# Ochoa, Richard

## COVERAGE AND EXCLUSIONS

### Jockeys

The worker employed as an exercise rider is not covered under the Act when preparing a horse for a race during a race meet. WAC 296-17-239, WAC 296-17-45001, WAC 296-17-73105. ***….In re Richard Ochoa*, BIIA Dec., 96 2423 (1997)** [dissent] [*Editor's Note:* The facts are almost identical to those described in *In re John Heath*, BIIA Dec., 68,742 (1985) and *In re Rick Obrist*, BIIA Dec., 68,775 (1985), but WAC 296-17-239 and new rules warrant a different result. *Reversed, Ochoa v. Department of Labor & Indus*., 143 Wn.2d 422 (2001).]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**
**STATE OF WASHINGTON**

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| **IN RE: RICHARD OCHOA** | **)** | **DOCKET NOS. 96 2423 & 96 2424** |
| | **)** | |
| **CLAIM NO. N-956186** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Richard Ochoa, by
Delay, Curran, Thompson & Pontarolo, P.S., per
Robert H. Thompson, Jr.

Employer, Horse Racing Industry of Washington, by
The Office of the Attorney General, per
Meredith Wright Morton, Assistant

Department of Labor and Industries, by
The Office of the Attorney General, per
Sheryl L. Gordon, Assistant

The claimant, Richard Ochoa, filed appeals with the Board of Industrial Insurance Appeals on May 1, 1996, from orders of the Department of Labor and Industries dated March 20, 1996 and March 21, 1996.

**In Docket No. 96 2423:** The order dated March 20, 1996, provided that:

> This claim coming on for further consideration pursuant to the Board of Industrial Insurance Appeals order of October 16, 1995;
>
> It is hereby ordered that the Department's order dated 07/22/94, is not final and binding as to the parties, is set aside, and held for naught. The injured worker's employer at the time of the alleged injury was Steve Quionez. The Department order of 07/22/94, was not communicated to Steve Quionez. Playfair Race Course was purported by the order to be the worker's employer at the time of injury. Playfair Race Course timely protested said order and said order was placed in abeyance as a matter of law.
>
> The order and notice of 03/22/95 is hereby set aside and held for naught.

**AFFIRMED.**

**In Docket No. 96 2424:** The order dated March 21, 1996, corrected and superseded Department orders dated February 17, 1995 and January 25, 1996, assessed an overpayment of

$11,550.64 for time loss compensation previously paid, and rejected the claim on the basis that the claimant was a licensed jockey participating in or preparing for race meets on behalf of employer, Steve Quionez, and the employer had not made provisions for coverage by means of elective adoption. **AFFIRMED.**

## PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on February 18, 1997, in which the order dated March 20, 1996, was affirmed. The order dated March 21, 1996, was reversed and that claim was remanded to the Department with direction to allow the claim for the industrial injury of September 26, 1993, on the basis that the claimant was an exercise rider and acting in the course of his employment when he was injured, void the assessment in the amount of $11,550.64, plus accrued interest and penalties, and provide benefits as required by the Industrial Insurance Act.

The Board has reviewed the evidentiary rulings and rulings on motions in the record of proceedings and in the Proposed Decision and Order and finds that no prejudicial error was committed and the rulings are affirmed and adopted.

## DECISION

Although there are two Board decisions designated as significant dealing with the precise issue raised by these appeals, we have granted review because since those decisions were made there have been changes in the Washington Administrative Code relating to the mandatory coverage of workers employed in the horse racing industry. At the time the decisions, *In re John Heath,* BIIA Dec., 68,742 (1985) and *In re Rick Obrist*, BIIA Dec., 68,775 (1985), were rendered the provisions of the WACs relating to coverage for jockeys and exercise riders were materially different than they were when Mr. Ochoa was injured on September 26, 1993. The

change in the regulations relating to coverage for jockeys and exercise riders constitutes an administrative clarification or definition of the exclusion of jockeys from mandatory coverage by RCW 51.12.020(7). The changes in WAC 296-17-739 and the adoption of WAC 296-17-45001 and WAC 296-17-73105 convince us that when he was injured Mr. Ochoa was employed as a jockey "preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW." Accordingly he is excluded from mandatory coverage by the provisions of RCW 51.12.020(7).

Review of the record and the jurisdictional facts establishes that the Department's order dated March 20, 1996, is correct in determining that the Department order dated July 7, 1994, was "not final and binding as to the parties." By reason of timely protests and requests for reconsideration filed by Playfair Race Course and Steve Quionez, the purported employers of Mr. Ochoa, the Department of Labor and Industries had jurisdiction to issue the order dated March 21, 1996, rejecting the claim.

The facts surrounding Mr. Ochoa's injury are straight forward and almost identical to the facts in *Heath* and *Obrist*. Mr. Ochoa was employed by a "trainer and/or owner," during a "race meet," while licensed as a jockey, to exercise a horse on a day when the horse was not scheduled to race. On September 26, 1993, Mr. Ochoa was practicing starts on a horse trained by Steve Quionez. He was injured when his right leg was pinned against the starting gate. The injury occurred when Mr. Ochoa was performing duties that were of a type performed by both exercise riders and jockeys, but Mr. Ochoa was being paid by Mr. Quionez as an exercise rider. The injury occurred "during the dates of a scheduled race meet" at Playfair Race Course. WAC 296-17-73105, provides that, "A meet, as used in this section, shall be for the duration of the racing season as set for each track by the Washington state horse racing commission."

At the time *Heath* and *Obrist* were decided, "[j]ockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW" were excluded from mandatory coverage by RCW 51.12.020(7). Although RCW 51.12.020 has been amended subsequently, the section denying mandatory coverage to jockeys remains the same. Effective January 1, 1982, mandatory coverage for other workers employed in horse racing related activities was provided under Classification 66-9, WAC 296-17-731. This WAC provided a classification for:

> Stables, stablemen and exercise boys. Riding academies or clubs **Jockeys**, horseshoeing and horse training, **N.O.C.**

(Emphasis added).

Subsequently WAC 296-17-731 was amended twice. Effective January 1, 1986, the classification number was changed to 6609. A further amendment was filed on May 31, 1988, that struck the previous provisions and provided:

> Parimutuel horse race tracks with an average daily attendance of three thousand or less. This classification is limited in scope to employees of trainers who come under the jurisdiction of the Washington horse racing commission and who become licensed subject to the Washington horse racing commission's rules and regulations. This classification covers all on or off track employments of employers subject to this classification including off season or prerace training activities. This classification includes such employments as assistant trainers, grooms, stable hands, and exercise riders. For purposes of this rule, **jockeys will be considered exercise riders when employed by a trainer outside of scheduled race meets**. A meet, as used in this section, shall be for the duration of the racing season as set for each track by the Washington state horse racing commission.

WAC 296-17-73102, Classification 6611. (Emphasis added.)

After August 20, 1989, and prior to Mr. Ochoa's injury, WAC 296-17-731 was repealed and the Classification changed to 6614, WAC 296-17-73105. This WAC provides:

> Parimutuel horse racing: All other employees, N.O.C. - Major tracks

> This classification is limited in scope to employees of trainers and/or owners who come under the jurisdiction of the Washington horse racing commission, and who become licensed subject to the Washington horse racing commission's rules or regulations. This classification covers all on or off track employments of employers subject to this classification, such as: Assistant trainers, pony riders, and exercise riders; but excludes grooms which are to be reported separately in classification 6615. **For purposes of this rule, jockeys will be considered exercise riders when employed by a trainer and/or owner at a time other than during the dates of a scheduled race meet**. A meet, as used in this section, shall be for the duration of the racing season as set for each track by the Washington state horse racing commission.

(Emphasis added.)

The amended WAC no longer specifically includes jockeys within this classification, the only mention of jockeys describes when they will be considered exercise riders so that they can be considered to be subject to mandatory coverage within this classification. Because the WAC describes when jockeys can be considered exercise riders, it also determines when they are **not** exercise riders. Given the wording of WAC 296-17-73105, licensed jockeys would not be "considered exercise riders when employed by a trainer and/or owner at a time . . . during the dates of a scheduled race meet." The language added to the WAC gives a specific definition to the terms in RCW 51.12.020(7), and constitutes an administrative determination by the Department of Labor and Industries of when a jockey is "preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW." At the time Mr. Ochoa was injured he was licensed as a jockey by the Washington horse racing commission and he was injured while employed by a trainer and/or owner during a licensed race meet. In light of the controlling portion of WAC 296-17-73105 that excludes a jockey's activities as an exercise rider during a race meet, Mr. Ochoa would only be covered if he had elected coverage under Classification 6708, WAC 296-17-739.

Prior to 1988, under WAC 296-17-739, coverage in Classification 6708 was provided for: "Jockeys, **racing.**" (Emphasis added.) In an amendment to WAC 296-17-739, effective January 1, 1988, the reference to "racing" was removed. This change was coupled with the elimination of any reference to jockeys and N.O.C. from WAC 296-17-731 and WAC 296-17-73105. During 1988, WAC 296-17-731 was amended to eliminate any reference to jockeys other than in an exclusionary sense by providing specifically that: "For purposes of this rule, **jockeys will be considered exercise riders when employed by a trainer outside of scheduled race meets**." (Emphasis added.) It is undisputed that Mr. Ochoa was injured while exercising a horse while he was employed by an owner/trainer during a scheduled race meet and while he was licensed as a jockey at that race meet.

The Department of Labor and Industries has also adopted WAC 296-17-45001, "**Special horse racing classification interpretation.**" This WAC provides that, "For the purposes of administering the parimutuel horse racing classifications 6614 through 6617 the terms used . . . shall be given the same meanings as those contained in chapter 67.16 RCW 'Horse Racing' or Title 260 WAC 'Horse Racing Commission.'"

Michael McLaughlin, a licensing field auditor for the Horse Racing Commission, testified that the Commission rules forbids dual licensing of exercise riders and jockeys. 9/24/96 Tr. at 32. A jockey can only be classified as an exercise rider under the Horse Racing Commission rules if they obtain an exercise license and surrender their jockey license. 9/24/96 Tr. at 43. Although the duties performed by jockeys and exercise riders differ, Mr. McLaughlin testified that, under the Horse Racing Commission rules, Mr. Ochoa's licensing status determined his work status, regardless of the activities he was engaged in at the time of injury. 9/24/96 Tr. at 44-46. Under the rules of the Horse Racing Commission Mr. Ochoa was not engaged in employment covered under

the classification for parimutuel horse racing that provided mandatory coverage, Classification 6614.

The changes in the WAC relating to mandatory coverage of employees of owners and/or trainers engaged in parimutuel horse racing constitutes a change or refinement in the definition of when a jockey is engaged in preparing a horse for a race meet. The Board is bound by this definition in light of the adoption of WAC 296-17-73105. We agree with the Department of Labor and Industries that Mr. Ochoa was a jockey at the time he was injured and was **not covered** under the mandatory provisions of the act. Because of the changes in the Washington Administrative Code prior to Mr. Ochoa's injury he cannot be considered an exercise rider for the purpose of providing mandatory coverage. The analysis used in *Heath* and *Obrist* no longer controls his classification as a worker.

Consideration of the Proposed Decision and Order, the Petition for Review filed thereto on behalf of the Department of Labor and Industries, and a careful review of the entire record before us, leads us to the conclusion that the Department of Labor and Industries orders dated March 20, 1996 and March 21, 1996, are correct and must be affirmed. This claim was appropriately rejected as Mr. Ochoa was a jockey when he was injured and not subject to mandatory coverage.

## FINDINGS OF FACT

1. On February 7, 1994, the claimant, Richard Ochoa, filed application for benefits alleging an industrial injury occurring on September 26, 1993, during the course of his employment with the Horse Racing Industry of Washington/Steven Quionez. On February 25, 1994, the Department issued an order rejecting the claim because the claimant was a jockey participating in or preparing for race meets licensed by the Washington State Horse Racing Commission, and the employer had not made provision for coverage by means of elective adoption.

   On April 26, 1994, the claimant filed a protest and request for reconsideration of the Department order dated February 25, 1994. On July 22, 1994, the Department issued an order determining the injured

worker was employed in a job covered by industrial insurance and set aside the Department order dated February 25, 1994. On August 15, 1994, the employer filed a protest and request for reconsideration of the Department order dated July 22, 1994.

On February 2, 1995, the Department issued an order allowing the claim and paying benefits. On February 9, 1995, the employer filed a protest and request for reconsideration of the Department order dated February 2, 1995. On February 13, 1995, the Department issued an order holding the Department order dated February 2, 1995 in abeyance. On February 17, 1995, the Department issued an order assessing on overpayment in the amount of $11,550.64 for time loss compensation previously paid and rejected the claim. On March 6, 1995, the claimant filed a protest and request for reconsideration of the Department order dated February 17, 1995. On March 22, 1995, the Department issued an order determining the claimant was a jockey at the time of injury and rejected the claim. On March 29, 1995, the Department issued an order affirming the provisions of the Department order dated February 17, 1995.

On April 13, 1995, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated March 29, 1995. On October 16, 1995, the Board issued an Order on Agreement of Parties.

On November 14, 1995, the Department issued a ministerial order reversing the Department order dated March 29, 1995, and placing the overpayment order of February 17, 1995, in abeyance.

On January 25, 1996, the Department issued an order setting aside the order dated February 17, 1995, and holding the claim open for authorized treatment and action as indicated.

On March 20, 1996, the Department issued an order providing that:

> This claim coming on for further consideration pursuant to the Board of Industrial Insurance Appeals order of October 16, 1995;
>
> It is hereby ordered that the Department's order dated 07/22/94, is not final and binding as to the parties, is set aside, and held for naught. The injured worker's employer at the time of the alleged injury was Steve Quionez. The Department order of 07/22/94, was not communicated to Steve Quionez. Playfair Race Course was purported by the order to be the worker's employer at the time of injury. Playfair Race Course timely protested said order and said order was placed in abeyance as a matter of law.

The order and notice of 03/22/95 is hereby set aside and held for naught.

On March 21, 1996, the Department issued an order correcting and superseding Department orders dated February 17, 1995, and January 25, 1996, assessed an overpayment of $11,550.64 for time loss compensation previously paid, and rejected the claim on the basis that the claimant was a licensed jockey participating in or preparing for race meets on behalf of employer, Steve Quionez, and the employer had not made provisions for coverage by means of elective adoption.

On May 1, 1996, the claimant filed Notices of Appeal with the Board of Industrial Insurance Appeals from the Department orders dated March 20, 1996 and March 21, 1996. On May 28, 1996, the Board issued orders granting the appeals. The Board designated the appeal from the March 20, 1996 order as Docket No. 96 2423, and designated the appeal from the March 21, 1996 order as Docket No. 96 2424.

2. On September 26, 1993, the claimant, Richard Ochoa, while in the course of his employment with Steve Quionez, sustained an injury when a horse fell in a starting gate at Playfair Race Course and crushed his right leg.

3. On September 26, 1993, at the time of his injury claimant was employed by owner/ trainer Steven Quionez to exercise a horse, during a scheduled race meet set by the Washington Horse Racing Commission, and was a jockey licensed by the Washington Horse Racing Commission.

4. On September 26, 1993, when injured, the claimant, as a jockey, was preparing a horse for a race meet licensed by the Washington Horse Racing Commission pursuant to chapter 67.16 RCW.

5. As a result of the injury of September 26, 1993, the claimant required medical treatment.

6. The licensing framework enacted by chapter 67.16 RCW "Horse Racing" and by Title 260 WAC " Horse Racing Commission", licenses 69 different occupations in the horse racing industry. The license of a jockey is exclusive and a jockey may not be licensed as an exercise rider.

7. On September 26, 1993, the horse Mr. Ochoa was riding was not scheduled to race that day or evening, but did race subsequently during the race meet.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.

2. On September 26, 1993, Mr. Ochoa suffered an injury while in the course of employment with Mr. Steven Quionez, an owner/trainer, while employed as a jockey.

3. On September 26, 1993, Mr. Ochoa was preparing a horse for a race meet licensed by the Washington Horse Racing Commission and was involved in a "race meet" as defined by RCW 67.16.010 and by WAC 296-17-73105.

4. Mr. Ochoa, a licensed jockey, sustained an injury on September 26, 1993, while employed by an owner/trainer to prepare a horse for a race meet licensed by the Washington horse racing commission and is excluded from mandatory workers' compensation coverage under the provisions of RCW 51.12.020(7).

5. In the matter assigned Docket No. 96 2323, the Department order dated May 20, 1996, provided that:

> This claim coming on for further consideration pursuant to the Board of Industrial Insurance Appeals order of October 16, 1995;
>
> It is hereby ordered that the Department's order dated 07/22/94, is not final and binding as to the parties, is set aside, and held for naught. The injured worker's employer at the time of the alleged injury was Steve Quionez. The Department order of 07/22/94, was not communicated to Steve Quionez. Playfair Race Course was purported by the order to be the worker's employer at the time of injury. Playfair Race Course timely protested said order and said order was placed in abeyance as a matter of law.
>
> The order and notice of 03/22/95 is hereby set aside and held for naught.

This order is correct and is affirmed.

6. In the matter assigned Docket No. 96 2424, the Department order dated March 21, 1996, that corrected and superseded Department orders dated February 17, 1995 and January 25, 1996, assessed an overpayment of $11,550.64 for time loss compensation previously paid, and rejected the claim on the basis that the claimant was a licensed jockey participating in or preparing for race meets on behalf of employer, Steve Quionez, and the employer had not made provisions for coverage by means of elective adoption, is correct and is affirmed.

It is so **ORDERED.**

Dated this 21st day of August, 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member

**DISSENT**

I must dissent from the Board's determination that we should abandon our **significant decisions**, *In re John Heath,* BIIA Dec., 68,742 (1985) and *In re Rick Obrist*, BIIA Dec., 68,775 (1985). Although the Legislature has amended RCW 51.12.020 on a number of occasions since we rendered our decisions in *Heath* and *Obrist*, no changes have been made to section 7, the section of the statute that excludes jockeys from mandatory coverage. While the changes made in the Washington Administrative Code effect the classification of jockeys they **do not change** the statute excluding jockeys from coverage. When Mr. Ochoa was injured he was employed as an "exercise rider" as were Mr. Heath and Mr. Obrist. While all were licensed jockeys riding at meets that were held pursuant to the authority of the Washington Horse Racing Commission, at the time they were injured they were employed as "exercise riders." Careful consideration of the Proposed Decision and Order, the Petition for Review and the record convinces me that our industrial appeals judge correctly determined that Mr. Ochoa was an "exercise rider" when he was injured, that he was not excluded from mandatory coverage by the provisions of RCW 51.12.020(7), and that he is entitled to benefits as an injured worker.

The record fully supports the determination made by our industrial appeals judge that Mr. Ochoa was a worker covered under the mandatory provisions of Title 51 RCW at the time he was injured while employed as an "exercise rider" by Steve Quionez on September 26, 1993. The decisions in *Heath* and *Obrist* were correct and should remain significant decisions that this Board should follow. I agree wholeheartedly with the Proposed Decision and Order and would adopt the findings, conclusion and order contained therein. The claim should be allowed in order to provide Mr. Ochoa the benefits that he is entitled to, and that have been delayed for too long.

Dated this 21st day of August, 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
FRANK E. FENNERTY, JR. Member