

# TerranearPMC Safety Share

Robert Brounstein

## Week of September 17, 2018 – OSHA and the NFL

During the recent confirmation hearings for Judge Kavanaugh, I listened to a line of questioning concerning an incident in 2010 when the Occupational Safety and Health Administration (OSHA) fined Seaworld in San Diego after a trainer was killed by a captive killer whale. This was the first time OSHA ever pursued fines of a major entertainment organization. While the purpose of the questioning focused on Mr. Kavanaugh's interpretation which led to the subsequent legal decision of this particular case, I found that this subject was quite fascinating with respect understanding how performers and professional athletes are protected – if at all – by OSHA workplace rules and regulations.

The fact is, while OSHA has established health and safety standards (i.e.: “Laws”) that apply to General Industry, Construction, Maritime and Agriculture, there is nothing that specifically addresses professional sports. As a “catch all” regulation OSHA has, on numerous occasions, used the General Duty clause: Section 5(a)(1) of the Occupational Safety and Health Act (OSHA) of 1970, to cite non-compliances in situations where a specific regulation does not exist for a specific situation and where it is clear that an employer did not properly protect its workers. The General Duty clause states that employers are required to provide their employees with a place of employment that “is free from recognizable hazards that are causing or likely to cause death or serious harm to employees.”

There are organizations in the US that are exempt from OSHA regulations. These include: self-employed persons; members of the immediate family of farm employers that do not employ outside workers; work locations that are regulated under other federal agencies (i.e. MSHA, Federal Railway Administration, etc.); and employees of state and local governments. Since professional sports teams do not fall within any of the OSHA-exempt categories, one can conclude that football, baseball, hockey, basketball teams are NOT exempt from OSHA rules. Yet there are no OSHA-specific regulations for professional sports. So, while OSHA has not promulgated health and safety laws for sports, fines could be issued to sports organizations under the General Duty Clause.

In an OSHA Letter of Interpretation (dated June 23, 2003), where it was asked if professional athletes are considered independent contractors and therefore, exempting sports teams from including injuries that were sustained during a professional sports event (and thus, be exempt from completing such events on an OSHA 300 log with subsequent inclusion in the Bureau of Labor and Statistics occupational injury illnesses records). OSHA responded with what one may refer to as a “punt,” concluding, “

*“...I am not aware of any formal OSHA interpretation or any directly relevant case law on whether players on professional sports teams should be considered independent contractors or employees under the common law test. This determination must be made on a case-by-case basis after considering all of the circumstances affecting the relationship between the teams and their players and applying the common law factors. The common law test is used for a variety of purposes in addition to OSHA's recordkeeping rule, and so the outcome of the analysis for a particular circumstance and a particular player may already be known and established...”*

Recently, Jeff Miller, the NFL's Senior Vice President for Health and Safety, admitted to the connection between football and Chronic Traumatic Encephalopathy (CTE). The NFL claims to support “player safety,” yet for years adamantly refused to admit that the game could cause such an unfortunate condition to its players. CTE is a progressive degenerative disease of the brain found in athletes. CTE has been known to affect boxers since the 1920s. A simple *Google* search for “NFL players with CTE” yields what seems to be



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a never-ending list of players. Such notables include Junior Seau, Dwight Clark, Kenny Stabler and Mike Webster (aka Iron Mike): all deceased from CTE or complications due to CTE.

The NFL's recent admission was a game-changer, because the NFL now acknowledges that their workplace causes an occupational disease that is preventable. As such the NFL is now required to take proactive steps to prevent and manage the workplace hazards that lead to CTE. And now regulatory oversight & enforcement actions from OSHA may be the next step.

It is true that players in the NFL (as well as other professional sports – but not all sports programs) provide a generous medical program for injured players as well as retirement and continued medical benefits – and quite frankly, the compensation can be considerably more than workers compensation per OSHA regulatory requirements. But that does not hold true for all professional athletes.

CTE is a debilitating disease and even the best PPE (helmets, padding, etc.,) has shown to be less than 100% effective to prevent such injuries. As recent studies have shown, helmets can protect the skull, but because the brain is semi-suspended, head impacts cause the brain to collide with the brain cavity. One severe blow or continuous repeated hits can result in permanent, irreversible damage.

A recent article in *The Arizona Law Review*, *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, considers what might happen if professional football players were subject to government regulations. The article states that OSHA clearly has the authority to regulate the NFL. Of course, there are many reasons why that hasn't happened. Despite the lack of previous government action, the article suggests there are several ways OSHA can provide guidance in the NFL. For instance, OSHA could issue regulations for the NFL through negotiated rulemaking via a petition from an interested 3<sup>rd</sup> party or per the result of a lawsuit. Regulations could be established based on a specific injury (ex. head trauma) or based on specific hazards found only in the NFL. OSHA could also issue a guidance document specifying what it believes constitutes an NFL club's general duty to maintain a safe and healthy workplace (a specific guideline based on the OSHA general duty clause). Another way for OSHA to take a proactive position in the NFL is that the NFL (or its players' union) and OSHA form an Alliance, That is, a program that works with employers and employees to promote worker safety and health.

Severe injuries that are associated with football, as well as other sports, are causing the public to take another look at our love for sports – violent sports in particular. This year the NFL has instituted new regulations designed to protect its players. They include prohibiting using the helmet to initiate contact with another player and “wedging” and can lead to being ejected. As one suspects, we will see a lot of questionable calls this season that will frustrate both players and fans.

In 1986, the Chicago Bears had an offensive lineman, William “the Refrigerator” Perry. He weighed around 350 lbs and he could run through defensive lines, almost always ensuring a touchdown during short yardage situations. In 1986, this was unusual; but this is no longer the case. Every team has a number of “Refrigerator Perrys” and that means body contact in the NFL has become more jarring than ever and therefore the potential for CTE and other debilitating injuries seem to be unavoidable. How can OSHA and the NFL keep football at such a competitive level while not having players sustain serious injuries? Maybe through a partnership between these organizations, a practical and feasible resolution may be realized. Unfortunately, if the excitement and entertainment value is compromised, the financial aspect of professional sports may take precedent and allow continued debilitating injuries to continue.

**The achievements of an organization are the results of the combined effort of each individual - Vince Lombardi**

