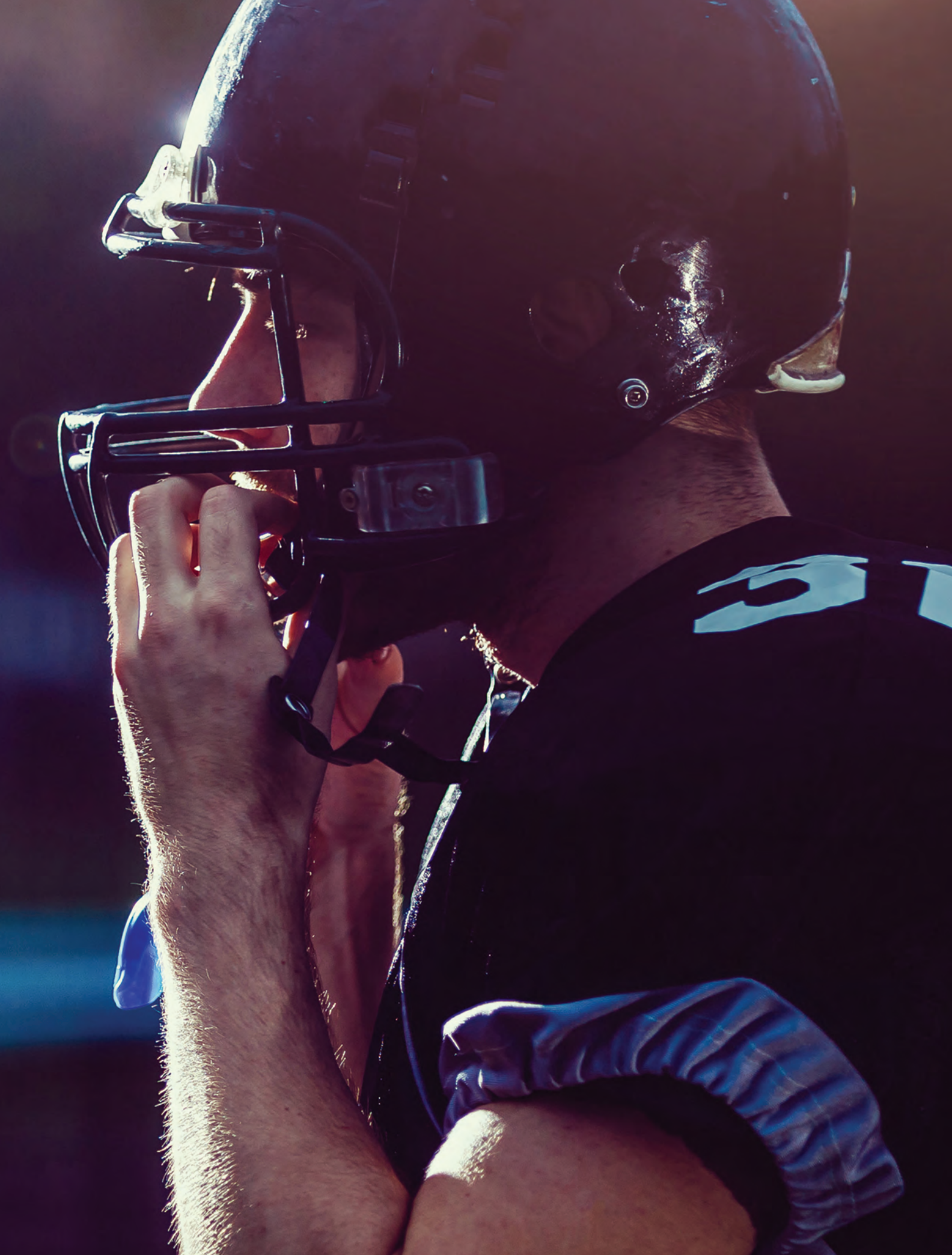
Pennsylvania Workers' Compensation Act and the Student-Athlete: The Ultimate Mismatch

By Anthony Natale III

Money changes everything. These three words are now proverbial in the context of collegiate sports. In years past, a "free ride" athletic scholarship was a once-in-a-lifetime golden ticket to garner an education while competing on an intercollegiate basis in a cherished sport. Then came the television contracts, national championships, bowl games and, yes, wheelbarrows full of money. Enough so that many Division I basketball and football coaches in Pennsylvania earn much more than our brain surgeons and rocket scientists combined. Amid the lucrativeness, the cheering crowds and the mostly nameless athletes exists the specter of implosion. To say that collegiate athletic organizations in the United States are in need of change in how they govern student-athletes is an understatement.

Currently there is a full-court press by student-athletes of all types to be recognized as "employees" of their member schools. The underpinning theme posited on behalf of many student-athletes seeking an employee designation is the hope that this status will open the door to coverage under the applicable workers' compensation statutes and a means to be paid for lost time and medical expenses due to a workplace injury. But seeking asylum through any workers' compensation act is not the touted universal panacea that will save college sports. To the contrary, it is a specious response to a problem that has a simple fix. Unfortunately, our student-athletes are being misinformed as to the benefits of workers' compensation while being led away from the true tools for change. The outcry of the student-athlete is palpable on the internet, in the locker room and even hidden in the tortured verbiage of their legal filings (if you read between the lines): They want a system within which they can secure an education, realize their market value as a whole (not as individual athletes) and have medical and financial protection while in school. It is a grave misapprehension to believe that gaining status as an "employee" for the purposes of the Pennsylvania Workers' Compensation Act will allow these athletes to achieve even a scintilla of their underlying goals. This has nothing to do with insurance companies or the politics of workers' compensation law. Every insurer



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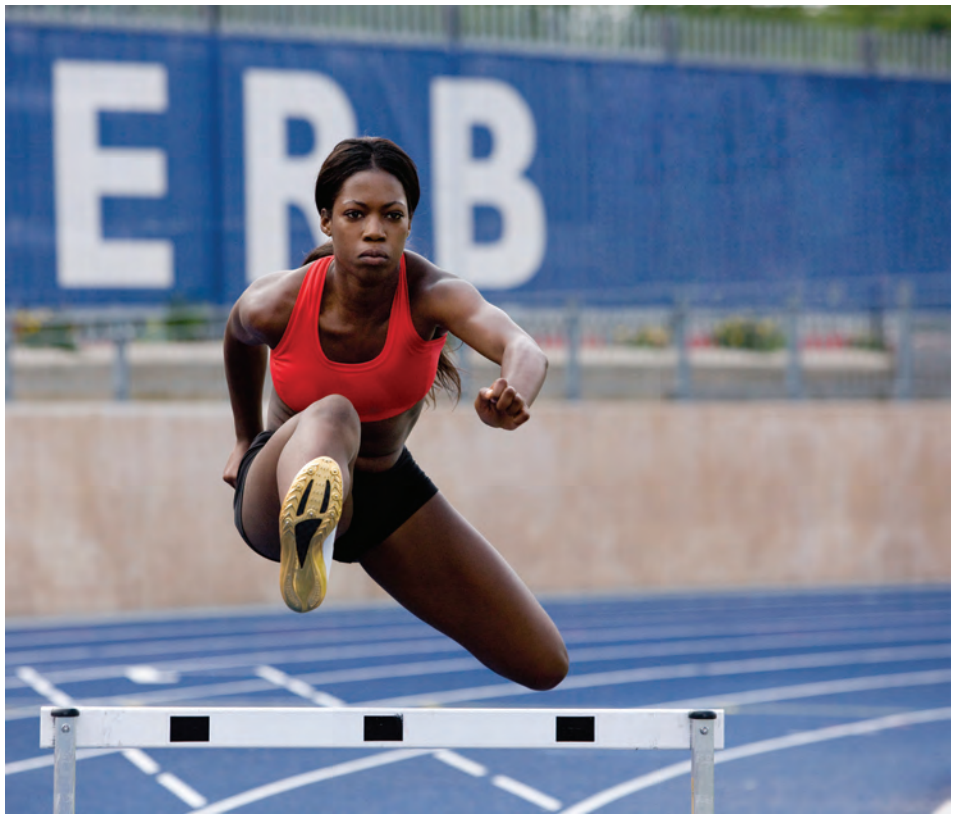
in the commonwealth would love a new opportunity for business by insuring scholarship athletes as employees through collegiate association member schools. Many outsiders to insurance envision the act as being akin to Social Security and unemployment — it is not. The insurance world is not designed for easy payouts or unobstructed medical coverage. If thrust into the workers' compensation system, student-athletes will quickly realize that immediate and tireless work will be undertaken by insurers to get them out of that system. Such is the nature of the beast in this area of law.

Clearly, the workers' compensation statute in Pennsylvania is not the vessel by which student-athletes can instigate the change they need. Yet, the pundits with no knowledge of Pennsylvania workers' compensation law continue to cheer for student-athlete employee status under the act. Law review articles and college theses have been written calling for amendments to the act to allow student-athletes to be considered employees for workers' compensation purposes, all the while setting up what amounts to a Hail Mary pass that would even make Doug Flutie gasp with futility. Moreover, it is clear that the student-athletes themselves are unaware of the negative effects of a workers' compensation paradigm when it comes to payment of indemnity and medical benefits. Workers' compensation employee status for student-athletes would ruin college sports and hurt the very individuals who are begging for a new standard. The pragmatic solution is to make changes to the concepts of stipends and scholarships, the money flow and the collegiate athletic organizations rules that govern student-athletes.

In the Pennsylvania workers' compensation arena, there is little by way of legal authority regarding whether student-athletes could be covered employees under the act. At the federal level, and more specifically regarding allegations of student-athletes as employees for the purposes of the Fair Labor Standards Act (FLSA), the federal district courts have already decided the issue. Student-athlete lawsuits through the FLSA alleging that minimum wage and overtime laws should be applied to the time spent in their athletic endeavors (since they are quintessential employees of their educational institutions) were dismissed by the district courts in *Berger v. NCAA* (Indiana) and *Dawson v. NCAA* (California). While these decisions are firmly based in reasoned legal analyses, the underlying message is very clear — athletic play is not considered work, plain and simple. The 7th U.S. Circuit Court of Appeals actually affirmed the dismissal in *Berger* on this principle. Notably, *Berger* arose out of an athlete schooled in Pennsylvania.

To the student-athlete, the musings of the court might be seen as an affront to their dedication. It is understood that many student-athletes hold schedules that rival a full workday in the outside world. On top of the requirements of their respective sports, those same athletes must also attend classes, study and sleep. Without a lawyer's grasp of case law, it is easy to see how perceived negative decisions from the courts can fuel more consternation. These cases should be read with the understanding that while change is needed, the FLSA never envisioned student-athletes as employees of their educational institutions. This kind of pressure, however, without beneficial change, explains the rush to file more lawsuits. A student-athlete in *Livers v. NCAA* (Pennsylvania) has filed similar allegations, with a twist. He is seeking a finding as to whether a "scholarship athlete" holds employee status in the eyes of the FLSA. There are 20 Pennsylvania educational institutions named as defendants in the suit, and the same relief is being requested as to minimum wage and overtime pay.



Based on this legal climate, it is no wonder that this issue is now being scouted in the Pennsylvania workers' compensation venue. After all, most workers' compensation statutes are born out of humanitarian principles. Again, to the casual observer, the act may seem to be a good way to help all student-athletes. To the legal insider, the act is a hurdle much too high to overcome and hurts more than it helps in the student-athlete setting. Section 104 of the act defines "employees" as all natural persons who perform services for another for "valuable consideration." Clearly scholarship student-athletes (especially full-ride scholarship athletes) can make a colorable argument that payment of tuition, room and board in exchange for participating in a sport is valuable consideration under the definition of the act. But consider the fact that the student-athlete population as a whole has just been drastically reduced in this analysis. We must eliminate from the list of potential employees all Division III and Ivy League athletes and some Division II athletes — no scholarship means no valuable consideration in Pennsylvania. So at the outset, student-athletes would have to be prepared to undermine all individuals (in their own class of claimants) who have not been awarded lucrative scholarships.

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Since there is no real Pennsylvania legal authority on this issue, next consider the fact that any Pennsylvania workers' compensation judge (WCJ) will be delving into the *Berger* and *Dawson* precedents when formulating a basis for a legal opinion. It will be difficult at best to convince a WCJ that playing a sport is working under the definitions associated with the act. The act holds that a person whose "employment" is casual in character and/or not in the regular course of business of the employer is not an employee for the purposes of the act. While many argue that a football or basketball program is a "business" engaged in by some universities in Pennsylvania, there are equally many who feel that the only business of a college or university is, in fact, to provide an education. The debate will linger in this regard.

Student-athletes are unaware of the negative effects of a workers' compensation paradigm.

Let's put the notion of employee status aside and delve into the "benefits" to which a proposed student-athlete employee would be entitled under the act. By way of lost "wages" for a proposed work injury, forget allegations of being paid minimum wage and overtime wage. Section 309 of the act governs the calculation of the average weekly wage. It holds that board and lodging can be included in the calculation of an employee's average weekly wage, as well as "gratuities reported to the United States Internal Revenue Service." It is not clear whether actual tuition remission (a nontaxable event) would be included in the calculation. Even if it is, that could result in all scholarships for these athletes being readjusted by the IRS as having tax consequences. Additionally, this section of the act provides further limiting rules for employees who engage in occupations that are exclusively seasonal. While the student-athlete may be able to argue that the "job" lasts all year (considering off-season training), the end result would be a very low benefit rate to say the least — not even close to minimum wage for the hours logged in. Don't be fooled either by the terms "indemnity payments" — they don't last long. Just as soon as they are awarded, the insurer will begin to work on limiting the payments. If a student-athlete employee fractures an ankle and is "out of work" for a period of time, the insurer will find modified duty to limit the payment of benefits. Now, instead of being the starting quarterback on the injured list, the student-athlete may be brought back to "work" warming towels to earn his scholarship "wages." This is not the goal the student-athletes aspire to achieve.

Many pundits argue that wages are not the major concern for student-athletes seeking workers' compensation employee status. Instead, it is argued that medical benefits (more so than wages) are needed to protect these students, especially in the world of head trauma, post-concussion syndrome and other traumatic brain injuries. It is agreed without equivocation that student-athletes need medical protection, and the current state of affairs is woefully deficient. Again, however, the act is no medical haven when it comes to work injuries and is clearly not the solution for student-athletes. First and foremost, the student-athlete must be prepared to treat for the first 90 days after an injury with a panel physician from the designated panel list controlled by the employer. If the student-athlete feels the need to forego treatment

with an unknown panel doctor in favor of a well-known orthopedic surgeon off panel, the first 90 days of treatment will not be covered by the employer. Consider further that not all medical treatment will be covered under the act once an injury occurs. Insurers have the right to challenge the reasonableness and necessity of medical treatment and even the causal relationship of that treatment within 30 days of the submission of the medical bill and report. Challenges to the treatment can hold up payment of medical expenses for years, further complicating the student-athletes' academic and athletic careers. This does not sound like the "fix" that many student-athletes are envisioning.

Overall, formulating a new status as "employee" for student-athletes to break into the Pennsylvania Workers' Compensation Act will do more harm than good. The real solution to this problem lies in the hands of the student-athletes, the collegiate sports regulating and governing bodies, the member schools and professional sports in general. Beginning with student-athletes, eliminate the notion that one athlete or group of athletes is more important than others. While name recognition and draft status form the basis for television coverage, the simple fact is that most student-athletes are nameless and faceless. All student-athletes work hard at their craft and a push needs to be made for universal scholarship payments to benefit all athletes. The regulatory associations that govern student-athletes need a rule overhaul. While these associations pigeonhole student-athletes in the category of amateurs, more can be done to allow student-athletes to capture their overall market value without being paid to play professionally while in school. Likewise, member schools need to reevaluate where the cash flow is invested. Medical programs to protect athletes injured during athletic events must be developed more fully. A student-athlete should never have to bear the costs of medical treatment over and above insurance payments. Scholarships should never be removed from student-athletes who, by the virtue of their injuries, can no longer participate in their chosen sport. The scholarship should continue to extend throughout the end of their undergraduate academic careers. Maybe the coaches or the conference commissioners take a small hit in salary for the better protection of the athletes. Finally, professional sports (especially basketball and football) need to redact nonsensical rules that force some athletes into college in order to qualify for the pros. Some of these rules are not helpful to the athletes or their families. While many other changes can be implemented, trying to fit student-athletes into the Pennsylvania Workers' Compensation Act is a losing proposition.⚖

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