

SPORTS MEDICINE

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Behind the Lines: Recent Changes to D1 Athletics Programs' Reporting Structures

By Rachel Goodman, J.D. Candidate and Kimberly L. Sachs, Esq.

In the wake of the deaths of Garden City Community College defensive lineman Braeden Bradford and University of Maryland offensive lineman Jordan McNair, universities are beginning to make changes to the reporting structures in their athletics programs. For years, the majority of Division I sports medicine employees reported to university athletics administrators. Now, in the face of increased scrutiny and litigation, more and more universities are realigning the chain of command and requiring employees to report directly to medical professionals.

In May 2019, for example, the University of Kansas ("KU") moved approximately 40

athletic trainers, strength and conditioning coaches, sports nutritionists, and athletics social workers from its athletics department to the University of Kansas Health System. A few weeks later, the University of Maryland ("UMD") announced that it, too, would transition team physicians, athletic trainers, sports nutritionists, and student-athlete mental health practitioners from its athletics department to the University Health Center. The current Athletics Health Care Best Practices Statement issued by the National Collegiate Athletics Association's ("NCAA") acknowledges that "[m]ultiple models exist for collegiate sports medicine. Primary athletics healthcare providers may report to the athletics department, student health

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Takeaways from the Onyshko Verdict: Win for NCAA, Loss for Plaintiffs, Draw for Others in Future Head Injury Cases

By Dylan F. Henry, Esq., Kimberly L. Sachs, Esq., and Kristen Mericle, J.D. Candidate

Matthew Onyshko, a former linebacker for the California University of Pennsylvania ("Cal. U."), suffered roughly twenty concussions during his five-year stint with the Vulcans. Years later, Onyshko was diagnosed with amyotrophic lateral sclerosis ("ALS"), a neurodegenerative disease that affects the brain and spinal cord. He is now confined to a motorized wheelchair and

speaks using a computer-generated voice device he guides with his eyes. This condition, Onyshko claimed in a 2014 lawsuit against the National Collegiate Athletic Association ("NCAA"), is a direct result of the head injuries he suffered during his football career at Cal. U. and the NCAA's negligence in failing to warn Onyshko of the long-term health effects of repeated head trauma. A recent jury disagreed, finding the NCAA was not negligent.

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SPORTS MEDICINE

and the **LAW**

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What Makes Athletes Report or Hide Concussion Symptoms?

Whether or not an NCAA Division I athlete is likely to report concussion symptoms depends on factors including their vested interests, their understanding of health implications, and their team culture and societal influences drawn from narratives of performance circulating in media, according to a study published May 8, 2019 in the open-access journal PLOS ONE by Steven Corman of Arizona State University, USA, and colleagues.

Awareness of concussions as a problem in college sports, as well as the medical impacts of concussions, has increased in recent years. Because many symptoms are internal — such as difficulty thinking, blurry vision, and fatigue — athletes must recognize and report symptoms for treatment to be effective. Current intervention efforts rely on athletes acting self-protectively in reporting concussion symptoms; however leaders in collegiate sports, such as the NCAA, remain concerned about low rates of reporting.

In this study, 401 male and female athletes who played Division I football, soccer, basketball, wrestling, lacrosse, or field hockey at one of 11 participating universities in a Power 5 conference completed a web-based survey asking about their vested interests and risk perceptions related to concussions and severe head impacts. In addition, 90 qualitative interviews were conducted with athletes, coaching staff, and athletic directors to determine organizational and team culture when it comes to concussion education, processes, and communication dynamics.

Overall, the survey data revealed that these athletes were uncertain if they would suffer negative consequences from severe head impacts and perceived that any that did arise would be in the distant future. All schools studied have both men's and women's basketball teams, and direct comparisons here showed that male basketball players viewed concussion risks as lower and as further in the future than female players. The

interviews revealed that athletes rarely found concussion education memorable, and that coaches tended to be relatively uninvolved in the education process. Athletes expressed that they weighed the costs and benefits of severe head impact reporting by considering not only health implications but impacts on their prospects as a team member and on their team as a whole, as well as possible undesirable reactions from teammates and coaches. Cultural narratives emphasizing performance and organizational culture promoting performance also tend to work against concussion reporting.

Athletes were recruited by availability rather than randomly sampled, and the study's reliance on qualitative methods and self-reporting risks bias in the collection and interpretation of results. Additionally, the study included basketball athletes; basketball has lower concussion risk than the other sports. It's not clear whether the findings specific to basketball are generalizable to sports with higher concussion risks. Nonetheless, this study provides initial evidence about the factors which college athletes may weigh when making decisions about reporting concussions and could inform future educational efforts.

Corman adds: "Detecting concussions is about more than helmets and technology. Athlete reporting of head impacts is critical, and their decisions are influenced by a complex mix of cultural narratives, team culture, and their own vested interests."

Journal Reference: Steven R. Corman, Bradley J. Adame, Jiun-Yi Tsai, Scott W. Ruston, Joshua S. Beaumont, Jessica K. Kamrath, Yanqin Liu, Karlee A. Posteher, Rikki Tremblay, Lisa J. van Raalte. Socioecological influences on concussion reporting by NCAA Division 1 athletes in high-risk sports. PLOS ONE, 2019; 14 (5): e0215424 DOI: 10.1371/journal.pone.0215424

Coach Suffering Two Separate Head Injuries While Performing Duties Entitled to Accidental Disability Benefits

A New Jersey state appeals court has reversed a trial court, and found that a high school softball coach, who suffered two unrelated accidents—causing two separate concussions, is eligible for accidental disability benefits.

Central to the court's ruling was its determination that plaintiff Thomas Mulcahey became "disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties." *Kasper v. Bd. of Trs., Teachers' Pension & Annuity Fund*, 164 N.J. 564, 575-76, 754 A.2d 525 (2000).

Mulcahey first became an athletic coach in the Freehold Regional High School District in the fall of 1991. Two years later, the district hired him as a high school physical education teacher. He continued his duties thereafter as a coach, and, during the 2006-07 school year, the district hired Mulcahey as the head coach for the girls' varsity softball team. Each year, the district would evaluate a coach's performance, the evaluations were forwarded through the chain of command to the district superintendent, and before hiring coaches, the district reviewed applications whether submitted by those who had previously coached or new applicants.

The district paid coaches a stipend, which was not included as pensionable salary, and the district therefore did not deduct pension contributions from the stipend. In this case, the collective negotiations agreement between the Board of Education and the teachers' bargaining unit established the amount of the stipend paid to Mulcahey. The district's coaching manual contained a broad "Philosophy Statement," which specified that the "fundamental purpose of interscholastic athletics" was, among other things, to

"foster the intellectual growth of the student by supporting and reinforcing the academic program of the school." It further stated, "functioning as a part of the educational whole, the athletic program should always be in conformity with the District's objectives."

A contractual responsibility of the softball coach was to supervise after-school practices. During practice on April 11, 2007 (2007 incident), Mulcahey was struck in the face by an "errant throw," causing a concussion and fracturing the zygomatic arch of his face in three places. He also suffered herniated discs, cognitive and vision problems, depression, and anxiety. As a result, Mulcahey took leave until January 2008. Upon his return, he claimed he was unable to cope with the stresses of the job.

On March 30, 2009 (2009 incident), Mulcahey suffered a concussion when, during a physical education class, a "spiked" volleyball hit his head. Mulcahey did not return to work until October. In April 2011, he submitted an application for accidental disability benefits, claiming he was permanently disabled as a result of both incidents. He continued to coach and teach until 2014, when he left because of his asserted disability.

The TPAF Board of Trustees (Board) initially denied Mulcahey's request for accidental disability benefits, concluding he was not "totally and permanently disabled." In 2014, based on supplemental medical evidence, the Board partially reversed its earlier decision. It concluded Mulcahey was "totally and permanently disabled," but it denied him accidental disability benefits.

Several appeals followed, before the final appeal led to the instant decision.

New Jersey state law provides for the following: "A traumatic event occurring

during voluntary performance of regular or assigned duties at a place of employment before or after required hours of employment which is not in violation of any valid work rule of the employer or otherwise prohibited by the employer shall be deemed as occurring during the performance of regular or assigned duties."

Intersecting with the law, the current legal question, on appeal, asks: "Is a high school teacher, paid a stipend under a separate contract to coach one of the school's athletic teams, who becomes 'permanently and totally disabled as a direct result of a traumatic event' during after-school practice, eligible for accidental disability benefits because the 'traumatic event occurred during and as a result of . . . his regular or assigned duties?'"

The aforementioned *Kasper* is dispositive. In that case, a teacher, who routinely arrived before the official start of the school day to distribute materials requested by other teachers, was robbed and assaulted on the steps of the school. 164 N.J. at 571. The Court concluded that administrative decisions and case law interpreting "during and as a result of the performance of [the employee's] regular or assigned duties," N.J.S.A. 18A:66-39(c), share the recurring theme that, assuming all other statutory prerequisites are met, a worker will qualify for an accidental disability pension if he or she is injured on premises owned or controlled by the employer, during or as a result of the actual performance of his or her duties, or in an activity preparatory but essential to the actual duty. That is true whether the injury occurs during the workday or before or after hours. [Id. at 585.]

The court said that under the Act, pre-and post-workday performance of

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Coach Suffering 2 Head Injuries Entitled to Accidental Disability Benefits

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an employee's regular or assigned duties essentially constitutes a parallel universe to the performance of those duties during the regular workday. Thus, a teacher who is required to come early or stay late for parent conferences or sports practices clearly qualifies for an accidental disability pension if she receives a disabling traumatic injury while performing those duties. [Id. at 586.]

"In short, a teacher qualifies for accidental disability benefits if he 'is on premises controlled by the employer and [his] injury is causally connected, as a matter of common sense, to the work the employer has commissioned.' Id. at 588.

"The Board distinguishes Kasper, contending that because Mulcahey was paid a separate stipend to coach, his injury did not occur 'during and as a result' of his 'regular or assigned duties.' The Board notes that while the 1986 amendment extended eligibility for injuries occurring before and after regular work hours, it was limited to only the 'voluntary performance of regular or assigned duties,' not situations, like this, where a teacher was paid a separate stipend for performing those duties. We reject the distinctions as meaningful for purposes of construing the Act under the particular facts of this case.

"There is no question that Mulcahey's traumatic injury was 'causally connected, as a matter of common sense, to the work the employer ha[d] commissioned.' Ibid. Pursuant to his contract, the District hired Mulcahey to coach the girls' varsity softball team and expected him to supervise after-school softball practice, which is what he was doing when injured. The Kasper Court did not address the exact facts presented here, nor did it exclude teachers who are paid by separate contract for supervising extra-curricular activities from eligibility. Neither the Court's 'soc-

cer coach' example, nor its interpretation of the 1986 Amendment, carved out such an exception.

"Moreover, there are several practical reasons why eligibility for accidental disability benefits should exist under these circumstances. Common experience recognizes that at the high school level, athletic coaches are routinely teachers in the same school or another school in the same district. That relationship permits the coach to interact with other educators, guidance counselors, and the like, to better serve the student and further, in this case, the District's goal that its athletic programs be 'part of the educational whole' and 'in conformity with the District's objectives.'

"Further, in this particular case, the stipend the District paid was an item negotiated and incorporated in the parties' collective negotiations agreement. We might assume that if teachers, who were part of a bargaining unit that negotiated an additional stipend for its members, became ineligible for accidental disability benefits by accepting that stipend, they

may decline the opportunity to apply for coaching positions.

"Lastly, under the Board's interpretation of the Act, if two teachers, one paid a stipend and the other a volunteer, are supervising after-school practice and both are injured as result by a common traumatic event, only the volunteer would be eligible for accidental disability benefits. The distinction urged by the Board compels an absurd result under those circumstances. See, e.g., *Kocanowski v. Township of Bridgewater*, 237 N.J. 3, 10, 203 A.3d 95 (2019) (quoting *State v. Twiggs*, 233 N.J. 513, 533, 187 A.3d 123 (2018)) (cautioning against literal reading of statutory language if it "yield[s] an absurd result . . . at odds with the overall statutory scheme")."

Thomas Mulcahey v. Board Of Trustees, Teachers' Pension and Annuity Fund; Super. Ct. N.J., App. Div.; DOCKET NO. A-5146-16T2, 2019 N.J. Super. Unpub. LEXIS 1260 *, 2019 WL 2338495; 6/3/19

Study Finds Sudden Death in Middle School Age Student Athletes Most Common Playing Basketball

The majority of sudden death in American youth sports (ages 6-17) from 2007-2015 were cardiac-related (heart) and occurred during practice within organized middle school sports according to a first-of-its-kind study published in the National Athletic Trainers' Association (NATA) Journal of Athletic Training.

The majority of those affected were male with an average age of 13 years old. "While high school and college sports usually get the spotlight when it comes to the prevention of catastrophic health and

injury events, this study confirms the need to extend best practices and policies to the youth and recreational levels to protect all young athletes," said NATA President, Tory Lindley, MA, ATC.

"Reports from the Korey Stringer Institute tells us that sudden cardiac death is one hundred percent preventable. Yet it is still a leading cause of sudden death. It is incumbent on middle schools, organized and recreational sports programs to put the health and safety of participant's first."

Athletic Trainer Michael Westerfer Talks About How His Role and that of Other Athletic Trainers Has Changed

Athletic Trainers typically occupy the front lines when it comes to treating athletes, while managing the risks of when the athletes can safely return to the field of play without risk of reinjury. Drexel Head Athletic Trainer and Assistant Athletic Director Michael Westerfer embraces that role. He also understands another role associated with the profession, one that increasingly involves managing the legal side of the equation. That's why we sought him out for the following exclusive interview in Sports Medicine and the Law.

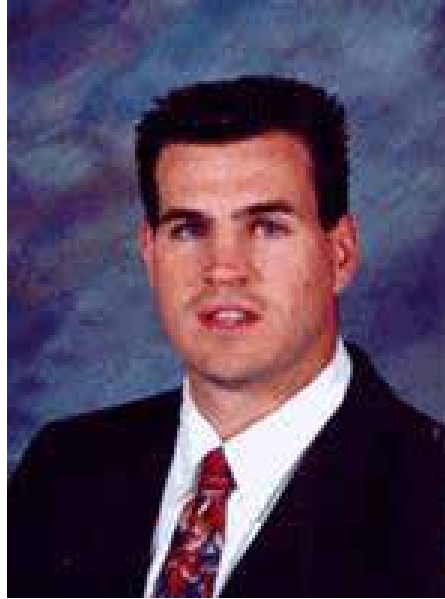
(Editor's Note: Michael was interviewed by Ali Shick, Marketing Intern at Montgomery McCracken and member of Drexel's 2020 class. Ali is a defender on the DI Drexel Women's Soccer Team and has worked closely with Drexel's sports medicine department throughout her career as a student-athlete.)

Question: *How has your job as an athletic trainer changed since the beginning of your career?*

Answer: The science of sports medicine has progressed greatly, so things that I faced earlier in my career are different. Science of surgery has greatly improved the rehab portion of how you treat somebody and how you get them back. The science-based part of it has changed how we do things in the clinical part of it. A lot of things that you do now are based upon clinical outcomes, which is based upon scientific study rather than what you were taught in a classroom or by your mentor who you worked under.

Q: *Is there more of a regulatory component today than there was before? If so, why is that?*

A: There's much more regulatory component to the sports medicine aspect of it and unfortunately a lot of these things are driven by legal or lawsuit-based outcomes. The concussion protocols that all NCAA schools have to follow are based upon legal cases where people sue in the NCAA and



Michael Westerfer

the NFL and them realizing, "What we're doing is not enough, so what do we need to do to make sure everybody's on the same page and to protect themselves legally?" They have to institute certain policies.

All NCAA student-athletes have to document their sickle cell trait status. This is based upon a legal lawsuit where a football player died in the early preseason in the heat because of a sickle-cell episode. The people weren't aware that the person had sickle and he started sickling and ended up dying. They sued the school and the NCAA and part of the settlement of the lawsuit was that they would test all student-athletes in the NCAA for sickle cell trait. I can think back to when I worked with Temple's football team. We had a kid who would cramp up at times. We'd have him hydrate and do all these things, and there were times when he would show sickling that wasn't really attributed to sickle cell trait at the time. Now that the policy is in place and I know more about it, and we've been down this road, I think back and say, "That kid probably had sickle cell

trait and he was sickling more than muscle cramping." If we had known that then, we could have treated him a little differently than just trying to rehydrate.

NCAA also has come out with mental health policies and how to deal with mental health crisis and supporting student-athletes. That was unheard of way back when I first started out. Since I've been at Drexel, though, we've had a great relationship with the counseling center, and they've been involved in helping us with the development policy and making sure student-athletes get seen and get in right away if there's something going on.

This past month, NCAA actually released a new document called, "Preventing Catastrophic Injury and Death in College Athletes." It's kind of taken up most of my time in the last couple months. This past year, I was the chair of the CAA Student-Athlete Wellness Committee which is a performance committee for the CAA made up of team physicians, athletic trainers, and strength and conditioning coaches from all the CAA schools. We have a meeting every year and as chair of that department, I ended up having to digest this and talk about it at the meeting.

This document goes into effect August 1st, 2019. There are a few recommendations in here. The first big thing is acclimatization and conditioning. Basically, it says that if college athletes have a long layoff from non-countable hours, the time frame we're dealing with at this point is two weeks. Then the student athlete needs to enter what is called a transition period. A transition period basically just says student athletes have to ramp up into their season. Coaches can't say, "Alright first day back we're doing double sessions every day." This allows student-athletes to get used to training in that environment, especially in

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pre-season in the summer. A kid might be coming from Iceland where it's nice and cool and all of a sudden, they're in Philadelphia heat- It's 90°, it's hot, and the heat index is up around 100. That kid's not going to do very well. If you take the transition period to gradually ramp up, most of the kids will come together and be on the same page. A lot of the serious things that have happened with student-athletes have occurred during the first week of conditioning. A majority of the football deaths that have happened have occurred during the early part of conditioning in the first week of practice when it's hot and humid. They're going too long and doing too much in a hot environment.

There are a lot of things that need to be clarified because it's not extremely clear. There are some legal terms in here that might be interpreted differently by different schools. The problem we're dealing with is it says something, but it doesn't spell it out clearly. So, I tell coach, "The first 5 days you need to go single sessions," and the coach says, "Well I don't know if the other coaches of the schools we're playing are doing that same thing, so why am I going to be at a disadvantage when they're not."

There's another huge recommendation that's coming from the NCAA. Some lawyers are probably thinking about how this is going to play out. It basically says physical activity should never be used for punitive purposes, or exercise cannot be used as punishment. I've been around athletics all my life. If someone's not doing what coaches want, it's, "Let's go run a lap." If you missed class, you're going to run sprints. If you're late for the bus, you're going to run. That can no longer happen. This is a big deal because if a coach does something or punishes someone with exercise and they get hurt, this is where the legal aspect of it comes into it. It is based upon intent, which is open to interpretation. It doesn't spell out

exactly what that means. If two groups of people are playing on the field and they all have to take ten corners and the team that scores the least amount of goals have to run to midfield and back, is that punishment? Probably not, but it's interpretation of a rule that's based upon intent.

Along with this, coaches have to be pre-planning their practice schedules and they all have to be documented. The coach can't just show up with no practice plan and say, "You know, I think this is what we're going to do today." This document actually says that coaches have to have and follow a practice plan. There can be changes when necessary, but it's going to be documented. Law firms, I'm sure, are looking at this. If something happens and if someone gets into a legal issue, they should be able to go to the school and say, "I want your practice plans for this date" and the coaches should be able to pull them up. There are a lot of big changes coming. We're trying to educate the coaches on the other ways to deal with things. Exercise is not always the answer. It's the easy answer, but there are plenty of other things you can have a student-athlete do to make them think about the consequences of their actions or behaviors and give them ramifications. You can have them read something and write a report, do community service, or meet with coach and discuss. You can have them do a lot of different things besides run or do up-downs or exercise as punishment.

I think coaches three or five years from now will look back and go, "Wow, you're going to punish people for missing class by running? That doesn't really make any sense." But I'm sure this document has a few people excited in the legal areas of sports law. It's a game changer, and it's more business if something bad happens. If nothing bad happens then it's not really an issue. But when there are negative outcomes, that's when there are issues. For the most part

people don't really get injured on that kind of stuff, but it happens. At the University of Houston, the women's soccer team had over a dozen girls going to the hospital for Rhabdomyolysis because a coach and strength and conditioning coach decided to punish them for something and went overboard and that factors into why we have this document. A lot of it is reactionary.

Q: Has a parent ever threatened to sue? If so, how did you respond?

A: Fortunately, I have not been threatened. Honestly, I think one of the biggest things on that end is establishing a personal relationship with student-athletes where you know them, they know you, and they understand that what you're doing is in their best interest- not the team or the coach's best interest. If you show you genuinely care, and you develop a relationship and show that your best intentions are for the student-athlete's health and safety. I think most people understand that and they believe that you're working on their behalf, not against them, trying to put them in harm's way or doing something that causes them to get injured.

Q: What injuries or conditions involving student athletes keep you up at night and why?

A: Concussions. When I started, there wasn't concussion testing protocol. Some of the stuff you do now you still did back then, but it was a lot more basic. Now we have other ways to test. We do computer testing, that came along in the last probably 20 years. But that's not the end-all be-all. It doesn't tell you if someone has a concussion, it's just a piece of the pie. From where I started to where I am now, I wonder about what they're going to tell us in 5, 10 or 15 years. I worry about that because we're part of the component- we're a cog in the wheel in allowing student-

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News Briefs

Petition Started to Require Full-Time Athletic Trainers in Florida County's School District

An athletic trainer in Hillsborough County (Tampa) started a petition last month calling on the county's school district to require all schools to have a full-time athletic trainer on staff. The petition was started by AT Chris Fuhrman after Middleton High School freshman Hezekiah Walters died on an athletic field during conditioning drills on June 11. His rationale was as follows: "I'm surveying the field the entire time, making sure everybody is up, looking for any red flags. If a kid may be stumbling or a kid may be starting to throw up, these are things we notice immediately." He added that having ATs at games isn't good enough. "The majority of injuries, over 60 percent, occur at practice or conditioning," Fuhrman said. "So it's one thing during games when the competition level is super high, but there's more practices in a week than games."

Houston Regents Chairman Commits to Addressing Rhabdomyolysis Controversy

Tilman Fertitta, University of Houston Board of Regents Chairman, issued a statement this summer in which he expressed confidence in the steps being taken by the university in the wake of several players being diagnosed with rhabdomyolysis, also known as rhabdo, a severe syndrome.

The controversy began after an anonymous player told the media over the summer that she and teammates were severely punished in February 2018 after two players were accused of taking food designated for the football team. Several players were then diagnosed with rhabdo.

The anonymous player told the media that Minor Bowens, former UH assistant director for sports performance, "forced the women's soccer team to do 100 'up-downs' and the team was forced to 'hold themselves up in a plank or push-up position and run drills' during the workout that lasted one hour," according to the Houston Chronicle. Bowens was ultimately fired.

An investigation is being handled by UH's police department, which will forward its findings to the Harris County district attorney's office for review.

"I have complete confidence in the way the University of Houston is handling the events related to the women's soccer team," Fertitta said in a statement provided by the university. "The strength and conditioning coach was terminated immediately following the workout in January 2019. We have multiple ongoing investigations, including one by our Audit Department that reports directly to the Board of Regents. UH Police will report their findings directly to the Harris County District Attorney. I find it unacceptable that any workout resulted in a student's health being compromised. We

are 100 percent committed to a thorough understanding of the facts and imposing accountability wherever necessary."

Lamar Names Kristen Willeford Assistant AD for Sports Medicine

Kristin Willeford has been named as the Lamar assistant athletic director of sports medicine. Willeford comes to LU from Portland, Oregon, where she spent the previous two years at Portland State. During Willeford's time in Portland, she served as the assistant athletic trainer providing coverage to the Viking softball and football teams. A certified athletic trainer who holds several licenses, Willeford also served as the athletic department's mental health training coordinator and NCAA drug testing program coordinator.

Sports Medicine Thought Leader Corbatta Named Deputy AD at George Mason

George Mason University Assistant Vice President and Director of Athletics Brad Edwards has announced that Dr. Deborah Beck Corbatta, a nationally recognized leader in sports medicine, sports performance and athletic administration, has been named the department's Deputy Athletic Director, Internal Operations/Risk Management. For the past 16 years, Dr. Corbatta has served in numerous leadership positions in athletics, focusing on the health, safety, well-being and performance of the George Mason student-athlete. Dr. Corbatta, who most recently acted as Mason's senior associate athletic director for performance, well-being and risk management, will continue to be the lead administrator of the Frank Pettrone Center for Sports Performance and direct the sports medicine, sports science, sports psychology, sports nutrition and strength and conditioning units. In addition, she will assume the duties as the senior woman administrator and will have direct supervision of the Mason women's basketball program.

A certified athletic trainer, Dr. Corbatta has served as NCAA Athletics Health Care Administrator for the university since 2017. Her long-standing commitment to Mason student-athletes and their well-being has spanned for more than 15 years. She has held various positions within the athletic training staff at Mason: assistant athletic director for sports performance (2012-17), associate head athletic trainer (2010-12), assistant athletic trainer (2004-10) and a team athletic trainer (2003-04). Dr. Corbatta was the head men's basketball athletic trainer under then-head coach Jim Larranaga and played an integral role in the team advancing to three NCAA Tournaments, including a berth in the Final Four in 2006.

Dr. Corbatta recently received her PhD in education and human development with a concentration in educational psychology/methodology at Mason in 2018.

Behind the Lines: Changes to D1 Athletics Programs' Reporting Structures

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services, the institution's medical school, a private medical practice or a combination thereof."¹ New NCAA recommendations advising that strength coaches should not report directly to athletic coaching staff will take effect on August 1, 2019.

The Medical Model

In recent years, there has been an increased concern that coaches pressure sports medicine employees into making decisions that are adverse to student-athletes' health. According to the results of a National Athletic Trainers' Association ("NATA") survey released on June 25, 2019, nineteen percent of athletic trainers claimed that college coaches have played an athlete who was deemed "medically out of participation." Thirty-six percent believed that coaches' influence over hiring and firing decisions equipped them with too much power over medical staff operations. Fifty-eight percent of that group felt pressured by an administrator or coach to make a decision that was "not in the best interest of a student-athlete's health."

The general reporting structure adopted by KU and UMD, which is known as the "medical model," is designed, in part, to eliminate that pressure. According to Murphy Grant, Chairman of NATA's Intercollegiate Council for Sports Medicine and the Associate Director of Sports Medicine at KU, however, the medical model's benefits extend beyond its ability to reduce potential conflicts of interest. Grant asserts that in a much broader sense, the model ensures that medical staff is practicing sound medicine. For example, Grant explains that the restructuring has expanded sports medicine employees' network, thereby "opening up a wider spectrum of care for the student-athlete." Before KU made the switch, its athletics staff did have access to hospital

facilities and personnel, but this model creates a "more efficient" way to capitalize on hospital resources.

While the changes at KU and UMD have recently garnered significant press and praise, the "medical model" is not particularly new. According to Scott Anderson, Head Athletic Trainer for the University of Oklahoma's football team, this general reporting structure has been in existence at some universities for almost fifty years. Anderson pointed to the University of North Carolina, which implemented a similar model following the death of a football player in 1971. What we are seeing now, Anderson explained, is not a new idea, but a "renewed focus" on medical staff independence likely triggered by the pressure to respond to high-profile student-athlete fatalities.

Anderson endorses the medical model. However, he rejects the notion that the inherent "tension between an athlete's performance and medical care" creates an unresolvable conflict among coaches, administrators, medical staff, and student-athletes. According to Anderson, a key to any team's success is recognizing that "the best interests of the athlete are also the best interests of the entire program." Whether switching to the medical model reporting structure will lead programs to that recognition still remains to be seen.

Effect on Future Litigation

The effect of the medical model on future litigation implicating student-athletes' health is similarly unclear. These changes may present novel questions about agency, duty, and theories of liability. Parties' interests and allegiances that traditionally aligned may begin to shift.

Despite this uncertainty, however, in a lawsuit alleging negligent care of a student-athlete, defendant parties are likely to benefit from an institutionalized medical model. Evidence that all sports medicine employees

reported to a medical center—not the head coach or university administration—can ease jury concerns about the conflict between a coach's desire to play an athlete and any health problems the athlete may have been suffering. Evidence that sports medicine employees were hired, fired, and paid by medical center staff is likely to be especially compelling in this regard. Demonstrating the ways in which sports medicine employees partner with physicians and utilize medical center resources will likely be similarly convincing. Proof that sports medicine employees were trained and given access to continuing medical education may also be persuasive. Medical reports and documented communications between sports medicine employees and their supervising physicians can help establish event timelines, individual actors' knowledge, and compliance with applicable standard of care.

Given these potential benefits and the medical model's increased popularity, all universities should evaluate their own reporting structures and consider the following:

- Which employees administer care to student-athletes?
- Who pays those employees?
- Who hires those employees?
- Who fires those employees?
- How are those employees trained?
- Where do those employees report?
- To whom do those employees report?
- What are those employees expected to report?
- How is that reporting handled?
- What are those employees expected to document?
- Which employees have the final say about student-athletes' care?

These questions become especially important in an era of increased media attention, scientific study, and litigation about alleged

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¹ <http://www.ncaa.org/sport-science-institute/athletics-health-care-administration-best-practices-0>

Takeaways from the *Onyshko* Verdict: Win for NCAA, Loss for Plaintiffs,

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Onyshko Kicks Off Suit; Court Punts Twice

In 2014, Onyshko and his wife filed suit against the NCAA in the Pennsylvania Court of Common Pleas, seeking \$9.6 million in damages. The suit sets forth a typical negligence cause of action: Onyshko alleged the NCAA, as the governing body of collegiate sports, owed Onyshko a duty, which it breached by failing to warn Onyshko of the long-term effects of repeated head trauma. This breach, Onyshko claimed, caused his ALS.

In response, the NCAA moved to have the case dismissed—twice—arguing, *inter alia*, that (1) it did not owe Onyshko a duty of care; and (2) that Onyshko assumed both the short-term and long-term risks associated with football. Presiding Judge Katherine Emery disagreed and denied both attempts to dismiss, essentially punting on the issue and indicating that a jury had to decide what the scope of the NCAA's duty to Onyshko was and whether the NCAA breached that duty. "While it is true that getting hit in the head is an inherent risk of football," Judge Emery stated, "plaintiffs assert that the NCAA increased Mr. Onyshko's risk of long-term injury by failing to disclose crucial information as well as failing to have procedures in place with respect to returning to play after sustaining serious head injuries." The case was teed up for trial.

Both Parties Shoot Their Shots At Trial; Jury Picks A Winner

In May 2019, Onyshko and the NCAA tried the case before a sixteen-person (nine women and seven men) jury. This was the second high-profile football-related brain disease case (after the *Ploetz v. NCAA* CTE-case) and the first football-related ALS case to go to trial.

Onyshko put on testimony from two renowned doctors in the sport-injury

field—Dr. Bennet Omalu and Dr. Robert Cantu—to support his case. Omalu testified that the prevalence of ALS in football players is markedly higher than that of the general population and that Onyshko's exposure to repetitive concussive and sub-concussive blows during his time playing football was a significant contributory factor to his developing trauma-induced ALS, what Omalu called in his expert report "CTE-ALS or CTME."

The NCAA responded by noting Onyshko was never even diagnosed with a concussion while playing for Cal. U, and stating "[i]f he doesn't demonstrate the symptoms, the trainers can't treat him. How was he supposed to have been treated or evaluated at the game if he doesn't tell someone?"

On May 23, 2019, the jury reached a verdict by answering only one question on the verdict slip: "Was the [NCAA] negligent? No." This was the first football-related brain disease case to reach a jury verdict (*Ploetz* settled three days into trial). Following the verdict, Onyshko's attorney, Gene Egendorf, stated he intends to appeal the verdict and file a wrongful death case once Onyshko passes away.

Takeaways From The Match

The verdict is unclear as to whether the NCAA met its duty, or whether it had a duty at all.

In arriving at its verdict in this case, the jury answered one question: "Was the [NCAA] negligent?" The answer, denoted with a check mark on the verdict sheet, was simply "No." It did not provide any guidance as to what the scope of the NCAA's duty to Onyshko was and whether the NCAA breached that duty. (The existence of a duty is a preliminary question of law for the court to determine, and so the court should have made that determination before turning the case over to the jury). Whether the NCAA owes a duty to student-athletes and what the scope of that duty is and what actions and

omissions breach that duty are important questions that remain unanswered by the *Onyshko* verdict.

In the NCAA's motion to dismiss, it attempted to nip these cases in the bud by arguing that "As a matter of law we don't have a duty."¹ The court's decision to deny the motion to dismiss, in essence, "told plaintiffs that under a certain set of facts, the NCAA could owe a duty. It open[ed] the door for other players to make similar claims."²

The NCAA and other similarly-situated defendants in these cases, such as athletic conferences and divisions (SEC, MIAA, etc.), that are further removed from the care of the student-athlete than the team doctor, athletic trainer, or institution, can still benefit from the argument that it does not owe a duty to the student-athlete in these types of cases going forward.

Onyshko Verdict Not a Solid Playbook for Other Defendants

Though the *Onyshko* verdict provided the first data point in how a jury would rule in a football-related brain disease case, it leaves other defendants, such as universities, athletic trainers, and coaches with little guidance. Because the NCAA is a governing body that does not oversee the day-to-day of football programs and student-athlete care, the duties it owes to football players are arguably different than the duties coaches and athletic trainers—who spend entire seasons with student-athletes and are often responsible for return-to-play decisions—owe. The "No Duty" argument likely will not work for these defendants, and they must focus

1 Sindhu Sundar, Pa. magistrate shows path for NCAA concussion plaintiffs, Law 360 (June 9, 2014), <https://www.law360.com/articles/544233/pa-magistrate-shows-path-for-ncaa-concussion-plaintiffs>.

2 *Id.*

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on defeating brain injury cases by attacking the breach and causation elements of a negligence claim.

This is because the plaintiff must show that the defendant's **breach** of its standard of care (e.g., failure to warn, educate, train) **caused** the plaintiff to sustain repetitive concussive and sub-concussive blows, which **caused** a brain disease to develop (e.g., CTE, ALS), which then **caused** symptoms associated with those diseases to manifest, which then **caused** the ultimate harm (e.g., death or disability). In order to bridge those causal gaps, plaintiffs need to rely on expert testimony. The issue with expert testimony in this area is that the science is unsettled. Looking at CTE, for example, there is a

spectrum of experts in this field, where on one extreme, the experts find CTE in almost every brain they examine, and on the other extreme, the experts believe that CTE does not exist. The ultimate decision maker as to who is "right" or "wrong" in this battle of the causation experts is the jury. Further complicating the unsettled science is that no causation theory that has been presented to a jury has reached a verdict.

Unfortunately, the *Onyshko* verdict, because it is silent on causation, has continued that trend. The verdict provides no guidance as to how a jury would rule on the causation element of a negligence claim in a sports-related brain injury case.

The unsettled science and untested causa-

tion theories have created a legal environment that makes it easier for a plaintiff to maintain a lawsuit beyond the various procedural thresholds (e.g., motion to dismiss, summary judgment) and uncertain how a jury would rule should a case go to trial.

Parties should not look to the *Onyshko* verdict as a guidepost as to how other juries may rule on future football-related brain disease cases. Although those cases will be, in all likelihood, factually similar to *Onyshko* (e.g., failure to warn ultimately caused a degenerative brain disease which ultimately caused harm), juries will continue to be the decision makers on a case-by-case basis should the parties be willing to roll the dice and go to trial.

Behind the Lines: Changes to D1 Athletics Programs' Reporting Structures

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failures to properly care for student-athletes. While today, the KU may be praised for its forward-thinking and cutting-edge approach, there are ample reasons to believe that KU's model will soon be all but standard across institutions of higher learning. As such, it may be in universities' best interests to restructure before the national conversation changes from one among administra-

tors about whether to implement a medical model to one between jurors about why the defendant did not.

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Athletic Trainer Westerfer Talks About How His Role Has Changed

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athletes to play sports. Is there something down the line where we'll say, "We should have really been more conservative with kids with concussions. They shouldn't have been out for 7-10 days. Maybe that wasn't long enough." We just don't know. It scientifically hasn't been proven, there isn't any medical literature to say this, but that may change, and we might say, "Wow, we really did it that way?" Based on the current scientific literature, we're following what are

best practices. That may change and may develop, and kids may not be able to return to sport that season or something like that.

Going through this document and thinking about all this, you worry about a catastrophic injury. NCAA rules require a full physical the first year. After that you just need to update medical history and that needs to be checked by a trainer or team physician. We actually do the cardiac monitoring every year. I worry about whether something

gets missed or anything along those lines. I worry if somebody has a cardiac event and it could have been picked up or it's something that doesn't manifest itself or comes out of nowhere. I worry if it's something that wouldn't be picked up on a simple screening that could have been picked up on an EKG, which aren't the standard at the NCAA level at this point. Somebody having a cardiac event that could have a catastrophic outcome, that worries me.