

July 2015

# College Athletes Should Be Entitled to Workers' Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01

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## Recommended Citation

Woodburn, David W. (1995) "College Athletes Should Be Entitled to Workers' Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01," *Akron Law Review*: Vol. 28 : Iss. 3 , Article 11.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol28/iss3/11>

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**COLLEGE ATHLETES SHOULD BE ENTITLED TO WORKERS'  
COMPENSATION FOR SPORTS-RELATED INJURIES: A REQUEST  
TO BROADEN THE DEFINITION OF EMPLOYEE UNDER  
OHIO REVISED CODE SECTION 4123.01**

INTRODUCTION

In today's highly competitive society, the emphasis on success and winning has manifested itself not only in the professional world, but more importantly, it has become solidified in the realm of amateur sports.<sup>1</sup> Since its inception in 1905, the National Collegiate Athletic Association (hereinafter referred to as NCAA) has attempted to shelter the nation's colleges and universities from the ever-mounting pressure to turn amateur sports into a billion dollar<sup>2</sup> business venture.<sup>3</sup> Despite the NCAA's protectionistic approach to amateur athletics, it has been relatively ineffective in its so-called efforts to preserve amateurism in the face of "profit-making enterprises."<sup>4</sup>

The futility of the NCAA's efforts is evidenced by the \$1 billion dollar television contract between CBS and the NCAA,<sup>5</sup> as well as the \$38 million contract Notre Dame University signed with NBC, which granted NBC the exclusive right to televise all of the school's home games for a period of five years.<sup>6</sup> When these agreements by the NCAA and its member institutions are

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1. See generally Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility For Athletic Injuries*, 55 U. PITT. L. REV. 129, 133-36 (1993).

2. Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 154 (1992) (quoting Alexander Wolff, *Reaching for the Stars*, SPORTS ILLUSTRATED, March 26, 1990, at 22, 25-26). See also William C. Rhoden, *\$1 Billion Just Isn't What It Used to Be*, N.Y. TIMES, June 22, 1990, at B8 (reporting that the NCAA entered into a \$1 billion contract with CBS under which CBS obtained the rights to televise the popular NCAA basketball tournament for seven years).

3. See Stephen Bourque, *Antitrust Law—N.C.A.A. Rules That Limit the Number of Televised Intercollegiate Football Games Violates Section 1 of the Sherman Act*, *National Collegiate Athletic Assoc. v. Board of Regents of the University of Oklahoma*, 10 T. MARSHALL L. REV. 632, 644 (1985). "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." *Id.* See also *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 88 (1984). Stating that the NCAA has "adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletics, and rules governing the size of athletic squads of coaching staff" in an effort to regulate amateurism in college sports. *Id.*

4. *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977). There is no dispute that "[w]hile organized as a non-profit organization, the NCAA—and its member institutions—are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises." *Id.*

5. Jones, *supra* note 2, at 154.

6. *Id.* at 154 n.213 (quoting Craig Neff, *Expansion and Divisions*, SPORTS ILLUSTRATED, June 11, 1990, at 11).

considered in conjunction with the amount of revenue that each university receives as a reward for a successful sports teams,<sup>7</sup> the notion that collegiate sports is purely "amateur" is severely discredited.<sup>8</sup> Furthermore, the concept that the NCAA and its member universities are engaged in big business is supported by repeated court holdings which have recognized the NCAA's activities as being similar to those of a business venture.<sup>9</sup>

In light of these contracts and various court rulings, there is little doubt that the impact of collegiate sports extends beyond the bank accounts of each university.<sup>10</sup> As the revenue earned by each university becomes more dependent upon the ultimate success of their respective sports teams, the universities are compelled to place further pressure on their coaches to produce winning programs.<sup>11</sup> This pressure is then radiated throughout the institution, affecting not only the coaches, but more importantly, the athletes themselves.<sup>12</sup>

When this pressure is coupled with the individual athlete's own desire to use college athletics as an avenue to professional sports and the millions of

7. See Mark. R. Whitmore, *Denying Scholarship Athletes Workers' Compensation: Do Courts Punt Away A Statutory Right?*, 76 IOWA L. REV. 763 n.1 (1991). In 1989, the NCAA Division I-A athletic programs produced an average of \$9,685,000 in revenues per institution. *Id.* (quoting M. RAIBORN, *REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS*, 10 (1990)).

8. *Id.* For each game that a university won during the 1990 NCAA basketball tournament, they received \$286,000; with each school reaching the "final four" receiving \$1.4 million. *Id.* See also Jones, *supra* note 2, at 154 n.210. In 1989 24 College Football Association teams earned a combined \$33 million for post-season bowl games. *Id.*

9. See, e.g., *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1148-49 (5th Cir.1977) (holding that the NCAA, with its multi-million dollar annual budget, is engaged in a business venture and not entitled to a total exemption from anti-trust regulation on the ground that its activities are educational and carried on for the benefit of amateurism); *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (agreeing with the *Hennessey* decision that the NCAA is engaged in a business venture); *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (holding that NCAA's attempt to televise its universities football games between 1982-85 violated section 1 of the Sherman Act).

10. E.g., Jones, *supra* note 2, at 156-57 (detailing the pressures and problems prevalent within college athletics and their potential effects on the universities, team physicians, and the athletes within the program).

11. *Id.*

12. *Id.* "The 'trickle-down' effect as it affects college athletes is real: colleges pressure coaches to produce winning programs, athletes to perform, doctors to heal injuries quickly; coaches to pressure athletes and doctors; other players wanting their teams to be successful, pressure peers to 'play hurt'; injured players, themselves, apprehensive that they will lose their spot in the starting line-up or their stage to perform for the professional scouts, play hurt and urge physicians to do whatever is necessary to help them perform. *Id.* Cf. Morely Ben Pitt, *Malpractice on the Sidelines: Developing a Standard of Care for Team Sports Physicians*, 2 COMM/ENT L.J. 579, 586, 588-90 (1980); Jones, *supra* note 2, at 157 n.222.

dollars<sup>13</sup> associated with that level of play, the likelihood that an amateur athlete will overextend himself and suffer injury increases tremendously.<sup>14</sup> Within the last ten years, there have been three notable instances in which prominent college football athletes were "catastrophically injured."<sup>15</sup> Although the injuries sustained by Marc Buoniconti, Chucky Mullins, and Hank Gathers were tragic, they were not in and of themselves unique or extraordinary.<sup>16</sup> Considering the accidents involving Buoniconti and Gathers, both players had been previously diagnosed as having problematic physical disorders, yet were allowed to compete in spite of these known conditions.<sup>17</sup>

It should also be noted that, within the last twenty years, the number of incidents involving fatalities directly related to collegiate football has fluctuated between 0.00 and 2.67 per 100,000 participants.<sup>18</sup> In addition, there were three "catastrophic injuries" sustained by athletes in sports other than collegiate football in the last fifteen years.<sup>19</sup> Although this number does not appear to be that high, when it is combined with the fact that approximately twelve college football players suffered permanent paralysis during the 1990 season alone, it becomes obvious that college athletics, as a whole, pose a tremendous risk to an athletes physical health and well-being.<sup>20</sup>

When one considers the amount of money that is potentially available to college athletes who are able to reach the professional level as well as the relatively high risk of physical injury caused by the competitive nature of

13. *E.g.*, *Stat of the Day*, WASH. POST, Aug. 3, 1991, at D2 (listing the average salaries of professional athletes in hockey, football, basketball, and baseball).

14. Jones, *supra* note 2, at 153.

15. *See, e.g.*, C. Leerhs, *Death on the Basketball Court*, NEWSWEEK, Mar. 19, 1990, at 52 (discussing the death of Loyola Marymount University basketball standout Hank Gathers, who died during a conference tournament game); William Nack, *Was Justice Paralyzed?*, SPORTS ILLUSTRATED, July 25, 1988, at 32 (detailing how Marc Buoniconti, a sophomore linebacker at the Citadel, was rendered a quadriplegic following a hit he applied to an opponent); Rick Telander, *An Enduring Legacy*, SPORTS ILLUSTRATED, May 20, 1991, at 24 (chronicles the death of Chucky Mullins, a safety for Ole Miss, resulting a year and a half after shattering four vertebrae in his neck while breaking up a pass).

16. *See* Jones, *supra* note 2 at 113-22 (discussing how Mark Tingstad, a football player at Arizona State University sustained a serious neck injury in the course of a game, after he had been cleared to play despite a diagnosed congenital defect in his spinal column).

17. *See* Jones, *supra* note 2 (for a detailed discussion of university and team liability for injuries sustained following a clearance to play).

18. *Id.* at 118-19 n.45 (quoting NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SPORTS MEDICINE HANDBOOK 22, (1987) [hereinafter NCAA SPORTS MEDICINE HANDBOOK]).

19. *See* NCAA SPORTS MEDICINE HANDBOOK, at Table VII. There were three catastrophic injuries sustained in intercollegiate gymnastics, lacrosse, and swimming during that period.

20. Jones, *supra* note 2 at 118-19 n.45 (quoting Douglas Lederman, *Athletic Notes: Study Shows No Football-Related Deaths in 1990 Season*, CHRON. HIGHER EDUC., May 1, 1991, at A34).

college athletics, the seriousness of an injury suffered at the amateur level clearly manifests itself.<sup>21</sup> Thus, a serious question arises as to what remuneration a collegiate athlete is entitled to receive upon suffering a serious injury in the course of intercollegiate athletics.<sup>22</sup>

Currently, there is no generally accepted means of protecting an amateur athlete against the future losses which may accompany a serious injury, although insurance coverage is an option for schools to employ.<sup>23</sup> Given the fact that college athletics is indeed a big business in which athletes sustain serious injuries, the applicability of workers' compensation as a means of remuneration appears to be highly viable.<sup>24</sup>

This Comment examines the Ohio Workers' Compensation Act<sup>25</sup> and its applicability to scholarship-athletes. Part I discusses the failure of the NCAA and its universities to adopt an insurance program capable of providing effective coverage to scholarship-athletes. Part II provides a general overview of workers' compensation and discusses the major cases which either support or negate the applicability of workers' compensation to scholarship-athletes. Part III examines Ohio Revised Code section 4123.01 and how it can be interpreted to include scholarship-athletes within its scope, as well as discussing the public policy implications of incorporating scholarship students with this section.

## I. ATHLETIC INSURANCE AND ITS APPLICABILITY TO COLLEGE ATHLETES

### *A. NCAA Insurance: An Inadequate Remedy for Injured College Athletes*

While insurance coverage would appear to be a plausible means of protecting scholarship athletes from financial harm, it has been relatively unsuccessful.

21. See Mitten, *supra* note 1, at 134-35. "College athletes also are willing to play with injuries or physical abnormalities. Despite enormous odds, many of them aspire to a future professional career and fear missing an opportunity to impress pro scouts by not playing." *Id.*

22. See William H. Baker, *Injuries to College Athletes: Rights and Responsibilities*, 97 DICK. L. REV. 655, 655-56 (1993) (detailing the various methods of reimbursement available to a student athlete who suffers a sports related injury during the course of their athletic career).

23. See generally Baker, *supra* note 22, at 663-65 (provides details as to the multitude of insurance coverages which may be used, but which are not plausible as a general solution, including the NCAA Insurance Plan, Exceptional Student-Athlete Insurance, Self-Insurance, and Family Insurance).

24. See Whitmore, *supra* note 7, at 799.

25. OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

cessful in its application.<sup>26</sup> The most recent attempt to protect student athletes has been the incorporation of the NCAA insurance plan, which became effective August 1, 1992.<sup>27</sup> The plan was projected to operate through August 1, 1995<sup>28</sup> and required the NCAA to pay one hundred percent of the premiums owed by universities which provided their athletes with "catastrophic athletics injury insurance."<sup>29</sup> This program also provided benefits such as a lifetime loss of earnings benefit of up to \$2,000 per month, nursing care at the individual's home of up to \$50,000 per year, a college education benefit of up to \$60,000 to assist in the completion of the individual's education, and a \$10,000 accidental death benefit.<sup>30</sup> The primary drawback of the insurance plan is the fact that a member institution of the NCAA is not required to subscribe to the plan or to any alternative insurance coverage.<sup>31</sup> When this notion is coupled with the fact that only "catastrophic" injuries are covered by the plan, it becomes obvious that this insurance scheme is inadequate, especially considering the wide array of "lesser" injuries which are prevalent in college athletics.<sup>32</sup>

Similarly, the NCAA has approved a disability insurance coverage plan which is available to "exceptional student-athletes."<sup>33</sup> Under this plan, talented athletes are provided with a maximum coverage of \$900,000 for baseball, \$1,800,000 for football, and \$2,700,000 in the case of basketball.<sup>34</sup> Clearly, this scheme of insurance coverage does not provide coverage for the vast majority of athletes and totally ignores participants in sports other than the three mentioned above.<sup>35</sup>

If neither of the previous insurance plans are available to an athlete, the athletes themselves are forced to purchase expensive self-insurance or fam-

26. See *infra* notes 27-38 and accompanying text.

27. Baker, *supra* note 22, at 663.

28. The plan is only scheduled to operate until August 1, 1995 because the NCAA was not willing to commit beyond that time frame of three years. *Id.*

29. *Id.* at 663-64. "Catastrophic athletics injury insurance" provides coverage for life-threatening injuries such as paralysis, while failing to provide coverage for injuries such as sprains and pulled muscles. *Id.* at 663 (quoting NCAA NEWS, June 24, 1992, Volume 29, No. 25).

30. *Id.* at 663-64 (quoting NCAA NEWS, June 24, 1992, Volume 29, No. 25).

31. *Id.* at 664-65.

32. See generally Whitmore, *supra* note 7, at 799.

33. Baker, *supra* note 22, at 664-65. The insurance applies to college football players whom are projected to be drafted in the first two rounds of the National Football League Draft. It also applies to college basketball and baseball players projected to be picked in the first round of the respective drafts.

34. *Id.* at 664.

35. *Id.*

ily insurance.<sup>36</sup> Given the vast amount of revenue which universities earn through athletic programs, it seems highly inequitable to force a scholarship-athlete to pay for their own insurance or otherwise face the risk of being left without any means of compensation.<sup>37</sup>

### *B. Workers' Compensation as a Solution for Scholarship Athletes*

In light of the fact that insurance coverage is not a comprehensive solution to student-athlete injuries, there exists a need for some type of unifying coverage.<sup>38</sup> A solution to this problem may lie in state workers' compensation codes.<sup>39</sup> If a scholarship-athlete is recognized as an employee of the university which he attends, then courts will allow recovery under the state workers' compensation.<sup>40</sup> However, if the laws of a particular state do not allow such an interpretation, the athlete may be left without compensation.<sup>41</sup> Thus, in order to insure that scholarship-athletes as a whole are provided with some sort of remuneration, it is necessary that either state courts interpret existing statutes as inclusive of scholarship-athletes or that state legislatures amend their respective workers' compensation acts to include scholarship-athletes within such coverage.<sup>42</sup>

## II. THE HISTORY OF WORKERS' COMPENSATION AND ITS APPLICABILITY TO SCHOLARSHIP-ATHLETES

### *A. A General Overview of Workers' Compensation*

With the dramatic increase of business resulting from the Industrial Revolution, the number and severity of injuries to employees increased drastically.<sup>43</sup> In an effort to alleviate poor working conditions and the injuries resulting therefrom, Germany and Great Britain enacted legislation of a type

36. *Id.* at 665. "One problem with [student-athlete's family insurance] is that families of many student athletes may not have insurance, and even if they do, their policies may not cover athletic injuries. *Id.* See also Ronald D. Mott, *Schools Feeling the Hurt of Rising Insurance Costs*, NCAA NEWS, Sept. 14, 1992 (discussing solutions to problems that colleges face due to increased insurance costs).

37. See generally Baker, *supra* note 22, at 665.

38. *Id.* at 689-91.

39. See, e.g., Whitmore, *supra* note 7. See also Baker, *supra* note 22, at 689-91.

40. See Baker, *supra* note 22, at 689.

41. *Id.* at 690.

42. Whitmore, *supra* note 7, at 765-66.

43. See Whitmore, *supra* note 7, at 767 n.19.

now commonly referred to as workers' compensation acts.<sup>44</sup> In the United States, versions of those acts were adopted in all fifty states.<sup>45</sup>

Under such statutes, an employer is obligated to pay for the injuries sustained by an employee while on the job by either arranging for self-insurance and paying the employee directly for the injuries or by paying premiums into the state workers' compensation fund.<sup>46</sup> In return, the employee is barred from suing the employer in tort for injuries not intentionally inflicted and is limited to recovery of a "statutorily designated amount" as their compensation.<sup>47</sup>

In determining whether an individual is entitled to workers' compensation, there are two fundamental inquiries that must be made.<sup>48</sup> First, the court must look to the agreement between the employer and the individual to determine if an employer-employee relationship existed at the time of injury.<sup>49</sup> If the court determines that such a relationship did exist, it must then decide whether the injury occurred as a result of, or in connection with, the employment.<sup>50</sup>

In determining whether the two preceding criteria have been met in a given situation, courts will look to the specific language of a particular state's workers' compensation statute<sup>51</sup> and decide whether the injury "arose out of

44. *Id.* (citing W. PROSSER & W. KEETON, *THE LAW OF TORTS* 573 (5th ed. 1984)). See also ROSCOE T. STEFFEN & THOMAS R. KERR, *AGENCY-PARTNERSHIP CASES AND MATERIALS*, 164 (4th ed. 1980).

45. See STEFFEN & KERR, *supra* note 44, at 164-65. Most of the states adopted versions patterned after the early British Workmen's Compensation Act of 1897 and continue to follow the formula invented by the British to fix the act's boundaries. New York's Act is illustrative "Every employer subject to this chapter shall in accordance with this chapter secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment without regard to fault as a cause of the injury." *Id.* See *infra* note 51.

46. Whitmore, *supra* note 7, at 769-70 (quoting 4 A. LARSON, *WORKMEN'S COMPENSATION LAW* § 1.10, at 7-1 app. A (1990)).

47. *Id.* at 770-71 n.28-31. See, e.g., F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 11.2, at 70-71, 77-78 (1986); W. PROSSER & W. KEETON, *supra* note 44.

48. Baker, *supra* note 22, at 690.

49. *Id.* See also Whitmore, *supra* note 7, at 771-72. "To qualify for workers' compensation benefits, individuals must work as employees rather than independent contractors. . . ." *Id.* at 771.

50. Baker, *supra* note 22, at 690.

51. See ALA. CODE § 25-5-1 (1994); ALASKA STAT. § 23.30.265 (1994); ARIZ. REV. STAT. ANN. § 23-901 (1994); ARK. CODE ANN. § 11-9-102 (Michie 1994); CAL. LAB. CODE § 3350 (West 1994); COLO. REV. STAT. § 8-40-201 (1994); CONN. GEN. STAT. ANN. § 31-275 (West 1994); DEL. CODE ANN. tit. 19, § 2301 (1994); D.C. CODE ANN. § 36-301 (1994); FLA. STAT. ANN. § 440.02 (West 1994); GA. CODE ANN. § 34-9-1 (1994); HAW. REV. STAT. § 386-1 (1994); IDAHO CODE § 72-102 (1994); ILL. ANN. STAT. ch. 820 para. 305/1 (Smith-Hurd



and in the course of employment.”<sup>52</sup> This often-used phrase summarizes the requirements that an employer-employee relationship be in existence at the time of injury, and that the necessary causal connection exists between the injury and the employment.<sup>53</sup>

In deciding whether the injury “arose out of and in the course of employment,” there are basically two interpretations of this phrase which a court may employ.<sup>54</sup> The first involves an analysis of the “master-servant” relationship<sup>55</sup> as dictated by the Restatement (Second) of Agency.<sup>56</sup> Under the Restatement, the focus is on whether the individual in question was “employed to perform services in the affairs of another and who, with respect to the physical conduct in the performance of the services is subject to the other’s control or right to

1994); IND. CODE ANN. § 22-3-6-1 (West 1994); IOWA CODE ANN. § 85.61 (West 1994); KAN. STAT. ANN. § 44-508 (1994); KY. REV. STAT. ANN. § 342.001 (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 23:651 (West 1994); ME. REV. STAT. ANN. tit. 39-A, § 102 (West 1994); MD. CODE ANN., LAB. & EMPL. § 9-101 (1994); MASS. GEN. LAWS ANN. ch.152, § 1 (West 1994); MICH. COMP. LAWS ANN. § 418.118 (West 1994); MINN. STAT. ANN. § 176.011 (West 1994); MISS. CODE ANN. § 71-3-3 (1994); MO. ANN. STAT. § 287.020 (Vernon 1994); MONT. CODE ANN. § 39-71-116 (1994); NEB. REV. STAT. § 48-101 (1994); NEV. REV. STAT. § 616.055 (1994); N.H. REV. STAT. ANN. § 281-A:2 (1994); N.J. STAT. ANN. § 34:15-35.11 (West 1994); N.M. STAT. ANN. § 52-1-1.1 (Michie 1994); N.Y. WORK. COMP. LAW § 2 (McKinney 1994); N.C. GEN. STAT. § 97-2 (1994); N.D. CENT. CODE § 65-01-02 (1994); OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994); OKLA. STAT. ANN. tit. 85, § 3 (West 1994); OR. REV. STAT. § 656.003 (1994); 77 PA. CONS. STAT. ANN. § 29 (1994); P.R. LAWS ANN. tit. 11, § 39 91994); R.I. GEN. LAWS § 28-29-2 (1994); S.C. CODE ANN. § 42-1-20 (1994); S.D. CODIFIED LAWS ANN. § 62-1-1 (1994); TENN. CODE ANN. § 50-6-102 (1994); TEX. LAB. CODE ANN. § 401.011 (West 1994); UTAH CODE ANN. § 35-1-44 (1994); VT. STAT. ANN. tit. 21, § 601 (1994); VA. CODE ANN. § 65.2-101 (Michie 1994); V.I. CODE ANN. tit. 24, § 251 (1994); WASH. REV. CODE § 51.04 (West 1994); W. VA. CODE § 23-4-1 (1994); WIS. STAT. ANN. § 102.01 (West 1994); WYO. STAT. § 27-14-102 (1994).

52. See, e.g., OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994). See generally STEFFEN & KERR, *supra* note 44, at 165. “Few groups of statutory words in the history of the law had to bear the weight of such a mountain of interpretation as has been heaped on this slender foundation.” The simple words “arising out of and in the course of employment” have been cited in a mass of decisions and seemingly may be used as authority for resolving in one counsel’s favor, regardless of whichever side he may be representing. *Id.* (quoting LARSON, WORKMEN’S COMPENSATION § 6.10)

53. See, e.g., OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

54. E.g., Whitmore, *supra* note 7, at 773-75.

55. The Restatement defines master and servant as

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. (2) A servant is an agent employed by the master to perform service in his affairs and who controls or has the right to control the physical conduct in the performance of the service or is subject to the right to control by the master.

RESTATEMENT (SECOND) OF AGENCY § 2 (1) & (2) (1957).

56. RESTATEMENT (SECOND) OF AGENCY § 220 (1957).

control.”<sup>57</sup> To assist in making this determination, the Restatement provides certain criteria by which a factual analysis is conducted: the extent of control which the master may exercise over the details of the work, the skill required in the particular occupation, whether the employer or workman supplies the tools and instrumentalities for the person performing the work, and whether the payment was by the time or the job.<sup>58</sup>

A second interpretation which a court may use is commonly known as the “control test”, essentially a variation of the Restatement’s “master-servant” analysis.<sup>59</sup> This test focuses directly on whether the employer has a right to control the actions of the employee.<sup>60</sup> In determining this, the test utilizes essentially the same criteria as set out in the Restatement (Second) of Agency section 220.<sup>61</sup>

Through the application of either the “master-servant” relationship test or the “control test”, courts are able to determine whether a particular injury “arises out of and in the course of employment” and therefore render the injury compensable by workers’ compensation.<sup>62</sup>

### *B. A Historical Perspective of Workers’ Compensation and Scholarship Athletes*

#### 1. Case History in Favor of the Application of Workers’ Compensation to Scholarship-Athletes

This same “arising out of and in the course of employment” analysis can be applied to scholarship athletes when they suffer athletic injuries.<sup>63</sup> The issue of whether scholarship athletes should be entitled to workers’ compensation benefits was first addressed in *University of Denver v. Nemeth*.<sup>64</sup>

57. *Id.* § 220 (1).

58. *Id.* § 220 (2)(a),(d),(e), & (g).

59. See Whitmore, *supra* note 7, at 774 n.48. “Most states rely on the ‘control test’ in analyzing alleged employment agreements.” *Id.* See also 3 J. LEE & B. LINDAHL, MODERN TORT LAW § 43.14, at 588 (1990) (“control is generally recognized as the most important factor in analyzing an employment agreement”).

60. See Whitmore, *supra* note 7, at 775-76 n.49-53 (providing citations as to a multitude of non-athletic injury cases which support this notion).

61. *Id.* at 775 n.50 (quoting 1C A. LARSON, WORKMEN’S COMPENSATION LAW § 43.30 (1990)).

62. *Id.* at 773.

63. See Donald Paul Duffala, Annotation, *Workers’ Compensation: Student Athlete as “Employee” of College or University Providing Scholarship or Similar Financial Assistance*, 58 A.L.R.4th 1259, 1260 (1987) (discusses the state and federal cases which have made rulings as to whether a scholarship-athlete qualifies for workers’ compensation).

64. *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

Nemeth sustained various neck injuries while engaged in spring football practice for the University of Denver.<sup>65</sup> At the time of the accident, Nemeth was receiving fifty dollars a month from the university to care for the campus tennis courts, as well as free housing in exchange for cleaning the furnace and sidewalks.<sup>66</sup>

Nemeth brought a claim for workers' compensation, alleging that he was employed by the university to play football and that the injury arose out of and in the course of employment.<sup>67</sup> The University maintained that they were engaged solely in the field of education, that the injury did not arise out of or in the course of employment, and that the award would contravene public policy.<sup>68</sup> The Supreme Court of Colorado ruled that the mere fact that a student may "augment the funds necessary for [his] maintenance while attending the University" does not alter the fact that he may be an employee for workers' compensation purposes.<sup>69</sup> Furthermore, the court stated that Nemeth was not a casual employee<sup>70</sup> given that "higher education in this day is a business"<sup>71</sup> and that Nemeth's participation on the football team was an incident of his employment.<sup>72</sup> Therefore, the court allowed Nemeth to recover for

65. *Id.* at 424.

66. *Id.* Nemeth's method of payment differed from non-athletic student's who performed services for the university, in that he was paid monthly versus on an hourly basis. *Id.* at 424-25.

67. *Id.* at 425 & 427 (quoting 1 HONNOLD ON WORKMEN'S COMPENSATION, § 114, that "where an employee is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing the injury may properly be held to arise out of and in the course of employment, and he will be entitled to compensation.").

68. *Id.* at 425. The court disagreed with this reasoning by citing to *Holland-St. Louis Sugar Co. v. Sharaluka*, 116 N.E. 330, 331 (Ind. Ct. App. 1917) which stated:

Such acts as are necessary to the life, comfort, and convenience of the workman, while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment.

*Id.* at 428.

69. *Id.* at 425.

70. "Casual employee" refers to independent contractors who are not entitled to receive workers' compensation benefits. *See, e.g.,* Whitmore, *supra* note 7, at 771 n.32 (listing a series of cases which negate the application of workers' compensation to independent contractors); *Gillum v. Industrial Comm.*, 48 N.E.2d 234 (Ohio 1943) (holding that an independent contractor is not an employee, workman, or operative within the meaning of the *Workmen's Compensation Act*).

71. *Nemeth*, 257 P.2d at 425-26.

72. Nemeth contended that he had been told by those in positions of authority that "it would be decided on the football field who receives the meals and the jobs." *Id.* at 426. "The obligation to compensate Nemeth arises solely because of the nature of the contract, its incidents and the responsibilities. . . ." *Id.* at 430.

his injuries under workers' compensation.<sup>73</sup>

In 1963, the California District Court of Appeals followed the *Nemeth* decision in holding that an individual who received an athletic scholarship may be considered an employee for purposes of workers' compensation.<sup>74</sup> In *Van Horn v. Industrial Accident Commission*, the court was presented with a scenario in which the wife of a member of the California State Polytechnic College football team brought a workers' compensation claim to recover for the death of her husband, who was killed in a plane crash while returning from an intercollegiate game.<sup>75</sup>

The case came before the court following a ruling by the Industrial Accident Commission that an annual one-hundred and fifty dollar "athletic scholarship" was merely a gift and that the decedent did not qualify as an employee because he was not "rendering services" within the meaning of the workmen's compensation act.<sup>76</sup> The Court of Appoints determined that, under California Labor Code sections 3351<sup>77</sup> and 3357,<sup>78</sup> Van Horn could indeed qualify as an employee rendering services on behalf of his employer. The court emphasized that the "form of the consideration," as a scholarship rather than hourly wages, was not important<sup>79</sup> and that public policy would be supported by allowing Van Horn to recover under the act.<sup>80</sup> By analyzing the facts in a manner similar to that of the "master-servant" relationship test, the court indirectly emphasized the significance it believed courts should place on employment law and contract principles when faced with such sports injury

73. *Id.* at 423. Although the court did not specifically employ either the "master-servant relationship" test or the control test, it did cite to *Nemeth* and various other nonathletic cases while applying basic employment law principles commonly found within these tests. Whitmore, *supra* note 7, at 776.

74. *Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).

75. *Id.* at 170. The plane was provided by the college for members of the football squad, officials, and faculty of the college to return on following a football game in Ohio.

76. *Id.* at 172.

77. "Employee means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. . . ." *Id.*

78. "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." *Id.* at 172.

79. *Id.* at 174. "A Court will look through form to determine whether consideration has been paid for services." *Id.* See also *Western Indemnity Co. v. Pillsbury*, 159 P. 721 (Cal. 1916).

80. Workers' compensation has been held to apply to such entities as churches, hospitals, universities, and other publicly-supported institutions, and not just those enterprises which produce goods for sale and which can therefore pass the cost on to the consumer. *Van Horn* at 174-75. *Accord Colonial Ins. Co. v. Industrial Accident Comm'n.*, 164 P.2d 490 (Cal. 1945) ("All provisions of the workmen's compensation law should be liberally construed to effect the law's beneficent purposes.").

claims.<sup>81</sup> Taken together, *Van Horn* and *Nemeth* provide significant support for the proposition that a scholarship athlete should be entitled to workers' compensation since a collegiate sports injury can be considered as "arising out of and in the course of business."<sup>82</sup>

## 2. Case History Against the Application of Workers' Compensation to Scholarship-Athletes

In 1957, the Supreme Court of Colorado again addressed the issue of whether a football player, who received a scholarship from the university, could be entitled to workers' compensation.<sup>83</sup> In *State Compensation Insurance Fund v. Industrial Commission*, the court was presented with a scenario similar to that of *Nemeth* in that the injured athlete was the recipient of a "grant-in-aid" scholarship and was employed part time by the school.<sup>84</sup> However, unlike *Nemeth*, the athlete in question (Dennison) died from the head injury he sustained on the opening play of a scheduled game.<sup>85</sup>

In denying recovery to Dennison's widow, the court reasoned that the "college (Fort Lewis A & M College) did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation."<sup>86</sup> The court then stated that since there was no contract between Dennison and Fort Lewis A & M College for his football participation, the injury was therefore not an incident of his employment by the college.<sup>87</sup> The court emphasized that without a contractual obligation to play football, there is no employer-employee relationship to which workers' compensation is applicable.<sup>88</sup> Finally, the court summarized its position by stating that it did not believe that the legislature intended the workers' compensation fund to be a "pension fund for all student athletes attending our state educational institutions."<sup>89</sup>

81. Whitmore, *supra* note 7, at 779.

82. See Duffala, *supra* note 63, at 1260-62.

83. *State Compensation Ins. Fund v. Industrial Comm'n*, 314 P.2d 288 (Colo. 1957).

84. *Id.* at 289. However, in this case, the athlete was being paid on an hourly basis rather than *per annum*.

85. *Id.*

86. *Id.* at 290.

87. *Id.* at 289-90.

88. *Id.* "A review of the evidence disclosed that none of the benefits he received could in any way be claimed as consideration to play football, and there is nothing in the evidence that is indicative of the fact that the contract of hire by the college was dependent upon his playing football, that such employment would have changed had deceased not engaged in the football activities." *Id.*

89. *Id.* Of great importance is the fact that the concluding words in this opinion deviate

Nearly three decades after *Nemeth*, the same issue was addressed in *Rensing v. Indiana State Univ. Bd of Trustees*.<sup>90</sup> The court was presented within a situation in which a scholarship football player suffered a fractured dislocation of the cervical spine, thereby rendering him 95-100% disabled.<sup>91</sup> In deciding the case, the Court of Appeals conducted an analysis which focused primarily on contractual elements that would support the notion that Rensing was covered by workers' compensation.<sup>92</sup> The court found that a bonified "bargain for exchange" existed under the scholarship agreement the university could terminate or reduce the athlete's award at any time.<sup>93</sup> In addition, the Court of Appeals reasoned that the "employment" was not casual since Rensing went to daily practices for sixteen weeks each year, as well as attending "off-season" conditioning, to maintain his position on the team.<sup>94</sup> Finally, the court recognized that an employer may be engaged in more than one business and that "maintaining a football team is an important aspect of the University's overall business" of education.<sup>95</sup>

Despite the apparently well-reasoned employment analysis of the Court of Appeals, the Supreme Court of Indiana reversed the decision and held that Rensing's permanent disabilities were not covered under the workers' compensation act.<sup>96</sup> Rather than conducting both a contractual and a control test analysis, the Indiana Supreme Court based its decision entirely on the contractual element of intent.<sup>97</sup> The university had argued that there was no intent to enter into an employer-employee relationship when the parties had entered into the agreement and that, without the requisite intent, there could be no contract.<sup>98</sup> The court accepted this argument and further stated that the finan-

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from the contractual analysis by focusing on "student athletes" rather than "scholarship athletes" in the overall analysis.

90. *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983).

91. *Id.* at 1172.

92. *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 84-85 (Ind. Ct. App. 1982) *rev'd*, 444 N.E.2d 1170 (Ind. 1983). Stating that the central question in the case is whether there was a "written or implied" employment contract within the meaning of the act. *Id.*

93. *Id.* at 85-86. "Rensing's scholarship could be terminated if he misrepresented his intention to enroll" and by signing a football "letter of intent" with Indiana State University, he restricted his eligibility to play for another institution. *Id.*

94. The work an individual engages in for his employer may be "periodically regular" *Id.* at 87-88. "The infrequency of employment or its duration is immaterial, in each case, the analysis concerned with the service rendered or the work done, rather than with the casual nature of the employment contract." *Id.* (quoting *Crabill v. Livengood*, 231 N.E.2d 854 (Ind. Ct. App. 1967)).

95. *Id.* at 89. See also *Scott v. Rhoads*, 51 N.E.2d 89 (Ind. Ct. App. 1943).

96. *Rensing*, 444 N.E.2d at 1171.

97. See Whitmore, *supra* note 7, at 779.

98. See *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind. Ct. App. 1980) (holding

cial aid which Rensing received did not constitute pay or income and therefore he could not qualify as an employee for purposes of workers' compensation.<sup>99</sup> Finally, the court stipulated that, as a "fundamental policy of the NCAA," intercollegiate athletics are considered part of the educational system and are distinguishable from professional sports.<sup>100</sup> Therefore, the court believed that the combination of these three findings outweighed the contractual and control arguments emphasized by the Court of Appeals.<sup>101</sup>

The most recent case to deal with the issue of scholarship athletes and workers' compensation is *Coleman v. Western Michigan University*.<sup>102</sup> In that case, Coleman had played football for the university via a renewable scholarship until the scholarship was revoked following an injury.<sup>103</sup> In analyzing whether Coleman was entitled to workers' compensation, the court employed an "economic reality" test to determine if an employer-employee relationship existed.<sup>104</sup>

Under the economic reality test, the court found that the university did possess some means of control over Coleman, but maintained that this control was not dependent upon the scholarship, rather it was applied to all student athletes.<sup>105</sup> Further, the university had the right to discipline Coleman by suspending him from the team, although it could not revoke the scholarship until after the year was over.<sup>106</sup> In addition, the court stressed that the schol-

that owner of plant was employer of temporary employee and, thus, the temporary employee was entitled to workers' compensation for his injuries). *See also Rensing*, 444 N.E.2d at 1173. There must be a mutual belief that an employer-employee relationship did exist. *Id.*

99. *Rensing*, 444 N.E.2d at 1173. Rensing received free tuition, room, board, laboratory fees, and a book allowance; yet did not consider the benefits as income for income tax purposes. *Contra Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).

100. *Rensing*, 444 N.E.2d at 1173. *See* NCAA Constitution, § 3-1-(a)-(1); § 3-1-(g)-(2). "Any student who does accept pay is ineligible for further play at an NCAA member school in the sport for which he takes pay. Furthermore, an institution cannot, in any way, condition financial aid on a student's ability as an athlete." *Rensing*, 444 N.E.2d at 1173.

101. *Rensing*, 444 N.E.2d at 1174.

102. *Coleman v. Western Michigan Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983).

103. *Id.* at 225.

104. *Id.* at 225-26. *See also Askew v. Macomber*, 247 N.W.2d 288 (Mich. 1976). Under *Askew*, the economic reality test focused on (1) the proposed employer's right to control or dictate activities of the employee; (2) the proposed employer's right to discipline or fire the proposed employee; (3) the payment of "wages"; (4) whether the task performed by the proposed employee was an "integral part" of the proposed employer's business. *Coleman*, 336 N.W.2d at 225-226.

105. *Coleman* 336 N.W.2d at 226. "Plaintiff's scholarship did not subject him to any extraordinary degree of control over his academic activities" and "the record suggests that the parties contemplated a primary role for plaintiff's academic activities and only a secondary role for plaintiff's activities as a football player." *Id.*

106. *Id.*

arship did constitute "wages" within the meaning of the workers' compensation act.<sup>107</sup> Despite the fact that those three factors all seemed to weigh in favor of the applicability of workers' compensation to Coleman, the court felt that, under the fourth factor of the economic reality test, the "task was not performed as an integral part of the University's business."<sup>108</sup> Therefore, in holding that Coleman did not qualify as an employee for workers' compensation purposes, the court placed greatest weight on whether the employee's duties were integral to the employer's business.<sup>109</sup>

### C. *What This Split Among Jurisdictions Means for Future Cases*

The earlier cases of *Nemeth*<sup>110</sup> and *Van Horn*<sup>111</sup> emphasize that, regardless of the jurisdiction, a court must engage in an analysis of employment principles and determine whether an injury "arises out of and in the course of employment."<sup>112</sup> These cases indicate that a court must conduct such an evaluation by analyzing the contractual relations and employer control, similar to the determination of non-athletic workers' compensation claims.<sup>113</sup> A court should first determine whether a contractual relationship existed between the university and the athlete.<sup>114</sup> If a contractual relationship is found to exist (i.e., a scholarship), the court should conduct a control test<sup>115</sup> analysis similar to that outlined by the Restatement (Second) of Agency.<sup>116</sup> When applying the appropriate test criteria, a court should keep in mind the general premise that workers' compensation acts are to be construed liberally to achieve their intended purpose.<sup>117</sup>

107. *Id.* A scholarship constitutes wages in that it is an item of compensation which is measurable in money or which can confer an economic gain upon the employee. (quoting *Morgan v. Win Schuler's Restaurant*, 234 N.W.2d 885 (Mich. Ct. App. 1975)).

108. *Id.* The primary function of the defendant university was to provide academic education rather than conduct a football program and plaintiff's purpose at the university was to further his education. *Id.*

109. *Id.* at 227. The court also cites to *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983).

110. *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

111. *Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).

112. *Nemeth*, 257 P.2d at 426.

113. *Whitmore*, *supra* note 7, at 776-79.

114. *Nemeth*, 257 P.2d at 430. "The obligation to compensate *Nemeth* arises solely because of the nature of the contract, its incidents and the responsibilities which *Nemeth* assumed in order to not only earn his remuneration, but to retain his job." *Id.*

115. *Van Horn*, 33 Cal. Rptr. at 173-74.

116. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1957).

117. *Whitmore*, *supra* note 7, at 768 n.23 (provides a long list of various cases which support this philosophy).



It appears that the holdings of *Nemeth* and *Van Horn* are more correct interpretations of workers' compensation principles than the three other cases discussed.<sup>118</sup> To begin with, the holding of *State Compensation Insurance Fund* deviated sharply from the decision four years earlier in *Nemeth*, yet the court provided no discernible means of distinguishing between the two scenarios.<sup>119</sup> Similarly, the *Coleman* court ignored its own factual findings in support of the applicability of workers' compensation and relied exclusively on the promise that the athletics were not integral to the university's actual business of education.<sup>120</sup> More troubling was the holding of *Rensing v. Indiana State University Board of Trustees*, which failed to even address the control test and opted instead to rely solely on the contractual issue of intent.<sup>121</sup> Given the distinctly different rationales applied in these three cases and the logical deficiencies noted above, it is clear that they provide inadequate guidance for dealing with the issue of workers' compensation and scholarship-athletes.<sup>122</sup>

#### D. Statutory Amendments to State Workers' Compensation Codes

While there is clearly a split among the states as to whether workers' compensation is applicable to scholarship athletes,<sup>123</sup> some states have opted to avoid the controversy entirely by amending their respective workers' compensation codes.<sup>124</sup> The legislatures of California and Hawaii have enacted amendments which expressly prevent scholarship athletes from receiving benefits under workers' compensation.<sup>125</sup> The California Labor Code specifically excludes student athletes from qualifying as employees under workers' compensation.<sup>126</sup> Under the particular provision, "any student participating as

118. *Id.* at 776-82. Compare *Van Horn*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963) and *Nemeth*, 257 P.2d 423 (Colo. 1953) and *Rensing*, 437 N.E.2d 78 (Ind. Ct. App. 1982) with *State Compensation Ins. Fund v. Industrial Comm'n*, 314 P.2d 288 (Colo. 1957) and *Rensing*, 444 N.E.2d 1170 (Ind. 1983) and *Coleman*, 336 N.W.2d 224 (Mich. Ct. App. 1983).

119. See Whitmore, *supra* note 7, at 778. The athletes both had contractual relationships with their universities, each suffered a permanent injury as a result of the obligation, and each athlete's job was secondary to their obligation to play football for the university; yet, only the court in *State Compensation Insurance Fund v. Industrial Commission* barred recovery under the Colorado Workers' Compensation Statute. *Id.*

120. See *Coleman*, 336 N.W.2d at 227.

121. See *Rensing*, 444 N.E.2d at 1173. See also Whitmore, *supra* note 7, at 779-80.

122. Whitmore, *supra* note 7, at 776-82.

123. See generally Whitmore, *supra* note 7, at 782.

124. See CAL. LAB. CODE § 3352(k) (West 1994); HAW. REV. STAT. § 386-1 (1994); NEV. REV. STAT. § 616.251 (1994).

125. See CAL. LAB. CODE § 3352(k) (West 1994); HAW. REV. STAT. § 386-1 (1994).

126. CAL. LAB. CODE § 3352(k) (West 1994).

an athlete in amateur sporting events" on behalf of a university, and who receives no remuneration other than those incidental to a scholarship, does not fall within the statutory definition of an "employee."<sup>127</sup> Hawaii has opted to exclude any student who performs services on behalf of a "school, college, university, college club, fraternity, or sorority" if the individual receives any form of remuneration similar to a scholarship.<sup>128</sup> This exclusion extends further than the California statute in that it excludes all students from being classified as employees if they receive some form of scholarship in exchange for their performances.<sup>129</sup>

Nevada's workers' compensation statute is in complete contrast to those of California and Hawaii.<sup>130</sup> The Nevada statute provides unlimited medical coverage of athletic teams "while engaged in organized practice or actual competition or any activity related thereto."<sup>131</sup> As by the workers' compensation statutes of the three statutes discussed it is clear that there is no prevailing view among state legislatures as to scholarship athletes and their abilities to recover under workers' compensation.<sup>132</sup>

In deciding whether to include student athletes within the scope of workers' compensation, a state has many options from which to choose.<sup>133</sup>

127. "'Employee' excludes the following: (k) Any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private non-profit college, university or school, who receives no remuneration for their participation other than the use of athletic equipment, uniforms, travel, meals, lodgings, scholarships, grant-in-aid, or other expenses incidental thereto." *Id.* See *Graczyk v. Workers' Compensation Appeals Board*, 229 Cal. Rptr. 494 (Cal. Ct. App. 1986) (holding that in light of the statutory amendment to the California Labor Code section 3352(k), a varsity athlete who had been the recipient of an athletic scholarship, and who had suffered injuries to his spine, was not entitled to receive benefits under the code).

128. HAW. REV. STAT. § 386-1 (1994). "Employment does not include the following: (3) service for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part." *Id.*

129. *Id.*

130. NEV. REV. STAT. § 616.251 (1994). Entitled "System to Provide Separate Program of Medical Coverage for Members of Athletic Teams of University and Community College System of Nevada."

131. "The system shall offer a program of unlimited medical coverage of freshman and varsity athletic teams of the University and Community College System of Nevada for injuries incurred while the members of the teams are engaged in organized practice or actual competition or any activity related thereto. The program must be funded separately from the state insurance fund and for this purpose the system shall establish premium rates on the basis of man months of athletic participation by members of the athletic teams. Any participation by the member of an athletic team during a calendar month must be counted as 1 man month for purpose of premium calculation. A team member so covered is not entitled to any other benefit under this chapter." *Id.*

132. See Whitmore, *supra* note 7, at 783.

133. See generally Duffala, *supra* note 63, at 1260. See also R. BERRY & G. WONG, LAW

Since only California, Hawaii, and Nevada have opted to make a specific statutory exclusion or inclusion for scholarship athletes, the question of interpreting a particular state's workers' compensation code is problematic.<sup>134</sup> Given the variety of holdings presented in the previous cases,<sup>135</sup> it is difficult for a court to determine which approach to follow in interpreting the statute.<sup>136</sup>

### III. THE APPLICABILITY OF SCHOLARSHIP ATHLETES TO OHIO REVISED CODE SECTION 4123.01

#### A. "In the Course of Employment" Analysis

Given the relatively small number of courts which have dealt the issue of the applicability of workers' compensation to scholarship athletes<sup>137</sup> and the lesser number of state legislatures which have statutorily resolved this question,<sup>138</sup> there is little surprise in the fact that neither the Ohio courts nor Ohio legislatures have addressed this issue.<sup>139</sup> Thus, because there is no precedent or clear statutory answer to the issue,<sup>140</sup> it is necessary to examine the Ohio Workers' Compensation Act, O.R.C. section 4123.01, and its surrounding case law to determine how Ohio courts would rule if presented with this issue.<sup>141</sup>

Rather than strictly following the precedents set by the previously mentioned cases,<sup>142</sup> a few of which have serious flaws in their rationale,<sup>143</sup> it is more beneficial to conduct an independent analysis based primarily on Ohio law and its application to other workers' compensation cases.<sup>144</sup> Ohio Revised Code section 4123.01 mandates that, in order for an injury to be compensable, it must have occurred or been received "in the course of and

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AND BUSINESS OF THE SPORTS INDUSTRIES (1986); G. SCHUBERT, R. SMITH, & J. TRENTADUE, SPORTS LAW (1986).

134. Whitmore, *supra* note 7, at 782.

135. *See supra* text accompanying notes 63-109.

136. Whitmore, *supra* note 7, at 783.

137. *See supra* note 118.

138. *See supra* note 124.

139. OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

140. OHIO REV. CODE ANN. § 4123.01 (A)(2) lists only two capacities in which an employee does not qualify as an "employee for workers' compensation purposes; those consist of (a) "A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of his ministry; or (b) Any officer of a family farm corporation." *Id.*

141. *See generally* Whitmore, *supra* note 7, at 783-85.

142. *See supra* note 118.

143. *See supra* text accompanying notes 110-22.

144. *See generally* Whitmore, *supra* note 7, at 783-85.

arising out of the injured employee's employment."<sup>145</sup> In determining whether an injury arose out of and in the course of the employment, the totality of the facts and circumstances surrounding the accident must be weighed.<sup>146</sup> Therefore, to determine the possibility of applying workers' compensation to scholarship athletes within Ohio, it is necessary to utilize the contractual and control tests of the Restatement (Second) of Agency.<sup>147</sup>

Under the Ohio Workers' Compensation Act, the requirement that an injury be incurred "in the course of employment" has been upheld repeatedly.<sup>148</sup> One of the methods commonly employed to determine whether an injury occurred in the course of employment is a contractual type of analysis.<sup>149</sup> Under this approach, the contract need not be express and may arise from either oral or written elements or a combination of both.<sup>150</sup> However, no matter what form the contract takes, it must bear some form similar to that of

145. "'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." OHIO REV. CODE ANN. § 4123.01(C) (Baldwin 1994). *See also* *Pilar v. Ohio Bureau of Workers' Compensation*, 613 N.E.2d 684 (Ohio Ct. App. 1992) ("recognizing the conjunctive nature of the formula, found the 'in the course of' prong to relate to the time, place and circumstances of the injury and the 'arising out of' prong as referring to a causal connection between the employment and the injury.").

146. *Pilar*, 613 N.E.2d at 686. This includes such factors as the proximity of the scene of the accident to the place of employment, the degree of control the employer had over the scene of the accident, the benefit the employer received from the injured employee's presence at the scene of the accident. *Id.*

147. *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 (1957) (dictating certain criteria which may be used in the form of a control test for employer-employee relationships) *with* *Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963) *and* *State Compensation Ins. Fund v. Industrial Comm'n*, 314 P.2d 288 (Colo. 1957) *and* *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953) *and* *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983) *and* *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78 (Ind. Ct. App. 1982) *rev'd*, 444 N.E.2d 1170 (Ind. 1983) *and* *Coleman v. Western Michigan Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983) (detailing the application of workers' compensation law with scholarship athletes).

148. *See* *Koger v. Greyhound Lines*, 629 N.E.2d 492 (Ohio Ct. App. 1993) (holding that employee of bus company who was walking picket line on company's premises at time he was injured was not "in course of" his employment for workers' compensation purposes). *See also* *Lumbermens Mut. Cas. Co. v. S-W Industries*, 23 F.3d 970 (6th Cir. 1994) (held that injury to employee due to long term workplace exposure to toxic chemicals occurred in the course of his employment), *cert. denied*, 115 S.Ct. 190 (1994); *Baughman v. Eaton Corp.*, 402 N.E.2d 1201 (Ohio 1980) (held that employee injured while crossing a public street between his employer's parking lot and the employer's plant suffered injuries in the course of his employment); *Fisher v. Mayfield*, 551 N.E.2d 1271 (Ohio 1990) (held that school teacher who fell on steps of another school in her district was injured in the course of her employment).

149. "'Employee' means every person in the service of any person, firm, or private corporation that (i) employs one or more persons . . . under any contract of hire, express or implied, oral or written." OHIO REV. CODE ANN. § 4123.01(A)(1)(b) (Baldwin 1994).

150. *See* *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 503-04 (Cal.

“an agreement in which an employee provides labor or personal services to an employer for wages or other remuneration or other things of value supplied by the employer.”<sup>151</sup> If, upon evaluation, there appears to be a contractual agreement between the scholarship athlete and the university, this fact would provide strong weight in favor of the applicability of workers’ compensation to a collegiate sports injury.<sup>152</sup>

In deciding whether the necessary contract for hire exists between a scholarship athlete and a university, it should be noted that many courts have emphasized that the relationship between a university and any one of its students is at least partly contractual.<sup>153</sup> Courts have maintained that, when a university accepts a student’s tuition, they thereby contract to provide educational services to that student.<sup>154</sup> Furthermore, courts have reasoned that, if a contract exists between a university and a non-athlete student, then certainly one should exist with a scholarship athlete who “provides athletic services in exchange for tuition and expenses.”<sup>155</sup>

Beyond this simple analogy, a court must examine the scholarship agreement between the athlete and university to determine whether it meets the elements required to create an employment contract.<sup>156</sup> A scholarship agreement appears to be contractual in nature in that it involves a bargain for exchange between the university and the scholarship athlete.<sup>157</sup> In exchange for participating in a college sport on behalf of the university, the scholarship

Ct. App. 1972) (holding that basic legal relation between a student and a university is contractual in nature, and the catalogues, bulletins, circulars, and regulations of the institution made available to the student become a part of the contract).

151. *Id.* See also *Creed v. Brophy*, 1992 WL 88481 (W.D.Va. 1992) (holding that baseball player, who did not receive a scholarship, was not entitled to workers’ compensation for injuries sustained during a summer league game).

152. *Creed*, 1992 WL 88481 at \*2. To be an employee, a worker must be under a written or implied contract for hire and the use of the common law master-servant relationship alone is insufficient to establish an employment relationship.

153. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1330-31 (N.D. Ill. 1990), *aff’d in part*, 957 F.2d 410 (7th Cir. 1992). See also *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868 (N.Y. App. Div. 1982); *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *aff’d*, 235 N.Y.S. 2d 834 (N.Y. 1962).

154. See *Paladino*, 454 N.Y.S.2d at 873.

155. *Ross*, 740 F. Supp. at 1331. Cf. *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App. 1972), *cert. denied*, 192 S.E.2d 197 (N.C. 1972).

156. See J. CALAMARI & J. PERILLO, *CONTRACTS* § 2-1, at 25 (1987). Whitmore, *supra* note 7, at 787.

157. *Hanson v. Kynast*, 494 N.E.2d 1091, (Ohio 1986) (holding that university student, who voluntarily joined team without any scholarship or aid through the university was not an agent for purposes of respondeat superior). See also *Gulf South Conference v. Boyd*, 369 So.2d 553, 558 (Ala. 1979) (holding that right to participate in college athletics is a property right of present economic value).

athlete receives as consideration a variety of financial assistance.<sup>158</sup> Not only does the student athlete agree to participate in a particular college sport, the athlete also agrees to be bound by the rules and regulations adopted by the college concerning the financial assistance.<sup>159</sup> These bargained for detriments and benefits by the athlete and university constitute valid consideration since "wages" refers to items of compensation, and not merely money paid as a salary.<sup>160</sup>

In addition to the element of consideration, a valid contract requires both a manifestation of assent by the parties to be bound by the agreement, as well as the intent to be bound.<sup>161</sup> Both of these elements appear to be fulfilled by the signing of the scholarship agreement.<sup>162</sup> Upon the signing of the athlete's "letter of intent," the athlete has effectively agreed to reserve his athletic talents for that particular university, while the university in turn manifests its intention to provide the athlete with the financial assistance necessary to enable them to attend the school.<sup>163</sup> In fact, the signing of the scholarship agreement and the "letter of intent" represents the culmination of the recruitment process, analogous to the completion of an offer and acceptance to enter into an employer-employee relationship.<sup>164</sup> It is in this relationship that the athlete agrees to subject himself to the control and demands of the university, solely for the purpose of receiving some form of remuneration.<sup>165</sup> Therefore, in viewing the scholarship arrangement in its entirety, it seems that a contract exists between the scholarship athlete and the university.<sup>166</sup>

While contractual analysis is beneficial in determining whether an employer-employee relationship exists between an athlete and a university,

158. *Id.* See also Whitmore, *supra* note 7, at 787. "An athlete will receive tuition, room, board, and use of necessary books in exchange for participating." *Id.*

159. *Gulf South Conference*, 369 So. 2d at 558. See also *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 86 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983). (stipulating that should an athlete not honor their "letter of intent", their eligibility to play for another institution would be restricted).

160. See *Coleman v. Western Michigan Univ.*, 336 N.W.2d 224, 226 (Mich. Ct. App. 1983).

161. Whitmore, *supra* note 7, at 787-88.

162. *Id.*

163. *Id.* *Contra Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983) (stating that "it is evident from the documents which formed the agreement in this case that there was no intent to enter into an employer-employee relationship at the time the parties entered into the agreement").

164. See generally Whitmore, *supra* note 7, at 787-89.

165. *Id.*

166. *Id.* See also Michael J. Cozillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989).

it is not capable of establishing this association without further support.<sup>167</sup> A trier of fact must look to the “substance and essence” of the relationship between the athlete and the university<sup>168</sup> and to whether the degree of control necessary to establish a master-servant relationship exists.<sup>169</sup> Under Ohio workers’ compensation law, the test that should be used to determine if there is sufficient control exerted by the university over the scholarship athlete is than outlined by the Restatement (Second) of Agency<sup>170</sup> and as further developed by precedent.<sup>171</sup> In a typical application of the control test, it is not necessary to take into account each individual criterion set out in the Restatement, given that none of them are dispositive in and of themselves.<sup>172</sup> Furthermore, under the Ohio view as expressed in the *Hanson* case,<sup>173</sup> it is not necessary to examine each individual factor; rather, it is more important to examine the factors in their totality.<sup>174</sup>

Of all the issues that may arise when applying the control test, the most difficult to resolve centers on whether or not a university may be considered to be in the business of collegiate sports.<sup>175</sup> As illustrated by *State Compen-*

167. *Hanson v. Kynast*, 494 N.E.2d at 1091, 1094–95 (Ohio 1986). See also *Baird v. Sickler*, 433 N.E.2d 593 (Ohio 1982); *Councell v. Douglas*, 126 N.E.2d 597 (Ohio 1955).

168. See *Anaheim Gen. Hosp. v. Workmen’s Compensation Appeals Bd.*, 83 Cal. Rptr. 495, 497 (Cal. Ct. App. 1970) (citing to *Pruitt v. Workmen’s Compensation Appeals Bd.*, 68 Cal. Rptr. 12, 16 (Cal. Ct. App. 1968)).

169. *Hanson*, 494 N.E.2d at 1095.

170. RESTATEMENT (SECOND) OF AGENCY § 220(2) outlines the criteria a court may employ to determine if an employer-employee relationship exists. (2)(a) “The extent of control, which by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation of business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by time or by job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.” RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957).

171. *Id.* The court in *Hanson* focuses primarily on the Restatement (Second) of Agency and case law from other jurisdictions in making its decision as to whether the employer-employee relationship exists.

172. *E.g.*, *Coleman v. Western Michigan Univ.*, 336 N.E.2d 224, 226 (Mich. Ct. App. 1983).

173. *Hanson*, 494 N.E.2d at 1095. Within this case the Supreme Court of Ohio utilized three factors (whether the individual was performing in the course of the principal’s business, whether the individual received any consideration from the principal, and whether the principal supplied the tools and the place of work in the normal course of business) and stipulated that several other factors may be used in the analysis. *Id.*

174. *Id.*

175. See *Whitmore*, *supra* note 7, at 796-97.

sation Insurance Fund, the primary argument against reorganizing an employer-employee relationship is the notion that a university or college is not in the business of amateur sports, but that of providing education to students.<sup>176</sup> On the other hand, both *Nemeth*<sup>177</sup> and *Rensing*<sup>178</sup> indicate that an employer may have more than one business, trade, or profession and that the scope of workers' compensation is not necessarily limited to the employer's principal activities.<sup>179</sup> Ohio courts have accepted this principle.<sup>180</sup> Therefore, the Ohio law appears to accept the notion that a university may be engaged in college athletics as a form of business.<sup>181</sup> In order to determine whether this premise is properly applied to a particular university, it is necessary for a court to examine the organizational structure of the university, as well as the extent to which the school operates as a business engaged in athletics.<sup>182</sup>

While there is little doubt that a university's primary objective is to provide education to its students, the fact that college athletics can be considered a big business cannot be overlooked.<sup>183</sup> Each year, colleges acquire millions of dollars in revenue generated by their sports teams and provided to them through the NCAA.<sup>184</sup> With all of the money that is potentially available to a university that is able to field a winning program, there can be little doubt that having a productive athletic program significantly impacts a university.<sup>185</sup>

Given the television revenue and publicity which college athletics pro-

176. "It is significant that the college did not receive a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation." *State Compensation Ins. Fund v. Industrial Comm'n*, 314 P.2d 288, 290 (Colo. 1957). *Accord* W. LOWELL, *THE LAW OF SPORTS*, § 1.21 (1979) (stating that "the fostering of scholastic, not athletic, achievement is the primary objective of the academic institution").

177. *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

178. *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 89 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

179. *Id.*

180. *E.g.*, *Caygill v. Jablonski*, 605 N.E.2d 1352, 1359 (Ohio Ct. App. 1992) (holding that employee who was injured when struck by a bat, thrown by a co-worker in a "pick-up" baseball game, was still in the service of his employer and therefore qualifies as an employee). *See also* *Ott v. Industrial Comm'n*, 82 N.E.2d 137 (Ohio Ct. App. 1948) (holding that death of employee while playing for a company sponsored baseball team occurred in the course of employment). *Cf.* *Miller v. Young*, 193 N.E.2d 558 (Ohio Cm. Pl. 1961) (holding that use of employer's name by a softball team did not establish an employer-employee relationship so as to allow recovery for injuries under workers' compensation).

181. *See generally* OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

182. *See generally* Whitmore, *supra* note 7, at 796.

183. *See* Jones, *supra* note 2, at 152-56. *See also* *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977); *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990).

184. *See supra* notes 2-7 and accompanying text.

185. *See* Jones, *supra* note 2 and accompanying text.



vide to many universities, it is difficult to maintain the position that they cannot be considered at least partially engaged in the business of sports.<sup>186</sup> In the *Hennessey* case,<sup>187</sup> the court held that “while organized as a non-profit organization, the NCAA-and its member institutions-are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of ‘profit-making’ enterprises.”<sup>188</sup> Similarly, the district court in *Gaines* held that, with its million dollar annual budget, the NCAA is engaged in a business venture and cannot be exempted from antitrust regulation on the ground that its activities and objectives are educational.<sup>189</sup>

The idea that a university may be in the business of athletics is strengthened by examining at the basic organizational structure of the schools.<sup>190</sup> Clearly, a university is not a single entity organized solely for the purpose of promoting education.<sup>191</sup> Practically every school consists of several organizational units<sup>192</sup> which must act together to enable the university to be operable.<sup>193</sup> Within this scheme, the athletic department, especially in Division I-A programs, plays a substantial role in providing non-tuition revenue necessary for the entire university to operate.<sup>194</sup> In order to fulfill this significant role within the university, the “athletic department, directors, coaches, and personnel in the system are charged with the responsibility of at least maintaining and fielding teams which are capable of competing with the best in their conference or in the nation.”<sup>195</sup> Therefore, it is obvious that for many universities the maintenance of a high-caliber athletic program is an important and vital aspect of the business of educating students.<sup>196</sup>

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186. See Jones, *supra* note 2 at 212-13 (quoting KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS 11 (1991)). The Commission was formed to study intercollegiate athletics and to make suggestions for reform. It stated that the purpose for which colleges were formed was education and that in light of this, college athletes did not deserve to be paid more than what they receive as scholarships.

187. *Supra* notes 4 & 9.

188. *Hennessey*, 564 F.2d at 1149 n.14. See also *supra* note 4 and accompanying text.

189. *Gaines*, 746 F. Supp. at 744. See also *supra* note 9 and accompanying text.

190. See Whitmore, *supra* note 7, at 796.

191. Whitmore, *supra* note 7, at 796.

192. For example, a university may be comprised of various academic departments, fundraising, public affairs, alumni, and placement offices. *Id.*

193. *Id.*

194. See *supra* notes 2-7 and accompanying text.

195. *Hall v. University of Minnesota*, 530 F. Supp. 104 (D. Minn. 1982) (holding that a college basketball player was entitled to a preliminary injunction preventing the university from denying his admission into a degree program).

196. *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 89 (Ind. Ct. App.

A second factor which the Restatement sets forth as a clear indicia of an employer-employee relationship is the extent of control which the principal may exert over the agent and the work that it performs.<sup>197</sup> In Ohio, courts have specifically held that the "relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks."<sup>198</sup> In determining whether a university has control over a scholarship athlete, it is necessary to look at the method by which a school will exert such control.<sup>199</sup>

One way by which a university attempts to exert control is through contractual means.<sup>200</sup> From the moment an athlete signs a scholarship agreement with a university, the athlete has submitted to the school's control.<sup>201</sup> Besides potential penalties that may be invoked by the university which the athlete attends,<sup>202</sup> the athlete's eligibility to participate at other institutions is restricted.<sup>203</sup> Clearly, the scholarship agreement itself is an exercise of control on the part of the university.<sup>204</sup>

There can be little doubt that, in collegiate athletics, a major goal of many schools is to produce a winning program.<sup>205</sup> In an effort to field a winning team, the athletes involved are required to dedicate a vast majority of their time to in-season practicing, off-season conditioning, and actual competition.<sup>206</sup> To maximize the effectiveness of these workouts and practices, the universities employ large coaching staffs, who are granted a extensive

1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

197. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1957).

198. *Hanson v. Kynast*, 494 N.E.2d 1091, 1094 (Ohio 1986). *See also Baird v. Sickler*, 433 N.E.2d 593, 595 (Ohio 1982); *Councell v. Douglas*, 126 N.E.2d 597, 599 (Ohio 1955); *Bobik v. Industrial Comm'n*, 64 N.E.2d 829, 831-32 (Ohio 1946).

199. *See Hanson*, 494 N.E.2d at 1094.

200. *E.g.*, *Whitmore*, *supra* note 7, at 785-89.

201. Each of the tender offers which constitute the bargained-for exchange between the university and the athlete stipulate that the school is able to reduce or terminate the scholarship if the athlete (1) fails to satisfy the university's and NCAA's grade requirements; (2) voluntarily renders himself ineligible for inter-collegiate competition; (3) fraudulently represents information on his application, letter of intent, or tender, or; (4) engages in misconduct warranting disciplinary penalties by the school or agency. *Rensing*, 437 N.E.2d at 85.

202. *Id.*

203. *Id.* at 85-86.

204. *Id.*

205. *See Townsend v. State of California*, 237 Cal. Rptr. 146, 149 (Cal. Ct. App. 1987).

206. For example, a Division I-A football athlete will practice daily for 16 weeks during the season, only to be followed by year-round "off-season" conditioning to maintain their physical skills and attributes. *Rensing* 437 N.E.2d at 88. *See Whitmore*, *supra* note 7, at 790-91 (for an example of the daily practice schedule of a college basketball player).

authority to control the activities of their athletes.<sup>207</sup>

The primary source of the university's control over scholarship athletes is their right to refuse renewal of an athlete's scholarship at the end of the year.<sup>208</sup> Clearly, this right to not renew a scholarship is recognized by the athletes as a means of control exercisable by the university if the athlete does not comply with the rigorous training schedule or fails to perform up to a certain level.<sup>209</sup> It is difficult to imagine that a scholarship athlete will not feel compelled to follow the orders and instructions of the university, whatever they may be, so as to retain the significant value which a full-scholarship provides.<sup>210</sup>

Given the fact that college athletes only participate in actual competition for a few months out of the year, it has been argued that the employment by the athlete is merely casual and not permanent as may be required under a control test.<sup>211</sup> While this argument would appear facially logical under the Restatement, the Ohio Workers' Compensation Act specifies that an employer may be any entity which has "one or more employees regularly in the same business or in or about the same establishment under any contract of hire."<sup>212</sup> Under this definition, it seems logical that a scholarship athlete who participates in an athletic program on a daily basis for a significant portion of the year would qualify as being a regular employee.<sup>213</sup> Furthermore, given that

207. "[T]he Trustees employ a large athletic department to administer the University's intercollegiate athletic program (in addition to physical education classes) and a sizable football coaching staff whose primary responsibility is to produce the best possible team so as to generate the largest possible income and whose teaching responsibilities to the general student body are, at best, of secondary importance." *Rensing*, 437 N.E.2d at 88-89.

208. See Mitten, *supra* note 1, at 135 (quoting MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 7, 207-08 (1990)).

209. Whitmore, *supra* note 7, at 790.

210. A full scholarship will entitle the athlete to tuition, room, board, and books. All of which when taken alone, represent a significant financial investment. *Id.* at 793. See also *supra* note 158.

211. RESTATEMENT (SECOND) OF AGENCY § 220(2)(f)(1957) ("the length of time for which the person is employed").

212. OHIO REV. CODE ANN. § 4123.01(B)(2) (Baldwin 1994). "'Employer' means: (2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more employees regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written."

213. Compare *Rensing*, 437 N.E.2d at 88 ("it is apparent that *Rensing's* employment was not casual, since it clearly was 'periodically regular,' although not permanent") with *McNeal v. Bil-Mar Foods of Ohio, Inc.* 585 N.E.2d 892 (Ohio Ct. App. 1990) (stating that a trial court is not precluded under the doctrine of promissory estoppel from finding that a temporary worker is an employee of the business which retains him through an employment agency, and that the business which employs the temporary worker may be liable under workers' compensation for injuries which arose during the employment).

cases such as *Fox v. Contract Beverage Packers Inc.*<sup>214</sup> establish that temporary employees may be covered by workers' compensation, it seems logical that a scholarship athlete may also be classified as a "regular employee."<sup>215</sup>

When determining whether employment is "regular" versus "casual," Ohio courts have repeatedly held that casual employment is not dependent on the length of employment, but rather the nature of employment.<sup>216</sup> In deciding whether a particular employment was "regular," the court in *State ex rel Herbert* stated that, as long as the employment was within the normal course of business, it is not "casual."<sup>217</sup> While the "employment" of a scholarship athlete is certainly not permanent, is undoubtedly "periodically regular" enough to entitle the athlete to workers' compensation for injuries which occur during the course of the sports season.<sup>218</sup>

The scholarship that an athlete is provided through a university is far more than just casual in the sense that the athlete has a clear interest in the employment.<sup>219</sup> During the period for which the athlete has their scholarship, they retain a "right against cancellation or gradation of" the scholarship and against revocation except for good cause.<sup>220</sup> Clearly this right represents a significant property interest in the athlete's opportunity to compete for the university.<sup>221</sup> When this "property right of present economic

214. *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind. Ct. App. 1990) (holding that owner of plant was employer of temporary employee, and thus, temporary employee was entitled to claim under workers' compensation).

215. The holding focused on the fact that although the employee was hired only for a temporary term, the business did have control over the employee and was responsible for telling the employee how and where the expected work was to be done. *Id.* at 711-12.

216. *Hanes v. Ticatch*, 150 N.E.2d 493 (Ohio Ct. App. 1957) (holding that where an employer has less than three regular employees, but occasionally asks a bystander to assist, without wages or compensation, the employer does not qualify under workers' compensation as employing three or more employees). *See also* *Schneeberg v. Industrial Comm'n*, 37 N.E.2d 427 (Ohio Ct. App. 1940); *Daniels v. MacGregor Co.*, 197 N.E.2d 427 (Ohio Cm. Pl. 1964), *aff'd*, 206 N.E.2d 554 (Ohio 1965); *State ex rel Herbert v. Sword*, 62 N.E.2d 506 (Ohio Ct. App. 1945).

217. *Herbert*, 62 N.E.2d at 506. "To be amenable to Workmen's Compensation Act, it is necessary that the employee be a regular employee and not just a casual one, the test being whether the employment was in the usual course of employer's business; if so, the employment is not held to be casual as defined in said act." *Id.* *See also* OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

218. *See Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 88 (Ind. Ct. App. 1982) *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

219. *See Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981) *cert. granted*, 458 U.S. 1120 (1982), *aff'd*, 460 U.S. 719 (1983).

220. *Rutledge*, 660 F.2d at 1353. *See also* *Gulf South Conference v. Boyd*, 369 So. 2d 553, 556 (Ala. 1979).

221. *See* Andrew Manno, *A High Price To Compete: The Feasibility And Effect Of Waivers Used To Protect Schools From Liability For Injuries To Athletes With High Medical Risks*, 79 KY. L. J. 867, 877 (1991).

value”<sup>222</sup> is combined with the notion that a scholarship athlete is engaged in the course of “regular” employment, it is highly likely that a court would find that the employment is not casual.<sup>223</sup>

Another factor to consider under the control test is the method by which employee receives payment from the employer.<sup>224</sup> It is a basic tenet of workers’ compensation law that direct compensation in the form of wages is not necessary to establish an employer-employee relationship.<sup>225</sup> Rather, a court will look through the specific form of the remuneration to determine whether consideration has been provided for the services which have been rendered.<sup>226</sup> In the case of a scholarship athlete, there can be little doubt that although the university does not directly pay money to the student athlete, they do provide significant consideration in the form of a scholarship.<sup>227</sup> Therefore, as long as a college athlete is not performing his services voluntarily and without compensation,<sup>228</sup> the scholarship should be considered as remuneration for the student’s “athletic prowess and participation” on the university’s athletic team.<sup>229</sup> Additionally, it appears that the drafters of the Ohio Workers’ Compensation Act may have intended to include such things as scholarships as an allowable form of compensation by including the provision that remuneration is “not limited to wages, commissions, rebates, and any other reward or consideration.”<sup>230</sup>

A further element to consider in determining whether an employer-employee relationship exists is whether the employer has supplied the tools and equipment necessary for the employee to complete the job.<sup>231</sup> Under

222. See *Gulf South Conference*, 369 So. 2d at 556.

223. Compare *Rensing*, 437 N.E.2d at 88 (holding that employment of scholarship athlete is regular) with *Gulf South Conference*, 369 So. 2d at 556 (holding that property right of present economic value exists in athletic scholarship).

224. RESTATEMENT (SECOND) OF AGENCY § 220(g)(1957) (“the method of payment, whether by the time or by the job”).

225. See *Whitmore*, *supra* note 7, at 791-93.

226. See *Van Horn v. Industrial Accident Comm’n*, 33 Cal. Rptr. 169, 174 (Cal. Ct. App. 1963).

227. See *supra* note 210.

228. To receive workers’ compensation, employee must receive remuneration in exchange for labor. *Houston v. Quincy Post* 5129, V.F.W., 544 N.E.2d 425, 427-28 (Ill. Ct. App. 1989). See also *Whitmore*, *supra* note 7, at 792 n.194.

229. *Van Horn*, 33 Cal. Rptr. at 174.

230. OHIO REV. CODE ANN. § 2913.48(E)(7) (Baldwin 1994). Under the section “Workers’ Compensation Fraud” it stipulates that “Remuneration” includes, but is not limited to wages, commissions, rebates, and any other reward or consideration.” *Id.*

231. RESTATEMENT (SECOND) OF AGENCY § 220(e)(1957) (“whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work”).

basic workers' compensation law, if an employee is responsible for supplying their own tools and supplies, it is likely that they are an "independent contractor,"<sup>232</sup> and therefore not covered by workers' compensation.<sup>233</sup> Since a college not only provides the practice facilities and equipment with which an athlete may practice and play, but also provides extra amenities such as shoes, uniforms, and transportation costs, it is obvious that this factor would support a finding of an employer-employee relationship.<sup>234</sup> It should be noted that while this analysis increases the likelihood that a scholarship athlete would be considered an employee of a university, the same factor would weigh heavily against members of university "club teams" who do not receive the funding necessary to function from the university.<sup>235</sup>

After applying the aforementioned factors to the university-scholarship athlete relation, it would appear that there is indeed a tremendous amount of control exerted by the school over the student.<sup>236</sup> The university through its contractual obligations, business interest in collegiate sports, control mechanisms, methods of payment, and supplying of tools and equipment clearly appears to possess the qualities which support the notion that a scholarship athlete should be construed as an employee of the university.<sup>237</sup> More so, this notion that a scholarship athlete is an employee of the university is strengthened when it is recognized that non-scholarship athletes have been denied coverage under the act for failing to satisfy many of these same elements.<sup>238</sup> Thus, it seems manifest under Ohio Revised Code section 4123.01 and the

232. *E.g.*, *Gillum v. Industrial Comm'n*, 48 N.E.2d 234 (Ohio 1943) (holding that an independent contractor is not classified as either an "agent," "workman," or "operative" within the meaning of the Workmen's Compensation Act. *See also* *McDonald v. Fruth*, 554 N.E.2d 1354 (Ohio Ct. App. 1988) (holding that the owner of a premises who employs an itinerant painter to paint buildings is not within the meaning of section 4123.01 where the property owner does not furnish any of the tools or equipment to complete the task).

233. *See* *Whitmore*, *supra* note 7, at 793 n.202 (quoting 1C A. LARSON, *supra* note 61, § 44.34(a) "when employer provides valuable equipment, relationship is "almost invariably" one on employment").

234. *Whitmore*, *supra* note 7, at 793-94.

235. *Hanson v. Kynast*, 494 N.E.2d 1091, 1095. The court stated that because a member of the school's club lacrosse team, Kynast, supplied his own equipment and paid for his own travel expenses, he did not meet the requirements necessary to establish an employee-employer relationship. *Id.*

236. *See supra* notes 175-235 and accompanying text.

237. *See Hanson*, 494 N.E.2d at 1095.

238. *Id.* *See also* *Swanson v. Wabash College*, 504 N.E.2d 327 (Ind. Ct. App. 1987) (holding that a non-scholarship student who organized recreational baseball practices was not entitled to workers' compensation since he never acquiesced in any type of control over him by college, the college did not make any sort of communications to the student which would lead him to believe that an employer-employee or agent-principal relationship existed, and because the college did not consent to his being an employee).

relative case history, that a scholarship athlete does meet the “in the course of employment” requirement dictated by the Code.

### B. “Arising Out of Employment” Analysis

In addition to the requirement that the injury occur while the claimant is engaged “in the course of employment,” the Ohio Workers’ Compensation Act also requires that the injury “arise out of the employment.”<sup>239</sup> Although the two criteria are typically analyzed simultaneously, it does represent a significant element which must be considered in order to determine if an employer-employee relationship actually exists.<sup>240</sup> The purpose of this criteria is to assure that there is a causal connection between the injury and the performance or conditions of the employment.<sup>241</sup> To determine whether such a connection exists, a court will examine the totality of the facts and circumstances surrounding the accident, including (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee’s presence at the scene of the accident.<sup>242</sup>

There is little doubt that, since the universities provide and maintain the facilities which the athletes use, they control the location at which an athlete may incur an employment related injury.<sup>243</sup> Furthermore, the fact that universities derive substantial benefits from their college sports programs indicates that the school receives a benefit from the injured athlete’s presence at the scene of the accident.<sup>244</sup> After analyzing the above factors, it is likely that a court would conclude that an injury sustained by a scholarship athlete during participation on a collegiate team did arise out of his employment with the university.<sup>245</sup>

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239. OHIO REV. CODE ANN. § 4123.01(C) (Baldwin 1994).

240. See *Miller v. Young*, 193 N.E.2d 558, 559 (Ohio Cm. Pl. 1961).

241. See *Tamarkin Co. v. Wheeler*, 610 N.E.2d 1042 (Ohio Ct. App. 1992) (holding that baker’s apprentice who was injured while inspecting his vandalized car during working hours, was not entitled to workers’ compensation because the injury did not arise out of and in the course of employment). See also *Delker v. Ohio Edison Co.*, 546 N.E.2d 975 (Ohio Ct. App. 1989) (holding that whether a workers’ injury in an employee locker room accident following his work shift is “received in the course of, and arises out of, the injured employee’s employment” is a question of fact); *Fox v. Mayfield*, 538 N.E.2d 1077 (Ohio Ct. App. 1988) (holding that an injury to a striking employee, acquired while in a picket line, did not arise out of the employment).

242. *Lord v. Daugherty*, 423 N.E.2d 96 (Ohio 1981).

243. See *Whitmore*, *supra* note 7, at 793–94.

244. See *supra* notes 183–84.

245. Compare *Ott v. Industrial Comm’n*, 82 N.E.2d 137, 140 (Ohio Ct. App. 1948) (holding that death of employee from injuries sustained on a company sponsored baseball team arose

Finally, under the Ohio Workers' Compensation Act, companies have been held liable for injuries sustained by employees who participated on company sponsored athletic teams.<sup>246</sup> Courts have held that, as long as the employee's injuries are received as a "direct outgrowth" of a company sponsored and authorized recreational program, the requirement that an injury "arise out employment" has been satisfied.<sup>247</sup> Since universities directly sponsor their athletic teams and programs, it seems logical that an injury to a scholarship athlete would also be considered to "arise out of and in the course of employment."<sup>248</sup>

### C. Public Policy Implications

While the relationship between scholarship athlete and university appears to satisfy the contractual and control factors established by the Restatement (Second) of Agency, it is also necessary to consider the public policy implications of including scholarship athletes within the coverage of Ohio Revised Code section 4123.01.<sup>249</sup> In order to determine whether the public would be benefited by the inclusion of scholarship athletes, it is necessary to examine the purposes sought to be achieved by workers' compensation.<sup>250</sup>

The Ohio workers' compensation system was initially created to serve as a trust fund for the benefit of employees who were injured on the job.<sup>251</sup> The drafters desired to create a system under which an injured worker would be partially reimbursed without expense or delay and without the uncertainty of a tort suit against his employer.<sup>252</sup> By doing so, the system would "substitute

out of the employment) *with Miller*, 193 N.E.2d at 559 (holding that use of employer's name by softball team did not establish that death of employee during a game arose out of employment).

246. *Ott*, 82 N.E.2d at 140.

247. *Id.* See also *Miller*, 193 N.E.2d at 559. "The degree of employer support or sponsorship of the extra-curricular activity may be most material in determining whether the injury is compensable." *Id.*

248. See *University of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953).

249. See, e.g., *Townsend*, 237 Cal. Rptr. at 149-50 (considering the public policy implications which would occur as a result of allowing student's to fall within the scope of workers' compensation); *Ott*, 82 N.E.2d at 139 (examining why workers' compensation was adopted in Ohio).

250. See *Caygill v. Jablonski*, 605 N.E.2d 1352, 1356-57 (Ohio Ct. App. 1992).

251. *Id.* (quoting *Industrial Comm'n v. Drake*, 134 N.E. 465, 467 (Ohio 1921)).

252. "Such partial reimbursement without expense or delay and without the uncertainties of litigation is more desirable that the opportunity of full compensation for all loss and damages at the hands of courts and juries, with the attendant delays, risks, and expenses." *Drake*, 134 N.E. at 467.



economic loss as the basis for recovery in place of negligence and fault.”<sup>253</sup> Additionally, the courts have repeatedly held that to best serve public policy, it is necessary to interpret the term “in the service of” and “arising out of and in the course of employment” broadly.<sup>254</sup> As a result, the definition of “injury” and “employee” are expanded to encompass more individuals within the scope of workers’ compensation, thereby aiding the achievement of the identified public policy goals.<sup>255</sup>

Currently, universities have been able to effectively bar the recovery of student athletes for sports related injuries through the use of contributory negligence<sup>256</sup> and assumption of the risk defenses.<sup>257</sup> Because these defenses are difficult obstacles to overcome, the athletes are often left without any means of recovery or compensation for their loss.<sup>258</sup> In light of this apparent inequity, it would seem that public policy would best be served by including scholarship athletes within the coverage of workers’ compensation.<sup>259</sup>

Besides from serving the general purpose of workers’ compensation, the fact that the university substantially benefits from the activities of its athletes also necessitates the student’s coverage as a matter of public policy.<sup>260</sup> Considering the millions of dollars of revenue which the universities receive from their athletic programs, the only equitable resolution to this situation would be to force the universities to pay a “statutorily designated amount” into the state workers’ compensation fund.<sup>261</sup> Not only would such coverage protect the university from potentially high adverse judgments, but it would also help to ensure that the present and future rights of the scholarship athlete are

253. *Couch v. Thomas*, 497 N.E.2d 1372, 1375 (Ohio Ct. App. 1985).

254. *See Caygill*, 605 N.E.2d at 1354. *See also Miller v. Young*, 193 N.E.2d 558, 559 (Ohio Cm. Pl. 1961). Stating that the court is “cognizant of the fact that Workmen’s Compensation Laws require liberal construction to effectuate the purposes of the Act.” *Id.*

255. *Caygill*, 605 N.E.2d at 1354.

256. *Whitmore*, *supra* note 7, at 797. “Contributory negligence is conduct by plaintiffs which is a legal cause of the harm experienced and is below the standard to which plaintiffs must conform for their own protection. Under tort law, plaintiffs who are contributorily negligent are barred from making claims.” *Id.* at 769 n.25 (quoting W. PROSSER AND W. KEETON, *supra* note 44, at 451).

257. *Id.* at 797. “The assumption of risk doctrine precludes plaintiffs from recovering in tort suits under the theory that plaintiffs who consent and recognize the risk relieve defendants from obligations arising out of the defendant’s conduct.” *Id.* at 769 n.26 (quoting W. PROSSER AND W. KEETON, *supra* note 44, at 480-81).

258. *Id.* at 797-98.

259. *See Whitmore*, *supra* note 7, at 798. Scholarship athletes deserve to receive the same statutory rights designated to other employees. *Id.*

260. *See Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 89 (Ind. Ct. App. 1982), *rev’d*, 444 N.E.2d 1170 (Ind. 1983).

261. *See supra* note 47.

protected.<sup>262</sup>

Yet another reason for the inclusion of scholarship athletes within the coverage of the act, derives from the relatively unequal bargaining positions of the students and the universities.<sup>263</sup> It does not seem equitable to compel scholarship athletes to submit themselves to the total control of the university, risking serious bodily harm, and yet possess no certain means of remuneration for the injuries which they may suffer.<sup>264</sup> Furthermore, because the athletes are not participating on the university team solely for their own benefit, there is a strong argument that their injuries "arise out of and in the course of employment."<sup>265</sup> Therefore, it seems that not only should scholarship athletes be considered as employees under the control and contractual analysis that should be given this status as a matter of public policy.<sup>266</sup>

### CONCLUSION

There is little doubt that the pressure and emphasis on winning in collegiate athletics has increased tremendously over the years.<sup>267</sup> In an effort to increase revenue and attract more students, universities have placed a great deal of emphasis on their athletic teams and the rewards which they may bring the school.<sup>268</sup> As a result of this focus, the NCAA and its member universities have become far more business oriented and have sought to produce successful programs in a manner similar to that of any other business.<sup>269</sup> By acting in this manner, the universities have essentially assumed the form of a business organized to operate in the field of college sports.<sup>270</sup>

262. See Whitmore, *supra* note 7, at 798.

263. "The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field." *Gulf South Conference v. Boyd*, 369 So. 2d 553, 558 (Ala. 1979).

264. *Id.*

265. Rendering moot the point that "injuries received by an employee engaged in some activity, undertaken solely for his own benefit, do not ordinarily arise out of or in the course of his employment especially where such activity is not an incident of his employment, not has any connection or relation to employment." *Gentili v. University of Idaho*, 416 P.2d 507, 509 (Idaho 1966) (holding that graduate assistant of university may be covered by Workers' Compensation Act for injuries sustained while doing lab work for graduate thesis).

266. *E.g.*, *Rensing*, 437 N.E.2d at 89.

267. See Whitmore, *supra* note 7, at 763-64.

268. See *supra* notes 7-8, and accompanying text.

269. See *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977).

270. *Id.*

Subsequently, as the universities and their athletic departments have become more business oriented, so too have the athletes who perform for the athletic programs.<sup>271</sup> Scholarship athletes submit themselves to the total control of their coaches and the university, and in return expect the university to provide them with an appropriate form of compensation (i.e., a scholarship).<sup>272</sup> By binding themselves in contract with the university and submitting to the control of the school and its athletic directors,<sup>273</sup> a scholarship athlete essentially qualifies as an "employee" of the university for workers' compensation purposes.<sup>274</sup>

In light of this, it appears that any injury sustained by a scholarship athlete would meet the requirement of "arising out of and in the course of employment."<sup>275</sup> Moreover, when one considers the seriousness of the injuries which an athlete may incur, as well as the loss of potential economic gains that may result from such injuries, it is apparent that the scholarship athlete deserves the same statutory protection offered to other employees.<sup>276</sup> Viewing all the above considerations in their totality, it is manifest that scholarship athletes should be included within the coverage of the Ohio Workers' Compensation Act.

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271. *See, e.g.*, *Van Horn v. Industrial Accident Comm'n*, 33 Cal. Rptr. 169, 173-74 (Cal. Ct. App. 1963); *Nemeth v. University of Denver*, 257 P.2d 423, 425-26 (Colo. 1953).

272. "A college athlete receives a scholarship of substantial pecuniary value to engage in college sports." *Gulf South Conference v. Boyd*, 369 So. 2d 553, 556 (Ala. 1979).

273. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1957) for a complete list of the factors used to determine whether an employer-employee relationship exists.

274. *See* OHIO REV. CODE ANN. § 4123.01 (Baldwin 1994).

275. *Compare* OHIO REV. CODE ANN. § 4123.01(C) (Baldwin 1994) (stating that an injury must be "received in the course of, and arising out of, the injured employee's employment.") with RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957) (listing ten factors to use in determining if an employer-employee relationship exists).

276. *See* Whitmore, *supra* note 7, at 798.