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Concussions in Athletes: Where We Are and What to do Now?

SPECIAL REPORT

January 2010

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Concussions in Athletes: Where We Are and What to do Now?

Over the past three months, the media has been fixated on concussions in professional football players. Some of the National Football League's top players – Ben Roethlisberger, Kurt Warner, Clinton Portis, DeSean Jackson – have recently been sidelined for concussions sustained on the playing field. After Ben Roethlisberger of the Pittsburgh Steelers was held out for an important game against division rival Baltimore because he was experiencing exercise-induced headaches, Hines Ward, the team's all-time leading receiver, suggested to the media that Roethlisberger should have played in the game, even if that meant lying to the team's medical staff in order to obtain clearance.¹

On December 1, it was reported that La Salle University had agreed to settle a lawsuit for \$7.5 million brought by the family of a football player who suffered significant injuries resulting from an on-field collision. The player's family contended that the player's injuries resulted from "second-impact syndrome," where an individual sustains a second head injury before an initial concussion has fully healed.

On December 4, 2009, Senator Robert Menendez introduced in the United States Senate the "Concussion Treatment and Care Tools Act of 2009" or "ConTACT Act," which would require the Secretary of Health and Human Services to develop federal concussion management guidelines within two years of passage of the law and would give federal grants to states if they commit to disseminating and ensuring the implementation of the guidelines by elementary and secondary schools.²

For professional sports franchises, colleges, universities, and even school systems across the country, *this is the perfect storm*. If these organizations do not take steps now to implement strong, aggressive measures to protect athletes, history shows the federal government may step in to require they take measures that they may be reluctant to implement.

THE NFL TAKES A MORE AGGRESSIVE APPROACH TO CONCUSSIONS

The NFL's approach to handling concussions sustained by its athletes is well-chronicled. Of course, concussions have always been part of the NFL "culture." One aspect of player toughness has been measured by the player's willingness to play through injuries, including injuries to the head. Hines Ward's comments regarding Ben Roethlisberger's playing status reflect that culture.

The NFL has consistently maintained that its franchises take all necessary and available steps to protect its players, given the importance of the players to the teams. No company, in the NFL's view, invests the types of resources into protecting the safety and health of its most valuable asset. However, numerous studies over the last decade have suggested that concussions in NFL players lead to serious and significant adverse health effects.

¹See Greg Bishop, *Steelers' Ward Voices Conflict between Team Goals and Player Safety*, N.Y. TIMES, DECEMBER 1, 2009, at B14.

²S.2840, 111th Congress (2009).

- A 2000 study surveying 1,090 former NFL players found that those players who had suffered concussions reported more problems with memory, concentration, speech impediments, and headaches than those who had not.
- A 2007 study surveyed 595 retired NFL players who said they sustained three or more concussions while playing. These players suffered depression at a significantly higher rate than players who sustained no concussions.
- A 2009 study commissioned by the NFL reported that Alzheimer's disease or other memory problems are diagnosed in former players at a higher rate than the general population.³

In October, the House Judiciary Committee held hearings on football brain injuries and questioned the extent to which the NFL and the National Football League Players Association (NFLPA) had taken steps to detect, treat, and prevent concussions in NFL players. The subtext of the hearings was clear: the NFL and the NFLPA better deal aggressively with concussions or Congress will step in and do it for them.

In response to this, the NFL released new protocols for teams to handle concussions. It has been widely reported that the protocols require an independent "third party" physician to be consulted regarding the treatment of concussions and "return-to-play decisions."⁴ George Attallah, assistant executive director of external affairs for the NFLPA was quoted recently as saying that the NFL protocols will hopefully "trickle down" to other levels and help standardize how sports teams and communities handle concussions.⁵

THE NCAA TAKES STRONGER ACTION

The NCAA is starting to follow the NFL's lead in this area. For years, the NCAA's guidance in the area of concussion management has been a few pages in the NCAA Sports Medicine Handbook.⁶ Guideline 2i of the NCAA Sports Medicine Handbook provides information on the rates of concussions amongst athletes in a variety of sports. It also lists the signs and symptoms of concussions to help guide universities in identifying athletes that may have suffered concussions.

The Handbook guides to a limited extent colleges and universities in determining when a head-injured athlete should return to active participation. Various factors are listed, such as clinical symptoms, previous history of concussion and severity of previous concussions, the sport, position, age, support system for the athlete and the overall "readiness" of the individual. The Handbook, however, does not describe what would constitute "readiness," as a practical matter. The Handbook also emphasizes the difficulties associated with making the "return to the field" decision, noting how each person must be evaluated on a case-by-case basis. In discussing a progressive return to practice and participation for head-injured players, the Handbook cautions, "[h]ow quickly one moves through this progression remains controversial."

³ See Times Topics, *Concussions and Head Injuries in Football*, N.Y. TIMES (2009), <http://www.nytimes.com/info/concussions-in-football/?scp=6&sq=concussions%20and%20head%20injuries%20in%20football&st=cse>.

⁴ See Paul Tenorio, *Congress Tries to Play it Safe*, WASH. POST, December 16, 2009, at D2.

⁵ *Id.*

⁶ NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2009-2010 SPORTS MEDICINE HANDBOOK (2009).

Finally, the Handbook mentions “second impact syndrome, in which a second impact with potentially catastrophic consequences occurs before the full recovery after a first insult.”⁷ It notes, however, that there is “some controversy” as to the existence of second impact syndrome.⁸

Notwithstanding this “controversy,” La Salle University just a few weeks ago agreed to pay \$7.5 million to a severely brain-damaged football player, who may have been the victim of second impact syndrome. The lawsuit was brought by Preston Plevretes and his parents. They alleged that Mr. Plevretes was cleared to play by university health professionals after sustaining an initial concussion – without adequate testing and before he was ready to return to the playing field. In a subsequent football game, Mr. Plevretes had a helmet-to-helmet collision and suffered significant head injuries. Since that collision, Mr. Plevretes has undergone several operations and treatments, requires around-the-clock care and has difficulty walking and talking.

Perhaps the shock of this settlement jarred the NCAA sufficiently to greater action. On December 16, the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports met and agreed to playing rules changes in all NCAA sports related to concussions:

- An athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as unconsciousness, amnesia, headache, dizziness, confusion, or balance problems), either at rest or exertion, shall be immediately removed from practice or competition and shall not return to play until cleared by a physician or her/his designee.
- Athletes who are rendered unconscious or have amnesia or persistent confusion shall not be permitted to continue for the remainder of the day. These athletes shall not return to any participation until cleared by a physician.

Also approved were the following new statements in the NCAA Sports Medicine Handbook:

- Any athlete exhibiting an injury that involves significant symptoms, long duration of symptoms or difficulties with memory function should not be allowed to return to play during the same day of competition.
- It has been further demonstrated that retrograde amnesia, post-traumatic amnesia, and the duration of confusion and mental status changes are more sensitive indicators of injury severity, thus an athlete with these symptoms should not be allowed to return to play during the same day. These athletes should not return to any participation until cleared by a physician.
- It is essential that no athlete be allowed to return to participation when any symptoms-persist, either at rest or exertion.

⁷ *Id.* at 52.

⁸ *Id.*

Is this Enough? Or is More Needed?

As the NFL has taken a stricter stance on concussions in players and the NCAA has just stepped up to the plate, the big question is: will this be enough to calm members of Congress and other federal authorities?

The ConTACT Act may be the first of many pieces of legislation dealing with concussion management. S.2840 would require the Secretary of Health and Human Services to develop guidelines “that address the prevention, identification, treatment, and management of concussions in school-aged children, including standards for student athletes to return to play after a concussion.”⁹ It also provides for grants to states that develop plans to disseminate and ensure the implementation by elementary and secondary schools of the guidelines.¹⁰

The ConTACT Act, while a meaningful development, is a baby step in this area. There is no doubt that having standardized federal guidelines related to concussion management would be important. A quick look at the Centers for Disease Control’s website on concussions shows the need for comprehensive federal guidelines on concussions. But the ConTACT Act directly addresses only elementary and secondary schools. It does not deal directly with colleges and universities and certainly does not touch upon professional athletes, who are exposed to concussion risks on an almost daily basis.

At the professional level, one has to ask where is the Occupational Safety and Health Administration (OSHA) in all this? While some professional athletes may be “independent contractors” and not covered by the Occupational Safety and Health Act of 1970 (OSH Act), many most assuredly are “employees” and their employers must take steps to protect them. The failure of employers to respond on their own to workplace injuries and illnesses was one of the key reasons that Congress passed the OSH Act.¹¹

In order for OSHA to regulate a hazardous condition in the workplace, it must first determine whether a “significant risk” of workplace injury or death exists from exposure to the hazardous condition.¹² The risk of this injury or death is considered over a 45-year working lifetime under the OSH Act.¹³ It would be interesting for OSHA to examine – in all professional sports – what is the risk of developing a concussion or other serious head injury assuming a professional athlete were to be exposed to hazards over a 45-year period. The numbers could be eye-opening.

With all of the media and public frenzy over concussions in athletes, OSHA has been silent. Perhaps the issue of injuries in professional athletes is too far outside OSHA’s comfort zone, believing its limited resources can be better used elsewhere. If that is the case, and professional sports franchises, colleges, and universities do not take it upon themselves to deal with the issue of concussions, the organizations may be staring down their own “Sports Safety and Health Administration” or “SSHA” to mandate athlete safety and health.

⁹ S.2840, 111th Congress § 3 (2009).

¹⁰ *Id.*

¹¹ 29 U.S.C. 651 *et seq.*

¹² *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980).

¹³ *Buildiing & Constr. Trades Dep’t v. Brock*, 838 F.2d 1258, 1264-65 (D.C. Cir. 1988).

What to do Now!

The message for professional sports franchises, colleges, universities, and public school systems across the country is to establish and implement protocols for handling concussions. And to do so now! This is particularly true for colleges, universities, and secondary school systems that may currently be focusing on the severity of the issues of concussion management. While each situation will be different, recommended steps include:

- Conduct an independent review of existing protocols, if any, for handling concussions. Compare these protocols against the latest scientific and medical guidance on concussion management.
- Interview key personnel in concussion management *and athletes* to identify how well the protocols are working and areas where improvement is needed.
- Identify and contact all local and regional resources for handling concussions. If using these outside resources, ensure they are using established protocols. Any use of outside resources should be documented on a case-by-case basis.
- Train (and retrain) key staff and the athletes on the protocols and concussion management.

Jackson Lewis' Professional and Collegiate Sports Employment Law and Compliance practice group will continue to keep you apprised of developments in this area. For more information on the Jackson Lewis Professional and Collegiate Sports Employment Law and Compliance practice group, please contact Robert Clayton at claytonr@jacksonlewis.com; Brad Hammock at hammockb@jacksonlewis.com; or the Jackson Lewis attorney with whom you regularly work.

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