SACKS & ZOLONZ LLP

December 2010 Blog Posts

LAWSUIT: NFL WRONGLY WITHHELD DISABILITY BENEFITS FROM EX-PLAYER

Wednesday, December 1, 2010

Today's workers' compensation defense post will take a closer look at a very interesting lawsuit filed by a former National Football League (NFL) player earlier this week seeking benefits withheld from the league's disability plan.

What makes this particular case so interesting is that it involves benefits being withheld for injuries sustained from a helmet-to-helmet collision, the very type of tackle that the NFL has recently vowed to outlaw from the playing field altogether due to the risk of serious injury. In fact, players can now be fined or even suspended for helmet-to-helmet collisions.

Eric Shelton, a former running back on 2006 Carolina Panthers, was taking part in an intrasquad scrimmage at the Washington Redskins' 2008 training camp, when he was struck by another player in a helmet-to-helmet collision.

Shelton's compliant - filed in the United States District Court in Maryland on Monday - alleges that after the helmet-to-helmet collision, he lost the feeling in his arms and legs for roughly one minute. He also all alleges that he suffered a loss of feeling in his legs the following day and has since endured various debilitating, recurring symptoms (i.e., migraines, fleeting numbness and other pain) that prevent him from working.

Following the injury sustained in the Redskins training camp, Shelton filed a claim seeking maximum benefits from the NFL's disability plan.

(Maximum benefits under the NFL disability plan are reserved for those players who endure a football-related injury that resulted in total and permanent disability within six months or 12 months.)

However, the disability panel, which is made up of three National Football League Players Association (NFLPA) representatives and three NFL representatives, rejected Shelton's claim for benefits. The reason? They claimed his injury was unrelated to football.

Upon appeal, this initial rejection was reversed and Shelton was awarded benefits for a "degenerative" injury, meaning one that becomes apparent more than six months or 12 months after a football-related injury.

To be continued ...

This post was provided for informational purposes only and is not to be construed as legal or medical advice.

Stay tuned for further developments in the area of workers' compensation defense ...

Related Resources:
Ex-Player Is Suing Over Pay for Injury (The New York Times)

LAWSUIT: NFL WRONGLY WITHHELD DISABILITY BENEFITS FROM EX-PLAYER – II

Friday, December 3, 2010

Today's workers' compensation defense post will continue to take a closer look at the lawsuit filed by former National Football League (NFL) running back Eric Shelton seeking benefits withheld from the league's disability plan.

What makes this lawsuit so interesting is that it involves benefits being withheld for injuries sustained from a helmet-to-helmet collision, the very type of tackle that the NFL has recently vowed to outlaw from the playing field due to the risk of serious injury.

Please see "Lawsuit: NFL Wrongly Withheld Disability Benefits From Ex-Player" for more information.

Continued ...

The decision by the NFL disability panel to award Shelton benefits for a "degenerative" injury rather than an immediate, permanent injury was significant from a monetary standpoint. Why? For the "degenerative" injury, Shelton would receive roughly $110,000 a year. However, for an immediate, permanent injury, he would have received nearly $220,000 a year.

What was the disability panel's justification for classifying Shelton's injury/impairment as degenerative?

Shortly after his helmet-to-helmet collision at the Washington Redskins training camp, Shelton worked briefly at a Walgreens. The panel found this to be illustrative of the fact that his disability could not have occurred with 6 months or a year - one of the main conditions for awarding maximum benefits under the NFL's disability plan.

"The lawsuit requests that Mr. Shelton be placed in the highest category, which in part applies where a player is unable to work immediately following his NFL career," said Douglas Ell, the head attorney for the NFL's disability plan. "Mr. Shelton worked at a pharmacy until April 2009."

According to Shelton's complaint, his brief stretch at Walgreens clearly demonstrated that his injuries prevented him from working effectively and therefore merited a classification as being permanently disabling.

Shelton's attorney, Cy Smith has expressed outrage over what he sees as the NFL's inconsistent stance toward helmet-to-helmet collisions. Namely, how the league is working vigorously to

prevent these types of hits via fines and suspensions, yet fails to provide adequate benefits to players like Shelton who have been victimized by them.

"Talk is cheap - it's easy to put out posters and public-service announcements and levy fines for hits that occur on Sundays, but when a player is seriously injured on those hits, the league says something completely different," said Smith "The plan's position that this must be degenerative is in sharp contrast to how dangerous these hits are. The mechanism of injury here is what they've said 1,000 times is the most dangerous."

This post was provided for informational purposes only and is not to be construed as legal or medical advice.

Stay tuned for further developments in the area of workers' compensation defense law ...

Related Resources:

Ex-Player Is Suing Over Pay for Injury (The New York Times)

A CLOSER LOOK AT CAL/OSHA'S REVISED HEAT SAFETY STANDARDS

Tuesday, December 7, 2010

Today's workers' compensation defense post will discuss the revisions to the Heat Illness Prevention Standard approved by the California Division of Occupational Safety and Health (Cal/OSHA) in August and implemented just last month.

Specifically, these revisions are designed to combat the risks of heat exhaustion and heat stroke by providing California employers with further clarification regarding shade requirements and mandating that employers in certain industries adhere to specific "high-heat rules."

Cal/OSHA's clarification concerning shade requirements

- If temperatures exceed 85 degrees Fahrenheit, shaded shelter capable of protecting at least 25 percent of on-shift employees from the sun must be provided and located as close to the worksite as possible. If temperatures are 85 degrees Fahrenheit or lower, employers must honor employee requests for shaded shelter in a timely manner.
- If providing the aforementioned shaded shelter proves hazardous and/or unreasonable, an employer may utilize a different measure for providing access to shade so long as it provides the same level of heat protection.
- If employers are able to provide the same level of heat protection, they may utilize alternative cooling measures - fans, air conditioning, etc. (Please note, this does not apply to employers in the agricultural sector.)

Cal/OSHA's 'High-Heat Rules'

- It temperatures reach 95 degrees Fahrenheit or above, employers must take care to remind employees to consume water, monitor employees for indications of heat exhaustion/heat stroke and carefully observe all new employees.
- These rules apply to employers in the following sectors: agriculture, construction, landscaping, oil and gas extraction and certain transportation/delivery industries.

"The amendments that became effective today represent important measures to clarify and strengthen the heat illness prevention standard," said Chief of Cal/OSHA Len Welsh. "Our efforts in enforcement, outreach and educational partnerships over the last five years have paid off. We have seen significant behavior change resulting in a compliance increase among employers inspected from 35 to 85 percent."

Employers must remain cognizant of the fact that California's sometimes high temperatures/dew points coupled with direct exposure to the sunlight, inadequate air circulation, excessive physical activity, and/or preexisting health conditions can create hazardous situations, resulting in potentially debilitating injuries to employees, decreased production and increased legal fees.

This post was provided for informational purposes only and is not to be construed as legal or medical advice.

Stay tuned for further developments in the area of workers' compensation defense law ...

Related Resources:

Cal/OSHA Implements Updated Heat Safety Regulations (California Division of Occupational Safety and Health)

OSHA FINES CELEBRATED NYC PERFORMING ARTS THEATER $51,000

Friday, December 10, 2010

As an employer, it is imperative to take the necessary steps to ensure that the work environment for all employees is free from potential health and safety hazards. Why? A proactive approach toward employee safety can prevent potentially debilitating work injuries, maintain production, avoid the regular incurrence of legal fees and prevent large fines. Unfortunately, many employers often neglect to take these steps and, as a result, suffer the aforementioned consequences.

To illustrate, the renowned David H. Koch Theater - part of the world-famous Lincoln Center for the Performing Arts in Manhattan - was recently fined $51,000 by the United States Department of Labor's Occupational Safety and Health Administration (OSHA) for multiple violations of health and safety standards that could cause serious or potentially fatal work injuries.

Specifically, OSHA uncovered the following during a 2010 inspection:

- Employees of the theater were not informed of potential asbestos-related health hazards (asbestos-containing and possible asbestos-containing materials were found in the theater's promenade area and electrical closets)
- A portable fire extinguisher was not properly mounted
- An exit door could not be opened
- An insufficient degree of guardrail protection to keep employees from falling and/or being crushed by the rising and descending of the stage
- Improper use of temporary wiring, instead of permanent wiring, in the promenade area

Since OSHA inspectors discovered similar conditions regarding the asbestos, fire extinguisher and sealed door during a 2009 inspection, the theater was issued four "repeat citations" for a total of $45,000.

(Federal law dictates that employers may be issued a repeat citation if they have been cited for the exact same or similar violation of workplace orders, rules, regulations or standards over the last five years.)

Regarding the stage and temporary wiring violations, OSHA issued three "serious citations" for a total of $6,000.

(OSHA defines a serious citation as one where "there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known.")

The David H. Koch Theater was given 15 days from the issuance of the citations to address the violations.

"The recurrence of these conditions is disturbing," said OSHA's Manhattan area director Kay Gee. "For the health and safety of its employees as well as outside contractors, the theater must take effective steps to identify and permanently eliminate these and other hazards identified during this latest OSHA inspection."

Stay tuned for further developments in the area of workers' compensation defense law ...

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Related Resources:
US Labor Department's OSHA Proposes $51,000 in Fines Against David H. Koch Theater in New York for Asbestos, Fall and Crushing Hazards (U.S. Department of Labor)

INSURANCE ANALYSTS: ANNUAL DECLINE IN WORK COMP CLAIMS HAS STOPPED

Tuesday, December 14, 2010

For the past several decades, employers have benefitted considerably from a steady annual decline in the frequency of workers' compensation claims. How? A decline in the frequency of claims meant fewer injuries, which translated into a safer, more productive workforce, as well as lower overall workers' compensation costs.

Unfortunately, insurance analysts and industry experts all seem to agree that this annual trend of a decline in the frequency of workers' compensation claims may have finally have come to an end or "flattened."

Experts identify our nation's poor economic climate as the likely reason for this leveling off in the decline of workers' compensation claims.

Specifically, tough economic conditions forced employers to 1) divert funds from employee safety programs that could otherwise help reduce the frequency/severity of work injuries and 2) hire inexperienced employees who are more susceptible to accidents in the workplace.

Why then is this flattening in the frequency of workers' compensation claims so significant? The steady annual decline of workers' compensation claims - estimated to have been as much as four percent a year - served to keep work comp insurance rates lower and offset the incurrence of workers' compensation-related expenses.

It is worth noting, however, that these same insurance analysts and industry experts are unsure if the flattening in the frequency of workers' compensation claims is permanent.

It's "too early to determine whether this indicates a reversal in the long-term trend that has occurred since the 1990s, a floor on frequency that will remain for the foreseeable future or a temporary pause in the long-term downward trend," said Glen Pitruzzello, vice president of workers' compensation claim practices for the Hartford Financial Services Group. "However, given the conventional wisdom that newer, lesser-experienced workers tend to have a higher incidence of workplace injuries, this could be an early indication of a strengthening job market and an improving economy."

Fortunately, there are still steps that an employer that is experiencing a higher frequency of workers' compensation claims can take.

For example, when Select Staffing Inc., a Santa Barbara-based organization that supplies temporary employees, began to see the number of workers compensation claims rise, they started executing additional safety measures/programs. As a result, the frequency of workers' compensation claims declined by roughly ten percent.

"I would say that [the frequency of our claims] is feeling pretty flat now," said company president Fred Pachon.

Consequently, the reintroduction of safety programs/measures may prove beneficial for California employers.

Stay tuned for further developments in the area of workers' compensation defense law ...
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Related Resources:

Fall in Comp Claims Coming to an End? (Business Insurance)

CANCER STRICKEN COP FIGHTING MANHATTAN BEACH FOR WORK COMP PAYMENTS

Thursday, December 16, 2010

In recent workers' compensation defense news, the city of Manhattan Beach, California, is currently involved in a controversial dispute with a city police officer over work comp payments. The issue? Whether the police officer - who is in the midst of a four-year fight with cancer - was struck with the potentially fatal disease while on the job.

Officer Mark Vasquez, 36, was hired by the Manhattan Beach Police Department in 2005, and eventually diagnosed with cancer two years later. Since that time (and after undergoing surgery), he has been able to return to work periodically, often while in-between treatments. Currently, Officer Vasquez is on medical leave from the police department and is not receiving work comp payments because the city of Manhattan Beach is choosing to dispute his claim that he was diagnosed with cancer while working as a police officer.

Under California law, cancer is recognized as a workplace injury for both firefighters and police officers. Accordingly, unless the city of Manhattan Beach can eventually prove that Officer Vasquez was not stricken with cancer while on the job, it could be liable for his past and future medical bills, as well as potential benefits to his family.

"[The city of Manhattan Beach] would have to disprove it, if not then the person who was exposed would win the case," said David Schwartz, an attorney and former head of the California Applicants' Attorneys Association. "It could be a lot of money."

The refusal to make work comp payments to Officer Vasquez is causing a stir in the Manhattan Beach community, particularly among his fellow law enforcement officials.

"Sadly, it appears the strategy being used by the city's attorney is to delay, delay and delay in the hopes of outlasting the cancer itself," said Office Tim Madgaleno of the Manhattan Beach Police Officers Association at a past meeting of the City Council."

The city attorney's office, however, is quick to refute this assertion.

"The city is not trying to delay, but there's a considerable amount of city money involved in this case, and we are trying to do our due diligence to make sure it doesn't get paid unless it should get paid under the statute," said City Attorney Robert Wadden.

Interestingly enough, a hearing on this matter was held before the Workers' Compensation Appeals Board just yesterday.

Stay tuned for further developments in this story and other areas of workers' compensation defense law ...

Related Resources:

Police Officer Battling For City to Pay Medical Bills (The Beach Reporter)

LACK OF PROGRESS IN STATE FUND INVESTIGATION CAUSING CONCERN

Monday, December 20, 2010

In recent workers' compensation defense news, the absence of any discernible movement by state officials investigating allegations of malfeasance at the State Compensation Insurance Fund has drawn the attention and criticism of both lawmakers and industry insiders.

Specifically, the criminal investigation, launched in 2006, was meant to explore allegations of conflicts of interests, misuse of nearly $1 billion and self-dealing by certain board members at the State Compensation Insurance Fund.

However, there has been no action in the investigation for a year and a half, when a board member was served with a search warrant.

"It's time for the Legislature to check in with the district attorney's office," said Assemblyman Jose Solorio (D-Santa Ana), chairperson of the Assembly's Insurance Committee. "Everyone deserves to know whether this case is being resolved or if it's still being investigated."

The State Compensation Insurance Fund is run by the state of California and provides affordable workers compensation policies to employers - mostly small and medium sized - that are otherwise unable to secure such mandated coverage due to cost restrictions.

The rapidly aging investigation into alleged malfeasance was lead by San Francisco District Attorney (and newly-appointed California Attorney General) Kamala Harris who formed a task force comprised of the state's Department of Insurance and California Highway Patrol to investigate the matter.

However, Harris is slated to begin her work as the Attorney General in a few weeks, leaving the status of the investigation somewhat unclear. (A spokesperson from her office declared, "this is an open and active investigation by the task force.")

"[The investigation] seems to have dropped off the face of the Earth," said Mark Webb, vice president of Pacific Compensation Insurance Company. "When you think of how much this played out publicly, it would seem that there would be at least enough to take this to a grand jury."

The primary concern is that the statutes of limitations for bringing certain criminal or civil lawsuits are close to expiring. For example, under California law, there is a three-year statute of limitations on fraud.

"If you have the Department of Insurance, the California Highway Patrol and the San Francisco district attorney all contributing resources to an investigation, they should know where they stand after four years," said Robert Fellmeth, a professor of law at the University of San Diego. "Those three agencies have a lot of power."

Stay tuned for further developments in this story and other areas of workers' compensation defense law ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:

State Fund Inquiry Has Gone Very Quiet (The Los Angeles Times)

STUNTMAN SUFFERS SERIOUS WORK INJURIES IN 'SPIDER-MAN' BROADWAY SHOW

Wednesday, December 22, 2010

As discussed in previous posts, the importance of maintaining a safe work environment cannot be overstated. By providing employees with a safe work environment, you can avoid serious and potentially debilitating work injuries, as well as avoid the incurrence of associated expenses (legal fees, large fines, increased workers' compensation costs, etc.).

Unfortunately, the creative elements behind the much-discussed (and much-maligned) Broadway production, "Spider-Man: Turn Off the Dark," may not fully appreciate this fact. On Monday, 32-year-old Christopher Tierney - a stuntman who performs complex aerial acrobatics as part of the $65 million show - was seriously injured when he fell 30 feet into the orchestra pit before a packed audience.

Federal and state investigators later determined that the primary cause of Tierney's accident was a failure by the crew to attach his safety harness.

Tierney, who suffered severe internal injuries and several cracked ribs in the fall, was scheduled for back surgery on Wednesday.

"Chris was not nervous in the least about this," said his brother, Patrick Tierney, "He's 32, [he] just wanted to go up and fly."

The Spider-Man musical - which is still only running trial performances at the Foxwoods Theatre in New York City - has already seen its fair share of work injuries. To date, four performers (including Tierney) have been injured on the production.

As for Tierney, his future seems uncertain.

"I don't know when he'll be back on stage, if at all," said his brother.

Stay tuned for further developments in the area of workers' compensation defense law ...

This post was provided for informational purposes only and is not to be construed as legal advice.

Related Resources:

'Spider-Man' Stuntman Christopher Tierney's Career May Be Over After Broadway Accident (New York Daily News)

EMPLOYERS AND LABOR UNIONS TEAM UP TO FIGHT MEDICAL FRAUD

Thursday, December 30, 2010

Compounded drugs are a class of medications which are modified to fit each patient's needs. While they have proven slightly more effective than mainstream medications, they are also significantly more expensive. In the last year California has seen a dramatic increase in the number of employees who charge compounded drugs to the state workers' compensation insurance fund.

Labor groups, insurance companies, and many corporations who are all normally at odds with one another have come together to condemn the rising trend. They are calling it an abuse of the system and worker's compensation fraud.

Representatives from several of these groups are skeptical of the need for these compound drugs. Critics say they often contain the same ingredients as generic prescriptions and over-the-counter medications yet they cost substantially more. These drugs are seen as an easy way for pharmacies to improve profits.

A representative of the California Labor Federation spoke out against what she considers widespread abuse. She points out that these compensation insurance funds are meant to help workers. When employees unfairly benefit, the cost gets transferred to the rest of the workers in the system and everyone is hurt.

California has already seen failed legislation to discourage the use of compounded drugs. Experts say there is a powerful lobby of medical professionals who are trying to protect the profits they gain from these drugs.

New legislation has been proposed which would add certain compounded drugs to the government's fee schedule. This would limit prices on compounded drugs.

Insurers, corporations and labor groups all have a right to be upset when millions of dollars are spent on needless medications. Hopefully new legislation will be a way to stop those trying to abuse the system.

Source: Los Angeles Times online, "Unusual coalition pushes for restrictions on compounded drugs," Marc Lifsher, 28 December 2010