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OPENING THE DOOR: RECOGNIZING THE MANY HATS OF JOCKEYS FOR WORKERS' COMPENSATION COVERAGE

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I. INTRODUCTION

No matter the industry, workers' compensation insurance coverage consistently generates controversy about everything from administrative policies to health care provider restrictions. Few issues, however, cause as many controversies as the failure to cover an entire occupation. Of those few occupations not covered, due to the danger of their sport, jockeys struggle significantly to obtain workers' compensation coverage.

Workers' compensation insurance is a creature of statute and is governed almost entirely by state law; therefore, the highly mobile jockey population is potentially exposed to thirty-six different types of systems. Of the thirty-eight states that authorize horse racing, only four states offer coverage.¹ Surprisingly, Kentucky is not among them.² New York, New Jersey, Maryland, and California include jockeys in their state mandatory compensation systems, but elsewhere jockeys are vulnerable.³ In 2006, Kentucky Governor Ernie Fletcher proposed adding jockeys to his state's existing system, but the Kentucky legislature rejected his proposal.⁴ This rejection illustrates the political difficulty that jockeys face in acquiring workers' compensation benefits. Their own union has been rocked by scandal,⁵ and the insurance coverage promised them by that union is no longer available.⁶ Further compounding the problem, only four states have stepped in to fill the void.

*Ochoa v. Department of Washington Labor and Industries*⁷ illustrates the difficulties facing the horse racing industry in insuring its employees. *Ochoa* involved an appeal from a Washington Court of

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¹ Vicki Smith, *Plight of West Virginia Jockey Leads to Outcry for Workers Comp*, SAN FRANCISCO CHRONICLE, Jan. 21, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/01/21/state/n195055S59.DTL&type=health>.

² See *id.*

³ *Id.*

⁴ See Chris Isidore, *SportsBiz: Jockeys Need a Lift After Union's Troubles*, CNNMONEY, May 4, 2006, http://money.cnn.com/2006/05/04/commentary/column_sportsbiz/sportsbiz/index.htm (last visited Apr. 17, 2009).

⁵ *Id.*

⁶ Lynch Ryan, *Jockeys: Coverage Update and a Scandal*, WORKERS COMP INSIDER, January 30, 2006, <http://www.workerscompinsider.com/archives/000429.html> (last visited Apr. 17, 2009).

⁷ *Ochoa v. Dep't of Labor & Indus. (Ochoa II)*, 20 P.3d 939 (Wash. 2001).

Appeals decision that denied benefits to a licensed jockey who was injured while employed as an exercise rider for a particular trainer.⁸ The Washington Supreme Court's holding concentrated on whether a jockey, like other types of employees, could act in a variety of capacities despite his sole licensure as a jockey.⁹ Reaching a decision on this question required the court to carefully interpret its own statute generally granting benefits and the specific exclusion of jockeys from the universal scheme of coverage.¹⁰ Although both the District Court and state Court of Appeals affirmed the Board's decision, the Washington State Supreme Court granted benefits to Ochoa.¹¹ In holding that Ochoa was entitled to mandatory, as opposed to elective, coverage the Washington Supreme Court offered a nuanced view of the statute reflective of actual horse industry practice and opened a door to at least some coverage for jockeys, depending on their activity at the time of injury.¹²

In Section II of this Comment, focus is on the general statutory scheme in Washington, examining what kinds of benefits are available, and to whom. In addition, the administrative appeals process will be discussed. Section III reviews the background of this particular case and its history, while Section IV discusses the analysis of the state Supreme Court. Section V examines the implications of the court's holding on the inclusion of jockeys in state mandatory workers' compensation schemes.

II. LEGAL BACKGROUND

A. *Workers' Compensation Overview (Washington)*

As with all states, workers' compensation coverage in Washington is a statutory right, meaning that the legislature has considered whom to include and exclude from the compensation system.¹³ This principle is clearly reflected in the basic statutory architecture of Washington's Industrial Insurance Act ("the Act").¹⁴ RCW § 51.12.010 extends application of the Act to all employments within the jurisdiction of the Act, and it is immediately followed by the legislature's list of exclusions.¹⁵ Subsection 7 explicitly exempts from coverage "[j]ockeys while participating in or preparing horses for race meets licensed by the

⁸ *Id.* at 940-41.

⁹ *Id.* at 943.

¹⁰ *Id.* at 941, 943.

¹¹ *Id.* at 940-41.

¹² *Ochoa II*, 20 P.3d at 943.

¹³ *Id.* at 941.

¹⁴ Washington's Industrial Insurance Act, WASH. REV. CODE § 51.12 et seq. (2009).

¹⁵ WASH. REV. CODE § 51.12.020 (2009).

Washington horse racing commission pursuant to chapter 67.16 RCW.”¹⁶ For those not explicitly exempted from coverage, however, the title proceeds to define the terms employer¹⁷ and worker,¹⁸ then notes a general multi-factor exception to mandatory coverage.¹⁹ It is important to note these definitions because both jockeys and exercise riders cleanly fall within their parameters. Without the specific exemption from coverage for jockeys²⁰ both would fall within the state compensation scheme. Neither jockeys nor exercise riders fall within the generalized exception to the definitions of “employer” and “worker”.²¹ Trainers, owners, and stables qualify as employers because they contract with workers for their personal labor.²² Washington’s statute further defines workers as “every person . . . engaged in the employment of an employer under this title,” and exercise riders fall easily within this definition.²³ Therefore, because exercise riders are not specifically exempted, they constitute a covered occupation. Furthermore, had the legislature not specifically exempted jockeys one could reasonably assume this group could also obtain coverage.

Once absorbed into the system, employees in Washington are statutorily entitled to a variety of benefits if they are injured while in the course of their employment.²⁴ First, the workers’ compensation fund will cover the expenses of receiving medical care for the injury, including hospital care.²⁵ A notice requirement contained in the statute forces employees to inform their employers of any injury.²⁶ The system also provides compensation schedules for those who are permanently or partially disabled as a result of an on-the-job injury, in addition to the

¹⁶ *Id.*

¹⁷ WASH. REV. CODE § 51.08.070 (2009) (defining employer as “any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers”).

¹⁸ WASH. REV. CODE § 51.08.180 (2009) (defining worker as “every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW”).

¹⁹ WASH. REV. CODE § 51.08.195(1)-(6) (2009).

²⁰ WASH. REV. CODE § 51.12.020(7) (2009).

²¹ WASH. REV. CODE § 51.08.195 (2009).

²² See WASH. REV. CODE § 51.08.070 (2009).

²³ WASH. REV. CODE § 51.08.180 (2009).

²⁴ WASH. REV. CODE § 51.32.015 (2009).

²⁵ WASH. REV. CODE § 51.36.010 (2009).

²⁶ WASH. REV. CODE § 51.28.010 (2009).

injured person's medical care.²⁷ For those who are permanently disabled, Washington offers payment for a personal attendant.²⁸

RCW § 51.32.060(1) also guarantees receipt of a percentage of former wages, based on marital status and the injured person's number of children.²⁹ Those injured are also entitled to payments for temporary total disability, and subsection (3) provides compensation for loss of earning power.³⁰ In addition, the state offers workers vocational rehabilitation,³¹ compensation for an occupational disease,³² and perhaps most importantly employment protection and time-loss compensation.³³

RCW § 49.78.280 guarantees that a worker's job remains available if he or she must take leave for serious illness.³⁴ In addition, if a worker is injured in the course of his or her employment, he or she is entitled to compensation from the employer for lost wages—the wages the employee would have earned had he or she not been injured.³⁵ Given the extensive coverage offered to beneficiaries of the workers' compensation system, Washington's exclusion of those who will certainly be repetitively injured is understandable. However, review of the benefits offered makes starkly clear what jockeys in particular are denied by exclusion from insurance. It also highlights the importance of Ochoa's case, which could offer an avenue for some coverage to a group that remains otherwise uninsured.

In order to obtain these benefits, workers must navigate through a specified claims process within the state's Department of Labor and Industries ("the Department"). Ochoa represents a typical case. In a fairly simple process, a worker must file a claim with the state Department of Labor and Industries within one year of the injury.³⁶ The statute also requires the employee to file a copy of the medical report from their attending physician with his workers' compensation claim.³⁷ If the worker does not notify the employer of the injury, the state will do so

²⁷ WASH. REV. CODE § 51.32.080 (2009).

²⁸ WASH. REV. CODE § 51.32.060(3) (2009).

²⁹ WASH. REV. CODE § 51.32.060(1) (2009).

³⁰ WASH. REV. CODE § 51.32.090(1), (3) (2009).

³¹ WASH. REV. CODE § 51.32.098 (2009).

³² WASH. REV. CODE § 51.32.180 (2009).

³³ WASH. REV. CODE § 51.32.090 (2009) allows for temporary total disability to follow the fee schedule for permanent disability, which entitle the worker to various percentage compensation for wages. WASH. REV. CODE § 51.32.060(1) (2009). WASH. REV. CODE § 51.32.090 also requires the employer to allow the employee to return to light duty, if light duty is available. Furthermore, WASH. REV. CODE § 51.48.025 (2009) prohibits employers from retaliating in the form of discharge or discrimination on the basis of the filing of a workers' compensation claim. Read together, these provisions show that the scheme intends to protect a worker's ability to return to work and prevent dismissal merely because of an injury incurred in the line of work.

³⁴ See WASH. REV. CODE § 49.78.020 (2009).

³⁵ WASH. REV. CODE § 51.32.060 (2009).

³⁶ WASH. REV. CODE §§ 51.28.010(1), 51.28.050 (2009).

³⁷ WASH. REV. CODE § 51.28.020 (2009).

immediately.³⁸ The statute also requires the employer to notify the Department of any injuries of which it is aware and allows the Department to exact penalties for failure to observe this requirement.³⁹ For most workers, this overview accurately describes the surprisingly simple claims process.

Payment for the claims filed with the Department comes from the state accident fund, administered by the Department.⁴⁰ RCW § 51.08.175 defines the term “state fund.” First, the fund insures employers who “secure the payment of industrial insurance benefits through the state.”⁴¹ In addition, the Department acts as the agency “to insure the industrial insurance obligation of employers.”⁴² Each employer that is not acting as a self-insurer for workers’ compensation must insure their employees through the state agency and pay premiums based on payroll reports to the state fund.⁴³ The statute additionally authorizes the director of the Department to pay the medical bills of injured workers.⁴⁴

The burden of providing money for the fund falls equally on the employees and the employers. Employers are required to deduct one-half of the required contribution from the worker’s pay, and the employer pays the remaining half.⁴⁵ The amount of total premiums due to the state varies according to the placement of each type of occupation on a classification system set by the Department.⁴⁶ Interestingly, the legislature provided a premium assessment system for some horse racing occupations.⁴⁷ Although it excludes jockeys, RCW § 51.16.210(1) includes grooms, exercise riders, and pony riders both on and off the track.⁴⁸ In addition, subsection (3) identifies trainers as the employers of these individuals and assesses trainers for premiums.⁴⁹ While this section does not apply to jockeys, as the title specifically exempts them, the statute clearly establishes that it is possible to insure those in the horse racing business.

B. *The Claims Appeal Process*

Despite the expansive coverage and simplicity of the premium and claim processes, individuals often disagree with the Department’s decision.

³⁸ WASH. REV. CODE § 51.28.020(2)(b) (2009).

³⁹ WASH. REV. CODE § 51.28.025(1), (2) (2009).

⁴⁰ WASH. REV. CODE § 51.36.010 (2009).

⁴¹ WASH. REV. CODE § 51.08.175 (2009).

⁴² *Id.*

⁴³ WASH. REV. CODE § 51.16.060 (2009).

⁴⁴ WASH. REV. CODE § 51.04.030(3) (2009).

⁴⁵ WASH. REV. CODE § 51.16.140(1) (2009).

⁴⁶ WASH. REV. CODE § 51.16.035(1), (2) (2009).

⁴⁷ WASH. REV. CODE § 51.16.210 (2009).

⁴⁸ WASH. REV. CODE § 51.16.210(1) (2009).

⁴⁹ WASH. REV. CODE § 51.16.210(3) (2009).

If a worker objects to the Department's decision, he or she has sixty days to file an appeal with either the Department or the Board of Industrial Insurance Appeals ("the Board").⁵⁰ On appeal, the appellant has the burden of establishing a prima facie case for the relief sought.⁵¹ Once the appeal is received by the Board, an industrial appeals judge will hear the case.⁵² The industrial appeals judge, who must simply be an active or judicial member of the Washington state bar, possesses the power to make findings of fact and of law, and submits these findings in writing to the Board.⁵³

The parties have twenty days to file any appeals to the Board's decision before it becomes final, and the statute specifically deems anything not contested in the appeal to be admitted.⁵⁴ If neither party appeals the decision of the industrial appeals judge, the statute requires the Board to consider that decision as final. It cannot be appealed to the court system.⁵⁵ If the Board denies review or the final decision of the Board is unsatisfactory to the worker, he or she may appeal to the state court system within thirty days.⁵⁶ At the state level, review of the decision of the Board is *de novo* but, like most administrative appeals, is limited to the record before the court and no party may introduce new evidence.⁵⁷ Once in the state court system, the appeal follows the normal appellate process.⁵⁸

C. *Exclusions from the Workers Compensation System*

RCW § 51.12.020 automatically excludes very few occupations from the workers' compensation system.⁵⁹ Most involve temporary employees with unsophisticated employers, such as domestic servants, casually engaged musicians, or officers of corporations that the corporation may elect to cover.⁶⁰ Although persons employed on railways are excluded, federal statute permits employees to sue their employers if those employers have acted negligently.⁶¹ Of all horse racing personnel, Washington's workers compensation system excludes only jockeys and does so specifically.

⁵⁰ WASH. REV. CODE § 51.52.050(1) (2009).

⁵¹ WASH. REV. CODE § 51.52.050(2)(a) (2009).

⁵² WASH. REV. CODE § 51.52.104 (2009).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ WASH. REV. CODE § 51.52.110 (2009).

⁵⁷ WASH. REV. CODE § 51.52.115 (2009).

⁵⁸ WASH. REV. CODE § 51.52.140 (2009).

⁵⁹ WASH. REV. CODE § 51.12.020 (2009).

⁶⁰ *Id.*

⁶¹ WASH. REV. CODE § 51.12.080 (2009); *see also* 45 U.S.C. § 51 (2009).

Washington provides a general alternative exception to coverage.⁶² Examining the requirements for qualification for exclusion under the general exception reveals the characteristics of the types of occupations the legislature wishes to exclude. The statute initially requires that the employee is free from control over the performance of the service, the service is outside the usual course of business of the employer or away from the usual place of business, and that the employee is engaged independently in business of the same nature as that which they contracted to do.⁶³

The legislature appears to articulate its reservations about various occupations in these exceptions, yet these characteristics do not apply to jockeys. Normally, one would expect that jockeys could obtain mandatory coverage under the state system because coverage of jockeys does not reflect the concerns expressed by the legislature in its generalized exception, and many other excluded occupations do. However, the legislature seems to specifically except those occupations in which employers consistently and quickly change, or those with unsophisticated employers who may not be aware of regulations and statutes. In addition to the changing nature of their occupation, jockeys also engage in a sport that is extremely hazardous and potentially expensive. Although such considerations may drive the list of exclusions in RCW § 51.12.020, a system can be designed to accommodate these individuals, as exemplified by the coverage of exercise riders and grooms, therefore raising the question of why Washington specifically chooses to exclude jockeys from workers' compensation coverage.

III. CASE HISTORY

Ochoa involved a licensed jockey acting as an exercise rider.⁶⁴ On the morning of September 26, 1993, trainer Steven Quionez hired Ochoa to exercise a horse.⁶⁵ Ochoa hoped that this ride would open a discussion with Quionez about racing the horse at a later time.⁶⁶ The horse was not yet scheduled for its next race, and Quionez had not yet decided who would ride as jockey.⁶⁷ Ochoa and Quionez entered into a verbal agreement to ride the horse for exercise only on one particular morning and Quionez would pay Ochoa a flat fee.⁶⁸ Although Quionez was exercising the horse on at Playfair Race Track during a meet, the horse was not entered in a race

⁶² WASH. REV. CODE § 51.12.020(7) (2009).

⁶³ WASH. REV. CODE § 51.08.195 (2009).

⁶⁴ *Ochoa II*, 20 P.3d. at 940.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

or exercising during a race.⁶⁹ During the exercise period, the horse panicked and flipped, crushing Ochoa's leg against a gate.⁷⁰ Since the accident, Ochoa has not been able to work.⁷¹

Ochoa filed a claim with the Department for workers' compensation, and after an initial denial, the Department agreed to offer benefits to Ochoa in a letter dated July 22, 1994.⁷² Following this letter, the Department paid \$11,550.64 in benefits to Ochoa, charging Playfair, which objected since Quionez was Ochoa's actual employer.⁷³ The Department agreed with Playfair, but then decided to deny Ochoa benefits altogether rather than charging Quionez.⁷⁴ The following spring, the Department reversed itself twice more, but eventually decided to deny benefits to Ochoa altogether.⁷⁵ The final decision to deny benefits rested on the grounds that the Department's original order granting benefits had not been properly communicated to Quionez as required by statute.⁷⁶ The decision had instead been communicated to Playfair.⁷⁷

On appeal, an industrial insurance appeals judge decided Ochoa was an exercise rider at the time of injury and was therefore entitled to benefits.⁷⁸ After this decision, the Department filed for review with the Board, which refused to accept the industrial insurance judge's recommendation and instead found in favor of the Department on the grounds that Ochoa was a jockey and therefore exempted from coverage.⁷⁹ Ochoa appealed to the district court, which also found for the Department. The Court of Appeals did as well, citing two main reasons.⁸⁰ First, the court noted that under Department regulation WAC 296-17-73105 jockeys were jockeys during the entire dates of a race meet, and this exercise had taken place during a race meet.⁸¹ Second, the court found that prior decisions by the Board that held that jockeys as exercise riders were covered had since been undermined by subsequent regulations; therefore Ochoa was a jockey and exempted from coverage under Washington law.⁸²

⁶⁹ *Ochoa II*, 20 P.3d at 940.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 941-42.

⁷³ *Id.* at 941.

⁷⁴ *Ochoa v. Dep't of Labor & Indus. (Ochoa I)*, 999 P.2d 633, 634-635 (Wash. Ct. App. 2000).

⁷⁵ *Ochoa II*, 20 P.3d at 941.

⁷⁶ *Ochoa I*, 999 P.2d at 635.

⁷⁷ *Ochoa II*, 20 P.3d at 941.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Ochoa I*, 999 P.2d at 636.

⁸¹ *Id.*

⁸² *Id.* at 636-637.

IV. ANALYSIS OF THE SUPREME COURT OF WASHINGTON

A. *Holding*

Ultimately, the Supreme Court of Washington ruled in favor of Ochoa and granted benefits.⁸³ The court's rationale rested on the fact that under prior case law the determination of eligibility turned on the nature of the activity being performed by the worker. In addition, jockeys and exercise riders were recognized in Washington as two separate job functions. Based on this reasoning, the court held that Ochoa was covered under the mandatory workers compensation statute and entitled to receive benefits.⁸⁴

B. *PRIOR HOLDINGS OF THE BOARD*

The court first noted its extreme deference toward administrative agencies in their "interpretation of regulations falling within its area of expertise."⁸⁵ It then moved on to consider the distinction that the Board had previously drawn between exercise riders and jockeys; the court essentially stated that the facts of the case at bar were substantially similar to two prior decisions.⁸⁶ The two cited cases, *In re John B. Heath*⁸⁷ and *In re Rick L. Obrist*,⁸⁸ dealt with facts "almost identical" to Ochoa's situation.⁸⁹ The Board explicitly recognized in both these cases that

licensed jockeys often engage in engage in different types of employment depending on whether they are preparing horse to ride in a race (the function of a jockey) or whether they are running a horse through a required regiment to keep the horse in racing condition (the function of an exercise rider).⁹⁰

Because of standard practices in the horse racing industry, the Board recognized that the responsibilities of a jockey begin approximately an hour before the horse's race, while exercise riders generally prepare the horse on a daily basis.⁹¹ The Supreme Court of Washington noted that in *Heath* and

⁸³ *Ochoa II*, 20 P.3d at 943.

⁸⁴ *Id.* at 942-943.

⁸⁵ *Ochoa II*, 20 P.3d at 941 (citing *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726 (2000)).

⁸⁶ *Ochoa II*, 20 P.3d at 941.

⁸⁷ *In re John B. Heath*, Bd. of Indus. Ins. Appeals No. J-405488 (1985).

⁸⁸ *In re Rick L. Obrist*, Bd. of Indus. Ins. Appeals No. J-427080 (1985).

⁸⁹ *Ochoa II*, 20 P.3d at 941.

⁹⁰ *Id.* at 941.

⁹¹ *Id.* (citing *Heath*, slip op. at 2; *Obrist*, slip op. at 3).

Obrist, the Board specifically recognized that if a jockey, although licensed, is being paid separately for exercise riding during a training regimen, not as part of a normal jockey contract, then that jockey is acting as an exercise rider for the purposes of workers' compensation.⁹²

The Board, the Department, and the Court of Appeals attempted to dismiss these rulings on the basis that subsequent regulations promulgated by the Department had eroded their rationale.⁹³ The Washington Supreme Court rejected these arguments, saying that the Court of Appeals erroneously believed that the rulings were founded on the Department's regulatory language.⁹⁴ It then pointed out that even if this interpretation was correct, the subsequent changes did not signify large enough alterations to nullify the previous holdings.⁹⁵

In order to reach these conclusions, the court first observed that the riders in *Heath* and *Obrist* were licensed jockeys who were injured while working to put horses through exercise programs.⁹⁶ The Board in those cases recognized that industry practice itself recognized the different "hats" of the riders, whatever their licensure.⁹⁷ The Court of Appeals relied on the regulatory language of former WAC 296-17-73105 to establish that jockeys were to be considered exercise riders only at a time "other than . . . the dates of a scheduled race meet."⁹⁸ Therefore, the Court of Appeals decided that workers' compensation law could never consider a jockey to be an exercise rider during the dates of a meet, regardless of whether the jockey was actually racing.⁹⁹ Because the race meet was technically in session at Playfair, Ochoa fell into the jockey classification and therefore could not receive benefits.¹⁰⁰ The Court of Appeals claimed that this new regulation replaced previous language distinguishing between "racing jockeys" and "jockeys and exercise boys;" because in the interpretation of the Court of Appeals the distinction intended by the statute was one of timing, not function, *Heath* and *Obrist* no longer applied.¹⁰¹

The Supreme Court rejected this reasoning, deciding instead that the regulatory language at issue was at best a supporting feature of those Board decisions.¹⁰² Instead, the court believed that *Heath* and *Obrist* rested on the function the jockeys performed rather than a formalistic

⁹² *Id.* at 942.

⁹³ *Id.*

⁹⁴ *Ochoa II*, 20 P.3d at 942.

⁹⁵ *Id.*

⁹⁶ *Id.* at 941-942.

⁹⁷ *Id.*

⁹⁸ *Ochoa I*, 999 P.2d at 636.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Ochoa II*, 20 P.3d at 942.

classification.¹⁰³ Because the jockeys performed the functions of exercise riders, then for purposes of workers' compensation the jockeys should be considered exercise riders and entitled to coverage.¹⁰⁴ The Supreme Court in *Ochoa*'s case decided that despite a slight change in regulatory language, *Heath* and *Obrist* still applied.¹⁰⁵ The key question in the case, therefore, revolved around the actual function of the rider at the time of the injury in question.¹⁰⁶

In addition to its characterization of the holdings in the two previous Board decisions, the Supreme Court dashed the notion that even if these subsequent regulatory changes had abrogated *Heath* and *Obrist* that the distinction between exercise riders and jockeys would be eliminated.¹⁰⁷ Current regulations still recognized a difference between the two.¹⁰⁸ In addition, the Department asked the court to decide that jockeys could never be exercise riders during the regular season, and given the absence of any limiting language in the statute, the court declined to do so.¹⁰⁹

The court also pointed out that workers' compensation represents a coherent and comprehensive statutory scheme. The Department cannot, with regard to jockeys, ignore previous rulings of the Washington Supreme Court applying to the system in general.¹¹⁰ The court has often recognized that employees may and often do "wear different hats throughout the course of their employment and their coverage . . . is often dependent on which hat they are wearing at the time of the accident."¹¹¹ A long line of cases established that a worker often performs more than one task and some may be covered while others may not.¹¹² Therefore, when determining whether a rider is covered by workers compensation, "[t]he Department must look to the rider's work status and the employment practices in the horse industry."¹¹³

The Washington Supreme Court essentially decided to reject a reading of the regulations and statutes that would have allowed the Department to refuse coverage to jockeys by simply claiming that a race meet was in session. Instead, the holding forces the Department to inquire as to exactly what function the jockey was performing, as well as what functions he may have been expected to perform by both the horse racing

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 943.

¹⁰⁷ *Ochoa II*, 20 P.3d at 942.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 942-943.

¹¹⁰ *Id.* at 943.

¹¹¹ *Id.* at 943 (referencing *Musson v. Dep't. of Labor and Industries*, 470 P.2d 183 (1970)).

¹¹² *Ochoa II*, 20 P.3d at 943.

¹¹³ *Id.*

industry and his employer.¹¹⁴ If the jockey functioned as an exercise rider, he or she should be covered as such and, if not, he or she should not be entitled to benefits under the jockey exclusion in RCW § 51.12.020(7).

C. *Application to Ochoa*

In the case at bar, the jockey entered into a verbal agreement with a trainer to exercise a horse for a flat fee.¹¹⁵ Although the jockey hoped to become a race jockey, they discussed nothing of the sort and the horse was not entered to race.¹¹⁶ In addition, his fee came directly from the trainer, not from winnings of any sort.¹¹⁷ Finally, while a race meet was technically in session, no races would be held on the course for several more hours.¹¹⁸ For these reasons, the Washington Supreme Court held that Ochoa was in fact an exercise rider at the time of his injury and was therefore entitled to workers compensation benefits.¹¹⁹

V. IMPLICATIONS

Ochoa offers important and interesting possibilities in the current battle over the coverage of jockeys in state workers' compensation schemes. In acknowledging that a place in mandatory workers' compensation schemes exists not only for jockeys but also generally for track personnel, including grooms and exercise riders, the ruling of the Washington Supreme Court may benefit jockeys in other states. Washington has answered one of the largest questions facing the jockeys: who pays?

Because of the fluid nature of jockey employment, the different parties who could potentially pay premiums continually fight over who should do so. Tracks, who employ huge numbers of people, do not want the high risk, and trainers struggle with the often irregular nature of cash flow to pay the premiums. The Washington system already allows for coverage for exercise riders, specifically designating trainers as employers for the purpose of workers' compensation.¹²⁰ Especially when a trainer regularly employs a jockey as a racing jockey, the situation seems similar to that of an exercise rider or a groom. *Ochoa* leaves the question unanswered, but it accepts without challenge the contention of the trial court that the trainer is the responsible party on whom premiums should be

¹¹⁴ *Id.*

¹¹⁵ *Ochoa II*, 20 P.3d at 943.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Ochoa II*, 20 P.3d at 943.

¹²⁰ WASH. REV. CODE § 51.16.210(3) (2009).

assessed. If exercise riders can obtain coverage, then jockeys have a strong argument that their situation is sufficiently similar to require equal treatment under the law. The statutory nature of workers compensation, however, may trend against such an argument, given that no mandate exists for the existence of the system as a whole except what the legislature chooses to create.

In addition, it is important to note that the final decision rested on the failure of the Department to communicate to the appropriate payor. In Ochoa's case, the Department had made the mistake of sending the notification to the track instead of his trainer.¹²¹ Both the Court of Appeals and the Supreme Court leave this issue open, leaving one to wonder how this notice requirement impacts such a highly fluid employment system as the jockey system. A jockey may ride for multiple trainers at once, often in an injured state. Jockeys move from one horse to another very rapidly and the sequence of an injury may be impossible to determine; therefore the Department must be certain to get the notice to the right trainer in a highly mobile population. Furthermore, jockeys may only be responsible for a horse for one hour at a time, and developing a premium schedule for such rapid movement may be difficult both to develop and administrate.

Currently most of those in the horse racing industry buy their own health insurance plans on the open private market. If the state offers workers' compensation coverage to these individuals, including jockeys and exercise riders, it opens a discussion about providing further benefits, such as comprehensive health insurance, since some kind of payment system can clearly be established. Trainers and tracks may therefore have further reason to resist the offering of coverage, seeing it as a floodgate of tremendous expenses for which they may be responsible.

VI. CONCLUSION

In *Ochoa*, the Washington Supreme Court reinforced the importance of the actual function of an employee at the time of injury in determining his or her eligibility for coverage. Although a statutory right, it is not one that the Department of Labor and Industries can interpret in a vacuum – the Court requires the Department to take into account industry practices and expectations. To this end, licensed jockeys are offered a small bite of the rights offered generally if they act as an exercise rider, and this possibility of coverage opens far-reaching implications that may help jockeys to eventually attain workers' compensation coverage.

¹²¹ *Ochoa II*, 20 P.3d at 941.

