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Workmen's Compensation and the Scholarship Athlete

Sheldon Elliot Steinbach*

"It costs a lot to field a college football team and run an athletic program—and the price keeps going up." E. E. Bernard, Ohio State University Athletics Dept. Business Manager, quoted in the *Washington Post* November 19, 1969., p. E 1.

THE PAST TWO DECADES have witnessed phenomenal growth of major intercollegiate sports. In particular, college football has maintained a steady increase in home attendance, from the end of World War II to the present. Accompanying this enormous expansion in popularity has been a concurrent dependence by colleges and universities on the gate receipts of major sports attractions. With costs rising between 12 to 15% a year, the athletic departments are under increasing pressure to produce winning teams in popular sports in order to meet budgetary demands.¹ Generally, football and basketball revenues have been used to balance the athletic department budget by supporting other non-revenue producing sports, intramural activities, and a host of other athletic department functions. Some institutions which have developed financially successful athletic programs have been able to utilize the receipts for financing capital improvements for the school as a whole.

Colleges and universities are remarkably hesitant to reveal pertinent figures concerning their athletic program. However, a recent article in a major newspaper, on the University of Oklahoma, gives one a good picture of the comprehensive athletic scholarship program that is undertaken by institutions in order to produce revenue. According to the data disclosed, Oklahoma presently awards 125 full scholarships in football, 25 in basketball, 30 in track, 20 in baseball, 6 in golf, 6 in tennis, 30 in wrestling, 14 in swimming, and 12 in gymnastics.²

Television and radio receipts constitute another factor which has turned collegiate football into big business. With the NCAA skimming

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¹ Besides 280 full scholarship athletes whose cost of education averages \$1900 per student, Ohio State athletic department lists other miscellaneous expenses for football coach and 9 assistants: \$357,000; policemen and gatemen \$64,000, clothing and equipment \$39,200, shoes \$10,000, movies of games and practice sessions \$20,000, meals for athletes \$46,146, and transportation \$18,000. *Washington Post*, November 19, 1969, at E. 1.

² *The National Observer*, September 29, 1969, p. 1. Ohio State is allowed 30 football scholarships a year, 6 basketball, and 34 for other sports. There are, therefore, 280 students on campus getting their education paid for—tuition, books, fees and \$15 a month for laundry—from athletic funds, mostly football. *Washington Post*, November 19, 1969, at E. 1.

4½% off the top, a school participating in a nationally televised game will receive in the neighborhood of \$350,000, and approximately \$225,000 for a regionally televised game.³ TV and Bowl revenue where received is divided among the other conference members in order to enable all to share in the good fortune. Stated simply, a consistently winning team, resulting from the use of numerous scholarship athletes, brings larger gate receipts, national recognition, and TV revenue.

The scholarship-attendance-athletic program cycle affects both the so-called "big" schools as well as the small. This fall, Johns Hopkins University, certainly not a major athletic powerhouse—with the exception of lacrosse, instituted a policy of charging admission to football, basketball, and lacrosse games for the first term in over thirty years, in order to continue other non-revenue producing sports such as swimming, fencing, golf, and track. In short, some forms of intercollegiate athletics constitute a substantial business operation, a monetary resource that is tapped by the various institutions to meet financial commitments that would otherwise have to be met with general funds.

The current state of college football was succinctly summarized by an editorial in the *Wall Street Journal* which stated in part that "College football, which chose this year to celebrate its centennial, can be highly profitable. Football often supports a school's entire athletic program and it usually is a help in holding alumni financial support."

The danger is that a school will let its athletic and academic program get out of balance. The danger has increased in recent years, as television has multiplied football's potential financial rewards. In some cases schools have come to see—and treat—athletes less as students than as tools to be manipulated for profit.⁴

Into this picture of big time business comes the student athlete, who is a most important element in this financial world. With a desire to maximize revenue, and obtain public acclaim and alumni support, institutions recruit high school athletes with a degree of vigor, determination and organization that is reminiscent of the professional football draft before the merger of the two leagues.⁵ With scholarships, part-time jobs, and other sometimes hidden extras, the potential All-American is cajoled and flattered into signing a letter of intent and, if all goes well, he eventually arrives on campus. The scholarship athlete is expected to engage in almost daily practices before and during the season, and to participate in scheduled games, or to forfeit all financial aid. The ques-

³ See *The National Observer*, September 29, 1969, at 1.

⁴ *The Wall Street Journal*, November 11, 1969, at 15.

⁵ E. E. Bernard, Ohio State business manager, stated that "Recruiting is a big factor. A university attempting to keep pace in a major conference must put seven or eight men on the road. They visit families of prospects, entertain, invite visits to the campus." *Washington Post*, November 19, 1969, at E. 1.

tion arises whether a scholarship athlete whose scholarship is solely dependent on his active participation on an athletic team, and who is injured in practice or in a game, should be able to qualify for Workmen's Compensation. This problem involves (aside from the moral issue) the question of whether an injured athlete should lose his scholarship, a crucial question that is beyond the scope of our present inquiry.

For statutory guidance, let us look to the Ohio law. The purpose of the Ohio Constitutional provision, Article 2, Section 35, authorizing passage of laws relating to Workmen's Compensation, is to make payment of compensation thereafter provided by law for accidental injuries to employees, occasioned in the course of the employee's employment, a charge on the industry, and to make business and the ultimate consumer of its products, and not have the injured employee, bear the burden of compensating for accidental injuries incident to such business.⁶

The Workmen's Compensation Act deprives the employer of the common law defenses of contributory negligence, assumption of risk, and the fellow servant doctrine, in exchange for limitation of his liability to contributions to an insurance fund. It also permits the employee to recover an award of compensation for accidents and occupational diseases wholly independent of fault of the employer or employee, while simultaneously depriving the employee of the common law action for negligence, with the only limitation that the worker must not suffer from a self-inflicted injury.⁷ Liability under the Workmen's Compensation Act arises out of the law itself and, strictly, is neither tortious nor contractual, but depends on status created by employment.⁸

In order to recover under the Workmen's Compensation Act, the relation of employer and employee must exist, and an injured employee must show that his injuries resulted from the work he was employed to perform and that such injuries were received while engaged in the business of his employer and in the furtherance of the employer's affairs.⁹

The relationship of employer and employee, within the Workmen's Compensation Act, depends primarily on the employer's right to direct the manner in which the work shall be done and, although selection, engagement, payment of wages, and the power of dismissal all are relevant, they are not necessarily conclusive.¹⁰

To be amenable to the Workmen's Compensation Act an employee must be a regular, not merely a casual employee, a concept that is de-

⁶ Jones v. Industrial Commission of Ohio, 60 Ohio App. 465, 21 N.E. 2d 1014 (1939).

⁷ Shoemaker v. Electric Auto Lite Co., 69 Ohio App. 169, 41 N.E. 2d 433 (1942).

⁸ Bozzelli v. Industrial Commission of Ohio, 122 Ohio St. 201, 171 N.E. 108 (1930).

⁹ Tipple v. High Street Hotel Co., 70 Ohio App. 397, 41 N.E. 2d 879 (1942) citing (then) Ohio Gen. Code, Sec. 1465-1. And see, Oleck, Horseplay by Employees, 17 Clev-Mar. L. Rev. 438 (1968).

¹⁰ Case v. Industrial Commission, 62 Ohio App. 219, 23 N.E. 2d 652 (1939).

defined not by the length of employment but by the nature of the employment.¹¹

A workman is a "regular employee" rather than a casual employee within the Workmen's Compensation Act if he is hired to do work in the trade, business, profession or occupation of the employer.¹²

It has generally been held, however, that where materials are furnished and the individuals are told what to do and how to do it, one generally has established an employer-employee relationship.¹³

Aside from the establishment of an employer-employee relationship, the injury sustained, in order to be compensable, must have occurred in the course of employment. This has been defined by the cases to mean an act which takes place during the period of employment, at a place where the employee may reasonably be, and where he is performing his duties or something reasonably incidental to his employment.¹⁴

Ohio, as has almost every other state, has held the Workmen's Compensation Act to be remedial in nature, which entails that it should be given a liberal construction in order to accomplish the purpose intended, and that such construction shall be made in favor of the claimant.¹⁵

Courts have examined the position of the scholarship athlete as a claimant under the Workmen's Compensation Act, and have held that he is an employee for purposes of the act. The first case to pass favorably on the application for workmen's compensation by a scholarship athlete was *University of Denver v. Nemeth*.¹⁶ In April, 1950, while engaged in spring football practice, Nemeth suffered an accidental injury to his back. At the time he was receiving \$50 per month from the university for work done on or about the campus tennis courts.

The university contended that Nemeth was a casual employee, that his job had no connection with his playing football, and that the application of Workmen's Compensation Act to scholarship students contravenes public policy. The court held that "higher education in this day is a business and a big one,"¹⁷ and "that a student employed by the uni-

¹¹ *Schneeberg v. Industrial Commission*, 67 Ohio App. 499, 37 N.E. 2d 427 (1941); *Hanes v. Ticatch*, 104 Ohio App. 523, 150 N.E. 2d 493 (1958).

¹² *Riese v. Industrial Commission of Ohio*, 55 Ohio App. 76, 8 N.E. 2d 567 (1937).

¹³ *Look v. Hinkle*, 66 Ohio L. Abs. 176, 113 N.E. 2d 611 (1953).

¹⁴ *General Motors Corp. v. Louson*, 14 Ohio Misc. 129, 232 N.E. 2d 657, *aff'd*. 15 Ohio App. 2d 192, 240 N.E. 2d 100 (1967). A professor in the employ of Ohio State University, who during his vacation periods attends meetings not required or contemplated by his contract of employment is not performing services for such university and is not an employee within the meaning of workmen's compensation law, even though he is attending the meetings as a representative of the university. 1934 Ohio Atty. Gen. Op. No. 2988.

¹⁵ *Nelson v. Industrial Commission*, 150 Ohio State 1, 80 N.E. 2d 430 (1950); *Keenan v. Young*, 195 N.E.2d 382 (Ohio, 1963).

¹⁶ 127 Colo. 385, 257 P.2d 423 (1953).

¹⁷ *Id.* at 425-6.

versity to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation Act is concerned."¹⁸

The record revealed that Nemeth was informed that "it would be decided on the football field who receives the meals and the jobs."¹⁹ The coach testified that meals and the job ceased when the student was "cut from the football squad."²⁰

Despite the university's claim that 800 students who were being assisted in obtaining their education would have to seek work elsewhere, or quit their education, if the decision favored the claimant, the court found no evidence to support the proposition that the application of the Workmen's Compensation Act in this instance would contravene public policy.

In holding that the claimant was a qualified applicant for Workmen's Compensation, the court stated that "the obligation to compensate Nemeth arises solely because of the nature of the contract, its incident and responsibilities which Nemeth assumed in order to not only earn his remuneration, but to retain his job . . . The university hired him to perform work on the campus, and as an incident of this work to have him engage in football."²¹

Another case to pass on the subject was *Van Horn v. Industrial Accident Commission*,²² which involved an application for death benefits by a widow and minor children of a California Polytechnic College football team member who was killed in an October, 1960 plane crash while returning with squad members from a game in Ohio.

The District Court held that a scholarship and "rent money" received from the school constituted payment for the decedent's football activities, thereby creating an employment relationship between the decedent and the school.

In addition to a small scholarship, the player in this instance received a subsidy from a coach-controlled fund maintained by businessmen in San Luis Obispo, known as the Mustang Booster Club, which was designed to subsidize married student housing off campus in order to make it comparable to campus accommodations. The foregoing financial aid was totally dependent on the decedent's remaining on the football team.

The university argued that treating athletic scholarships as payment for services would unjustly burden institutions of higher education, and would be contrary to public policy. The court held that the Work-

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 430.

²² 33 Cal. Rptr. 169 (1963).

men's Compensation law itself was the true embodiment of public policy—the protection of the worker. It was also sufficiently clear to the court that the student in this case was not a volunteer, nor a donee of charitable benevolence, but an employee within the full meaning of the act.²³

The school contended that the inclusion of student actors or band players who receive scholarship assistance under workmen's compensation coverage would be incompatible with the legislative intent. The court, after stating that "there is authority for the proposition that one who participates for compensation as a member of an athletic team may be an employee within the statutory scheme of the Workmen's Compensation Act,"²⁴ distinguished football by holding that "it cannot be said as a matter of law that every student who receives an athletic scholarship and plays on the school team is an employee of the school."²⁵ The court acknowledged that an athletic scholarship for track, fencing, or swimming, may be looked at in a different light than is football or basketball, due to the financial gain for the institution.²⁶

Lastly, the college argued that the increased cost of Workmen's Compensation coverage would discourage the giving of athletic scholarships. The court offered a simple solution to the potential scholarship problem, by suggesting that schools award scholarships without creating an employment relationship. A player injured while performing gratuitously would not be an employee, and his injury would not be compensable under the Act. It is furthermore clear that any increased cost incurred by carrying workmen's compensation insurance can be easily passed on to the public in the form of higher admission prices.

The *Van Horn* and *Nemeth* cases are clearly distinguishable from *State Compensation Ins. Fund v. Industrial Fund*,²⁷ where a claim for compensation for the death of a scholarship athlete was denied. The court found that the evidence failed to disclose any contractual obligation to play football, and that decedent's employment was not dependent on playing football. To aid it in reaching its decision, the court made the finding that the college, Fort Lewis A. & M., was not in the football business and received no benefit from this kind of recreation.

²³ See *Athletic Association of University of Illinois v. Industrial Commission*, 384 Ill. 208, 51 N.E. 2d 157 (1943), where a member of the swimming team, without remuneration, was injured while taking part in a circus staged by the physical education department and was denied workmen's compensation since he was a mere volunteer, not an employee.

²⁴ 33 Cal. Rept. 173 (1963).

²⁵ *Id.* at 175.

²⁶ In *Todd School v. Industrial Commission*, 412 Ill. 453, 107 N.E. 2d 745 (1952), it was held that work done by a student under the direction of faculty and resulting in benefit to the school, does not in itself create a relationship of employer-employee in institutions of higher education; however, the *Todd School* did receive substantial financial benefit from athletic gate receipts.

²⁷ 135 Colo. 570, 314 P. 2d 288 (1957).

Although only two states have clearly passed on the status of the injured, subsidized athlete, the guidelines in this area seem clear. Workmen's Compensation law is a law of a remedial nature and is liberally construed in all states. The *Van Horn* case is strictly limited to those instances where a school has materially benefited from the student's activities, and where the continuance of financial aid is solely dependent upon his performance of those activities. In order to avoid the impact of *Van Horn* and *Nemeth*, the schools must eliminate any contractual relationship which provides for the rewarding or renewal of scholarship aid only so long as the student plays on the team. If this proviso is eliminated from scholarship awards, the athlete's participation can be characterized under the law as voluntary or merely gratuitous, thereby avoiding the effect of the Workmen's Compensation Act. Should institutions of higher education persist in retaining a contractual employment relationship with their scholarship athletes, whereby financial aid is only dispensed as long as the student is a participating team member, it is only just that the student be protected and receive the benefits under Workmen's Compensation for any injuries sustained while employed by his school.