for families to recover damages for wrongful death scenarios in the workplace.

According to the State of Tennessee's Department of Labor & Workforce Development (2017),

"Tennessee has strict claims handling standards for adjusters and employers to ensure that work-related injuries and illnesses are reported timely and correctly. Employers covered by the Tennessee Workers' Compensation Act must submit all known or reported injuries or illnesses to their insurance carriers, unless they are qualified to be a

self-insured employer, within one (1) working day of the employer's knowledge of the injury or illness.”

These strict standards make sure that all employers and employees within the state are accountable and follow pre-acknowledged guidelines for worker's compensation claims.

According to the University of Tennessee website (2017), the University has campuses in Knoxville, Chattanooga, Martin and medical campuses spread across the entire length of the state. Every single employee from facilities services to lecturers, to system president, Dr. Joe DiPietro is covered under worker's compensation. All employees of the university would be covered if they were injured on the job moving boxes or were in a car wreck; however, there is one class of person presents that is not covered for worker's compensation at the university, that being students.

Regarding worker's compensation cases in the courts there are three main tests to determine the validity of a claim that are generally used by the courts outside of exclusive circumstances. Those three tests are the “control test”, the “relative nature of the work” test and the “economic reality” test. All three tests are important to consider and any one of the tests or a combination of them could be used by the courts or a compensation board to come to a decision.

I. The Control Test

According to Gurdus (2001), the Control Test uses the following legal standards:

“The control test, the traditional test used in questions of employment, focuses on whether the employer has a right to control the employee. ‘The test to be used in determining the relationship of [employee to employer] is whether [the employer] had a

reserved right of control over the means and agencies by which the work was done or the result produced, not the actual exercise of such control."

In other words, for the purposes of this Note, the question is whether universities have a right to control their student athletes. The control test basically uses the same criteria as the "master-servant" analysis under the Restatement (Second) of Agency (2005):

"The four principal factors under the control test, are (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire.' In addition, when applying the control test, each of the factors present must be balanced to determine their relative weight and importance; none of the factors are controlling."

Following that control test, it is necessary to determine the legal definition of the "servant" or more appropriately the employee. The "employee" of the school which in question in the case of collegiate athletics are the student-athletes, but whether these student-athletes should be called "employee(s)" or "athletes" is a major point of contention among both parties. The Restatement (Second) of Agency (2005) defines as a servant as, "a person employed to perform services in the affairs of another with respect to the physical conduct in the performance of the services is subject to the other's right of control." In the example of a student-athlete the employer-employee relationship would be determined by how much the coach, administrator, etc. has "control" of the activities of the student-athlete. This relationship is not as clearly defined as that of a manager and his directly reporting employees, but the relationship is fairly comparable.

Another definition of servant within the employer-employee relationship comes from The Restatement of the Law (Second) of Agency (1958), which defines the servant in this context as, “A servant is an agent [a worker] employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. [He may or may not be an agent.]” This definition is important because it defines the worker as being employed by the employer, but that person does not have to be an agent. This definition clearly defines what the employer-employee relationship and in the case of student-athletes this relationship would be the relationship between the player and coach. Additionally, The Restatement of the Law (Second) of Agency (1958) defines an independent contractor as someone who, “contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.” This definition could be used by either student-athletes or schools to try and make a point, but it would be difficult to maintain the enterprise of collegiate athletics if student-athletes were deemed to be independent contractors. That language would seem to imply them as almost contracted professionals like NBA or NFL players and that definition would not seem to be in concert with mission of educating student-athletes as well as allowing them to compete.

Additionally, the Second Restatement of Agency mentions that there are ten factors that must be determined as a matter of fact to decide whether someone is an independent contractor or in fact an employee. Independent contractors are treated differently under the law because they are hired on a case by case or task by task basis. Full-time employees on the other hand are kept on staff at all times, like keeping a lawyer or search firm on retainer instead of hiring them

on a situational basis. Of the 10 factors mentioned, there are three factors that are most pertinent to the situation of student-athletes as a whole. Those three factors are:

- a. the extent of control which, by the agreement, the master (employer) may exercise over the details of the work
- g. the method of payment, whether by the time or by the job
- h. whether or not the work is a part of the regular business of the employer

It is necessary to break down each of these points individually. When considering “extent of control” it is important to note that different sports and different coaching staffs exert unique amounts of control, but generally once a National Letter of Intent is signed the student-athlete is under the control of their direct coach and that staff. Furthermore, coaches determine who plays in games, when practices and study halls occur and what many aspects of student-athlete’s daily lives will consist of. This fairly high to extremely high level of control exerted by authority figures over student-athletes is important to consider.

Discussing “the method of payment” is tricky when NCAA student-athletes and their employment status is at stake because fundamentally NCAA athletes do not receive payment. Amateurism remains a main pillar of eligibility for all NCAA athletes regardless of division. The only payment for student-athletes is grant-in-aid, room and board, and cost of attendance stipends from schools that provide them.

Finally, determining if athletics is a regular part of university business has long been a contention between schools and athletes, students and other entities who have taken universities to court in worker’s compensation related and other suits. Determining the veracity of “point h.” is difficult because of the numerous connections between athletics and academics at any given

school. Referring to the NCAA Finance data from USA Today (2017), Texas A&M led the country in athletic revenue which is not necessarily part of the strict business of educating students. However, according to the Texas A&M Foundation's annual report (2016), the university's total net assets were \$1,559,800,000 in that fiscal year. The money generated and raised through athletics certainly played a hand in making sure Texas A&M was able to keep increasing that billion-dollar endowment. This is just one example among a multitude of the intertwined relationship between academics and athletics in higher education. Student-athletes as the name suggests are students like all undergraduate and graduate students at a university or college, but they are also quite different from their peers which makes untangling these connections extraordinarily difficult.

II. The "Relative Nature of the Work" Test

According to Gurdus (2001), the "relative nature of the work" test is generally used in the legal system to, "either supplement or replace the control test." The "relative nature of the work" test operates differently than the control test by determining how integral the employee's work was to the employer's business. Basically, the "relative nature of the work" test is used to determine the level of involvement with the fundamental business interest that an employee is involved. It is important to note that:

"with respect to the character of the work performed, the claimant would be required to show: (1) the degree of skill involved; (2) the degree to which the work is a separate calling or business; and (3) the extent to which a worker so situated reasonably can be expected to carry the burden of accident. With respect to the relationship of the work to the putative employer's business, the claimant would have to establish: (1) the extent to

which the work is a regular part of the putative employer's regular business; (2) the extent to which the work is being performed continuously or intermittently; and (3) the extent to which the work is of sufficient duration to constitute continuing services rather than a particular assignment.”

Breaking down the first three points is fundamental for this particular test. Regarding the degree of skill, NCAA athletes are recruited specifically for their skill in the sport they play. Any number of students every year will be recruited to schools all across the country for scholastic excellence, their ability to play an instrument or any other skill. However, only a select few will be targeted by the coaching staff of the women’s basketball team or baseball team to play on that team, so an elevated level of skill is certainly required. The second point talks about the, “degree to which the work is a separate calling”, which is a fairly easy point for the claimant to make if that claimant is an NCAA athlete. A collegiate soccer player may be majoring in engineering, but her soccer practices, games, and community functions will not necessarily help her ever get closer to earning her undergraduate degree. Study halls and mandatory tutoring could be used by schools as evidence that collegiate sport does in fact support the pursuance of a degree, but the overwhelming majority of activities related to playing a sport at the collegiate level are focused on that sport not educational attainment.

Athletics is often considered the front door of any university and the most important marketing tool, available to a university. Curtis (2017) points out that this phrase was often uttered by former University of Tennessee President Joe Johnson who regularly described the, “Athletic Department as the university's front porch. If your front porch is tidy, it reflects well on the rest of your house.” This idea is integral to the way universities use athletics as a tool to help gain funding, increase visibility and compete with their peers. Starting in 1984, colleges have

followed this correlation closely. In that year, Boston College star Doug Flutie completed a famous Hail Mary to beat Miami and won the Heisman Memorial Trophy. This visibility and publicity in turn resulted in the “Flutie Effect” where applications to Boston College greatly increased surrounding that season and an increase in applications often allows a university to be more selective in the quality of students it admits. Increases in applications, greater alumni giving, and facility renovations often occur in conjunction with improved or elite performance in athletics.

Increased donor responsiveness and the ability to make a school’s overall profile better are often cited as reasons for investing in athletics. Both of those are certainly worth the investment and according to Belzer (2015), “In 2014, college football revenues alone topped \$3.4 billion.” Incredible revenue growth and rising expenses have made collegiate athletics, specifically football and basketball, in that order a massive business. Student-athletes happen to be the only labor source for this large and growing business, yet they are denied the right to even claim worker’s compensation. This fundamental discrepancy has existed since the some of the earliest student-athlete worker’s compensation cases, but the situation has changed drastically since then.

Another point that must be proven in the first group concerns who would reasonably be at fault for an accident. According to *Sports Illustrated* (2017), Joel Berry II, North Carolina’s point guard recently broke his hand due to punching a wall after suffering a video game defeat. Berry is the starting point guard for the defending National Champion North Carolina Tar Heels men’s basketball team, but UNC officials and the basketball program would be hard-pressed to oversee every aspect of Berry’s life. It is unreasonable to expect the that the university as a whole and the UNC basketball program specifically is responsible for how Berry handles defeats

in a recreational video game between himself and one or more of his teammates. However, if Berry's injury had come during a team-mandated workout or during a practice drill or an actual game, then Berry would have a much stronger case against the university and athletic department regarding the "burden of accident".

The first part of the second group of factors that the claimant needs to prove to show that an employer-employee relationship exists for worker's compensation appears to be the most difficult to prove. Proving that participating in intercollegiate athletics is a putative part of the employer's business, i.e. colleges and universities educating students can be difficult. According to the University of Michigan's Accreditation website (2010), the university's mission statement is, "to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art and academic values, and in developing leaders and citizens who will challenge the present and enrich the future." Nowhere in that statement does it state that Michigan needs to pay Head Coach Jim Harbaugh a \$7.5 million base salary to control the football program or that Michigan must have a softball team. Nevertheless, athletics offer unique opportunities within universities and intercollegiate athletics can definitely help develop leaders and citizens who can challenge the present which is something the University of Michigan explicitly states that it is trying to do. Both sides can clearly make a case for how this either proves or disproves the employer-employee relationship based on the character of the work. The claimant would need to show that their athletic experience clearly fell within the educational mission of the university as well to establish this point.

The second point in this group for the "relative nature of the work" test concerns whether or not the work is being performed continuously or intermittently. If work is being performed intermittently then an employer regardless of the nature of the business would be able to present

a strong case that the employee was in fact an independent contractor which would essentially the claimant's case for a worker's compensation claim to be upheld by a court or compensation board. No, being a student-athlete is not technically a full-time job, i.e. 40+ hours per week on either a salaried basis or hourly wage. Because NCAA eligibility requirements strictly prohibit the payment of student-athletes and or those same collegiate athletes accepting prize money, bonuses, etc. However, it is very clear that the work of almost all student-athletes is in fact continuous and not intermittent. Intermittent work in terms of sport might be better characterized by someone who plays golf in the four majors, but does not play in any of the other PGA Tour events on the season while only practicing based on desire. Almost all collegiate athletes are not afforded that flexibility by their coaches or athletic departments. Many sports, including the major revenue producing sports of football and men's basketball are fairly comparable to full-time jobs. When meals, study hall, practice(s), travel to and from games, the games themselves, film study and meetings are considered that is a fairly significant chunk of the student-athlete's week in season. It is also useful to note that this does not include attending classes and meetings around academic which are certainly an integral part of any student-athlete staying eligible. Out of season, a student-athlete must maintain his/her eligibility, continue to make strides toward graduation, perfect their craft, attend practices and often stay on campus for summer school. When compared with the demands of a typical full-time job and compared against the requirements and time constraints of other students it appears clear that student-athletes undoubtedly put in the time and effort to be considered continuously employed.

The final tenet of the second group for the "relative nature of the work" test is determining whether, "the extent to which the work is of sufficient duration to constitute continuing services rather than a particular assignment." This third tenet is similar to the second

tenet that was just discussed. A particular assignment might be trying to qualify for the Summer Olympics in the high jump as an athlete or writing a thesis as a student in the Chancellor's Honors Program at the University of Tennessee. Those single assignments could take great skill, effort and time, but taking a holistic view those appear to be single assignments.

III. The "Economic Reality" Test

The final test that the courts have used according to Gurdus (2001) is the "economic reality" test. Gurdus (2001) states that the "economic reality" is less utilized and, "appears to be a combination of the control and "relative nature of the work" tests. Under the economic reality test there are certain factors that the court must consider in deciding whether an employer-employee relationship existed." The interesting thing about the economic reality test is that there is no one factor that controls the process or is a determining weight in how a case is decided.

The "economic reality" test is often used to reconcile the differences between the control test and the "relative nature of the work" test. Gurdus (2001) states that, "in applying the "economic reality" test, courts also examine the totality of circumstance surrounding the work performed." This could mean all manner of things for differing types of employment. Whether a manager at a coal mine was technically a miner could depend on his/her involvement and day-to-day activities in the actual core business of extracting the coal. On the other hand, a student-athlete's claim to be an employee could hinge on the time invested, potential lost earnings from not working a job and whether or not a scholarship is deemed to be a form of payment. All of those factors would be addressed and considered in totality using the "economic reality" test.

The crux of the "economic reality" test's usage in student-athlete worker's compensation is pointed out by Gurdus (2001), the test defines the employer-employee relationship through, "a

balancing of all the relevant factors in each case”. This flexibility makes the economic reality test different from the first two tests in worker’s compensation cases which are more often used and more strictly defined.

Case History in Student-Athlete Worker's Compensation Cases

A legal challenge for worker's compensation benefits as a student-athlete could come from any number of avenues. There have been player's paralyzed in football games, injured at soccer practice and injuries suffered as student-athletes that resulted in extensive and expensive medical care later in life. Some schools have done an excellent job of providing support for injured athletes, and others have not. Eric Legrand, a former Rutgers defensive tackle was paralyzed in game versus Army in 2010. According to Duggan (2015), Legrand has been rehabbing at the Kessler Institute for Rehabilitation with help from his alma mater Rutgers University since 2011. Rutgers has helped support Legrand in his efforts to rehabilitate his body and raise money for the Team Legrand Foundation for paralysis research. Another case with a positive story is the story of former Southern University football player Devon Gales who was paralyzed during a game at the University of Georgia (UGA). UGA's football program and athletic department helped Gales with medical expenses and this year the university began the process of doing even more for Mr. Gales. GeorgiaDogs.com posted a press release from the University of Georgia Athletic Association (2017) about building Devon Gales a handicap accessible house after receiving \$500,000 in donations. The actions of the Georgia community toward a fellow competitor who was injured during a contest are wonderful and show what can happen with a tremendous flow of support.

While both of those stories are tremendous examples of kindness and support that exemplify what is best in collegiate sport, they also highlight the fundamental issue of the lack of worker's compensation for student-athletes. The lack of the right to worker's compensation means that these athletes could only receive fully paid medical care until their scholarships expired. Rutgers has continued to support Legrand, but that would not have been an option for

Southern, which is cash strapped in the SWAC. The lack of funds available for the athletic department at a university in the same financial position at Southern require “guarantee games” where a Power 5 opponent like Georgia gives its opponent a large sum to play the game. Gales suffered his injury at Georgia’s Sanford Stadium and received an excellent outpouring of support from the university and its fans. Had Devon Gales been injured somewhere else the support and charity he received would likely have been much less and could have cost him the treatment that he needed to rehabilitate and gain the best quality of life possible. The fact that he could not claim worker’s compensation from Southern meant that Gales had to hope for and receive support from others, just like Legrand did.

Devon Walker’s injury during his time as a student-athlete at Tulane is unfortunate and mirrors what happened to Legrand during his collegiate career at Rutgers. One mistimed hit or fall caused not only a collegiate athlete’s career to end, but much more importantly a life to be forever altered. TCU’s SB Nation fan site “Frogs O’ War” discussed the issue of student-athlete injuries in a 2014 article entitled: *"Student Athletes"- Okay, but what happens when things go wrong?* The article makes an essential point about the medical care, financial and emotional support and general backing that student-athletes who have recently been paralyzed have received. Frogs O’ War’s article (2014) points out that in both of these situations, “the universities have done what they're legally able to do to help out.” Because these schools are not able to offer worker’s compensation or some other form of legal recompense that would allow these players to file for damages or stipends they are forced to go to remarkable lengths to help injured players.

Tulane, Rutgers, Southern and Georgia in the previous examples have all done whatever they could to support the student-athletes to the best of their abilities. Rutgers helped Legrand

with medical bills and rehabilitation; however, the Frogs O' War article clearly articulates one other essential thing that Rutgers did which was to help Legrand get a position with the Rutgers IMG Sports Network, a position that he holds to this day. Legrand can be heard by Scarlet Knights fans on the radio where he gives analysis on the pregame, halftime and postgame shows, and he is in the broadcast booth for home games. Even though he suffered a catastrophic injury on the football field, Rutgers helped make Legrand's lifelong dream of a career in broadcasting possible. Tulane established "Devon's Den" to help support Devon Walker as he seeks his advanced degree from Tulane while also going through the rehabilitation process. Tulane along with several entities help connect Walker with former New Orleans Saint Steve Gleason who is famed for his ALS research. Walker and Gleason are working together on causes and sit together at Saints home games in the Louisiana Superdome.

The actions of these schools are undoubtedly good and provide a glimpse into people in college athletics doing the right things. However, the Frogs O' War article makes an essential point after highlighting all the good that schools who have faced this tough situation have done, the schools can only do so much. NCAA member institutions are legally hamstrung and required to follow the rules of the organization they are a member of, or forfeit the opportunity for their student-athletes and school to participate in major intercollegiate sport. Because student-athletes are just that, students and athletes as well, not employees, Tulane cannot offer a weekly, monthly or yearly stipend based on a worker's compensation claim to Devon Walker. Even though Rutgers was able to secure employment for Legrand with the Rutgers IMG Sports Network and has been able to help facilitate his rehab, they are unable to give Legrand the worker's compensation benefits that any contracted employee of the school would receive.

The legal gray area that worker's compensation for student-athletes falls in means that invariably certain student-athletes have fallen through the cracks. Many student-athletes have sued for the right to be called an employee or receive worker's compensation benefits from the school they represented. One student athlete who fell through those legal cracks was Kent Waldrep of TCU. The Frogs O' War article (2014) identifies a central issue that is rarely discussed by the fans of any team, let alone one like TCU that has had a player paralyzed in a game, "what happens to players who get seriously injured while playing for a university?" That question is difficult to clear up because of the varying degrees of injuries, scholastic financial support and family/player need.

Kent Waldrep was a football player for Texas Christian University (TCU) in the early 1970s when TCU was still a member of the Southwest Conference (SWC). Waldrep played running back and his life would forever be changed during a game against Alabama at Legion Field in Birmingham during the 1974 season. According to Drape (1997), the play that Waldrep was injured on was, "defended well by the Crimson Tide, and in a violent collision near the sideline, Waldrep's neck was snapped." Waldrep nearly died and Drape (1997) says that he was in an, "Alabama hospital for a month and nearly died of pneumonia. He was told at a Houston rehabilitation clinic that he would never be able to feel anything from the neck down. He was told that he needed to learn to accept life in a wheelchair." Waldrep's medical bills were extensive and without the charity of Alabama Head Coach Paul "Bear" Bryant, Bryant's influential friends and numerous other forms of outside charity Waldrep's family would not have been able to pay his medical bills. Kent Waldrep received support from TCU, but that support was clearly limited and time dependent based on the life of his scholarship.

43 years after his injury, Waldrep is still alive in his 60s. Waldrep is still paralyzed and in a wheel chair as he has been for two thirds of his life. 40 plus years of medical bills is an inordinate amount for someone injured to pay let alone someone injured in the course of their employment. Waldrep established the National Paralysis Foundation in 1978 and he has helped raise over \$30 million for research since his injury. In the early 1990s, Waldrep decided to investigate whether he could receive worker's compensation from TCU, the Southwest Conference, the NCAA and other groups based on his injury and the medical expenses he incurred. Waldrep also decided to see what other financial support he may have been entitled to since his injury in October 1974.

Waldrep's journey through the court system began in 1992 when he pursued a worker's compensation claim for his injuries and the expenses incurred because of them with the Texas Workers' Compensation Commission. Waldrep would not get a final answer on his specific claim for eight long years, and during that time his claim would serve That battle still rages on 25 years later with little progress toward Waldrep's initial goal. In 1993, Waldrep received some good news regarding his pursuance of worker's compensation for his paralysis, he won his initial case with the Texas Workers' Compensation Commission. According to the New York Times (1993), the Commission ruled that a, "scholarship football player is a university employee and is such entitled to full employee benefits for injuries received while playing his sport." This decision would be appealed, still it was a ruling in favor of Waldrep and his fellow student-athletes with the determination that student-athletes were in fact employees of their respective schools. Waldrep's status as an employee in that 1993 ruling from the Commission entitled him to the benefits that any employee of TCU would be eligible for. The Texas Workers' Compensation Commission chose to award Waldrep \$70 per week since the date of the injury.

This money could cover medical bills, costs associated with treatment and incidental expenses and was a major victory for Waldrep.

The saga of Kent Waldrep, TCU and the NCAA's prevention of worker's compensation claims was far from over with the ruling in 1993. In 1997, Waldrep's case made it to District Court in Texas where he suffered a setback. Drape (1997) reported that, "a jury in state District Court ruled today that a former Texas Christian University running back who was paralyzed during a football game was not an employee of the school at the time and therefore was not entitled to workers compensation benefits for his injury." That jury decision invalidated the Texas Worker's Compensation Commission's prior decision to grant Waldrep a lifetime award of \$70 from the date of the injury. This decision led to the final part of the legal process for both sides which was Waldrep's appeal heard by the Court of Appeals of Texas, Third District located in the state capital of Austin.

In 2000, Waldrep's case went before the Court of Appeals. *Waldrep v. Texas Employers Insurance Association* (2000), Waldrep was seeking a reversal of a lower court decision against him that had determined that he was *not an employee* of TCU at the time of his severe injury against Alabama. The background for the case informs the judges presiding over the case that Kent Waldrep was primarily recruited to TCU by an assistant coach named Tommy Runnels. *Waldrep v. Texas Employers Insurance Association* (2000) asserts that during an in-home recruiting visit, "Waldrep's mother asked Runnels what would happen if Waldrep were injured during his football career at TCU. Runnels assured Waldrep and his family that TCU would 'take care of them' and emphasized that Waldrep would keep his scholarship even if he were injured and could not play football." There is no dispute that TCU paid the majority of Waldrep's early

medical bills; nonetheless, that financial support eventually ceased, but Waldrep's medical bills did not go away.

When he was still a prospective student-athlete Waldrep signed two crucial documents. Waldrep signed a letter of intent that student-athletes today typically sign before enrolling in school. In 1971-72 when Waldrep was being recruited, the letter of intent was mandatory for him to enroll and participate on the football team at TCU. The second pivotal document that Waldrep signed was his financial agreement with TCU as part of his decision to play football for the Horned Frogs. *According to Waldrep v. Texas Employers Insurance Association* (2000), Waldrep's signing of the financial aid agreement assured that as long as he stayed on scholarship his, "room, board and tuition would be paid for while attending TCU and that Waldrep would receive ten dollars per month for incidentals. This cash payment was generally referred to as 'laundry money'."

Applying the control test to Waldrep's situation with TCU can help prove or disprove if an employer-employee relationship existed or not. The first principal factor of the control test is the "direct evidence of right or exercise of control". On this factor, TCU likely had this power since according to *Waldrep v. Texas Employers Insurance Association* (2000), Waldrep signing the letter of intent meant that he would be penalized if he, "decided to enter a different school within the Southwest Conference." Today, the Southwestern Conference no longer exists, but the competition for recruits has increased feverishly in the 45 years since Waldrep was a recruit, yet the penalties for prospective student-athletes backing out of enrollment are still stiff. Additionally, the penalty for a student-athlete transferring from one school is a loss of a full year of eligibility which is a severe penalty when most student-athletes only have four years of eligibility total.

The second tenet of the control test is the “method of payment”. In the case of Kent Waldrep the method of payment was fairly straight forward. Waldrep received grant-in-aid from the university which covered his tuition, some meals and his room and board. Also, Waldrep’s expenses were in some form or fashion covered through the “laundry money” he received from TCU each month for his miscellaneous expenses. The scholarship was not provided as a bi-weekly paycheck like it would be for many employees of the university, but is a form of payment in exchange for Waldrep’s agreement to perform on the football field.

The third factor considered by commissions and courts alike under the control test states that for an employer-employee relationship to exist there must be, “the furnishing of equipment.” This principal factor is not specifically mentioned in the complaint from Waldrep or background presented in the court’s opinion, but is nevertheless relevant. Beyond a shadow of a doubt, Kent Waldrep received equipment from Texas Christian University as a football player. T-shirts, shoes and other items may not have been provided by the university; nevertheless, Waldrep was certainly provided pants, jerseys, helmets, mouth guards, cleats, etc. as a member of the TCU football program. Waldrep was wearing equipment provided by TCU the day that he was paralyzed, so the third condition of the control test is satisfied. Likewise, the fact that Waldrep was injured during an officially sanctioned contest of the university against another university means that Waldrep has a solid point in a potential case or worker’s compensation claim that he was injured in “the course of his employment”.

Finally, the final principal factor required under the control test to prove the existence of an employment relationship is the employer having, “the right to fire.” No, a university cannot revoke a player’s scholarship immediately for poor play or making illicit remarks in the media, but coaches and school officials have plenty of options for recourse against student-athletes at

their disposal. Student-athletes can be suspended indefinitely or for a set length of time, removed from the playing field by a coach's decision, declared academically ineligible or have the school decline to renew their scholarship among many other negative outcomes based on the situation. It is fair to point out, that many times either the student-athlete would not have his/her academics in order or his/her actions would have warranted the punishment. Nevertheless, it does not take away the fact that these punishments exist. Players can be kicked off teams or even expelled from their school, so it seems generally that schools might have "the right to fire" their student-athletes, even if is not directly comparable to a typical termination of employment.

Based on this tentative analysis, Waldrep appears to have a solid standing for proving the existence of an employment relationship based on the control test. Waldrep also had the original ruling from the Texas Workers' Compensation Commission in 1993 saying that he was an employee under the Commission's interpretation of worker's compensation. That decision was mute based on the district court ruling against him, but Waldrep appears to have had a solid case using that test. Waldrep was challenging five issues before the appeals court. In *Waldrep v. Texas Employers Insurance Association* (2000), the appellant wanted to determine, "whether as a matter of law, Waldrep was an employee of TCU." The other four challenges were based on evidentiary rulings and did not necessarily relate to the control test or any other test that the court could choose to assess the existence of an employment relationship or not.

The 2000 case was an appeal, so the facts of the case and decision made by the lower court were left intact. Waldrep was arguing importantly that when he played football he was, "an employee of TCU *as a matter of law*." This specific declaration was very important to the case. The jury in the original court case was asked simply if at the time of the injury was Kent Waldrep an employee of TCU – and the question was phrased as a simple yes or no question.

This simple yes or no answer went against Waldrep 10-2 in the district court verdict and is pivotal to both Waldrep's case and student-athletes' future claims to worker's compensation.

According to *Waldrep v. Texas Employers Insurance Association* (2000), the jury went to deliberations with a charge that clearly stated that an employee was someone, "in the service of another under a contract of hire, express or implied, oral or written, whereby the employer has the right to direct the means or details of the work and not merely the result to be accomplished." The appeals court in this case took pains to make sure they interpreted the lower court's decision to the best of their ability. Whether a "contract for hire" existed between Waldrep and TCU proved to be central in the jury's ruling against the paralyzed former football player. It bears noting that both parties must agree mutually for a contract to be formed and agreed upon. Still, the letter of intent and financial aid documents would seem to indicate that this occurred, and it is fair to wonder if the jury's decision might be different in 2017. The rapid commercialization of collegiate sport and the encroachment of professional sports on the collegiate landscape means certain elements of the Waldrep case in 2000 could be interpreted very differently in 2017.

The appeals court's brief in the Waldrep case mentions something extremely important to consider. The Court of Appeals in this case would uphold the jury's finding and rule against Waldrep's appeal if there was a *scintilla* of evidence. Scintilla's legal definition in this situation is a, "barely perceptible manifestation". This means that even if Waldrep's case had merit and could prove itself using any of the tests required to prove an employer-employee relationship, a small amount of evidence on the side of the original verdict would necessitate the appeals court ruling against Waldrep's appeal. In fact, this is what the appeals court did when they affirmed the decision of the lower court against Waldrep.

Former NCAA Executive Director Walter Byers was deposed in this case and by the time of the deposition he was no longer directly involved with the organization he had shaped. At that time, Byers had recently released a book entitled *Unsportsmanlike Conduct* and that book was a long form scathing indictment of the system that Byers and his lieutenants had been so successful in implementing. Byers made a number of interesting statements regarding whether athletes should be paid and what he would change in the NCAA system, but two things that he said in the deposition that appear in the case brief are particularly notable. First, Byers admitted that NCAA athletes are, “under contract on a pay scheme that is set in place by the national body and it is time to change that.” The fact that a former NCAA Executive Director who was the architect of the modern NCAA system considered the student-athletes to be under a contract says quite a lot. Being involved in a contract would strongly suggest that an employer-employee relationship exists between the NCAA member institutions and the student-athletes who compete on their behalf. Secondly, Byers when pressed by Kent Waldrep about whether the term “student-athlete” had been coined to avoid worker’s compensation admitted that the term in question allowed, “colleges to better ‘deal with’ such claims.” Byers answer is not a straight up denial or affirmation of what was behind the genesis of the student-athlete term, but it is important in Waldrep’s case. TCU paid for a sizeable early portion of Waldrep’s medical expenses, but he was a student-athlete and not an employee, and the Horned Frogs athletic department eventually stopped contributing. If student-athlete and employee were identical in meaning, then Waldrep would have been entitled to worker’s compensation through TCU’s school-wide insurance policy.

Waldrep’s case never made it to the Texas Supreme Court and he was denied a chance at worker’s compensation under the Texas Employers Insurance Association’s purview. The TEIA

was an association of employers that insured the payment of compensation to injured employees.

Employees became a member of the TEIA by paying dues that contributed to the support of all members in the case of injury. Because of Waldrep's dubious legal status as an employee due to being a college football player, and inability to prove that he directly paid dues to the TEIA at the time of his injury his claim was never able to be fulfilled. This was not the first setback against collegiate athletes gaining the right to worker's compensation, but it was one of the more recent cases that made its way through a number of levels of the court system and was additionally very high profile. It is now instructive to look at the relevant case law surrounding this issue.

Controlling Case Law

As previously stated, Kent Waldrep's struggle to prove that he deserved worker's compensation and in the process, gain more rights for all student-athletes fell short in 2000. Unfortunately, Waldrep's case is just one of many cases of severe injury in collegiate athletics history, and there are plenty of other noteworthy cases regarding this issue. The very first major case regarding worker's compensation for a student-athlete actually resulted in a legal victory for the athlete in question.

That case was the landmark 1953 case, *University of Denver v. Nemeth*. The Nemeth case made it all the way to the Colorado Supreme Court and in this case, the student-athlete claimed that he, "sustained injuries while performing services arising out of and in the course of his employment by the University of Denver." Nemeth was injured playing football for the school and was receiving \$50 from the school at the time of his injury. The University of Denver claimed in Nemeth (1953) that, "the University of Denver is solely engaged in the field of education, and its relationship with students is not within the purview or intent of the Workmen's Compensation Act." Two key points come from this assertion in resolving the future possibilities of worker's compensation protections for student-athletes.

First, in this case the University of Denver establishes an idea that schools still use as a legal defense. By stating that the school is only in the business of education, the University of Denver was trying to remove liability for something that did not happen strictly within the academic mission of the university. This statement could fall under the fourth tenet of the "economic reality" test for determining an employment relationship. That part of the "economic reality" test is concerned with determining whether the task performed was an integral part of the

proposed employer's business. The University of Denver claimed that Nemeth's work and participation on the football team was not an integral part of its business and most schools still say the same thing. The Industrial Commission in Colorado agreed with Nemeth that his injury came in the course of employment, but for an employment relationship to exist it must pass all four factors in the "economic reality" test. One of the main differences between Nemeth's situation and that of a modern football student-athlete is that Nemeth was employed by his school for outside work on the tennis courts. Today's college football player has much greater time demands and expectations than a player in the 1950s would have had and is almost always ineligible to be paid for outside work by the school while a student-athlete.

The second point that arises from the opinion of the Colorado Supreme Court in the Nemeth case is that the University of Denver sought to consider Nemeth a student like any other regular student at the university and not an employee. This strategy made legal sense then, just as it does now because preventing student-athlete's the right to call themselves employees means that they are in perpetual limbo between full employees and regular students. This distinction comes up time and again in worker's compensation cases with NCAA connections.

The Colorado Supreme Court stated in *University of Denver v. Nemeth* (1953) that, "the University of Denver is a private corporation. It is not in any sense a charitable institution, as that term is known to the law. Workmen's Compensation Acts are being extended even to the employees of charitable institutions." The University of Denver is a private school, but the distinction made by the court about a "private corporation" would generally apply to public schools as well meaning that this term could apply to almost all, if not all member NCAA institutions. The University of Denver being defined as such and Nemeth's potential employment

being more serious than “casual employment” meant that the establishment of an employment relationship could be reasonably inferred from the evidence in the case.

Another important factor to consider from the Nemeth case is that worker’s compensation cases are generally liberally construed to give maximum effect and protections to workers in a wide array of fields. This has not been the case for student-athletes, due to later cases, but at the time of the Nemeth case in 1953 those legal challenges had not yet occurred. Therefore, Nemeth could reasonably argue that worker’s compensation statutes should be liberally interpreted and applied to his football injury. That same case would likely be made today by any student-athlete looking to challenge for worker’s compensation rights under the current NCAA umbrella.

The final important point from the Nemeth case concerns the first tenet of the control test for an employment relationship and that entire test as a whole. In *University of Denver v. Nemeth* (1953), the Colorado Supreme Court quoted a case from that state where someone had been struck by lightning,

“when one in the course of employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one ‘arising out of’ the employment of the person so injured.”

Nemeth was required by the coaching staff of his football team to be there and play the game in question when he was injured. The court agreed with him that an employment relationship existed and under the control test, Nemeth’s requirement to be at the game where he was injured would satisfy the condition that mentions, “direct evidence of right or exercise of control.” This direct exercise of control by the agents of the University of Denver over Nemeth

combined with the previously discussed factors led to the Supreme Court of Colorado confirming the decision of the lower court to affirm the award the Commission gave Nemeth.

Based on the results of Nemeth, it might have seemed that student-athletes would be set up for success in the courtroom trying to gain and or exercise the right to worker's compensation. However, the truth could not be farther from that conclusion. Nemeth was precedent after its ruling in 1953, and is still cited regularly in these cases. However, this ruling would soon be overshadowed by another important case.

The next important case in the history of student-athlete worker's compensation case law came in Colorado in the 1950s as well. Ray Dennison, a football player at Fort Lewis A&M also worked for the school, and he subsequently died after injuries suffered on the field. Dennison's widow Billie Dwade Dennison filed for worker's compensation benefits from the Industrial Commission of the State of Colorado and was initially awarded the benefits that she sought for the family. However, on appeal this time the Supreme Court of Colorado used the precedent they set in *University of Denver v. Nemeth* to rule against student-athlete worker's compensation coverage.

The ruling in *State Compensation Insurance Fund v. Industrial Commission of Colorado* (1957) would eventually set the tone for future cases regarding student-athlete worker's compensation claims. The Supreme Court of Colorado made two clear distinctions between this case and the Nemeth case the court had ruled on four years earlier. First, they pointed out that in the Nemeth case, Nemeth's employment was wholly dependent on his playing football. In the case of Ray Dennison, the court did not believe that the same conditions applied and therefore his employment was incidental compared with Nemeth's. Second, the Supreme Court of

Colorado states in the opinion of this case that, “liberal construction of the Workmen’s Compensation Act cannot be expanded beyond the plain, clear and explicit language of the Act.” The court felt that to extend workmen’s compensation to the family of the deceased would extend the benefits too greatly and thus reversed the decision. This decision’s effects continue to reverberate 60 years later because this decision changed the dynamics of collegiate athletes applying for worker’s compensation nationwide.

In *Van Horn v. Industrial Accident Commission* (1963) which concerns the family of a student-athlete killed in a plane crash trying to prove that the decedent student-athlete was an employee of his university so that his family could receive worker’s compensation benefits. Gary Van Horn played football for California State Polytechnic College at San Luis Obispo, but he was a married player who commuted back and forth from school. To keep him on the team, Van Horn received a \$50 check at the beginning of each quarter. This money was provided to the football program from a booster program called the Mustang Booster Club. Support groups like the Mustang Booster Club are very common in intercollegiate athletics and many of them have extensive budgets.

The crux of the argument that Van Horn’s family was making hinged on the employment relationship as worker’s compensation cases tend to do. The California Court of Appeals states in the opinion of *Van Horn* (1963) that, “if services are voluntarily rendered without compensation, there is no employment relationship.” Basically, just because someone is a volunteer employee of any organization does not establish any kind of employer-employee relationship, which is a fairly straightforward assertion. However, the court later cites the California state labor code saying, “any person rendering service for another, other than as an independent contractor or unless expressly excluded herein, is presumed to be an employee.”

This case hinges on the fact the Industrial Accident Commission originally determined that Van Horn was not “rendering services” when he played football and travelled to and from the regularly schedule game in Ohio.

The California Court of Appeals then makes an essential point late in the opinion. The court in *Van Horn v. Industrial Accident Commission* (1963) sets forth that, “the Workmen’s Compensation Act is in effect a socially-enforced bargain which compels an employee to give up his valuable right to sue in the courts for full recovery of damages under common-law theories in return for a certain, but limited, award.” The inverse is true for the employer giving up its right to defend itself in the courts in exchange for only limited recovery by employees. This trade-off is generally considered to be mutually beneficial for both parties.

After deliberation, the court overturned the commission’s initial ruling and sent the proceedings back for further review. However, the overall decision is not as important for the study of this issue long-term as it to understand the trade-off that occurs between employers and employees when they agree to worker’s compensation statutes and rulings. Yes, student-athletes would have to show proof of employment like any other citizen seeking worker’s compensation benefits, but understanding that give and take is key. Student-athletes technically cannot sue the schools for injury and they do not have the right of a typical employee to get worker’s compensation either. This legal gray area significantly affects student-athletes even after the NCAA instituted a wide variety of student athlete insurance programs including the catastrophic injury insurance program.

In *Rensing v. Indiana State University Board of Trustees* (1983), the plaintiff Rensing wanted to file for worker’s compensation after suffering an injury at football practice. This case

brought the issue of whether a scholarship (grant-in-aid) constituted a contract of hire. In front of the Industrial Board, and before the Supreme Court of Indiana took the case, the Indiana State Board of Trustees had argued that providing a scholarship did not constitute hiring the individual or offering them a contract for hire. The university and Rensing argued back and forth concerning the obligations surrounding the receiving of a scholarship and what that entails, but this case truly focused on how the Indiana Supreme Court viewed the mission of the university as a whole versus the mission of Indiana State's football program.

According to the Supreme Court of Indiana's opinion in the Rensing (1983) case, "as far as scholarships are concerned, we find that the Indiana General Assembly clearly has recognized a distinction between the power to award scholarships and the power to hire employees." Hiring an employee could be done by any state agency or for that matter any business that complied with Indiana state laws and the U.S. Federal code. However, institutions of higher education that were funded by Indiana tax payers were given the special power to award educational or athletic scholarships to prospective students they targeted. This ability was determined to not be the ability to hire and fire and because of this Rensing lost his case. It is clear that the Indiana Supreme Court did not view Indiana State University as having the power to hire Rensing, so they would not have been able to fire him from his scholarship in the same way. This means that Rensing would have failed the control test for proving his employment relationship with Indiana State University.

Recommendations for Moving Forward

The NCAA was founded to deal with a rash of deaths on the football field. Players thankfully are much safer today, but concerns are still great in both contact and non-contact sports across the entire spectrum of sports that the NCAA offers. Unfortunately, cases like Kent Waldrep's seem the only likely way for the issue of worker's compensation for student-athletes to make it into the highest courts to be tested under the law. For issues like this to be resolved once and for all it seems that very serious injuries to student-athletes are required, so that these athletes can then test the legal system over this issue again. That assumption is no doubt unpleasant and an outcome which no one wants to see.

In the legal realm, the employer-employee issue has reached new levels recently as far as the NCAA is concerned. The Northwestern football team led by Quarterback Kain Colter tried to unionize and gain the right to collectively bargain for employee status with Northwestern University. Had the Wildcats football team voted to unionize and organized themselves into a collective unit then they also would have been able to collectively bargain with the university. The ability to collectively bargain would have likely put the issue of worker's compensation on the table as it would be for any union negotiating on behalf of its employees.

The National Labor Relations Board (NLRB) released an unpublished decision in 2014 that was non-binding precedent except for the parties in the case related to the Northwestern football team's attempts to unionize. The Northwestern players claimed that because they received scholarships that allowed them to decide whether they wanted to be represented for collective bargaining purposes. The evidence presented by the Northwestern football players is the best evidence currently to describe the cumulative amount of work that playing on

intercollegiate athletics at the NCAA level entails in the modern era. The players point out that they regularly spent 40-60 hours a week on football related activities before going to demanding classes and studying. In this case, the NLRB considered the general legal definition of employee. That broad definition defines anyone as an employee who, “performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.” This brings the situation back to the same employer-employee question that is central to all of the NCAA student-athlete worker’s compensation claims. The NLRB (2014) posited that, “players receiving scholarships to perform football-related services for the Employer (Northwestern University) under a contract for hire in return for compensation are subject to the Employer’s control and therefore employees within the meaning of the act.”

The NLRB case in question was to determine if the Northwestern football players were employees so they could vote to unionize. The Board found in favor of the players as employees in this non-binding decision and the vote was allowed to proceed. The players failed in unionizing after a failed vote, but the simple fact that the NLRB sided with them and allowed them to vote showed the changing landscape within college athletics. College athletes have generally been unsuccessful in the courts since the *Nemeth* case in acquiring any kind of worker’s compensation. In Kent Waldrep’s case his initial success was taken away by the courts. The Northwestern route seem to be the most likely way for student-athletes to earn the worker’s compensation they rightly deserve. Worker’s compensation laws exist in all 50 U.S. states, so student-athletes should be afforded this right that the vast majority of all workers in the U.S. receive. If athletes are able to unionize in the future that would give them the power to collectively bargain and then push for worker’s compensation. Based on the case law that seems

the most likely way for athletes in the NCAA to successfully be protected from and allowed to take financial compensation for injuries from their sports.

For the schools that can afford to pay worker's compensation for student-athletes to the current law or beyond that seems like the fair and equitable thing to do. Discussions between the NCAA and the large number of schools that could be financially impacted by trying to support worker's compensation benefits is a necessary dialogue. Some schools make significant amounts of revenue and profit, but most schools do not so that is an important discussion to have because the program would not be successful even if implemented if there is no money to support the injured players once they make a claim. This is certainly an issue that will be worth following closely as the NCAA landscape evolves.

Without collective bargaining it seems difficult to imagine that the NCAA would bestow the right of worker's compensation on it's athletes, but as discussed in section III, there are plenty of schools who have recently gone above and beyond to help support their athletes. A case similar to the recent Northwestern football program union case appears to be the most formidable chance to gain that right for the players in the future. However, there are others working toward future where collegiate athletes have more of a say in the process and more rights than they have had in the past. Ramogi Huma is a former UCLA football player and the head of CAPA which stands for the College Athlete Players Association. Huma's organization includes former Northwestern Quarterback Kain Coulter who led the Northwestern football team effort to unionize. CAPA was one of the driving forces behind the vote to unionize, and CAPA is still working to gain additional rights for collegiate athletes. The eventual goal is likely for student-athletes to have an employment status at least similar to their counterparts in other sectors of the professional world.

The other main issue is the future of the NCAA and its member institutions. This month, former Florida State University Head Football Coach Jimbo Fisher agreed to a 10-year, \$75 million-dollar contract to coach the Texas A&M Aggies. Through the support of prominent alumni and admission to the SEC, Texas A&M has become one of, if not the most profitable athletics departments in the country. This is a single example, but that single lump sum of \$75 million spread out over the life of the contract to student-athletes both at Texas A&M and to other NCAA member institutions could help thousands of college athletes deal with medical expenses and other expenses accrued due to injury and lifestyle change from their participation in collegiate sport. It is highly unlikely that Texas A&M will divert that money to worker's compensation or the payment of athletes, but it is more likely that the continued stratification of college athletics will only grow more severe.

According to ESPN (2016), "NCAA officials often argue that only two dozen or so of the 350 Division I athletic departments are truly self-sustaining, meaning revenues exceed or break even with expenses." Even if there are only 24 or less collegiate athletic departments that are generating a profit, the revenue numbers are staggering. The same ESPN (2016) report mentions that,

"The Outside the Lines analysis shows that the disparity between the richest and poorest schools has never been greater. In 2008, the gap between the average overall revenue of schools in today's Power Five conferences and those in the Group of Five was about \$43 million. In 2015, it was \$65 million. For public schools, if subsidies are subtracted from that revenue, the gap gets even wider, from an average \$53 million in 2008 to \$83 million in 2015."

The Power 5 conferences generate significantly more revenue than all the other conferences in the NCAA from Division III to the remainder of the Football Bowl Subdivision and that disparity will likely continue grow into the future. This chasm between the richest schools in the NCAA and the remainder of the member schools affects student-athletes trying to gain worker's compensation as a fundamental right as well. The schools with tremendous revenue and the student-athletes at those schools have leverage against other student-athletes at different schools because of the disparity in economic impact.

Yes, large schools making worker's compensation available to student-athletes would be a step in the right direction, but that would still leave most NCAA student-athletes lacking protection because their respective schools cannot afford to provide worker's compensation without significantly altering their athletic departments, likely by cutting a number of sports. Should another college player suffer an unfortunate injury in the near future and take their case to the courts it would allow the courts to take a look at the precedent in the previous worker's compensation cases involving student-athletes and possibly decide to go in another direction in favor of the players. Also, a vote to unionize by any team or conference would drastically alter the collegiate sporting landscape and immediately put worker's compensation on the table as a possible addition to student-athlete rights. College athletics is currently an enterprise undergoing immense change on an exceedingly quick timeline. While court cases take significant time and resources it would only take one case to unlock a fundamental right that players who sacrifice so much could use to offset catastrophic injuries and a lifetime of medical expenses and other hardships. This issue and the context surrounding it bear close examination in the months and years to come.

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