

NOTE
**THE UNKNOWN DRUG DEALERS IN THE NHL:
NHL PLAYERS, DRUG ADDICTION, AND THE
NEED FOR REGULATION OF PRESCRIPTIVE
DRUG USE IN THE NHL**

I. INTRODUCTION

To play in the National Hockey League (“NHL”), a player must be willing to put it all on the line, which includes taking painkillers to play through the various injuries they suffer every season.¹ The use of painkillers by the athletes is naked to the public eye; however, seeing any player play through injury gives fans a sense of admiration, thus creating a “double standard” in which a player may be scrutinized for sitting out even with a major injury.² This has created a culture where these athletes are determined to ignore their pain and continue playing through even the most painful injuries only with the help of painkillers, jeopardizing their emotional and physical well-being.³ The NHL is governed by a Collective Bargaining Agreement (“CBA”), which represents the “core authority” of the NHL, “its players and their agents, its team owners[,] and the league’s management.”⁴

1. See Jillian Ponck, *Injured NHL Players Find Themselves Battling Painkiller Addiction*, ADELANTE RECOVERY CTRS. (June 1, 2021), <https://adelanterecovery.com/blog/injured-nhl-players-find-themselves-battling-painkiller-addiction> [<https://perma.cc/8AKW-JRZB>] (discussing the “cut-throat industry” that exists in the NHL and how players feel compelled to play through major injuries in order to keep their jobs); see also Greg Wyshynski, *Former Player Ryan Kesler Says There’s Lack of Education Across NHL in Risks of Pain Medications*, ESPN (Sept. 22, 2020, 4:00 PM), https://www.espn.com/nhl/story/_/id/29946533/former-player-ryan-kesler-says-there-lack-education-nhl-risks-pain-medications [<https://perma.cc/SMA8-H26U>] (quoting former NHL player Ryan Kesler as stating, “I never wanted to hurt the team, so I knew I had to play. To play you have to take painkillers”).

2. Chemmy, *Painkillers and Double Standards in the NHL*, SBNATION (July 1, 2015, 12:35 PM), <https://www.pensionplanpuppets.com/2015/7/1/8874513/painkillers-and-double-standards-mike-richards-nhl-oxycodone> [<https://perma.cc/2ZL6-NV8G>] (discussing the double standard created by NHL athletes playing through injuries).

3. *Is Toxic Hockey Culture Pushing Athletes Toward Substance Abuse?*, MOUNTAINSIDE, <https://mountainside.com/blog/drug-addiction/nhl-causing-hockey-players-drug-abuse> [<https://perma.cc/4RYW-AJVQ>] (last visited Apr. 15, 2024).

4. *Collective Bargaining Agreements in Sports: How Do They Work in the United States vs Europe*, SPORTS FIN. LITERACY ACAD.: MONEY SMART ATHLETE BLOG (Aug. 29, 2018),

The story of beloved hockey enforcer Derek Boogaard is a tragic one; he unfortunately passed away in 2011 due to a drug overdose.⁵ Boogaard was known as the “Boogeyman” on the ice and, standing at six-foot-seven, his job was to parade around the ice protecting his teammates and “instilling fear into his opponents.”⁶ Boogaard ended up skating in twelve professional seasons, totaling 277 NHL games and 184 fights.⁷ Yet, when Boogaard took the gear off he was described as both “[m]eek and mild[,]” and a “big teddy bear” by his parents.⁸ Boogaard’s father, Len, knew his son “was an addict,” but he found no indication of abuse until Derek sustained injuries from fights in the NHL.⁹ It has been determined that in Boogaard’s final three seasons, he received over 100 prescriptions for thousands of pills from team doctors, and Len is dumbfounded at how many more players have to die before the NHL confronts the issue.¹⁰

As evidenced by a documentary titled “The Problem of Pain,” Boogaard is not the only player to experience the consequences of overuse of prescription medication in the NHL.¹¹ Among those appearing in the documentary was longtime NHL player Ryan Kesler, who played 1,001 games for the Vancouver Canucks and the Anaheim Ducks, but because of chronic hip issues has not been able to play in the NHL since March 2019.¹² In order to deal with the pain, Kesler was frequently

<https://moneysmartathlete.com/economic-environment/collective-bargaining-agreements-in-sports-how-do-they-work-in-the-united-states-vs-europe> [<https://perma.cc/WTR8-H5PF>]. The CBA is an “agreement between the NHL and NHL Players Association (NHLPA) which outlines rules for the NHL” *What Is the CBA?*, PUCKPEDIA, <https://puckpedia.com/salary-cap/2-what-cba> [<https://perma.cc/UVB3-Q2D2>] (last visited Apr. 15, 2024).

5. Ryan Guillemette, *Breaking News: Information in the Death of Famed Enforcer Derek Boogaard*, BLEACHER REP. (Dec. 6, 2011), <https://bleacherreport.com/articles/970667-breaking-news-information-in-the-death-of-famed-enforcer-derek-boogaard> [<https://perma.cc/JE5E-AB4H>].

6. Michael Russo, *‘I Don’t Want Him Forgotten’: Derek Boogaard’s Family Opens Up, 10 Years After His Death*, ATHLETIC (May 13, 2021), <https://theathletic.com/2576689/2021/05/13/i-dont-want-him-forgotten-derek-boogaards-family-opens-up-10-years-after-his-death> [<https://perma.cc/4YVJ-CT8F>].

7. *Id.*

8. *Id.*

9. John Branch, *In Hockey Enforcer’s Descent, a Flood of Prescription Drugs*, N.Y. TIMES (June 4, 2012), <https://www.nytimes.com/2012/06/04/sports/hockey/in-hockey-enforcers-descent-a-flood-of-prescription-drugs.html> [<https://perma.cc/J8BU-GU8L>].

10. *See id.*; *see also* Rick Westhead, *A Decade After His Own Loss, Boogaard Feels Sorrow and Anger Over Jimmy Hayes’ Death*, TSN (Oct. 19, 2021), <https://www.tsn.ca/a-decade-after-his-own-loss-len-boogaard-feels-sorrow-and-anger-over-jimmy-hayes-death-1.1708676> [<https://perma.cc/H3UX-NHQL>].

11. *See generally* THE PROBLEM OF PAIN (CTV 2020) (telling the stories of former NHL players who experienced drug addiction issues both during their careers and post-retirement, including Ryan Kesler, Kyle Quincey, and Zenon Konopka).

12. Wyshynski, *supra* note 1.

prescribed and took pain medication without any warning of the potential consequences of long-term usage.¹³ In 2015, Kesler developed colitis—a long-lasting digestive issue that causes inflammation and ulcers in the digestive tract—which doctors linked back to his extended use of a prescription drug called Toradol.¹⁴ Then, in 2019, Kesler was diagnosed with Crohn’s disease, an inflammatory bowel disease stemming again from his overextended use of pain medication.¹⁵ Kesler decided to share his story in the documentary because NHL teams continue to be ignorant of the consequences of long-term pain medication usage, and he feels that his story could help spread awareness.¹⁶ Other players have also been vocal about the issues connected with prescription drug use in the NHL.¹⁷

This Note will begin by describing the collective bargaining process and how it is governed.¹⁸ Part II will also discuss the relevant sections of the CBA between the NHL and the NHL Players’ Association (“NHLPA”) and the lack of accountability the NHL has consistently shown to the many drug addiction stories that come from current and

13. Erica Commisso, *Ryan Kesler Supported Robin Lehner’s Painkiller Claims in 2020*, SPORTSNAUT (Nov. 4, 2021), <https://sportsnaut.com/robin-lehner-painkiller-ryan-kesler> [<https://perma.cc/A6A8-8WNC>]. Kesler acknowledged that he never knew the risks of the pain medications, and never asked. *Id.*

14. *Id.*; Wyshynski, *supra* note 1. Kesler explained the issues he dealt with in great detail, stating:

I had holes in my colon and ulcers, and basically my whole intestines went into spasm. . . . You’ve gotta go to the bathroom 30-40 times a day. And when you do go to the bathroom, it’s pure blood. . . . [I]t’s all because I wasn’t made aware of what this drug could potentially do to me.

Wyshynski, *supra* note 1.

15. Erin Walsh, *Former Selke Winner Ryan Kesler: Pain Medication Use Led More Health Problems*, YARDBARKER, https://www.yardbarker.com/nhl/articles/former_selke_winner_ryan_kesler_pain_medication_use_led_more_health_problems/s1_13132_32927345 [<https://perma.cc/2TUQ-BL9B>] (Sept. 23, 2020).

16. Wyshynski, *supra* note 1.

17. *See, e.g.*, Robin Lehner (@RobinLehner), TWITTER (Oct. 2, 2021, 9:46 PM), <https://twitter.com/robinlehner/status/1444478978937417729> [<https://perma.cc/38UV-PXAF>] (accusing NHL teams of over-prescribing Ambien and other pain medications); Robin Lehner (@RobinLehner), TWITTER (Oct. 2, 2021, 1:08 PM), <https://twitter.com/robinlehner/status/1444348543330828290?lang=en> [<https://perma.cc/86K2-XXLC>] [hereinafter Robin Lehner] (accusing the Buffalo Sabres of giving him many pills for an ankle injury); Tom Sestito (@TomSestito23), TWITTER (Oct. 4, 2021, 12:18 PM), <https://perma.cc/2D5C-LD93> (explaining that the amount of Toradol and Ambien given to him during his playing days was “insane”). There are many others who have told their story about their battle with addiction, and there remain various lawsuits against the NHL for its contribution to their battles. *See* C.R. Davies, *Addiction & Substance Abuse in the NHL – It’s Bigger Than the Game*, HOCKEY WRITERS (Nov. 10, 2021), <https://thehockeywriters.com/nhl-addiction-substance-abuse-bigger-than-the-game> [<https://perma.cc/3Q4H-9FKX>].

18. *See infra* Part II.A.

former players.¹⁹ Part III will discuss the history of the Occupational Safety and Health Administration (“OSHA”), as well as section 5 of the Occupational Safety and Health Act of 1970 (“OSH Act of 1970”).²⁰ Additionally, Part III will explain that, currently, OSHA fails to exercise jurisdiction over the NHL, even though the league clearly falls under its jurisdiction.²¹ Part IV will suggest what has to happen in order for OSHA to bring the NHL under its control.²² Part IV will also suggest a rule promulgating the NHL to come in accordance with section 5 of the OSH Act of 1970.²³

II. A HISTORY OF THE NHL’S COLLECTIVE BARGAINING AGREEMENT AND THE DANGEROUS ROAD THE NHL CONTINUES TO HEAD DOWN

Part II of this Note will describe background information regarding the CBA and why the NHL continues to head down a dangerous road.²⁴ Subpart A discusses the history of collective bargaining in professional sports.²⁵ Subpart B addresses the CBA between the NHL and NHLPA as well as the drug policies laid out in various provisions of the CBA.²⁶ Subpart C discusses how there is no federal rule promulgating the NHL, or any other professional sports league, to drug test the players.²⁷ Subpart D outlines the traumatic story of Derek Boogaard and his estate’s lawsuit against the NHL.²⁸ Subpart E discusses the dangerous road the NHL continues to spiral down.²⁹

A. Collective Bargaining in Sports

Collective bargaining negotiations and unionization by players in professional sports is governed by the National Labor Relations Act (“NLRA”).³⁰ Further, the NLRA bestows upon employees the right to

19. *See infra* Part II.B.

20. *See infra* Part III.A–B; 29 U.S.C. § 654(a)(1).

21. *See infra* Part III.C.

22. *See infra* Part IV.

23. *See infra* Part IV. There is a statute that could be on point, as it outlines a mandatory drug-free workplace with a drug-free awareness program; however, it only applies to federal contractors, and it is therefore not the subject of this Note and outside the boundaries of this Note. *See* 41 U.S.C. § 8102.

24. *See infra* Part II.

25. *See infra* Part II.A.

26. *See infra* Part II.B.

27. *See infra* Part II.C.

28. *See infra* Part II.D.

29. *See infra* Part II.E.

30. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012); Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 654 (2007).

unionize, collectively bargain, and “engage in other concerted activities for the purpose of collective bargaining.”³¹ When it comes to the collective bargaining relationship, the NLRA requires that the employers and employees negotiate in “good faith” for “wages, hours, and other terms and conditions of employment.”³² If either party fails to negotiate any of these terms at the request of the other party, or if those terms are unilaterally decided on those subjects, it will result in an unfair labor practice.³³

It has been established that the drug testing of employees is a subject that must be covered during collective bargaining.³⁴ Even though it is a mandatory subject of collective bargaining, there is no rule regarding what the policies have to look like; it is a prerequisite for leagues to be able to implement a drug testing policy, and the league itself cannot implement a policy without negotiating with the players.³⁵ In 2005, Congress did introduce multiple bills designed to regulate performance-enhancing drug testing in professional sports, and while none were ever put into law, it did put pressure on the leagues to implement new changes, specifically regarding steroid policies.³⁶

B. The NHL’s Collective Bargaining Agreement and Drug Policies

The CBA is a specific contract between the NHL and the NHLPA which governs most aspects of the player’s employment over a set

31. 29 U.S.C. § 157.

32. *Id.* § 158(d).

33. Showalter, *supra* note 30, at 655.

34. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989) (holding that drug and alcohol testing is a mandatory topic of collective bargaining because it is “germane to the working environment” and outside the scope of managerial decisions, which are the two criteria that the Supreme Court has established are mandatory subject matters of collective bargaining) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 448, 498 (1979)).

35. Showalter, *supra* note 30, at 655. When negotiating drug policies, collective bargaining can be lengthy, and when it comes to drug policies, compromise is not easily attained since the players have a lot at stake and the players union is often not quick to agree to the harsh penalties that come along with drug testing. *Id.* Even though a major concern to the union and its players is privacy-related, the bigger concern is the consequences of a positive drug test, since it could potentially lead to the end of a player’s career. *Id.*

36. *Id.* at 653, 656.

The bills included four in the House of Representatives: Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, H.R. 2565, 109th Cong. (superseded by H.R. 1862); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong.; and three in the Senate: Clean Sports Act of 2005, S. 1114, 109th Cong. (companion bill to H.R. 2565); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); and Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. (2005). *Id.* at 653 n.13. These bills concern the testing policies concerning performance-enhancing drugs, not recreational drugs or opioids; therefore, the bills are outside the boundaries of this Note. For a discussion on these bills see *id.* at 653, 656.

number of years, including medical standards and drug-related policies.³⁷ The current CBA was originally entered into on February 15, 2013.³⁸ The CBA between the NHL and the NHLPA was set to expire in September 2022, but when the COVID-19 pandemic shut down play in March 2020, the two sides were forced to negotiate a “Return to Play” scenario in July 2020 and agreed to an extension of the CBA, through a Memorandum of Understanding, that will continue to run through the 2025-26 season.³⁹

In accordance with CBAs, teams generally have an absolute right to “designate the doctors and hospitals responsible for furnishing medical treatment to the players.”⁴⁰ The standard of care due to NHL athletes under Article 34.1 of the CBA states that “[e]ach Club shall provide its Players with high quality health care appropriate to their needs as elite professional hockey players”⁴¹ In addition to the CBA, player contracts express that teams must provide medical care, thus putting a duty on clubs to “exercise reasonable care to ensure the safety, fitness, and health of their players.”⁴² Additionally, team physicians are employees of the team itself; they get hired and fired by the team, creating a

37. Alec Roberson, *The NHL CBA and the 2020-21 Season That Almost Never Happened*, BEYOND GLASS (Jan. 17, 2021), <https://beyondtheglasshockey.com/2021/01/the-nhl-cba-and-the-2020-21-season-that-almost-never-happened.html> [<https://perma.cc/Z76Y-6QKH>] (explaining the governance of collective bargaining).

38. NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION 1 (2013) [hereinafter NHLPA CBA], https://www.cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf [<https://perma.cc/5424-NPVW>].

39. Tom Gulitti, *NHL, NHLPA Ratify CBA Extension Through 2025-26 Season*, NHL (July 10, 2020), <https://www.nhl.com/news/nhl-nhlpa-ratify-cba-extension-through-2025-26-season/c-317377214> [<https://perma.cc/DC8R-UCED>]; MEMORANDUM OF UNDERSTANDING BETWEEN THE NAT'L HOCKEY LEAGUE AND THE NAT'L HOCKEY LEAGUE PLAYERS' ASS'N 1 (July 10, 2020) [hereinafter NHLPA MEMORANDUM OF UNDERSTANDING], https://www.cdn.nhlpa.com/img/assets/file/NHLPA_NHL_MOU [<https://perma.cc/24CT-4849>]. A Memorandum of Understanding is an agreement negotiated between the parties “when circumstances rise that require additional clarification of the CBA.” *Your Collective Bargaining Agreement*, UNITED FAC. FLA.—UNIV. FLA., <https://uff-uf.org/your-cba> [<https://perma.cc/YSA5-NZPD>] (last visited Apr. 15, 2024).

40. Teresa Herbert, *Are Player Injuries Adequately Compensated?*, 7 SPORTS LAWS. J. 243, 247 (2000) (discussing collective bargaining agreements and the terms and conditions of a player's contract).

41. NHLPA CBA, *supra* note 38, at 176.

42. Nick DiCello, Note, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507, 517 (2001). As per the National Labor Relations Board, collective bargaining agreements in professional sports require teams to provide medical care to their players, and since this is reflected in a standard player's contract, a team could potentially be held liable for negligence or breach of contract if a player feels that clause has been breached through a *respondeat superior* theory. *Id.* at 517-18.

possible conflict between the relationships the physician has with the players.⁴³ However, the American Medical Association requires that when physicians are hired on a contractual basis by teams, they will be free from the teams encroaching upon medical matters, and that the physicians' sole responsibility is to the player, but, since the team is the physician's direct employer, it seems inevitable that the team's interests could easily influence the physician's decision-making when it comes to a player's health.⁴⁴

In 2009, Derek Boogaard was released from the Substance Abuse and Behavioral Health Program ("SABH"), and the SABH instructed, "as part of his 'Aftercare Program' that 'he was to refrain from all opioid and Ambien drug use'" while also threatening to permanently suspend him from the NHL if he tested positive.⁴⁵ Subsequently, from the time period of January to March 2011, Boogaard failed multiple drug tests, violating the program, and received no disciplinary action from the league.⁴⁶ Under Article 47, the CBA addresses a Performance Enhancing Substances Program but seemingly fails to incorporate a program that addresses the use of opioids or other addictive substances.⁴⁷ Article 34.8 governs prescription drugs, and all the CBA states is:

Each Club shall identify one (1) individual who is responsible for monitoring on an ongoing basis, or auditing on a regular basis, prescription drugs that have been given to each Player on the Club, with a particular emphasis on monitoring controlled substances and sleeping pills, if any, that have been prescribed.⁴⁸

Now, under Article 47.7(a)(i), a player shall receive a suspension of twenty games for a first positive test for performance-enhancing drugs, compared to no discipline when Boogaard violated his "Aftercare Program" on multiple occasions.⁴⁹

43. See Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Team Athletes*, 50 ST. LOUIS U. L.J. 185, 191-92 (2005) (discussing the status of the physician-team relationship along with the physician-player relationship).

44. *Id.*

45. *Nelson v. Nat'l Hockey League*, 20 F. Supp. 3d 650, 654 (N.D. Ill. 2014), *aff'd sub nom. Boogaard v. Nat'l Hockey League*, 891 F.3d 289 (7th Cir. 2018).

46. *Id.*

47. NHLPA CBA, *supra* note 38, at 188-89. The SABH is a player assistance program "created to assist players and their families in dealing with mental health, substance abuse and other issues." Bryan Murphy, *NHL/NHLPA Player Assistance Program Explained: Panthers' Spencer Knight Latest to Join*, SPORTING NEWS (Feb. 24, 2023), <https://www.sportingnews.com/us/nhl/news/nhl-nhlpa-player-assistance-program/hspgaxshyg0uildegf02tbg4> [https://perma.cc/9WQT-C8EX]. However, "[t]here is no set time a player must spend in the program[.]" and players continue to be paid while they are in the program. *Id.*

48. NHLPA CBA, *supra* note 38, at 184.

49. *Id.* at 191-92; *Nelson*, 20 F. Supp. 3d at 654.

Additionally, under Article 47.4(a), the players are tested for the use of performance-enhancing substances from what the league calls the “Prohibited Substances List.”⁵⁰ The Prohibited Substances List has been said to be based on the World Anti-Doping Agency’s (“WADA”) Prohibited List.⁵¹ The NHL’s Prohibited Substance list is not available to the public but is said to include certain substances chosen by the NHL and NHLPA to be tested because of their relevance in hockey.⁵² In accordance with Article 47.6, each team is subject to one teamwide, no-notice drug test during training camp and one teamwide, no-notice test during the season.⁵³ In addition, individual players will be selected at random during the regular season and Stanley Cup Playoffs.⁵⁴ There is also a league-wide maximum of sixty tests during the offseason, and a player may also get tested at any time if the NHL or NHLPA “has information that gives it reasonable cause to believe that a Player has, in the previous 12-month period, engaged in the use of a Prohibited Substance.”⁵⁵ Regarding recreational drugs, there are no rules in the CBA concerning suspension or fines for recreational drugs, but if a player is found to have an excessive amount of recreational drugs in his system, he is enrolled in the SABH Program.⁵⁶

C. No Rule Promulgating the NHL to Drug Test

Currently, there is no general federal law that requires employee drug testing, however, the federal government may require certain workplaces to remain drug-free.⁵⁷ OSHA has stated that it “supports

50. NHLPA CBA, *supra* note 38, at 189.

51. See Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 2017 HARV. J. SPORTS & ENT. L. 1, 143 (discussing the NHL’s drug policies).

52. *Id.*

53. NHLPA CBA, *supra* note 38, at 190.

54. *Id.*

55. *Id.* at 190-91.

56. *NHL Wasn’t Always Lenient on Drug Users*, SPORTS-KINGS, <http://sports-kings.com/featured/nhl-wasnt-always-lenient-drug-users> [<https://perma.cc/P7LM-SYEP>] (last visited Apr. 15, 2024) (“Anybody who is found to have a high level of recreational drugs in their system . . . could be referred to the NHL’s Substance Abuse and Behavioral Health Program. There are no rules in the CBA regarding suspensions and/or monetary fines for using recreational drugs . . .”).

57. See KARIN D. JONES & JAMES M. SHORE, MARIJUANA REGULATION § 5.04 (2021). The few exceptions include some “safety-sensitive” jobs that are regulated by the federal government where employees are required to remain drug-free, thereby requiring testing for controlled substances (i.e., commercial motor carriers and air carriers). *Id.* Others include federal grantees and contractors that are subject to the Drug-Free Workplace Act, which does not necessarily require specific drug testing but does expressly prohibit the “unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance” while performing the government contract. 41 U.S.C.

measures that contribute to a drug-free environment and reasonable programs of drug testing” within a workplace.⁵⁸ However, an overly broad drug testing policy could potentially violate the only rule OSHA has promulgated regarding drug testing, which states that “drug testing, or the threat thereof, cannot be used to deter employees from reporting workplace injuries.”⁵⁹ Although it seems as if this new OSHA regulation has put a limit on drug testing, it has only put a limit on it for post-injury purposes, and in most instances, workplace drug testing programs are permissible under the new law, yet there is still nothing requiring these programs to be put in place.⁶⁰

Professional sports operate in a world of their own, governing themselves without government regulation.⁶¹ Historically, the NHL “has not been subject to direct government regulation.”⁶² It has been argued, and accepted, that when it comes to professional sports, “athletic governing bodies are in the best position to establish appropriate drug testing programs to regulate the permissible bounds of competition and to protect athletes’ health and safety.”⁶³ The argument that is most consistently brought up in regard to why the federal government should not be able to mandate drug testing in sports is that professional athletes and their unions may assert that drug testing violates their rights under the Fourth Amendment of the Constitution.⁶⁴

§ 8102(a)(2). However, these exceptions are outside the scope of this Note. See JONES & SHORE, *supra*, at § 5.04.

58. Letter from John B. Miles, Jr., Dir. of Enf’t Programs, Occupational Safety & Health Admin., to Patrick Robinson, Safety Coordinator, Starline Mfg. Co. (May 2, 1998), <https://www.osha.gov/laws-regs/standardinterpretations/1998-05-02> [<https://perma.cc/CJJ5-4CGZ>].

59. See Stacy Hickox, *It’s Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL’Y REV. 419, 434 (2017).

60. Memorandum from Kim Stille, Acting Dir., Enf’t Programs, Occupational Safety & Health Admin., on Clarification of OSHA’s Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv) (Oct. 11, 2018), <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11> [<https://perma.cc/5QEAWMCC>].

61. See Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 640-43 (2015) (discussing the need for government regulation in sports and how professional leagues go largely unchecked by the federal government).

62. Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 806 (2005).

63. *Id.*

64. *Id.* at 805. In 1989, the Supreme Court applied the “special needs” doctrine to do away with normal warrant and probable cause requirements when the government has a compelling justification beyond ordinary law enforcement for an employee drug testing program. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66, 674-75 (1989). Moreover, the Court later found that a drug testing program for high school student athletes met the special needs doctrine and upheld the program notwithstanding a Fourth Amendment challenge. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (explaining that by choosing to participate in athletics the students “voluntarily subject themselves to a degree of regulation even higher than that imposed on students

D. *The Story of Derek Boogaard*

Boogaard's parents, Len and Joanne, filed a wrongful death lawsuit against the NHL in 2013 alleging that the league was a major contributor to their son becoming addicted to painkillers.⁶⁵ It was alleged in Boogaard's estate's lawsuit against the league that from October 2008 to April 2009, he was prescribed over 550 painkillers due to injuries during games.⁶⁶ Boogaard voluntarily entered himself into the NHL's SABH Program, which led to all negative drug tests during the 2009-10 season with the Minnesota Wild.⁶⁷ After that season, Boogaard signed as an unrestricted free agent with the New York Rangers.⁶⁸ During that 2010-11 season, despite both a conversation between Boogaard and the Rangers concerning his addiction, and Boogaard's father alerting the league that his son had relapsed, Boogaard was prescribed 366 more prescription pain medications by team physicians.⁶⁹ Additionally, after his relapse, the SABH Program had Boogaard go to a rehab facility in California, and even though the league knew he was not complying with treatment there, the SABH Program allowed his release.⁷⁰ Even after it was discovered that he had an addiction issue, and while this was happening, he

generally"). It has been argued that professional athletes could meet the special needs doctrine due to their importance as role models to the nation's youth, thus justifying unannounced testing for controlled substances. CHARLES DALE, CONG. RSCH. SERV., RL32911, FEDERALLY MANDATED RANDOM DRUG TESTING IN PROFESSIONAL ATHLETICS: CONSTITUTIONAL ISSUES 6 (2005). Additionally, it can be argued that professional athletes have a diminished expectation of privacy as a consequence of league rules that already require drug testing. *Id.*

65. Bill Chappell, *Derek Boogaard's Family Sues NHL Over Player's Death in 2011*, NPR (May 13, 2013, 3:51 PM), <https://www.npr.org/sections/thetwo-way/2013/05/13/183677613/derek-boogaards-family-sues-nhl-over-players-death-in-2011> [<https://perma.cc/D5T2-AD3C>].

66. Melanie Romero, Comment, *Check to the Head: The Tragic Death of NHL Enforcer, Derek Boogaard, and the NHL's Negligence—How Enforcers Are Treated as Second-Class Employees*, 22 JEFFREY S. MOORAD SPORTS L.J. 271, 281 (2015).

67. *Id.* at 281-82.

68. John Molinaro, *Thrashers Trade for Bashers*, CBC SPORTS (Aug. 2, 2010, 9:39 AM), <https://www.cbc.ca/sports/hockey/thrashers-trade-for-brashear-1.960292> [<https://perma.cc/HD8Y-9YA2>].

69. See Romero, *supra* note 66, at 282. The Rangers allegedly knew of Boogaard's issues concerning drugs, since a senior official of the team, Doug Risebrough, knew Boogaard well, considering he drafted Boogaard as general manager of the Minnesota Wild in 2001, and when Boogaard went to rehab in 2009 he called Risebrough. Branch, *supra* note 9. Two days after Boogaard's father, Len, spoke with Risebrough, it is said that the general manager of the Rangers, Glen Sather, called Boogaard into his office demanding the truth and threatening to trade him, and even after this conversation Boogaard continued to play and increasingly received more prescription medication. *Id.*

70. *Nelson v. Nat'l Hockey League*, 20 F. Supp. 3d 650, 653 (N.D. Ill. 2014), *aff'd sub nom. Boogaard v. Nat'l Hockey League*, 891 F.3d 289 (7th Cir. 2018).

was never disciplined, and the league turned a “blind eye,” as the Boogaard family’s attorney put it.⁷¹

The suit by Boogaard’s estate alleged, *inter alia*, that the NHL breached its voluntary duty to treat and sufficiently address Boogaard’s drug addiction while he was enrolled in the SABH Program.⁷² The original complaint alleged that by establishing the SABH Program in 1996 “the NHL assumed the duty to curb, cure, and monitor” Boogaard.⁷³ In 2017, the District Court for the Northern District of Illinois granted the NHL’s motion to dismiss because Boogaard’s estate failed to prove that the NHL was negligent in the handling of Boogaard.⁷⁴ However, Judge Feinerman stated that “[a]lthough judgement was entered in the NHL’s favor, this opinion should not be read to commend how the NHL handled Boogaard’s particular circumstances—or the circumstances of other NHL players who over the years have suffered injuries from on-ice play.”⁷⁵ The CBA allegedly fails to address the NHL’s duty when it comes to prescribing pain medications or the protocol for administering controlled substances, which tends to show that the NHL may not view opioid use as a serious issue.⁷⁶

71. See Steve Silverman, *Will the Derek Boogaard Wrongful Death Lawsuit Be a Game-Changer for the NHL?*, BLEACHER REP. (July 30, 2013), <https://bleacherreport.com/articles/1721685-will-the-derek-boogaard-wrongful-death-lawsuit-be-a-game-changer-for-the-nhl> [<https://perma.cc/P6V7-LUML>]; see also Jared Clinton, *Report: Derek Boogaard Played After Failed Drug Tests, Failed 14 Times in Final Six Months of His Life*, HOCKEY NEWS (Apr. 9, 2016), <https://thehockeynews.com/news/report-derek-boogaard-played-after-failed-drug-tests-failed-14-times-in-final-six-months-of-his-life> [<https://perma.cc/AW7M-BYWF>] (“In all, Boogaard failed 14 of the 19 drug tests he took in the final six months of his life . . .”).

72. *Nelson*, 20 F. Supp. 3d at 654. Boogaard’s estate alleged that the NHL voluntarily undertook duties to Boogaard upon his enrollment in the SABH program. *Id.* at 655. It was alleged that the NHL breached this voluntary duty by failing to comply with the SABH program’s requirements and by failing to give Boogaard the proper treatment while he was enrolled in the SABH program. *Id.* The voluntary undertaking theory of tort liability is that “one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one’s failure to exercise due care in the performance of the undertaking.” *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1153 (7th Cir. 2010) (quoting *Wakulich v. Mraz*, 785 N.E.2d 843, 854 (Ill. 2003)).

73. *Boogaard v. Nat’l Hockey League*, 891 F.3d 289, 294 (7th Cir. 2018).

74. *Boogaard v. Nat’l Hockey League*, 255 F. Supp. 3d 753, 766 (N.D. Ill. 2017), *aff’d*, 891 F.3d 289 (7th Cir. 2018).

75. *Id.*

76. *Romero*, *supra* note 66, at 288-90.

E. *The NHL Is Headed Down a Dangerous Road*

The NHL is headed down a dark path, and more players are going to become vulnerable to drug use along with addiction.⁷⁷ It has been over a decade since Len Boogaard buried his son Derek, and he had this to say following the death of former NHL player Jimmy Hayes in August 2021: “How many players have to die before the NHL acknowledges that there’s a problem?”⁷⁸ Hayes, who was thirty-one and left behind a wife and two children, died due to an accidental overdose; fentanyl was said to contribute to his death.⁷⁹ During his NHL career, in which he played for the Florida Panthers, New Jersey Devils, Chicago Blackhawks, and Boston Bruins, he sustained various injuries, was sent to drug rehabilitation, and was given an abundant amount of medication, including the 1,021 pills he was prescribed during the 2008-09 season alone.⁸⁰

In regard to the potential dangers that could come about due to unregulated drug use, look to the story of Tyler Skaggs, a pitcher for the Los Angeles Angels of Major League Baseball (“MLB”), who was found dead in a Texas hotel on July 1, 2019.⁸¹ During his wrongful death trial, four other MLB players testified that they received drugs from former Angels employee Eric Kay.⁸² The MLB, like the NHL, does not test for opioids, and the Skaggs trial could make the MLB revisit its drug testing and monitoring protocols.⁸³ The NHL has the opportunity to fix things before an employee is found guilty of providing players drugs

77. See Matthew Benedict, *Lessons for the NHL After Examining the Life of Derek Boogaard: Based on the Correlation Between Brain Injury and Drug Addiction the NHL Needs to Improve Player Safety and Revamp the Drug Testing Procedure*, ST. SMART SPORTS (Dec. 5, 2017), <https://streetsmartsports.org/2017/12/05/lessons-for-the-nhl-after-examining-the-life-of-derek-boogaard-based-on-the-correlation-between-brain-injury-and-drug-addiction-the-nhl-needs-to-improve-player-safety-and-revamp-the-drug-testing-proc> [https://perma.cc/WB2T-XXX9].

78. Westhead, *supra* note 10.

79. George Richards, *Family Reveals Fentanyl Contributed to the Death of Jimmy Hayes*, FLAHOCKEYNOW (Oct. 18, 2021), <https://floridahockeynow.com/fentanyl-contributed-to-death-jimmy-hayes> [https://perma.cc/MX4R-XH44].

80. See Westhead, *supra* note 10.

81. Jonathan Franklin, *Former L.A. Angels Employee Found Guilty of Providing Drugs That Killed Tyler Skaggs*, NPR (Feb. 17, 2022, 7:52 PM), <https://www.npr.org/2022/02/17/1081586769/tyler-skaggs-death-eric-prescott-kay-convicted> [https://perma.cc/RXD6-DPLS].

82. Associated Press, *At Skaggs Trial, 4 MLB Players Testify They Received Drugs*, SPORTSNET (Feb. 15, 2022, 2:37 PM), <https://www.sportsnet.ca/mlb/article/skaggs-trial-4-mlb-players-testify-received-drugs> [https://perma.cc/PQY3-C82G].

83. Michael McCann, *Tyler Skaggs Investigation Turns Toward Legal Battle in Report Angels Employee Supplied Drugs*, SPORTS ILLUSTRATED (Oct. 13, 2019), <https://www.si.com/mlb/2019/10/13/tyler-skaggs-death-investigation-latest> [https://perma.cc/XJM8-5JFS] (discussing the implications for the MLB due to the death of pitcher Tyler Skaggs).

illegally like Eric Kay did in the Tyler Skaggs trial.⁸⁴ The NHL has been put on notice of the dangers associated with drug use in the league and the lack of communication with the players regarding the dangers associated with medications.⁸⁵ Prescription drug follow-up is a must to combat this danger, and in order to do that, OSHA must regulate the NHL like other dangerous workplaces.⁸⁶

III. SO, DOES DRUG USE IN THE NHL CONSTITUTE A HAZARD?

This Part argues that the drug policy in the NHL, as is, creates a dangerous work environment for the players.⁸⁷ Subpart A discusses OSHA and the OSH Act of 1970.⁸⁸ Subpart B outlines the General Duty Clause of the OSH Act of 1970.⁸⁹ Subpart C explains that, currently, the NHL is not under the jurisdiction of OSHA and discusses why the NHL does fall under the jurisdiction of OSHA.⁹⁰ Subpart D argues that drug use in the NHL, with this current infrastructure, constitutes a violation of the General Duty Clause under section 5(a)(1) of the OSH Act of 1970.⁹¹ The main issue here arises from a weak drug policy that the NHL has endorsed.⁹² For example, Tom Sestito, a former NHL player, said that he was given an “insane” amount of a certain painkiller, Toradol, as well as Ambien, used to treat insomnia.⁹³

84. Franklin, *supra* note 81.

85. Westhead, *supra* note 10 (discussing the deaths of Jimmy Hayes and Derek Boogaard due to drug use and a documentary titled “The Problem of Pain,” which featured multiple NHL players who all state that they were given painkillers regularly while never being told about the dangers associated with using them on a consistent basis). Tom Sestito was also vocal on Twitter about the amount of drugs he was given while in the NHL, describing the quantity as “insane.” Sestito, *supra* note 17. Sestito went on further in another tweet, stating that as a “fringe player” he was given a whole bottle of Toradol (a known painkiller), that he felt “[n]ot a pain in [his] body,” and that no one explains to players the nature of the drugs provided to them. Tom Sestito (@TomSestito23), TWITTER (Oct. 4, 2021, 1:36 PM), <https://perma.cc/L9AC-6MUV>.

86. *See infra* Part IV.

87. *See infra* Part III.

88. *See infra* Part III.A.

89. *See infra* Part III.B; 29 U.S.C. § 654(a)(1).

90. *See infra* Part III.C.

91. *See infra* Part III.D.

92. *See* Benedict, *supra* note 77 (discussing how the NHL drug protocol is inadequate).

93. Sestito, *supra* note 17; Thomas Williams, *Former NHL Enforcer Says He Was Given Copious Amounts of Toradol and Ambien*, YAHOO!SPORTS (Oct. 5, 2021), <https://www.yahoo.com/lifestyle/former-nhl-enforcer-tom-sestito-says-he-was-given-copious-amounts-of-toradol-and-ambien-thanks-robin-lehner-150820471.html> [https://perma.cc/87LC-N9DE]. Sestito said that it took him a year of being sober after his use of Ambien “to learn how to sleep” regularly again. *Id.*

A. OSHA

The OSH Act of 1970, which established OSHA and was signed into law by President Richard Nixon in December 1970, was enacted to create overall safer working conditions and to ensure that work environments are free from hazards that pose danger to employees' health.⁹⁴ OSHA is a part of the United States Department of Labor, and the administrator of OSHA answers to the Secretary of Labor.⁹⁵ OSHA is said to cover most, if not all, private sector employers and employees, in addition to some public sector employers and employees.⁹⁶ OSHA, through the power given to it by the OSH Act of 1970, seeks to encourage employers to reduce safety and health hazards at places of employment by instituting new programs, or perfecting the ones in place, that aim to provide safe working environments.⁹⁷ While passing the OSH Act of 1970, Congress determined that "injuries and illnesses suffered in the workplace hinder interstate commerce through lost production, lost wages, and the like."⁹⁸ Due to Congress's power to regulate interstate commerce, the OSH Act of 1970 has an extremely broad range to reduce workplace hazards.⁹⁹ OSHA aims to reduce such hazards by potentially instituting new programs, as well as reforming existing programs, in order to provide safe working conditions.¹⁰⁰ Additionally, OSHA must conduct research into an industry's occupational health and safety in order to develop new standards and methods for dealing with industry-specific occupational and safety problems.¹⁰¹ When it comes to enforcement, the OSH Act of 1970 allows OSHA to develop and promulgate occupational safety and health standards, as well as provide an effective enforcement program for those standards.¹⁰²

94. See Laura Green, *Occupational Safety and Health Act: Definition and Requirements*, INVESTOPEDIA, <https://www.investopedia.com/terms/o/occupational-safety-and-health-act.asp> [https://perma.cc/242L-NS28] (Sept. 27, 2021) (discussing the OSH Act of 1970, its purposes, main points, and overall history).

95. *About OSHA*, U.S. DEP'T OF LAB., <https://www.osha.gov/aboutosha> [https://perma.cc/M688-MZC9] (last visited Apr. 15, 2024). OSHA's administrator is also known as the "Assistant Secretary of Labor for Occupational Safety and Health." *Id.*

96. *Id.*

97. 29 U.S.C. § 651(b)(1).

98. Keiran Bleich, *Dropping the Ball: Analyzing the Impact and Hurdles of Potential OSHA Regulation in Collision Sports*, 18 TEX. REV. ENT. & SPORTS L. 85, 93 (2018).

99. David J. Kolesar, Note, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079, 2084 (1992).

100. See § 651(b)(1); see also Bleich, *supra* note 98, at 93.

101. Bleich, *supra* note 98, at 93.

102. § 651(b)(9)–(b)(10).

The terms “employers” and “employees” were defined by OSHA in order to establish who it regulates.¹⁰³ Under the OSH Act of 1970, the term “employer” is defined as “a person engaged in a business affecting commerce who has employees”¹⁰⁴ Furthermore, the word “commerce” means “trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof”¹⁰⁵ Additionally, “employee” is interpreted as “an employee of an employer who is employed in a business of his employer which affects commerce.”¹⁰⁶ This definition of employee has been described as “circular,” explaining nothing.¹⁰⁷ Moreover, commerce is known as commercial activities between states, including traffic, intercourse, and navigation, as well as commodities associated with interstate commerce.¹⁰⁸ The determination of whether an employer-employee relationship exists is made on a case-by-case basis.¹⁰⁹ To make this determination, the courts have used the common law test originally laid out in *Nationwide Mutual Insurance Co. v. Darden*,¹¹⁰ which was later reaffirmed in *Loomis Cabinet Co. v. Occupational Safety and Health Review Commission*¹¹¹:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring

103. *Id.* § 652(5)–(6).

104. *Id.* § 652(5).

105. *Id.* § 652(3).

106. *Id.* § 652(6).

107. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

108. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

109. Letter from Frank Frodyma, Acting Dir., Directorate of Evaluation & Analysis, Occupational Safety & Health Admin., to Dave Chamberlain, Dir. of Loss Control Servs. (June 23, 2003), <https://www.osha.gov/laws-regs/standardinterpretations/2003-06-23-1> [<https://perma.cc/KE9Z-9PVB>] (“This determination must be made on a case-by-case basis after considering all of the circumstances . . . and applying the common law factors.”).

110. 503 U.S. 318 (1992).

111. 20 F.3d 938 (9th Cir. 1994).

party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹¹²

This test is now known as the “*Loomis* Test.”¹¹³ The Court said that these factors outlined in the common law test for an employment relationship were known as the “economic realities” of the situation being reviewed.¹¹⁴ When looking at these factors, no singular factor is decisive, and instead, all the factors must be examined.¹¹⁵

B. Section 5(a) of the OSH Act of 1970

Section 5 of the OSH Act of 1970 declares that an employer

shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees [and] . . . shall comply with the occupational safety and health standards promulgated under this [Act].¹¹⁶

Section 5(a)(2) speaks to the authority that OSHA has under the Act to promulgate rules and set standards concerning the health and safety of the workplace.¹¹⁷ Although OSHA has wide discretion about when to regulate a specific hazard, on at least one occasion, a court has demanded OSHA to promulgate a standard because the court found that OSHA “could not justify indefinite delay and recalcitrance in the face of an admittedly grave risk to public health.”¹¹⁸ Recognized as the “General Duty Clause,” section 5(a)(1) means to set a general place of employment standard that employers must provide to their employees.¹¹⁹ The OSH

112. *Id.* at 942; *see also Nationwide*, 503 U.S. at 322-323 (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)).

113. Bleich, *supra* note 98, at 94.

114. *Loomis*, 20 F.3d at 941 (“We have held that whether an employment relationship exists depends upon the economic realities of the situation.”).

115. Bleich, *supra* note 98, at 94-95 (“The common law economics realities test is non-exhaustive and does not give rise to a short hand formula to find whether an employer-employee relationship exists because all aspects of the relationship must be assessed with no single factor being decisive.”).

116. 29 U.S.C. § 654(a)-(b).

117. *Id.* § 655 (discussing the authority to promulgate standards).

118. *Pub. Citizen Health Rsch. Grp. v. Chao*, 314 F.3d 143, 145 (3d Cir. 2002) (commanding OSHA to promulgate a standard for exposure to hexavalent chromium).

119. *See Alan Ferguson, OSHA’s General Duty Clause*, SAFETY + HEALTH (Dec. 20, 2019), <https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause> [<https://perma.cc/YHJ3-UZW7>].

Act of 1970 was enacted mainly to ensure safe and healthy work environments for all working individuals.¹²⁰

Moreover, according to the Third Circuit Court of Appeals, in order to prove a violation of the General Duty Clause,

the Secretary must establish that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard.¹²¹

Additionally, the issue under the General Duty Clause is whether it is likely that employees could suffer potential physical harm.¹²² In order to constitute a recognized hazard under the General Duty Clause, the dangerous potential of an activity must either be actually known to the particular employer or known in the industry generally.¹²³ Injuries or death to employees or former employees can be used as prima facie evidence of a hazard that is likely to cause death or serious injury.¹²⁴ Part III.D will show that the drug environment in the NHL constitutes a violation of the General Duty Clause.¹²⁵

C. The NHL Falls Under the Jurisdiction of OSHA

Today, other than the National Labor Relations Board's ("NLRB") oversight of the collective bargaining process, there is no governmental oversight of professional athletes ensuring their safety.¹²⁶ However, OSHA would be the agency responsible for any regulation of the health and safety of professional athletes.¹²⁷ OSHA has always maintained the position that its mission is "[t]o assure safe and healthful working

120. *The Occupational Safety and Health Act and OSHA Standards*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/niosh/z-draft-under-review-do-not-cite/safetyculturehc/module-5/2.html> [<https://perma.cc/7LGE-TCC7>] (last visited Apr. 15, 2024).

121. *W. World, Inc. v. Sec'y of Lab.*, 604 F. App'x 188, 192 (3d Cir. 2015) (quoting *Timken Co.*, 20 BNA OSHC 1070, 2003 WL 1889150, at *5 (No. 97-0970, 2003)).

122. *Babcock & Wilcox Co. v. Occupational Safety & Health Rev. Comm'n*, 622 F.2d 1160, 1165 (3d Cir. 1980) ("The issue is not whether an accident was likely to happen but rather whether, assuming one had occurred, it was likely employees would have suffered serious physical harm.").

123. *Brennan v. Occupational Safety & Health Rev. Comm'n*, 494 F.2d 460, 463-64 (8th Cir. 1974).

124. *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977).

125. *See infra* Part III.D.

126. Bleich, *supra* note 98, at 86 ("There is no formal governmental oversight of U.S. professional collision sports to ensure the safety of athletes.").

127. *See* 29 U.S.C. § 653(a) (noting that OSHA's enabling statute applies to all employment in the United States and its territories).

conditions for working men and women” by setting and enforcing standards and by providing training, outreach, education, and assistance.¹²⁸ Nevertheless, in a 2008 interpretation letter, OSHA reaffirmed its stance that its enabling statute was not meant to regulate professional athletes.¹²⁹ In addition, OSHA only regulates the health and safety of those who are in an employer-employee relationship, and OSHA does not consider professional athletes to be in that sort of relationship.¹³⁰

The jurisdiction of OSHA “covers private sector employees, with the exception of the self-employed, family farm workers, and governmental workers.”¹³¹ OSHA uses a priority list in order to determine which industries it will regulate with the intent to “focus its inspection resources on the most hazardous workplaces”¹³² The priority list includes imminent danger situations, severe injuries and illnesses, worker complaints, referrals, targeted inspections, and follow-up inspections.¹³³ Most relevant to this Note are imminent danger situations, which involve “hazards that could cause death or serious physical harm[,]” and severe injuries and illnesses, which also include employment-related death, bodily harm, and incidents of hospitalization.¹³⁴

Historically speaking, OSHA has failed to evaluate and manage the hazards associated with professional sports, due in part to the deference that the leagues generally receive, along with the fact that OSHA has deemed professional athletes to be “independent contractors.”¹³⁵ Additionally, Supreme Court Justice Brett Kavanaugh has been vocal that OSHA has no authority to regulate professional sports.¹³⁶ In 2014, the

128. Occupational Safety and Healthy Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678).

129. Letter from Richard E. Fairfax, Dir. of Enf’t Programs, Occupational Safety & Health Admin., to Robert Van Laanen (Sept. 12, 2008), <https://www.osha.gov/laws-regs/standardinterpretations/2008-09-12> [<https://perma.cc/R2L2-LZYM>] (“OSHA has no specific [applicable] standards that address protection for professional athletes playing in games.”).

130. *See id.*

131. Kristie Brenson, Comment, *Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation*, 2017 U. CHI. LEGAL F. 595, 605 (2017).

132. *Occupational Safety and Health Administration (OSHA) Inspections*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf> [<https://perma.cc/M42N-XTD6>] (last visited Apr. 15, 2024).

133. *Id.*

134. *Id.*

135. *See* Adam Finkel, *How a Government Partnership Could Make the NFL Safer*, GLOB. SPORT MATTERS (June 21, 2022), <https://globalsportmatters.com/health/2022/06/21/how-osha-could-make-nfl-safer-cte> [<https://perma.cc/HXB2-87PC>] (explaining that OSHA has jurisdiction over the NFL and other professional sports leagues but has consistently failed to assess and regulate the risks due to various reasons, including the deference constantly given to the leagues).

136. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (Kavanaugh, J., dissenting) (“But the Department of Labor, acting with a fair degree of prudence and wisdom, has

D.C. Circuit ruled that OSHA could fine SeaWorld of Florida for allowing its employees to get in the water with an orca whale, knowing the whale previously killed a trainer in Canada and then proceeded to kill a SeaWorld trainer in Florida.¹³⁷ Serving as Circuit Judge at the time, Justice Kavanaugh dissented, arguing that Congress meant for section 5 of the OSH Act of 1970 to not be controlling over the sports and entertainment industry.¹³⁸ Even though Justice Kavanaugh's dissent is not binding law, it could be used as a persuasive mechanism to future courts.¹³⁹ However, the majority ruled that OSHA correctly recognized its authority over SeaWorld.¹⁴⁰

OSHA has previously had involvement in the professional sports industry, however, its involvement specifically dealt with the actual facilities hosting the sporting events.¹⁴¹ On the other hand, however, these previous involvements do not address the issues concerning the current drug environment in the NHL.¹⁴² As mentioned above, OSHA has

not traditionally tried to stretch its general authority under the [OSH Act of 1970] to regulate participants taking part in the normal activities of sports events or entertainment shows.”).

137. *Id.* at 1206-07, 1216 (majority opinion).

138. *Id.* at 1222 (Kavanaugh, J., dissenting) (“Congress did not in any way indicate or even hint that the Clause’s vague terms encompassed an implicit grant of authority to the Department of Labor to regulate or re-make some undefined swath of America’s sports and entertainment behemoth.”).

139. Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291, 315 (2018).

140. *SeaWorld*, 748 F.3d at 1204-05, 1216. What was important about Judge Kavanaugh’s dissent was the way he applied a 1986 decision by the Occupational Safety and Health Review Commission, which ended up vacating penalties by OSHA against a chemical manufacturer, Pelron Corporation, under the General Duty Clause. *Id.* at 1219-22 (Kavanaugh, J., dissenting). In *Pelron*, OSHA contended that the corporation allowed a recognized hazard, the accumulation of high quantities of ethylene oxide in a pressure vessel, to persevere. *Pelron Corp.*, 12 BNA OSHC 1833, 1986 WL 53616, at *2 (No. 82-0388, 1986). However, the Commission vacated because it found that OSHA had failed to demonstrate a feasible way of eliminating or reducing the hazard. *Id.* at *7. Judge Kavanaugh, using *Pelron*, asserted that “some activities, though dangerous, are among the normal activities intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause.” *SeaWorld*, 748 F.3d at 1219 (Kavanaugh, J., dissenting). The majority, however, responded to Judge Kavanaugh’s dissent by arguing that he was “stretching *Pelron* beyond its moorings,” asserting that OSHA had recognized authority to regulate even though the “normal activities” were “extremely dangerous.” *Id.* at 1211-13 (majority opinion).

141. See Finkel et al., *supra* note 139, at 313-14 (discussing OSHA’s prior involvement in the sports and entertainment industries). For example, OSHA investigated an incident involving the collapse of the Dallas Cowboys’ practice dome. *OSHA Sorts Through Flattened Facility*, ESPN (May 4, 2009), <https://www.espn.com/nfl/news/story?id=4136258> [<https://perma.cc/SRT9-7Q86>]. Additionally, OSHA investigated an accident in which a worker at the St. Louis Rams stadium fell to his death. *Deadly Fall in Dome*, INDUS. SAFETY & HYGIENE NEWS (Jan. 24, 2003), <https://www.ishn.com/articles/84752-deadly-fall-in-dome> [<https://perma.cc/ET3F-U5WN>].

142. Cf. Finkel et al., *supra* note 139, at 314 (discussing how OSHA’s prior involvements in the sports world does not answer the questions regarding player safety in the NFL).

jurisdiction over private sector employers and employees.¹⁴³ Further, the NLRA governs the CBA process, and the NLRA governs collective bargaining between only employers and employees.¹⁴⁴ Moreover, NHL players certainly meet the test of an employee under OSHA, since it has been established by the NLRB that professional sports affect interstate commerce, thereby making them fit the definition of an employer under OSHA.¹⁴⁵ Additionally, the NLRB “dictates that an employer, the NHL, is obligated to bargain collectively with the employees’ representatives, the NHLPA, and that both will confer in ‘good faith.’”¹⁴⁶ Furthermore, when evaluating some of the factors in the *Loomis* Test pertaining to professional hockey players, the evidence demonstrates the existence of an employer-employee relationship.¹⁴⁷

1. Skill Required to Be in the NHL

In order to play in the NHL, one must have a skill level that is quite unparalleled when compared to the skill of the average hockey player, which is what is required under the *Loomis* Test.¹⁴⁸ The National Collegiate Athletic Association (“NCAA”) keeps track of the number of hockey players from high school to the collegiate level.¹⁴⁹ According to the NCAA, there were a reported 35,283 athletes playing men’s ice hockey in high school.¹⁵⁰ Out of those athletes, only 4,323 were reported to be playing NCAA men’s ice hockey, and only 4.8% of those high school athletes made it to Division I.¹⁵¹ Going even further, the NCAA reports that only approximately 961 are NHL draft-eligible.¹⁵² There are 217 draft picks in the NHL Draft, and 71 NCAA ice hockey players got

143. See *supra* text accompanying note 96.

144. See *supra* text accompanying notes 30-32; 29 U.S.C. § 151 (2012) (explaining the purpose of the NLRA).

145. See Mitten, *supra* note 62, at 805 (“Congress has jurisdiction to establish a drug testing program for professional leagues based on its federal constitutional authority to regulate interstate commerce”); MATTHEW J. MITTEN ET. AL., SPORTS LAW AND REGULATION 513-14 (2005).

146. Timothy L. Epstein, *NHL Sidesteps NLRA but Creates Issues*, CHI. DAILY L. BULL. (Nov. 6, 2012), https://www.smithamundsen.com/media/publication/114_Epstein_NHLSidestepsNLRAbutCreatesIssues.pdf [https://perma.cc/34XV-UX5P] (citing § 158(d)).

147. See *infra* Part III.D.1-7.

148. Bleich, *supra* note 98, at 95.

149. See *Estimated Probability of Competing in College Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2015/3/2/estimated-probability-of-competing-in-college-athletics.aspx> [https://perma.cc/E8MN-43LE] (Apr. 8, 2020).

150. *Id.*

151. *Id.*

152. *Estimated Probability of Competing in Professional Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx> [https://perma.cc/9YJP-FANF] (Apr. 8, 2020).

drafted, but only approximately 7.4% actually make it to the NHL.¹⁵³ The Fifth Circuit held that if employees have the skills necessary to help bring profits in for the hiring party then they cannot be considered independent contractors.¹⁵⁴ Likewise, the specialized skill possessed by NHL players brings in profits for their teams and the league.¹⁵⁵

2. Location of the Work

Moreover, in accordance with the common-law definition of employee, the NHL has a whole department, the department of scheduling and broadcasting, which controls “the manner and means” by which the NHL season is accomplished.¹⁵⁶ The location is often the arena, practice arena, gym, or any other facility owned by the player’s team in the NHL.¹⁵⁷ A team’s ownership over the arenas or facilities where athletes work has a propensity to show the characteristics of an employer-employee relationship.¹⁵⁸ Further, the NHL, specifically the commissioner or his “designee,” is in charge of supplemental discipline for on-ice and off-ice conduct.¹⁵⁹

3. Employee Benefits

While on the road, NHL athletes receive money, known as daily per diems, to cover the cost of food or other expenses.¹⁶⁰ While it is a common practice, it is not required for employers to provide their employees

153. *Id.*

154. *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976). The *Usery* court held that the workers who are responsible for handling dry-cleaned clothing possessed the required skill necessary to trigger an employer-employee relationship, as opposed to independent contractors. *Id.* at 1314-15. The specific skills that the court identified were interacting with customers, handling money, settling accounts, and tagging clothes. *Id.*

155. Bleich, *supra* note 98, at 95.

156. *Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm’n*, 20 F.3d 938, 942 (9th Cir. 1994); see Pierre LeBrun, *LeBrun: What’s It Really Like to Put Together the NHL’s Schedule?*, ATHLETIC (Feb. 16, 2021), <https://theathletic.com/2390143/2021/02/16/lebrun-whats-it-really-like-to-put-together-the-nhls-schedule> [<https://perma.cc/CJ9U-4PYB>] (discussing the job of Steve Petros, the executive vice president of scheduling and broadcasting, and how he and his staff make the NHL schedule).

157. Bleich, *supra* note 98, at 96.

158. *Loomis*, 20 F.3d at 942 (finding evidence that the company owned the workshop where the employees worked, and that the company had total control over the environment in that workshop).

159. NHLPA CBA, *supra* note 38, at 116, 124.

160. *Id.* at 128-29; Ayden Rudd, *How Much Do NHL Players Get for Per Diem?*, NBC COMEDY PLAYGROUND (Jan. 28, 2021), <https://www.nbccomedyplayground.com/how-much-donhl-players-get-for-per-diem> [<https://perma.cc/7WRG-EQV3>] (noting that NHL players earned an average \$110 per diem, which included all expenses for telephone, laundry, dry cleaning, tips and gratuities, and two game tickets).

with work-related travel reimbursement.¹⁶¹ Also, the NHL supplies a pension for retired players, which caps out at \$255,000 per year after a player has accrued ten years and reached full service requirements laid out in the CBA; while most players will see a smaller amount, it is all outlined in Article 21 of the CBA.¹⁶²

4. Assignment of Additional Projects to the Employee

The assignment of additional projects and potential punishment for non-performance of those additional tasks tends to demonstrate an employer's dominion over its employees.¹⁶³ The *Loomis* court found it important that Loomis negotiated with the customers while the work by the employees was being done and then exercised control over the schedule of when the employees would do the job.¹⁶⁴ NHL players, on successful teams specifically, have to play additional games in the form of playoffs, which also creates more revenue for their team and the league.¹⁶⁵ NHL players may also be required at media events or community events during the offseason, or even during the season in addition to games.¹⁶⁶

5. Method of Payment and Business of the Hiring Party

NHL players are compensated biweekly, meaning twice a month, and are only compensated during the course of the regular season, which runs from October to April.¹⁶⁷ Players may also receive different types of bonuses, such as a signing bonus or bonuses based on individual

161. See 29 C.F.R. § 778.217 (2010) (noting different types of expenses that may be reimbursable by an employer).

162. NHLPA CBA, *supra* note 38, at 131, 140-42; see also Dan Kent, *Do NHL Players Get a Pension?*, BIG SHOT HOCKEY (Jan. 14, 2022), <https://bshockey.com/nhl-pension> [<https://perma.cc/6VC4-DQUT>].

163. Bleich, *supra* note 98, at 96.

164. *Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n*, 20 F.3d 938, 942 (9th Cir. 1994) (finding that this control over the employees constituted the requisite dominion over them, thus tending to prove an employer-employee relationship exists).

165. See Kurt Badenhausen, *The NHL Scores with Maple Leafs Ending Playoff Drought*, FORBES (Apr. 24, 2013, 1:41 PM), <https://www.forbes.com/sites/kurtbadenhausen/2013/04/24/the-nhl-scores-with-maple-leafs-ending-playoff-drought/?sh=2d4a300e7b43> [<https://perma.cc/JVX9-N9G4>] (describing the additional games the Maple Leafs players will play during playoffs and how it will ultimately make the Maple Leafs and the NHL approximately \$2.5 million during the playoff series).

166. Bleich, *supra* note 98, at 96 (discussing the additional projects, other than playing in games, that professional athletes are required to partake in when it comes to an employer-employee relationship).

167. Drew Hanson, *NHL Salaries Not as Advertised*, HOCKEY WRITERS (May 11, 2018), <https://thehockeywriters.com/nhl-salaries-not-as-advertised> [<https://perma.cc/UP4S-67S4>].

performance.¹⁶⁸ The *Loomis* court found that Loomis conducted all contract negotiations with suppliers and customers and concluded that tends to show an employer-employee relationship.¹⁶⁹ The players get paid by their individual teams, which are considered separate entities, because players contract with their individual team.¹⁷⁰ Because of this, some may argue—even though it has not been ruled on regarding the NHL—that the clubs of professional sports, not the leagues, are the employers; however, there are varying decisions by the courts regarding this issue.¹⁷¹ Additionally, the NHL has a salary cap, which means that teams must build a roster under a certain dollar amount, which depends on the league's total revenue from the previous season.¹⁷²

6. Length of Employment

The Supreme Court case *National Labor Relations Board v. United Insurance Co. of America*¹⁷³ found that when workers have a position with the hiring party that continues as long as their work is deemed satisfactory, it tends to indicate an employer-employee relationship is present.¹⁷⁴ The length of this relationship in the NHL can vary; some may come to training camp on what is known as a “professional tryout contract,” and end up getting cut.¹⁷⁵ In contrast, the New York Islanders signed Rick DiPietro to a fifteen-year deal in 2006.¹⁷⁶ There are even instances where a player may spend his whole career with one team, such

168. Bleich, *supra* note 98, at 97.

169. *Loomis*, 20 F.3d at 942.

170. Bleich, *supra* note 98, at 98.

171. See *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002) (finding that players are employees of the clubs, not the NFL). *But see Williams v. Nat'l Football League*, No. 27-CV-08-29778, 2010 Minn. Dist. LEXIS 111, at *31 (Minn. Dist. Ct. 2010) (finding that the NFL exercises the requisite control to possibly be considered a joint employer of players).

172. See *What Is the Salary Cap?*, PUCKPEDIA, <https://puckpedia.com/salary-cap/1-what-salary-cap> [https://perma.cc/6YF3-7Y39] (last visited Apr. 15, 2024).

173. 390 U.S. 254 (1968).

174. *Id.* at 258-60 (noting that the agents employed were kept on to work for the employer as long as their collection of insurance premiums stayed at an acceptable level).

175. See Gavin Lee, *Jake Virtanen Released from PTO*, PRO HOCKEY RUMORS (Oct. 6, 2022, 1:58 PM), <https://www.prohockeyrumors.com/2022/10/jake-virtanen-released-from-pto.html> [https://perma.cc/PV49-2BSB] (discussing how Jake Virtanen, who was brought into the Edmonton Oilers training camp on a professional tryout, got cut before the season, thus ending his relationship with the team only after a few weeks).

176. See Michael Anderson, *New York Islanders Sign Rick DiPietro 12 Years Ago Today*, EYESONISLES (Sept. 12, 2018), <https://eyesonisles.com/2018/09/12/new-york-islanders-sign-rick-dipietro-12-years-ago-today> [https://perma.cc/GT42-LL6P] (discussing the deal between the Islanders and DiPietro, which eventually turned sour due to injuries).

as Henrik Lundqvist with the New York Rangers.¹⁷⁷ Clearly, the length of employment in the NHL varies, which is mainly based on performance and how the team values that player, tending to show evidence of an employer-employee relationship.¹⁷⁸

7. Tax Treatment of the Hired Party

When it comes to paying taxes, NHL players pay taxes just as any normal employee does, since they have federal, state, and in some cases, city taxes.¹⁷⁹ Additionally, professional athletes sometimes must pay a special tax, which is known as “jock tax.”¹⁸⁰ Whether employees report and pay their taxes is considered as a factor when determining whether an employer-employee relationship exists.¹⁸¹

D. Drug Use in the NHL Constitutes a Violation Under Section 5(a)(1) of the OSH Act of 1970

The General Duty Clause allows OSHA to find an employer violation when either there is no promulgated standard or an already established standard does not apply.¹⁸² In order to prove a violation under the General Duty Clause, one must prove the four elements outlined in the Third Circuit case *Western World, Inc. v. Secretary of Labor*.¹⁸³ Prescription drug use adequately equates to an activity in the workplace that presents a hazard to the players.¹⁸⁴ Additionally, this hazard is a

177. Vin A. Cherwoo, *Lundqvist Is 11th Player in Rangers History to Have Jersey Retired*, CBC SPORTS, <https://www.cbc.ca/sports/hockey/nhl/new-york-rangers-nhl-henrik-lundqvist-1.6332270> [<https://perma.cc/86EK-RYXN>] (Jan. 29, 2022).

178. Bleich, *supra* note 98, at 97 (“The varying lengths of contracts that teams give to players based on their performance and subjective value to the team show evidence of an employer keeping an employee around as long as it makes sense, financially and otherwise.”). The fact that a team may ultimately decide whether to terminate or continue the relationship with the player based on job performance on its own tends to show a team’s control over the player, evidencing an employer-employee relationship. *Id.* at 97.

179. See Daniel K. Schindler, *How Much NHL Players Really Make*, ANDERS (Mar. 7, 2019), <https://anderscpa.com/how-much-nhl-players-really-make> [<https://perma.cc/SGA4-FNNS>] (discussing how much NHL players actually make after their additional costs, including taxes).

180. See *id.*

181. Bleich, *supra* note 98, at 99 (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976)).

182. See Aaron T. Lloyd, *What Happens When the Bubble Bursts? Why Sports Teams Must Learn from the Collapse of the Dallas Cowboys’ Practice Facility*, 8 WILLAMETTE SPORTS L.J. 46, 51 (2010) (describing OSHA’s General Duty Clause as a “catch all” provision); see also Kolesar, *supra* note 99, at 2086 (noting that the General Duty Clause plays a “secondary role” because of the fact that an applicable promulgated standard will take precedent over the General Duty Clause).

183. 604 F. App’x 188 (2015); see *supra* text accompanying note 121.

184. See *infra* Part III.D.1.

“recognized hazard” under the General Duty Clause.¹⁸⁵ Furthermore, prescription drug use in the NHL is likely to cause, and has been causing, death or serious bodily harm.¹⁸⁶ Lastly, feasible means existed to materially reduce or eliminate the hazard presented by prescription drug use in the NHL.¹⁸⁷

1. Overuse of Prescriptive Drugs in the Workplace Presents a Hazard to Players

The General Duty Clause “concerns only hazards arising out of an employer-employee relationship.”¹⁸⁸ Additionally, “the employer’s liability for [a] violation is triggered by [a] mere existence of [a] hazard[,]” not by an injury caused by the hazard.¹⁸⁹ A hazard, under OSHA, is defined as the potential for physical or mental harm and “often is associated with a condition or activity that, if left uncontrolled, can result in an injury or illness.”¹⁹⁰

As outlined above, the NHL and the players fall under the employer-employee relationship necessary under the General Duty Clause.¹⁹¹ Prescription painkillers are some of, if not the most, commonly abused drugs among professional athletes.¹⁹² NHL athletes feel the need to play through injury due to a fear of being replaced by another athlete waiting for their chance, and therefore, they turn to pain medication.¹⁹³ Specifically, prescription drug use in the NHL is a hazard under

185. See *infra* Part III.D.2.

186. See *infra* Part III.D.3.

187. See *infra* Part III.D.4.

188. Richard S. Morey, Comment, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 994 (1973). When construing the language of the General Duty Clause, it is clear that the “employer is under no duty concerning *nonemployees* who may from time to time be present in the workplace.” *Id.* (emphasis in original). Even if a nonemployee is subjected to hazards that do not affect the employees, then there is still no violation of the General Duty Clause. *Id.*

189. *Id.* Morey argues that the duty owed by employers to employees could be extended beyond the workplace in certain situations, such as when a truck driver gets in an accident due to faulty automotive maintenance by the employer. *Id.*

190. OCCUPATIONAL SAFETY & HEALTH ADMIN., HAZARD IDENTIFICATION AND PREVENTION (NDLON-OSHA), <https://perma.cc/5D4L-6LFW> (last visited Apr. 15, 2024).

191. See *supra* Part III.C.

192. See *Athletes Addicted to Painkillers: A Growing Phenomenon*, ADELANTE RECOVERY CTRS., <https://adelanterecovery.com/blog/athletes-addicted-to-painkillers> [https://perma.cc/A9BX-JFW8] (last visited Apr. 15, 2024). There are various factors that contribute to painkiller addiction in professional sports, including the need to play despite an injury, lack of comprehensive medical insurance, the stress of competition, mental illness, and the lack of knowledge about the consequences of abusing pain medications. *Id.*

193. See Poněk, *supra* note 1 (discussing the professional hockey industry and the trend of playing through the pain).

OSHA because, as shown through various stories, such as Derek Boogaard's, left uncontrolled it leads down a dangerous path to drug addiction and possible death.¹⁹⁴ Many around the league consider painkiller addiction to be an extremely dangerous problem that needs attention due to the nature of hockey.¹⁹⁵ When playing in the NHL, many are faced with challenging injuries and surgeries, and the process of coping with these various ailments "often entail[s] the use of painkillers."¹⁹⁶

2. Prescription Drug Use in the NHL Is a Recognized Hazard

Pursuant to the General Duty Clause, an employee must have been harmed by a hazard recognized by the employer or by that industry.¹⁹⁷ When determining whether a hazard is "recognized" for purposes of OSHA, one must look to precedent from the federal courts for guidance.¹⁹⁸ Additionally, the legislative history of the Act provides further guidance on determining whether the hazard is "recognized."¹⁹⁹ An activity may also be deemed to be a recognized hazard regardless of whether the employer is ignorant to the existence of the hazard.²⁰⁰ Essentially, a "recognized hazard" is defined as one known either to the individual employer or recognized in general in that specific industry.²⁰¹

The knowledge of prescription drug abuse is widespread when it comes to the world of professional sports.²⁰² The NHL is put on notice

194. See Stu Hackel, *Derek Boogaard Alarming Example of NHL's Easy Path to Addiction*, SPORTS ILLUSTRATED (May 13, 2015), <https://www.si.com/nhl/2015/05/13/derek-boogaard-alarming-example-nhl-drug-addiction> [<https://perma.cc/7YX3-4N6D>] (telling the story of Derek Boogaard through the lens of his father, Len Boogaard, and demonstrating that the path to drug addiction in the NHL is an easy one to fall into).

195. *Id.*

196. *Id.*

197. 29 U.S.C. § 654(a)(1); Morey, *supra* note 188, at 995.

198. See, e.g., *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) ("To constitute a recognized hazard, the dangerous potential of a condition or activity must actually be known either to the particular employer or generally in the industry."); *Brennan v. Occupational Safety & Health Rev. Comm'n*, 494 F.2d 460, 464 (8th Cir. 1974) ("Even a cursory examination of the Act's legislative history clearly indicates that the term recognized was chosen by Congress not to exclude actual knowledge, but rather to reach beyond an employer's actual knowledge to include the generally recognized knowledge of the industry as well.").

199. See Morey, *supra* note 188, at 995 n.37 (explaining that when the amendment which became the General Duty Clause was proposed, a representative stated that "[a] recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry").

200. *Nat'l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973).

201. Lloyd, *supra* note 182, at 52.

202. See, e.g., THE PROBLEM OF PAIN, *supra* note 11 (telling the stories of various NHL players who suffered from substance abuse due to taking prescription medications during their playing days); Gabe Lacques, *Matt Harvey, Former Angels Testify They Received Pills from Angels Em-*

when a player is prescribed medication since any medication given to an NHL player by a team doctor is mandated to be recorded in that individual player's medical file, while any medication prescribed by a private doctor is not required to be entered in that player's file.²⁰³ Additionally, the NHL has known of this hazard, as evidenced by the documentary "The Problem of Pain," which was produced to show the dangers associated with drug use in the NHL.²⁰⁴ Those brave players who stepped up to tell their stories included former defenseman Kyle Quincey and former forwards Ryan Kesler and Zenon Konopka, among others.²⁰⁵ The NHL even proved that it was aware of the hazard after Robin Lehner's aforementioned tweets, since the NHL requested to interview Lehner regarding his accusations and in fact did sit down with him in October 2021.²⁰⁶ Moreover, the NHL has shown it is aware of the hazard since the NHL created the player assistance program in order to assist players with substance abuse, among other issues.²⁰⁷

3. Drug Use in the NHL Is Causing Death or Serious Physical Harm

The hazard must be of a serious nature, in that OSHA will not find a violation of the General Duty Clause unless the "hazard is causing or is likely to cause death or serious physical harm."²⁰⁸ The clause exempts

ployee in Trial Over Tyler Skaggs Death, USA TODAY, <https://www.usatoday.com/story/sports/mlb/angels/2022/02/15/eric-kay-trial-matt-harvey-tyler-skaggs-drug-abuse/6799015001> [<https://perma.cc/2SUR-UH9S>] (Feb. 16, 2022) (discussing the tragic story of Tyler Skaggs, who died from a drug overdose, and his teammates, who admitted to also using prescription medications while playing, leading to abuse by many—not only Skaggs); John Barr, *Painkiller Misuse Numbs NFL Pain*, ESPN, <https://www.espn.com/espn/eticket/story?page=110128/painkillersnews> [<https://perma.cc/9RL4-ZCYH>] (last visited Apr. 15, 2024) (explaining a study conducted by researchers at Washington University School of Medicine that tends to prove that retired NFL players misuse pain medications at a rate much higher than the general population and that this new evidence suggests this abuse stemmed from the use of painkillers during their playing days).

203. See David Shoalts & Allan Maki, *NHL's Drug Registry Should Be More Open*, Doctor Says, GLOBE & MAIL (June 4, 2012), <https://www.theglobeandmail.com/sports/hockey/nhls-drug-registry-should-be-more-open-doctor-says/article4231047> [<https://perma.cc/77WY-HZEJ>].

204. See THE PROBLEM OF PAIN, *supra* note 11; Westhead, *supra* note 10.

205. See THE PROBLEM OF PAIN, *supra* note 11; see also Westhead, *supra* note 10.

206. Jon Lane, *Lehner 'Encouraged' After Meeting with NHL*, NHLPA, NHL (Oct. 5, 2021), <https://www.nhl.com/news/golden-knights-robin-lehner-meets-with-nhl-and-nhlpa/c-326601836> [<https://perma.cc/W5QX-Y6RE>].

207. Murphy, *supra* note 47 (discussing the latest player to experience difficulties and enter the player assistance program, and stating that the program has been used more frequently in recent years, indicating that issues such as substance abuse are on the rise).

208. Lloyd, *supra* note 182, at 53. However, since the requirement is a serious nature, the statute exempts coverage of hazards that can cause only minor injuries or illnesses. Morey, *supra* note 188, at 997.

conditions in the workplace that could only cause physical harm due to “a freakish or utterly implausible concurrence of circumstances.”²⁰⁹ In addition, a factor OSHA will consider when looking into hazards is whether the hazard is ongoing or if it is truly rare.²¹⁰ Therefore, a violation of the General Duty Clause requires asking “whether reasonably foreseeable circumstances could lead to the perceived hazard’s resulting in serious physical harm or death—or more simply, the proper test is plausibility, not probability.”²¹¹

Drug use in the NHL is certainly an activity that presents a hazard to employees; Ryan Kesler stated that due to the overuse of Toradol during his playing days, he dealt with major health complications, such as holes in his colon and bleeding every time he used the bathroom.²¹² Additionally, players like Jimmy Hayes, Derek Boogaard, and Rick Rypien have passed away from drug addiction that stemmed from their playing days.²¹³ Their deaths can be used as prima facie evidence of a hazard that is likely to cause death or physical injury.²¹⁴ Also, it is “reasonably foreseeable” that the use of pain medication in the NHL today could lead to serious consequences, thus constituting an activity that presents a hazard in the NHL.²¹⁵ Additionally, the drug problem is not just a hazard to the players but to their families as well.²¹⁶

209. Lloyd, *supra* note 182, at 53 (quoting Nat’l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm’n, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973)).

210. *Understanding OSHA’s General Duty Clause*, J.J. KELLER SAFETY MGMT. SUITE (May 9, 2022), <https://www.jjkellersafety.com/news-articles/understanding-oshas-general-duty-clause> [<https://perma.cc/MF6M-Q3KC>].

211. Morey, *supra* note 188, at 997-98.

212. *Ryan Kesler’s Life Has Become a Nightmare!*, HOCKEYFEED, <https://www.hockeyfeed.com/nhl-news/ryan-kesler-s-life-has-become-a-nightmare> [<https://perma.cc/W5QX-Y6RE>] (last visited Apr. 15, 2024) (discussing the complications Ryan Kesler has had to deal with due to the use of painkillers in the NHL).

213. Westhead, *supra* note 10.

214. *See* Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 910 (2d Cir. 1977).

215. *See* Morey, *supra* note 188, at 997-98; Poněk, *supra* note 1 (explaining the process of how painkiller abuse easily turns to addiction); *see also Athletes Addicted to Painkillers: A Growing Phenomenon*, *supra* note 192 (“Long-term use of painkillers leads to physical and psychological dependence, making the user unable to feel normal without a regular dose.”). Some NHL players have admitted to taking up to three pills a day in order to cope with injury, and for long-term pain management in the NHL, where most surgeries are suggested in the offseason, athletes are exposed to long-term use, causing addiction. Poněk, *supra* note 1. It can also be argued that team doctors face an “inherent tension,” since the doctors presumably want to provide the best care possible but deal with players who are accustomed to pain and want to play due to contract concerns, while the teams are often concerned with their top players being able to perform. Branch, *supra* note 9.

216. *See generally* Rick Westhead, *Wife of Former NHL Defenceman Asks League, NHLPA to Do More for Families of Struggling Players*, CTVNEWS, <https://www.ctvnews.ca/w5/wife-of-former-nhl-defenceman-asks-league-nhlpa-to-do-more-for-families-of-struggling-players-1.5764662> [<https://perma.cc/C83Z-9E7L>] (Feb. 5, 2022, 8:02 PM) [hereinafter Westhead, *Wife of Former NHL Defenceman Asks League to Do More*] (discussing the story of Tess White, the wife of

4. Feasible Means Existed to Eliminate or Materially Reduce the Hazard

When a hazard is deemed to be recognizable and of a serious nature, employers will only be held liable if the hazard is deemed to be “preventable.”²¹⁷ The General Duty Clause seeks to impose a duty on the employers that is actually “achievable” to reduce the hazard, rather than absolute liability for employers.²¹⁸ In order for a hazard to be preventable, there must be “feasible measures” available to materially reduce the likelihood of death or serious physical injury for the hazard to fall within the scope of the General Duty Clause.²¹⁹

When it comes to feasible means to materially reduce the hazard, the NHL could have tested more regularly for recreational substances, such as cocaine and prescription drugs, and put forth a treatment plan garnered for each individual.²²⁰ The NHL can reconsider its existing drug testing policies; the league could have enforced a system where players are tested on a more regular basis for prescription medications, and when they are prescribed medication, a treatment plan could be put in place for each individual player.²²¹ Therefore, as this Subpart has described, it is clear that drug use in the NHL classifies as a violation of the General Duty Clause, and OSHA must step in to ensure the NHL is in compliance.²²²

IV. A DUTY OF CARE ARISES

As discussed above, NHL athletes and the NHL, under the *Loomis* Test, clearly classify as an employer-employee relationship, thus falling under the jurisdiction of OSHA.²²³ The sport of hockey is a collision sport where the players get injured and need medication to ease their

former NHL player Ian White, and the crisis her family has gone through because of Ian’s substance abuse). Tess said that she never felt an inch of support from any of the five teams Ian played for or the league, even though his substance abuse problems were widely publicized. *Id.*

217. Brenson, *supra* note 131, at 609. However, hazardous conduct will not be deemed preventable when it is “so idiosyncratic and implausible in motive or means” that when creating a safety program, experts within the industry would disregard the hazard. *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm’n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Additionally, when elimination of the hazard “would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible[,]” it will not be deemed preventable. *Id.*

218. *Babcock & Wilcox Co. v. Occupational Safety & Health Rev. Comm’n*, 622 F.2d 1160, 1164 (3d Cir. 1980).

219. See Brenson, *supra* note 131, at 609 (quoting *Babcock*, 622 F.2d at 1164).

220. Davies, *supra* note 17.

221. *Id.*

222. See *supra* Part III.D.1–4.

223. See *supra* Part III.C.1–7.

pain, so eliminating the medication altogether is not the solution.²²⁴ Some may argue that the NHL itself is in the best position to establish appropriate drug testing programs because it has the power to suspend players for harming the integrity of the game.²²⁵ Some may also argue that there are too many hurdles to overcome when it comes to government regulation of professional sports.²²⁶ However, OSHA has the authority to deal with industries that have monetary motivations to delay potential regulation, and the NHL falls into such a category.²²⁷ Additionally, the painkiller issue in the NHL does not go to the integrity of the game; it is putting players in harm's way and clearly constitutes a hazard under the General Duty Clause.²²⁸ As Ryan Kesler has put it, what the players need is to be informed of the risks associated with the drugs they are being given in order to make informed decisions on usage.²²⁹ To tackle the drug issue in the NHL, OSHA must exercise its authority, under section 7 of the OSH Act of 1970, for the creation of a National

224. *Painkillers and Professional Athletes*, BANYAN TREATMENT CTRS., <https://www.banyantreatmentcenter.com/2020/11/24/painkillers-and-professional-athletes-heartland> [<https://perma.cc/PB2Y-Y4V3>] (last visited Apr. 15, 2024) (noting that even though athletes and prescription drugs can be a “risky duo[.]” injuries are a never-ending problem, and athletes turn to prescriptive medication to help cope with the pain).

225. See Mitten, *supra* note 62, at 806. Additionally, the sports market combined with increasing political pressure incentivizes professional sport leagues, along with their respective players' associations, to establish highly effective drug testing protocols. *Id.* It is argued that rather than imposing external drug testing protocols on these sports organizations, the government should focus on restricting access to drugs that pose health risks and then prosecute those who distribute these drugs illegally. *Id.* at 807.

226. Bleich, *supra* note 98, at 108. Some may argue that sports fans themselves may be overly opposed to governmental regulation of their favorite sports, which could potentially lead to lower fan interest and shrinking revenues. *Id.* However, this argument is overcome by the fact that OSHA faces criticism from both sides of the spectrum, on one side from businesses and pro-business politicians, and on the other side from labor advocates, unions, and even pro-union politicians. *Id.* (citing Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REGUL. 1, 6 (1989)). Due to the influence constituents have over politicians, if there is a lack of support for government regulation of a business by the people, members of Congress could potentially suffer major backlash from their supporters if OSHA was allowed to regulate their favorite sports leagues. Shapiro & McGarity, *supra*, at 10-12. Additionally, OSHA, as an administrative agency of the executive branch, faces scrutiny by not only Congress but the President as well. Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 171 (2013).

227. Bleich, *supra* note 98, at 108. There are also benefits of OSHA involvement, since OSHA possesses specialized expertise in many safety and health issues that arise in the workplace, meaning that OSHA knows best how to deal with safety and health issues. Smith, *supra* note 226, at 170. These benefits do not exist in litigation, and the costs and timeliness of OSHA involvement are often less than the costs associated with litigation. *Id.* at 170-71.

228. See *supra* Part III.D.

229. Ryan Kesler (@Ryan_Kesler), TWITTER (Sept. 22, 2020, 6:16 PM), https://twitter.com/Ryan_Kesler/status/1308530599246913536 [<https://perma.cc/QDX7-U6NQ>] (“Players need to be aware of the potential side effects these medicines can have on their bodies.”).

Advisory Committee on Occupational Safety and Health (“National Advisory Committee”) in order to promulgate a new standard regulating drug use in the NHL.²³⁰ Subpart A will outline the formation of a National Advisory Committee under OSHA.²³¹ Additionally, Subpart B will outline the promulgation of a new standard regarding drug policies in the NHL.²³²

A. *The Formation of a National Advisory Committee*

OSHA’s goal of increasing safety and promoting a healthy work environment for NHL athletes should focus on “research, information, education, and training” on the specific dangers associated with prescriptive drug use.²³³ The National Advisory Committee “shall advise, consult with, and make recommendations to the Secretary [of Labor] and the Secretary of Health and Human Services on matters” related to the OSH Act of 1970.²³⁴ These advisory committees created by OSHA can only be formed in order to assist the Secretary of Labor in the “standard setting functions” under section 6 of the OSH Act of 1970.²³⁵ It has been noted, however, that these committee’s goals “should be to suggest new rules with regards to [the] safety” of the NHL and to review any pending rules the NHL has on its docket when the rule relates to anything regarding the safety and health of the players.²³⁶

These committees created by OSHA shall consist of no more than fifteen members.²³⁷ The committee will consist of a representative of the state health and safety agency, as well as persons of both the employers and the workers in order to assure that both viewpoints are represented, thereby allowing both the players and representatives from the league to have a voice in the process.²³⁸ Additionally, the Secretary of Labor may appoint individuals with specialized knowledge including “professionals specializing in occupational safety or health, and one or more representatives of nationally recognized standards-producing

230. 29 U.S.C. § 656(a)(1); *see infra* Part IV.A–B.

231. *See infra* Part IV.A.

232. *See infra* Part IV.B.

233. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678).

234. § 656(a)(2).

235. *Id.* § 656(b). The Secretary may promulgate any national consensus standard as he sees fit, unless he has determined that promulgating such a rule will not increase the safety or health of the employees it is designed to protect. *Id.* § 655(a).

236. *See* Bleich, *supra* note 98, at 106.

237. § 656(b).

238. *Id.* The members of both the employers and the workers must be qualified by experience and affiliation appropriate to accurately reflect the viewpoints of each party. *Id.*

organizations”²³⁹ An advisory committee of this nature would allow for not only the representation of both the employer and employee, but also experienced medical professionals who specialize in the dangers of drug use along with experts in the field of occupational safety and health regulation setting.²⁴⁰ Moreover, this committee will hold no less than two meetings per year, and all the meetings shall be open to the public, with a transcript that will be kept and made available for public inspection.²⁴¹ At these meetings, OSHA will supply any research or data that needs to be reviewed.²⁴² During these hearings there are no rules of evidence, and any decision on evidence admitted is left up to the discretion of the chairman of the committee.²⁴³

B. *The Promulgation of a New Standard*

The goal of a National Advisory Committee here is to “assist” the Secretary in his standard setting functions; therefore, the next step is to promulgate a standard in order to combat the hazard that is prescription drug use in the NHL.²⁴⁴ There are multiple steps in the process of OSHA rulemaking, including notice of the proposed rulemaking to the Federal Register, followed by public comment periods, and then the final standard being recorded in the Federal Register by the Assistant Secretary of Labor.²⁴⁵ The need for a new standard concerning prescription drug use

239. *Id.*

240. *Id.*; Bleich, *supra* note 98, at 106.

241. § 656(a)(2).

242. Paul I. Weiner, *OSHA's Standard-Setting Process*, 32 LAB. L.J. 23, 25 (1981).

243. *Id.* at 26.

244. § 656(b) (“An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions . . .”).

245. Carolyn S. Klinger & Mary Lou Jones, *The OSHA Standard Setting Process*, 48 AAOHN J. 374, 375 (1994). The initiation of rulemaking “may be triggered by information or requests from many sources.” *Id.* After initiation, the next step is publication by OSHA of an “Advanced Notice of Proposed Rulemaking” to the Federal Register, which is followed by a public comment period occurring usually between thirty to ninety days from the date of publication in the Federal Register. *Id.* After the public comment period OSHA

must demonstrate that a particular hazard poses a significant risk to the worker; show that implementing a standard will eliminate or substantially reduce such a risk; select the most protective exposure limit that is economically and technologically feasible; and find the most cost effective ways for employers to meet the exposure limit.

Id. (further citations omitted). Once that is determined, OSHA will publish a “Notice of Proposed Rulemaking” into the Federal Register, and a second comment period will then be open to the public to obtain information. *Id.* An administrative law judge presides over the public comment period and keeps a record open for the “Post-Hearing Comment Period[.]” *Id.* at 376. Following that period, the “Final Rule” is posted to the Federal Register by the Assistant Secretary of Labor, with the reasoning behind the action. *Id.*

in the NHL is crucial since already promulgated standards will not work as they are meant for not so specialized fields.²⁴⁶

First, OSHA must promulgate a standard that whenever a player is prescribed pain medication, a duty of care arises on the part of the NHL and the teams to regulate the usage by that player.²⁴⁷ Many questions regarding the care players receive still remain—all of which are important and are included in the duty of care whenever a player is prescribed any sort of pain medication—such as whether team doctors communicate with one another about the care they are giving or the drugs they are prescribing, whether they demand to see the player before prescribing medication, whether team medical records are monitored and complete, among others.²⁴⁸ Players put their bodies through a lot just to continue to play in the NHL, and according to former NHL players, they were reliant on painkillers to deal with the pains of a career in professional hockey.²⁴⁹ Further, many players who have been prescribed certain medications said that they have used the prescription drugs longer than recommended by many.²⁵⁰ Before follow-up medical treatment or testing begins, the duty of care should include educating the players about the medications they are being prescribed.²⁵¹

In addition, the duty of care needs to require more stringent testing and follow-up medical treatment.²⁵² It is true that the NHL player assistance program is an available resource for players to turn to when dealing with drug use issues, however, the program “only steps in after the

246. Bleich, *supra* note 98, at 103.

247. See, e.g., Wyshynski, *supra* note 1 (quoting the creator of the documentary “The Problem of Pain,” Rick Westhead, as stating that “[a] lot of this, in terms of accountability and responsibility, comes down to team trainers and team doctors” and explaining that players have been taking painkillers longer than is necessary or suggested); *Is Toxic Hockey Culture Pushing Athletes Toward Substance Abuse?*, *supra* note 3 (“The combined overprescribing of and lack of education on painkillers raised, and continues to raise, the susceptibility of substance abuse among athletes.”).

248. See Branch, *supra* note 9 (discussing the questions facing hockey and other professional sports when it comes to the standard of care that players receive on an everyday basis, especially when it concerns major injuries or prescribing medication).

249. Riley Nimens, *Pushing Through the Pain, NHLers Say They’re Regularly Taking Painkillers in Order to Play*, CTV NEWS (Oct. 23, 2020, 6:48 PM), <https://www.ctvnews.ca/w5/pushing-through-the-pain-nhlers-say-they-re-regularly-taking-painkillers-in-order-to-play-1.5158297> [<https://perma.cc/8SQQ-93EM>].

250. *Id.* The drug that most NHL players complain about is Toradol, a safe and effective anti-inflammatory that blocks the hormones that cause inflammation and pain. *Id.* Doctors believe that the extended use of the drug by players puts them at serious risk for long-term effects such as kidney issues and internal bleeding, along with other possible complications. *Id.*

251. Wyshynski, *supra* note 1 (explaining Ryan Kesler’s role as an advocate for educating players about the potential side effects of certain medications, as he stated, “I never knew what it could do to me. Or the side effects. I feel like if I can talk about the dangers about it, it’ll help everybody”).

252. Davies, *supra* note 17.

[player] has reached out for help[,]” and the focus should be to try and prevent the dangerous addiction before it starts.²⁵³ This follow-up medical treatment should include not just a standardized plan but an individualized plan for each player, specifically made to what works for them.²⁵⁴ Part of the follow-up treatment should not just concern the player but also the family of that player in order to ensure that the player is adequately supported.²⁵⁵ All players, once prescribed medication, need to be tested on a regular basis for illegal substances to assure the players, as well as even the coaches and families, that the league and its doctors are doing everything they can.²⁵⁶

V. CONCLUSION

The substance abuse issue has led to some very traumatic results in the NHL, including the deaths of Derek Boogaard and Jimmy Hayes.²⁵⁷ Len Boogaard still feels the loss of his son twelve years later.²⁵⁸ Len continues to question what the NHL has learned over the past decade, and when his son died, he “maintained that it was a learning experience for everybody, so that Derek didn’t die in vain.”²⁵⁹ Len then went as far to say that “now it’s Jimmy’s dad saying he wants to bring this to everyone’s attention, so it doesn’t happen to everyone else. I guess it’s going to take more players dying, maybe three or four back-to-back again, or maybe more, for the NHL to do something.”²⁶⁰ “The Problem of Pain” told the story of seventeen NHL players who were given pain medication for a longer time than recommended, and even after that, the NHL and NHLPA restated their position that since Boogaard’s death, the drug testing program has strengthened.²⁶¹ However, Len stated it best by questioning how good the program really is, saying, “The program is

253. *Is Toxic Hockey Culture Pushing Athletes Toward Substance Abuse?*, *supra* note 3.

254. *See* Davies, *supra* note 17.

255. Westhead, *Wife of Former NHL Defenceman Asks League to Do More*, *supra* note 216. Tess White, the wife of former player Ian White, has been vocal about the need for the NHL to help the families of players struggling with substance abuse since she witnessed her husband overdose in their kitchen after being arrested in 2015. *Id.* Ian was routinely given pain medications during his playing career, and after his overdose, Tess stated, “You’re left picking up all the pieces that blew up while everything was happening . . . I don’t want anyone to have to do that alone[.]” *Id.*

256. Davies, *supra* note 17 (discussing the next steps regarding substance abuse after the death of Jimmy Hayes, and how the “NHL Family” needs to reassure everyone that players are fully supported at all times).

257. *See, e.g.*, Romero, *supra* note 66, at 281-83; Westhead, *supra* note 10.

258. Westhead, *supra* note 10 (“There isn’t a day that goes by that I don’t think about Derek, about that quirky smile he had where he’d just sit and look at you and then laugh[.]”).

259. *Id.*

260. *Id.*

261. *Id.*; THE PROBLEM OF PAIN, *supra* note 11.

much better now than ten years ago? . . . Tell that to the Hayes family.”²⁶²

Ryan Kesler is a veteran of fifteen seasons in the NHL, played over one thousand games in the league, and won a Selke Trophy, presented annually to the forward who excelled in the defensive aspects of the game.²⁶³ Kesler was prescribed pain medications for various injuries he suffered, and due to his overextended use of certain pain medications, his life became very difficult.²⁶⁴ As a man, under the age of forty, dealing with holes in his colon and constant blood in his urine every day, he felt completely depleted.²⁶⁵ All of this is because he was unaware of the potential consequences of the use of such medication.²⁶⁶

Every year after the Stanley Cup has been raised, NHL teams reveal all of the injuries, sometimes gruesome, that players on their rosters dealt with and played through to win one of the most coveted trophies in all of sports.²⁶⁷ This does not just happen during the playoffs; there is a culture in the NHL where substance abuse is encouraged through a “tough guy” mentality, where players feel they need to play at all costs.²⁶⁸ Due to this, many players felt like Kesler when he said that he never wanted to hurt the team and “[t]o play, you have to take painkillers[.]”²⁶⁹ However, section 5(a)(1) of the OSH Act of 1970 requires an employer to furnish each of his employees a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]”²⁷⁰ Since drug use in the NHL fails the standard put forth in the Third Circuit case *Western World, Inc.*

262. Westhead, *supra* note 10.

263. Adam Kimelman, *Kesler Says He Understands NHL Career Is Over*, NHL (Sept. 13, 2021), <https://www.nhl.com/news/ryan-kesler-understands-nhl-career-is-over/c-326133688> [<https://perma.cc/VZR7-QAG7>].

264. *See Ryan Kesler’s Life Has Become a Nightmare!*, *supra* note 212.

265. *Id.*

266. *Id.*

267. *See* Kevin Allen, *Cut Faces, Broken Bones, Frayed ACLs: Injuries Don’t Slow Down Players in NHL Playoffs*, USA TODAY (May 4, 2018, 10:18 AM), <https://www.usatoday.com/story/sports/nhl/columnist/allen/2018/05/04/nhl-playoffs-injuries-ryan-ellis/579032002> [<https://perma.cc/4QLR-Q3BB>]. Back in 2013, Patrice Bergeron played with a broken rib and a separated shoulder. Steven Ellis, *A Brief History of Players Gutting Out Severe Injuries in the Stanley Cup Final*, HOCKEY NEWS (June 6, 2019), <https://thehockeynews.com/news/a-brief-history-of-players-gutting-out-severe-injuries-in-the-stanley-cup-final> [<https://perma.cc/FP6X-37HV>]. Similarly, in 2015, Norris Trophy-winning defenseman Duncan Keith played through a major knee injury in order to win the Stanley Cup. *Id.* In 2017, Ian Cole of the Pittsburgh Penguins played through a broken hand and broken ribs, while his teammate Nick Bonino played through a broken tibia in order to win the Stanley Cup. *Id.*

268. *Is Toxic Hockey Culture Pushing Athletes Toward Substance Abuse?*, *supra* note 3 (discussing the toxic culture that is created by a “tough guy” mentality).

269. Wyshynski, *supra* note 1.

270. 29 U.S.C. § 654(a)(1).

v. Secretary of Labor,²⁷¹ OSHA must address the situation.²⁷² In order to address this situation, a rule should be promulgated, with input from the players themselves, addressing a duty of care upon the NHL once a player is prescribed such addictive medications.²⁷³ Such a rule can prevent situations like the one Kesler has gone through and continues to go through, as well as prevent future families from experiencing the pain that the Boogaard and Hayes families have had, and continue, to endure.²⁷⁴

*Keith O'Brien**

271. 604 F. App'x 188 (2015).

272. *See supra* Part III.D.

273. *See supra* Part IV.

274. *See supra* Part IV.

* J.D. Candidate, 2024, Maurice A. Deane School of Law at Hofstra University; B.S., *cum laude*, Business Management, 2021, State University of New York at Stony Brook. First and foremost, thank you to my parents, Debbie and Daniel O'Brien, for your unwavering love and support. I would not be where I am today without you both encouraging me to be the very best version of myself. To my friends from home and lovely fiancée, Ally, thank you for keeping me grounded and believing in me throughout my law school experience. To my Notes Editor, Gianfranco Regina, thank you for your guidance and encouragement from start to finish. A special thank you to my faculty advisor, Professor J. Scott Colesanti, for your insight and mentorship which greatly contributed to my writing of this Note. I would like to extend a thank you to Belen Gayta, Madison Einhorn, and Nicholas Tramosch for their contribution to the publication of this Note. Further, thank you to the rest of the Volume 52 Board of Editors and Staff Members for making such publication possible. And lastly, to the Volume 52 Managing Board—Alexa Torrens, Emanuele Putrino, and Paul Sessa—thank you for your thoughtful, diligent, and downright phenomenal leadership of the *Law Review*. Without such, the publication of this Note would not be possible.