BLUE RIBBON PANEL ON JOCKEY WORKERS' COMPENSATION

REPORT TO GOVERNOR ERNIE FLETCHER

RECOMMENDATIONS RELATING TO WORKERS' COMPENSATION FOR LICENSED JOCKEYS, APPRENTICE JOCKEYS AND EXERCISE RIDERS

CREATION OF A NEW SYSTEM

Kentucky
UNBRIDLED SPIRIT

HISTORY AND RECOMMENDATIONS

CREATION OF A NEW SYSTEM

INTRODUCTION

Pursuant to KRS Chapter 342 all employers in the Commonwealth must provide workers compensation insurance for it employees. However, in the Commonwealth of Kentucky's signature industry, the horse industry, certain workers are classified as "independent contractors" and lack adequate protection from work place injuries that can range from minor cuts and scratches to an employee's death. In an effort to rectify these problems, on February 15, 2005, Governor Ernie Fletcher through Executive Order 2005-164 created a Blue Ribbon Panel to thoroughly study the issue of workers' compensation for jockeys, apprentice jockeys and exercise riders in the Commonwealth of Kentucky.

MEMBERS OF PANEL

Senator Gary Tapp – Kentucky State Senate

Representative Jim Bruce – Kentucky State House of Representatives

Mr. Tom Ludt – Kentucky Horse Racing Authority

Mr. David Switzer – Executive Director Kentucky Thoroughbred Association

Ms. Susan Bunning – President Kentucky Horsemen's Benevolent & Protective Association

Mr. Darrel Haire – Jockeys' Guild

Mr. Harvie Wilkinson – Vice President Keeneland Association

Mr. Steve Sexton – President Churchill Downs

Mr. Jim Gallagher – Executive Director Kentucky Horse Racing Authority

Secretary LaJuana Wilcher – Environmental and Public Protection Cabinet

Mr. William P. Emrick – Executive Director Office of Workers' Claims

HISTORY

Soon after the members of the Governor's Blue Ribbon Panel on Jockey's Workers Compensation (herein after Panel) were selected and finalized in early summer 2005, the

Panel began to meet and discuss the various complex issues and competing interests that surrounded the group's objective. During the Panel's various meetings and forums, groups both from within the industry in the Commonwealth as well as groups outside the industry came and presented concerns, suggestions, solutions and alternatives as to ways the Commonwealth should address this situation. Groups that made presentations to the Panel included the Thoroughbred Owners and Breeders Association, Horsemen's Benevolent & Protective Association, Jockeys' Guild, various independent jockeys, Kentucky Thoroughbred Association, National Thoroughbred Racing Association, Kentucky Harness Horsemen Association, Kentucky Employers Mutual Insurance (KEMI), Kentucky Quarterhorse Association, various other insurance companies and representatives, and members of the general public. The meetings took place on June 27, 2005, July 14, 2005, July 20, 2005, August 15, 2005, and September 1, 2005. These meetings were held in accordance with the Kentucky open meeting laws pursuant to KRS 61.805-850.

RECOMMENDATIONS

Statement of General Provisions

On September 1, 2005, the Panel voted unanimously to recommend a multi-step solution to the current problem of providing workers compensation to jockeys, apprentice jockeys and exercise riders. While details of the recommendation are set out in more detail later on in this proposal, the Panel's recommendations are as follows:

1. All exercise riders in the Commonwealth of Kentucky, for purposes of workers' compensation, shall be deemed employees of the trainers who hire them to perform services.
2. A Fund shall be set up to provide workers' compensation benefits to jockeys and apprentice jockeys. Those individuals would be deemed, for purposes of workers' compensation only, employees of the fund only while mounting, riding, or dismounting a horse.

Specific provisions

Exercise riders

In the Commonwealth of Kentucky a large number of the individuals who do not have coverage, but at the same time are an integral part of the horse racing industry, are "exercise riders." Many of these individuals are classified as "independent contractors" and thus are not required by law to be covered by the workers' compensation policy of the individual or business who hires them.

The Panel has come to the conclusion that based upon the important role that these individuals play in the horse racing industry, and based upon the desire for the Commonwealth to maintain the title "Horse Capital of the World," it is good public policy that these individuals be provided protection from work place injuries under the current Kentucky Workers' Compensation Act. However before this can happen, other changes must first be made to the current system. First and foremost, so that a system may be set up, it is reasonable and necessary that exercise riders be an identifiable class. Based upon this need, it is the recommendation of the Panel that all exercise riders in the Commonwealth of Kentucky be licensed by the Kentucky Horse Racing Authority (KHRA), as are most other individuals who participate in the industry. This requirement should

not cause an undue hardship as many individuals who perform these services are currently licensed under the classification of "stable employees;" however, from now on any individual who wishes to work as an exercise rider in the Commonwealth of Kentucky must have a separate exercise rider license issued by the KHRA.

If this recommendation by the Panel is to be written into legislation for consideration by the 2006 General Assembly, the regulatory licensing requirements for exercise riders need to be put into place by emergency regulation by December 1, 2005. According the KHRA, all licensees in the horse industry must annually renew their licenses. Applications for the 2006 year will be accepted beginning on December 1, 2005.

Once exercise riders are licensed, certain provisions of the Kentucky Workers' Compensation Act, KRS Chapter 342, must be modified. First and foremost, the term "exercise rider" must be defined in KRS 342.0011. Then in order to provide for coverage, a new section of KRS 342.640 (Coverage of Employees) must be created. As mentioned previously, by unanimous vote, the Panel recommends that all exercise riders be considered employees of the trainers who hire them for the purpose of workers' compensation. This new section, which would by law delineate exercise riders as employees of the trainers who hire them for workers' compensation purposes, is necessary to overcome and override the previous statutory and case law precedent ruling otherwise. This is not a novel legal concept as the current Act has a similar provision for newspaper delivery persons. While they may be considered independent contractors under current case law, newspaper delivery personnel, by statute, are considered for workers' compensation purposes employees of the publisher. This law would require all trainers in the Commonwealth of Kentucky to provide workers' compensation benefits to the individuals who exercise their horses. The new provision of KRS 342.640 should read as follows:

> **Coverage of employees.**
> The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650: . . .
> (4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury; and
> (5) Subject to the provisions in subsection (4) of this section, every person regularly selling or distributing newspapers on the street or to customers at their homes or places of business. For the purposes of this chapter, the person shall be deemed an employee of an independent news agency for whom he is selling or distributing newspapers, or, in the absence of an independent agency, of each publisher whose newspapers he sells or distributes.
> **(6) Subject to the provisions of subsection (4) of this section, every person performing the duties of an exercise rider who holds a license with the Kentucky Racing Authority. For the purpose of this chapter, the exercise rider shall be deemed an employee of the trainer who hires the rider to perform services.**

Jockeys & Apprentice Jockeys

After much thought and discussion, the Panel agreed by unanimous vote that the preferred method by which to solve the workers' compensation problem for jockeys and apprentice jockeys was the creation of a non-profit fund which would purchase a blanket workers' compensation policy covering these individuals. The Panel has suggested that this fund be similar to the fund in place in New York; however, the fund in Kentucky would be more limited in scope. This fund,

which would be known as the Kentucky Injured Jockeys Compensation Fund, (hereinafter Fund) would provide for jockeys and apprentice jockeys in the event of a work-related injury, and further advance the goal of maintaining the Commonwealth of Kentucky as the "Horse Capital of the World."

Funding

Another mandate by Governor Fletcher's executive order to the Panel was to determine a method by which to fund any proposal. After much debate, by unanimous vote, the Panel recommends that the Fund be financed by the following mechanisms:

- 1/3rd of the premium shall be apportioned to the licensed racing facility with each facility's liability proportionate to the percentage of number of starts compared to the total starts.

- 1/3rd of the premium shall be apportioned to the owners to be paid by a per start fee in amount to be determined by a review the previous year starts.

- 1/3rd of the premium shall be paid from of 1% of the owners' share of the winning purse.

The Panel also recommends that to reduce the added financial strain on owners that a regulation change shall be made to 810 KAR 1:009 Section 8. The amendment would reduce the fee a jockey received from a winning mount from 10% to 9%.

Alternate Funding proposals that did not receive unanimous support

In addition to the unanimously passed funding mechanism, there were several other funding proposals that were discussed but not adopted by the Panel.

1. Handle: There was a recommendation by several members of the Panel that part of the funding for the Fund to come from a ¼ of 1% increase in the amount taken from the instate Kentucky live handle. The funding breakdown would be changed to some combination of the following funding sources:

    a. premium from tracks
    b. from owners in start fees
    c. from 1% of owner's purse
    d. from ¼ of 1% increase in handle

2. Unclaimed tickets: Another recommendation by several members of the Panel was that part of the funding for this fund come from a portion of the money from unclaimed tickets. Currently this money is allocated to the Kentucky Health and Welfare Fund.

Proposed Legislation Creating Kentucky Injured Jockey Compensation Fund

AN ACT relating to workers' compensation injury fund for jockeys and apprentice jockeys.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

Legislative findings and declarations.

The General Assembly hereby finds and declares that the establishment of the Kentucky Jockey Injury Compensation Fund, Inc., is necessary in order to protect licensed jockeys and apprentice jockeys who work in the Commonwealth of Kentucky. The proceeds of this fund will be utilized to purchase workers' compensation insurance for licensed jockeys and apprentice jockeys who suffer work-related injuries while mounting, riding, or dismounting a horse.

SECTION 2. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 through 8 of this Act:

(1) "Jockey" means a rider licensed as a jockey by the Kentucky Horse Racing Authority during the act of mounting, riding, or dismounting a horse.

(2) "Jockey apprentice" also herein "apprentice jockey" means a rider licensed as a jockey apprentice by the Kentucky Horse Racing Authority during the act of mounting, riding, or dismounting a horse.

(3) "Exercise rider" means a rider licensed as an exercise rider by the Kentucky Horse Racing Authority.

(5) "Authority" means the Kentucky Horse Racing Authority.

(6) "Board" means the board of directors of the Kentucky Jockey Injury Compensation Fund, Inc.

(7) "Fund" means the Kentucky Jockey Injury Compensation Fund, Inc.

SECTION 3. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

Creation of Kentucky Jockey Injury Compensation Fund, Inc.

(1) There is created a non-profit corporation to be known as The Kentucky Jockey Injury Compensation Fund, Inc. and referred to in this Act as "the fund."

(2) To the extent that the provisions of the non-profit corporation law, as contained in KRS Chapter 273, do not conflict with the provisions of this Act, or the plan of operation of the fund hereunder, the non-profit corporation law shall apply to the fund.

(3) If an applicable provision of this Act or the plan of operation of the fund hereunder relates to a matter embraced in a provision of the non-profit corporation law but is not in conflict therewith, both provisions shall apply.

(4) The fund shall perform its functions under the plan of operation established and approved under this Act and shall exercise its powers through a board of directors established under this Act.

SECTION 4. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

(1) Board of directors.

(a) The fund shall be governed by a board of directors. The board of directors shall exercise complete jurisdiction over the fund with the oversight of the Kentucky Horse Racing Authority as specified in this Act.

(b) The board of directors shall be appointed by the Governor.

(2) The board of directors shall be composed of:

(a) The chairman of the Kentucky Horse Racing Authority or his or her designee;

(b) Two representatives of horsemen's organizations;
(c) Two representatives of jockey organizations;
(d) Two representatives of the racing associations, and
(e) The executive directors, or their designees, of the Office of Insurance and Office of Workers' Claims serving as ex officio members.

(3) The Governor shall make the initial appointment to the board as follows: two (2) members shall be appointed to a term that expires December 31, 2006, two (2) members shall be appointed to a term that expires December 31, 2007, and two (2) members shall be appointed to a term that expires December 31, 2008. Subsequent members shall serve terms of four (4) years and shall serve until their successors are appointed and qualified.

(4) Senate confirmation of the Governor's appointees is required in accordance with the provisions of KRS 11.160. If the Senate does not confirm a member, the Governor, within thirty (30) days of the rejection, shall make another appointment. That member shall serve the remainder of the term in question and shall also be subject to the confirmation should the term extend to the next session, or a special session which includes this subject on the call, whichever occurs earlier.

(5) Any vacancy which occurs prior to the expiration of a term shall be filled by the governor in the same manner as the initial appointment was made and the new appointee shall serve only the remainder of the unexpired term.

(6) Members of the board of directors, shall serve without compensation for their service, but shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties.

(7) Members of the board of directors, except as otherwise provided by law, may engage in private employment, or in a profession or business.

(8) Election of Officers – Quorum – Ex officio members of board.
(a) The board shall elect a chair and other officers it deems necessary to execute its powers and functions.
(b) Four (4) members shall constitute a quorum. The affirmative vote of a majority of the members present of the board of directors shall be necessary for the transaction of any business or the exercise of any power or function of the Fund. The fund may delegate to one or more of its board members such powers and duties as it may deem proper.
(c) The board shall meet at least quarterly and at such other times as the chair may determine. The board shall also meet upon the call of four (4) or more of the members of the board.
(d) A board member may be removed for cause by the board. Cause shall include, but not be limited to, incompetence or misconduct defined in policies or bylaws adopted by the board.

SECTION 5. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

(1) The proceeds of the fund shall be used to purchase workers' compensation insurance on a blanket basis for the benefit of all jockeys and apprentice jockeys licensed and approved by the Kentucky Horse Racing Authority; to pay for annual physical examinations for all jockeys and apprentice jockeys licensed and approved by the Kentucky Horse Racing Authority; and, to pay the fund's other necessary operating expenses.

(2) Jockeys and apprentice jockeys shall be considered employees of this fund only for purposes of the Workers' Compensation Act as set out in Kentucky Revised Statutes Chapter 342 and only while mounting, riding, and/or dismounting a horse.

(3) Every jockey and apprentice jockey receiving insurance coverage pursuant to this statute shall be required to submit to an annual physical examination to be given by a physician or pool of physicians designated by the fund. The fund shall bear the cost of each examination. Any failure on the part of a jockey or apprentice jockey to undergo this physical examination shall render that jockey or apprentice jockey disqualified for coverage that year.

(4) The fund shall purchase workers' compensation insurance from an insurance carrier authorized, or meeting the condition for export, pursuant to KRS Chapter 304.

(5) The fund shall be exempt from the requirements of KRS Chapter 45A when purchasing workers' compensation insurance. However, the fund shall adopt procedures for obtaining bid proposals on a yearly basis for workers' compensation insurance to ensure that it obtains the most appropriate and cost efficient workers' compensation insurance policy.

SECTION 6. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

(1) In order to pay the costs of the workers' compensation insurance required by Section 5 and to carry out its duties and pay for its liabilities under KRS Chapter 342, the Kentucky Jockey Injury Compensation Fund, Inc. shall annually:

(a) Ascertain and project the total funding necessary for purchasing workers' compensation insurance for its employees;

(b) Assess 1/3 of the premium against the licensed racing facilities with each facility's liability proportionate to the percentage of number of starts compared to the total starts; and

(c) Assess 1/3 of the premium against the owners whose horses ride in sanctioned events to be paid by a per start fee in an amount to be determined by a review of the previous year starts; and

(d) Assess 1/3rd of the premium by payment of 1% of the owners' share of the winning purse;

(e) Make recommendations for any additional funding mechanisms necessary to perform its functions as prescribed by this Act.

(f) Not withstanding KRS342.420, a reduction in the percentage of winnings a jockey or apprentice jockey receives by regulations shall be permissible and not be deemed an employee contribution.

(2) The Kentucky Horse Racing Authority shall be responsible for the collection of the sums set forth by the fund from each track.

(3) (a) Should the fund determine that the amount which has been collected in the manner prescribed is inadequate to pay the annual costs required by this Act, it shall notify the Kentucky Horse Racing Authority within ten (10) days of this knowledge of the deficiency and the amount of the additional sum or sums necessary to rectify the deficiency.

(b) In the case of deficiency of the fund, the Kentucky Horse Racing Authority shall recommend additional funding mechanisms necessary to correct the deficiency.

(4) All amounts collected by the Kentucky Horse Racing Authority pursuant to this Act shall be transferred to the fund created under this Act and shall be used by the fund to purchase workers' compensation insurance for jockeys and apprentice

jockeys, to pay for any of its liabilities under KRS Chapter 342, the Workers' Compensation Act and to administer the workers' compensation program for jockeys and apprentice jockeys required by this Act and KRS Chapter 342, the Workers' Compensation Act.

SECTION 7. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

(1) The fund shall submit to the Kentucky Horse Racing Authority a plan of operation and any amendments to the plan of operation necessary or suitable to assure the fair, reasonable and equitable administration of the fund.

(2) Amendments relating to the assessment of the costs of insurance for the subsequent year, other than deficiency assessments, shall be submitted to the board on or before November fifteenth of each year.

(3) The plan of operation and any amendments shall become effective upon approval in writing by the Kentucky Horse Racing Authority.

(4) The plan of operation shall constitute the bylaws of the fund and shall, in addition to requirements enumerated elsewhere in this Act:

(a) Establish procedures for handling the assets of the fund.

(b) Establish regular places and times for meetings of the board of directors.

(c) Establish procedures for records to be kept of all financial transactions of the fund, its agents, and the board of directors.

(d) Establish a formula for determining the appropriate amount of the assessments under this Act.

(e) Contain such additional provisions as the board or fund may deem necessary or proper for the execution of the powers and duties of the fund.

SECTION 8. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

(1) The fund shall be subject to examination and regulation by the Kentucky Horse Racing Authority.

(2) The fund shall submit to the board not later than May first of each year a financial report for the preceding calendar year in a form approved by the Kentucky Horse Racing Authority and a report of its activities during the preceding calendar year.

(3) The fund shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions, except taxes levied on real property.

(4) The fund and the Kentucky Horse Racing Authority shall have such power as is necessary to implement the provisions of this Act, and the Kentucky Horse Racing Authority shall have the authority to promulgate administrative regulations on behalf of the fund to implement the provisions of this Act.

SECTION 9. KRS 230.310 IS AMENDED TO READ AS FOLLOWS:

Every person not required to be licensed under KRS 230.300 who desires to participate in horse racing in the Commonwealth as a horse owner, trainer, jockey, apprentice jockey, ***exercise rider***, agent, stable employee, racing official, association employee, or employee of a person or concern contracting with the association to provide a service or commodity and which requires their presence on association grounds during a race meeting, or veterinarian, farrier, horse dentist, or supplier of food, tack, medication, or horse feed, shall first apply to the authority for a license to participate in the activity on association grounds during a race meeting. No person required to be licensed by this section may participate in any activity required to be licensed on association grounds during a race meeting without a valid license therefore. An applicant for a license shall submit to the authority fingerprints as may be required and other information necessary and

reasonable for processing a license application. The authority is authorized to exchange fingerprint data with the Kentucky State Police and the Federal Bureau of Investigation in order to conduct a criminal history background check of an applicant. The authority may issue a license if it finds the financial responsibility, age, experience, reputation, competence, and general fitness of the applicant to perform the activity permitted by a license, are consistent with the best interest of racing and the maintenance of the honesty, integrity, and high quality thereof. A license shall be issued for the calendar year in which it is issued and may be renewed by the authority. The license shall be valid at all horse race meetings in the Commonwealth during the period for which it is issued unless suspended or revoked under the administrative regulations promulgated by the authority under this chapter. With respect to horse owners and trainers, the authority may promulgate administrative regulations to facilitate and promote uniform, reciprocal licensing with other states.

SECTION 10. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

Whereas it is imperative to immediately provide compensation for work-related injuries for jockeys and apprentice jockeys an emergency is declared to exist, and this Act shall take effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

SECTION 11. A NEW SECTION OF KRS CHAPTER 230 IS CREATED TO READ AS FOLLOWS:

Exclusiveness of liability:

(1) When the fund, employer, secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law. Statutory contribution to fund shall entitle contributor to the same exclusive liability protection as if they were the employer of the covered individuals
(2) The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner.
(3) The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier and or to parties legally required to contribute to the funds premium, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.