

PETITION FOR RULEMAKING

Pursuant to 29 U.S.C. § 655(b) and 29 CFR §§ 1910.3 and 1911.3, People for the Ethical Treatment of Animals (PETA) petitions the Occupational Safety and Health Administration (OSHA) to propose, seek public comment on, and ultimately promulgate an occupational safety and health standard requiring employers in the horse-racing industry to disclose to riders in their employ all medications recently administered to horses prior to racing, training, or exercising. In the alternative, PETA petitions OSHA to issue enforcement guidance explaining that failing to disclose to riders medications administered to horses either for the purpose of or with the effect of masking injury is a violation of the Occupational Safety and Health Act's ("OSH" Act) General Duty Clause.¹

PETA's Interest in Disclosure of Drug Administration in Horse Racing

Prohibiting employers from using drugs that may have the effect of concealing horses' injuries is both safer for riders and more humane for animals. PETA is the largest animal rights organization in the world, with more than three-million members and supporters. A central tenet of its mission is to protect animals used in sports and other entertainment from abuse and neglect. As such, PETA has a clear interest in the administration of drugs to horses, which can have deadly consequences for the animals.

Summary of the Petition

In horse racing today, horses suffer catastrophic breakdowns—career-threatening injuries during a run—in alarming numbers. Between 2009 and 2012, approximately 3,600 horses died racing or training at state-regulated tracks. At least twenty-four horses a week die or are euthanized following injury during races at racetracks around the country.

Not only are breakdowns a serious animal-welfare concern, they pose a grave risk of life-threatening injury for the jockeys and exercise riders² who ride these 1,000-pound animals. The most common injuries sustained by horses in races are fractures of front legs, causing the horses to fall. Riders have been tossed in the air, flung to the ground, smashed into obstacles, and crushed by injured horses—suffering broken bones, lacerated organs, collapsed lungs, compressed hearts, permanent paralysis, and even death. Since 1940, there have been 154 fatalities at U.S. race tracks, including thirteen fatalities since 2000. A seventeen-year-old rider was thrown from his horse and killed at a track just one year ago, in October 2014. And seventy-one riders are currently receiving assistance from the Permanently Disabled Jockey Fund, a charity established by the Jockeys' Guild.

The risk to riders is substantially increased by the pervasive drug culture in horse racing. The number one risk factor for catastrophic breakdown is previous injury. However, owners and trainers routinely administer powerful pain medications and other drugs to injured horses in the days and even twenty-four hours before races, which have the effect

¹ 29 U.S.C. § 654(a)(1).

² Exercise riders guide horses through their morning workouts.

of masking the clinical signs of animals' injuries. The results are that injured horses—who should not be allowed to run—are raced, and that, unable to receive the proper signals from their bodies, these horses push themselves beyond the breaking point.

If a jockey or exercise rider cannot tell that a horse is injured, he or she cannot make an informed decision about whether to ride the horse and risk catastrophic breakdown and life-threatening injury to both the horse and the rider. Therefore, PETA petitions OSHA to promulgate an occupational safety and health standard requiring employers in the horse-racing industry to disclose to riders in their employ all medications recently administered to horses prior to racing, training, and exercising, as well as running for prospective buyers at auctions. In the alternative, PETA petitions OSHA to issue enforcement guidance explaining that failing to disclose to riders medications administered to horses either for the purpose of or with the effect of masking injury is a recognized hazard[] that is causing or likely to cause death or serious physical harm to riders, in violation of the OSH Act's General Duty Clause.

Legal Framework

The purpose of the OSH Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”³ This is accomplished by requiring each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” and to “comply with occupational safety and health standards promulgated under this Act.”⁴ The OSH Act authorizes the Secretary to “by rule promulgate, modify, or revoke any occupational safety or health standard.”⁵

The OSH Act's General Duty Clause requires employers to furnish employees with an environment and workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm to [its] employees.”⁶ Congress intended that “[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace.”⁷ “To establish a violation of the General Duty Clause,”

the Secretary must establish that: (1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.⁸

³ 29 U.S.C. § 651(b).

⁴ *Id.* § 654(a).

⁵ *Id.* § 655(b).

⁶ *Id.* § 654(a)(1).

⁷ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973)).

⁸ *Id.* at 1207 (quoting *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (citation omitted)).

Courts have found that an employer's adherence to even common industry practice is not outcome determinative of an employer's compliance with the General Duty Clause. Indeed, courts have repeatedly found that, in instances where "industry practice fails to take reasonable precautions against hazards generally known in the industry . . . it may not be unfair to hold the employer to a standard higher than that of actual practice."⁹

Discussion

I. The OSH Act's Protections Extend to Jockeys and Exercise Riders.

Although jockeys and exercise riders are often considered independent contractors, some riders qualify as employees.¹⁰ In the workers-compensation context, for instance, courts have found jockeys to be employees of horse owners in multiple cases.¹¹

The OSH Act defines "employee" to mean "an employee of an employer who is employed in a business of his employer which affects commerce."¹² In relevant part, "employer" means "a person engaged in a business affecting commerce who has employees." *Id.* § 652(5). To determine whether a worker is an "employee" under the OSH Act, courts apply the common-law test, as described in *Slingluff v. Occupational Safety & Health Review Commission*:¹³

A key consideration in determining whether Respondent was the actual employer of particular workers is whether it had the right to control the manner and means by which they carried out their work.

The Commission has considered a number of factors when making such a determination, including the following:

⁹ *Cape & Vineyard Div. of New Bedford Gas v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *see also F.A. Gray, Inc. v. OSHRC*, 785 F.2d 23, 24-25 (1st Cir. 1986) (reversing an OSHA order where reliance upon industry practice was not supported by "sufficient evidence"); *Donovan v. Mo. Farmers Ass'n*, 674 F.2d 690, 692 (8th Cir. 1982); *Voegelé Co., Inc. v. OSHRC*, 625 F.2d 1075, 1078-79 (3d Cir. 1980) ("find[ing] th[e] policy reason for not making industry standards determinative" of whether there has been a violation of another section of the OSH Act "to be quite compelling") (citing *Am. Airlines, Inc. v. Sec'y of Labor*, 578 F.2d 38, 40 (2d Cir. 1978); *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976)). This is consistent with the general rule that "proof of adherence to an industry practice or custom is not dispositive on the issue of negligence," *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1074 (4th Cir. 1982) (citing *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1156-57 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979)); *accord Keller v. United States*, 38 F.3d 16, 1995 A.M.C. 397, 406 (1st Cir. 1994); *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 610 (9th Cir. 1990)," because "what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not," *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 383 (9th Cir. 1992) (quoting *Tex. & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903)).

¹⁰ *MacMillen v. N.Y. State Racing & Wagering Bd.*, 59 N.Y.2d 664, 666, 450 N.E.2d 216, 217 (1983).

¹¹ *See, e.g., Biger v. Erwin*, 57 N.J. 95, 270 A.2d 12 (1970); *Drillon v. Indus. Accident Comm'n*, 17 Cal.2d 346, 110 P.2d 64 (1941); *Rice v. Stoneham*, 254 N.Y. 531, 173 N.E. 853 (1930); *Pierce v. Bowen*, 247 N.Y. 305, 160 N.E. 379 (1928) (jockey is employee of horse owner).

¹² 29 U.S.C. § 652(6).

¹³ 425 F.3d 861 (10th Cir. 2005)

- 1) Whom do the workers consider their employer?
- 2) Who pays the workers' wages?
- 3) Who has the responsibility to control the workers?
- 4) Does the alleged employer have the power to control the workers?
- 5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
- 6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
- 7) How are the workers' wages established?

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 party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. Thus, the central inquiry . . . is the question of whether the alleged employer has the right to control the work involved.¹⁴

Facts that support this determination include, but are not limited to, (1) a trainer or owner providing the rider tools, such as horses, saddles, and bridles; (2) a trainer or owner requiring the rider to ride only that trainer's or owner's horses on a given day; (3) the rider working for a single trainer, owner, or race track; and (4) the rider receiving a minimum salary rate not predicated on the number of horses ridden. For example, the Internal Revenue Service has ruled that a jockey is an employee, not an independent contractor, when

[t]he contract [between the jockey and owner] provides that the jockey will perform services for the owner as both jockey and exercise boy for a specific period. He is to render faithful service in such capacity and will report to the stable for duty any day that his service may be needed subsequent to a date specified in the contract. It further provides that the owner will be ready to ride at a weight not to exceed a specified maximum, and must have the owner's consent to ride for any other individual.¹⁵

Likewise, Minnesota regulations provide that “[a] jockey is an employee of the trainer if all of the following criteria are substantially met”:

- A. The jockey rides only for the employing trainer or the jockey rides for other trainers only with the permission of the employing trainer.
- B. The

¹⁴ *Id.* at 867-68 (internal quotation marks and citations omitted).

¹⁵ IRS Rev. Rule 70-573, 1970-2 C.B. 221, 221-22.

jockey is not free to reject the employing trainer's call. C. The trainer provides or pays for the jockey's saddle. D. The jockey is not free to disregard the instructions of the trainer regarding the running of the race except for safety reasons. E. The jockey is paid a salary or wage by the trainer on a time rather than per-race basis; compensation usually includes room and board, and the wage may be paid from the horseperson's account at the racetrack.¹⁶

II. Horse Breakdowns Cause Jockeys and Exercise Riders Death and Serious Physical Harm.

A horse “breaks down” when he or she suffers a potentially career-ending injury, usually to the leg, during a run. Between 2009 and 2012, approximately 3,600 horses died racing or training at state-regulated tracks.¹⁷ At least twenty-four horses a week die at racetracks around the country.¹⁸ According to the New York Times, “[i]n one 13-day stretch of racing in 2010 at Sunland Park Racetrack and Casino in New Mexico, nine horses died racing, five were hauled away in ambulances and two jockeys were hospitalized, one in critical condition.”¹⁹

Between 2009 and 2014, horses fatally broke down during races more than two out of every 1,000 starts.²⁰ However, this number does not tell the whole story. In 1992, a study found that horses broke down severely enough to prevent them from finishing races nearly five times as often as they fatally broke down.²¹ In addition, these statistics only include breakdowns during races, not training or workouts, which may be even more common.²² And, by industry definition, a fatal breakdown is only one followed by euthanasia within twenty-four hours,²³ so horses euthanized within several days of a breakdown—even as a direct result of an injury sustained in a race—are also not included in these statistics.

Approximately fifteen percent of fatal breakdowns in thoroughbred races lead to jockey injuries²⁴—which, of course, does not include the injuries suffered during training or workouts or from non-fatal breakdowns on race day. The most sought-after jockeys ride

¹⁶ Minn. R. 5224.0311(3).

¹⁷ Walt Bogdanich et al., *Mangled Horses, Maimed Jockeys*, N.Y. Times, Mar. 24, 2012 (Ex. 1).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Joe Drape, *A Track's Shift to Dirt Adds to Horses' Risks*, NY Times, Apr. 3, 2014 (Ex. 2).

²¹ William Nack, *The Breaking Point: A Rising Toll of Racetrack Breakdowns Has Shaken Public Confidence and Put the Thoroughbred Industry at a Crossroads*, Sports Illustrated, Nov. 1, 1993 (Ex. 3).

²² *Id.*; see Defs.' Answers to Pls.' Interrogatories, *Rivera v. Calder Race Course, Inc.*, No. 12-031958 CA (14), at 9 (Fla. Cir. Ct. Apr. 26, 2013) (Ex. 4) (stating that the racetrack does not keep records of horse fatalities during morning workouts).

²³ Bill Toland, *Horse Racing Has Grim Underside*, Pittsburgh Post-Gazette, June 10, 2006 (Ex. 5).

²⁴ P.L. Hitchens et al., *The Role of Catastrophic Injury or Sudden Death of the Horse in Race-Day Jockey Falls and Injuries in California, 2007-2012*, Equine Veterinary Journal (Nov. 2014) (Ex. 6).

in as many as eight or nine races a day, five or six days a week,²⁵ so injuries as a result of breakdowns are common.

In fact, there have been 154 rider fatalities at U.S. race tracks since 1940, including thirteen fatalities since 2000. A seventeen-year-old rider was thrown from his horse and killed at a track just one year ago, in October 2014. And seventy-one riders are currently receiving assistance from the Permanently Disabled Jockey Fund, a charity established by the Jockeys' Guild.²⁶ The following are just a few examples of the injuries suffered by riders as a result of catastrophic breakdowns:

- On August 22, 2015, Orlando Baldillez broke his shoulder in multiple places when another horse suffered a breakdown during a race at the Fair Grounds in New Orleans, causing the horse Baldillez was riding and a third horse to tumble over the fallen animal.²⁷
- On April 11, 2013, a twenty-one-year-old exercise rider, Jess C. Meche, was killed when the horse he was riding in training fractured both front legs, throwing Meche to the ground and landing on his head and upper body. He was pronounced dead at the scene.²⁸
- On September 2, 2011, quarter horse racing legend, Jacky Martin's, neck was broken in three places—paralyzing him instantly—when the horse he was riding broke a leg during a race. The horse had to be euthanized on the track. For the rest of his life, Martin, who could not move his arms or legs and could only breathe with a respirator, was in and out of hospitals, suffering through infections, pneumonia, nausea, weight loss, bedsores, and other problems.²⁹ The jockey, who won almost 3,000 races and earned more than \$45 million in prize money, died just three-and-a-half years after his accident, at age fifty-nine.³⁰
- On September 25, 2010, Mark Anthony Villa was thrown to the ground and killed when the quarter horse he was racing broke down right over the finish line. “With a herd of thousand-plus-pound animals bearing down on him, Mr. Villa tried to crawl to safety. He never made it. A horse’s hoof struck him in the head with such force that his helmet shot like a bullet across the track. He died within an instant, leaving a wife and twin children.”³¹
- On July 23, 2010, Hall-of-Fame jockey Scott Stevens was critically injured when his horse, Sombre, suffered a leg fracture and tumbled during a race. Sombre was euthanized on the track. Stevens was airlifted by helicopter to the hospital, where

²⁵ Being a Jockey FAQs, Bluegrass Community & Technical College, http://bluegrass.kctcs.edu/en/NARA/About_Us/~link.aspx?id=FCB52C11A9D04CCC87BCAF60C6014381& (last visited Oct. 21, 2015) (Ex. 7).

²⁶ Chris Isidore, *The Derby's Dark Side: Jockeys Are the Most Injured, Underpaid Pro Athletes*, CNN Money, May 1, 2015 (Ex. 8).

²⁷ Greg Thompson, *Jockey Orlando Baldillez Breaks Shoulder in Spill at Fair Grounds* (n.d.) (Ex. 9).

²⁸ Ray Paulick, *Louisiana Exercise Rider Killed by Horse from Suspended Trainer's Stable*, Paulick Report, Apr. 27, 2013 (Ex. 10).

²⁹ *Id.*

³⁰ *Ruidoso Downs' Racehorse Hall of Fame Member Jacky Martin Dies After Extended Paralysis*, El Paso Times, Apr. 5, 2015 (Ex. 11).

³¹ Bogdanich et al., *supra* note 17.

he was treated for two punctured lungs, fractures to multiple ribs and vertebrae, and a broken collarbone on both sides. The accident also caused three other jockeys to fall, two of whom were taken to the hospital by ambulance for “significant back injuries” and both later transferred to a larger hospital “[d]ue to the severity of their injuries.”³²

- On November 25, 2008, the horse Chris Zamora was riding, Sinful Heart, began to experience pain and drifted out of his lane. Sinful Heart clipped heels with another horse and fell before a third horse tripped over them. Zamora, the winner of more than 1,000 races, fractured his skull, pelvis, ribs, and four vertebrae. His lungs collapsed, his liver was lacerated, and his heart was compressed. Three races later, Sinful Heart collapsed and died on the track.³³
- In February 2004, jockey Michael Rowland died after a three-horse accident during a race at Turfway Park in northern Kentucky. The horse Rowland was riding broke down, sending him to the ground, before two trailing horses trampled him. Before his death, Rowland was in a coma for nearly four days, and underwent three surgeries, with a fractured skull, a blood clot in his brain, and bleeding on his brain stem.³⁴

III. Administering Drugs to Horses that Have the Intended or Unintended Consequence of Masking the Horses’ Injuries Increases the Risk of Life-Threatening Injury to Riders.

According to The Jockey Club, the principle governing body for thoroughbred registration in the U.S., “multiple studies . . . show permissive drug rules are part of the cause of the high mortality rates.”³⁵ This link is also strongly implied by the international statistics. For instance, in England, where horses may not race on any drugs, breakdown rates are half of what they are in the U.S.³⁶ Dr. Rick Arthur, the equine medical director for the California Horse Racing Board and a member of Racing Medication and Testing Consortium, states that, generally, “[r]acing fatality rates in the U.S. are two- to three-times higher than other major racing countries,” and “there is no question medication regulation is the most glaring difference between [the] U.S. and [these] other countries.”³⁷

³² Dan Adams, *Stevens in Critical Condition*, Daily Racing Form, July 3, 2010 (Ex. 12).

³³ *Id.*

³⁴ Bob Roberts, *Popular Jockey Dies from Injuries*, Cleveland Plain Dealer, Feb. 10, 2004 (Ex. 13).

³⁵ Joe Drape, *At Breeders’ Cup, A Volatile Mix of Speed and Drugs*, N.Y. Times, Nov. 3, 2010 (Ex. 14); see also Joe Drape, *Lawsuit Sheds Light on Use of Legal Medications in Horses*, N.Y. Times, Oct. 5, 2009 (Ex. 15) [hereinafter “*Lawsuit Sheds Light*”] (“There is a growing concern within the veterinary community that overmedication—with drugs like corticosteroids, anti-inflammatories that can have dangerous consequences—and lax oversight are part of the reason the United States has the world’s worst mortality rate for thoroughbreds.”).

³⁶ Bogdanich et al., *supra* note 17; *Lawsuit Sheds Light*, *supra* note 35.

³⁷ Rick Arthur, Racing Medication and Testing Consortium, Presentation at the Fifty-Eighth Annual Round Table Conference on Matters Pertaining to Racing (Aug. 22, 2010) (Ex. 16) [hereinafter “Racing Medication and Testing Consortium Presentation”], available at <http://www.jockeyclub.com/default.asp?section=RT&year=2010&area=11>.

Although illegal drugs are a serious problem in horse racing in the U.S., “legal therapeutic drugs—pain medicine in particular—pose the greatest risk to horse and rider.”³⁸ California researchers have found that approximately ninety percent of horses that break down had pre-existing injuries.³⁹ This is strongly linked to the administration of drugs to horses close to race day: States require that horses undergo prerace veterinary examinations, but, “[a]t higher levels, pain medicine can mask injury, rendering prerace examinations less effective.”⁴⁰ “This is just a recipe for disaster,” says Dr. Tom David, the recent chief veterinarian for the Louisiana Racing Commission.⁴¹ “Inflamed joints, muscles and mild lameness are masked by medication and therefore undetectable to the examining veterinarian.”⁴² Mary Scollay, the equine medical director for the Kentucky Horse Racing Commission agrees that “[i]f the things that we’re looking for during a prerace inspection in terms of heat, pain, swelling and inflammation [are] mitigated by the effects of medication, then we really c[a]n’t assess the horse’s condition.”⁴³

Moreover, “[i]f a horse cannot feel an existing injury, [he] may run harder than [he] otherwise would, putting extra stress on the injury.”⁴⁴ This is a significant reason for Hong Kong’s zero-tolerance policy on drugs in a horse’s system on race day. “A horse will try his hardest,” Dr. Brian Stewart, head of veterinary regulation for the Hong Kong Jockey Club explains, “and if he can’t feel pain he will run through it, increasing the risk of injury.”⁴⁵

For example, between November 30, 2011, and March 18, 2012, twenty-one horses died as a result of injuries sustained while racing at Aqueduct Race Track in Ozone Park, New York. The New York Task Force on Racehorse Health and Safety, which was appointed by the New York State Racing and Wagering Board to conduct an investigation of these deaths, found that, although there was no evidence that “any of the fatally injured horses was administered an illicit or non-therapeutic drug,”⁴⁶ the drug regimens prescribed to at least eight of these horses likely played a role in their deaths.⁴⁷ In several instances, a horse was injected with an intra-articular corticosteroid just days prior to his race. The task force found that these injections “may have compromised the ability of the NYRA veterinarian to properly assess this horse’s condition on race day.”⁴⁸ In other instances, horses were routinely trained on medications in the months prior to their fatal injuries,

³⁸ Bogdanich et al., *supra* note 17.

³⁹ *Id.*; see also N.Y. Task Force on Racehorse Health and Safety, Official Report: Investigation of Equine Fatalities at Aqueduct 2011-2012 Fall/Winter Meet 72 (2012) (Ex. 17) [hereinafter “Task Force Report”] (“The most significant factor for fatal musculoskeletal injury in the racehorse is the presence of pre-existing injury.”).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Amy L. (Williams) Kluesner, *And They’re Off: Eliminating Drug Use in Thoroughbred Racing*, 3 *Harvard Journal of Sports & Entertainment Law* 297, 311 (2012) (Ex. 18) (citation omitted).

⁴⁴ Bogdanich et al., *Mangled Horses, Maimed Jockeys*, *supra* note 17.

⁴⁵ Gina Rarick, *I’m Not Barbaro, for Lots of Reasons*, *N.Y. Times*, Feb. 4, 2007 (Ex. 19).

⁴⁶ Task Force Report, *supra* note 39.

⁴⁷ See, e.g., 16-17 (Speight of Hand), 18-19 (Dreamin of Silver), 24 (Sheeds Paisley), 25 (Skorton), 27 (Coronado Heights), 29-30 (Wes Vegas), 30-31 (Almighty Silver), 31 (Big Polka Dot).

⁴⁸ *Id.* at 16-17, 18, 27, 31.

which “may have reduced the ability of the trainer[s] to accurately assess [their] condition[s] and [their] response[s] to high speed exercise.”⁴⁹

Phenylbutazone is but one of the usual suspects. Known as “bute,” phenylbutazone is a commonly administered drug, which reduces pain and inflammation—both important clinical signs of injury. As Dr. Rick Arthur, the equine medical director for the California Horse Racing Board, explains, bute “interfere[s] with a veterinarian’s ability to do a meaningful clinical examination [and] [t]his masking of clinical signs doesn’t apply to veterinarians alone.”⁵⁰ Bute is possibly an even “bigger problem in training than it is in racing because trainers cannot get an accurate assessment of the soundness of their horses.”⁵¹ After Virginia raised the allowable level of bute administered to horses twenty-four hours before a race in 2005 from two micrograms to five micrograms, the number of “catastrophic incidents increased significantly,” according to Dr. Richard Harden, equine medical director for the state racing commission.⁵² Likewise, Iowa’s horse fatality rate rose more than fifty percent after the state raised the allowable level of bute in 2007.⁵³ In one study, cited by the New York Times, researchers at Oklahoma State University found bute in most of the horses that died racing or training on Oklahoma tracks in 2010.⁵⁴

Masking the clinical signs of injury has grave consequences for riders. As Dr. Arthur explains, “[t]he horse feels fine to the jockey . . . , whether the horse is fine or not.”⁵⁵ In 2012, exercise rider James Rivera sued Calder Race Course and William White Racing Stables after he was rendered a quadriplegic when the horse he was riding, Flyfly Fly Delilah, suffered a fatal breakdown.⁵⁶ According to Rivera, days earlier, he and two other riders had reported a problem with the horse’s right front leg, and he assumed that the horse was now safe to ride.⁵⁷ Instead, the complaint alleges that Delilah was “administered steroids and other medications which masked [her] injury and were intended to rush [her] back to racing status, as well as to enhance [her] performance . . . even though [she] was physically impaired.”⁵⁸ In fact, records show that in the days preceding the accident, the horse, Flyfly Fly Delilah, received multiple doses of two powerful anabolic steroids, Stanazolol and Equipoise; Lasix, a drug that prevents bleeding in the lungs; and multiple anti-inflammatory drugs, including Naquasone, which contains dexamethasone, a potent masking agent.⁵⁹

⁴⁹ *Id.* at 24, 25, 29.

⁵⁰ Rick Arthur, *Bute Not in Racing’s Best Interest*, *The Blood-Horse*, Sept. 18, 2010 (Ex. 20).

⁵¹ *Id.*

⁵² Bogdanich et al., *supra* note 17.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Arthur, *supra* note 50.

⁵⁶ Fourth Am. Compl., *Rivera v. Calder Race Course, Inc.*, No. 12-031958 CA (14) ¶ 20 (Fla. Cir. Ct. Apr. 17, 2014) (Ex. 21).

⁵⁷ *Id.* ¶¶ 15-16, 18.

⁵⁸ *Id.* ¶ 17.

⁵⁹ Michael E. Miller, *Lawsuit Involving Paralyzed Rider Jimmy Rivera Aims to Clean Up Horse Racing*, *Washington Post*, May 11, 2015 (Ex. 22).

Thus, the evidence amply supports that administering drugs with either the intended or unintended consequence of masking horses' injuries substantially increases the risk of life-threatening injury to riders from breakdowns.

IV. Disclosing the Drugs Administered to Horses in the Period Before Racing, Training, or Exercising Is a “Feasible Means to . . . Materially Reduce the Hazard[s]” to Riders of Breakdowns.

If a jockey or exercise rider cannot tell that a horse is injured, he or she cannot make an informed decision about whether to ride the horse and risk catastrophic breakdown and life-threatening injury to both the horse and the rider. In testimony to Congress in support of H.R. 2012, “A Bill to Improve the Integrity and Safety of Interstate Horseracing, and for Other Purposes,” Dr. Sheila Lyons, a specialist in equine sports medicine and the founder of the American College of Veterinary Sports Medicine and Rehabilitation, explained that, “[w]ithout being able to evaluate the horses’ soundness while drug free,” a “rider can[not] confidently identify the horses that have a high risk of breakdown.”⁶⁰ Dr. Rick Arthur, the equine medical director of the California Horse Racing Board, concurs that jockeys “evaluate a horse’s well-being and soundness by clinical signs, signs that are masked by analgesics . . . and anti-inflammatories.”⁶¹

Therefore, requiring employers in the horse-racing industry to disclose to riders in their employ all medications recently administered to horses prior to racing, training, or exercising is a “feasible means” to “materially reduce the hazard”⁶² to jockeys and exercise riders of riding horses whose injuries are being masked by drugs.

There is precedent for OSHA adopting an occupational safety and health standard requiring disclosure of a hazard. 29 C.F.R. § 1910.1200 requires “all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, safety data sheets, and information and training.”⁶³ When OSHA promulgated this rule it explained that “[i]mplementation of these hazard communication programs will ensure all employees have the ‘right-to-know’ the hazards and identities of the chemicals they work with, and will reduce the incidence of chemically-related occupational illnesses and injuries.”⁶⁴

OSHA also recently proposed a rule that would require certain employers to *publicly* disclose workplace injuries and illnesses. One rationale for the proposed rule is that “[p]ublic access to this information will allow current employees to compare their

⁶⁰ Sheila Lyons, Testimony to the House, Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, H.R. 2012, A Bill to Improve the Integrity and Safety of Interstate Horseracing, and for Other Purposes, Hearing, Nov. 21, 2013, at 19 (Ex. 23).

⁶¹ Racing Medication and Testing Consortium Presentation, *supra* note 37.

⁶² *SeaWorld of Fla., LLC*, 748 F.3d at 1207 (quoting *Fabi Constr. Co.*, 508 F.3d at 1081 (citation omitted)).

⁶³ *Id.* § 1910.1200(b)(1).

⁶⁴ Hazard Communication, 59 Fed. Reg. 6126-01, 6126 (Feb. 9, 1994).

workplaces to the best workplaces for safety and health and will allow potential employees to make more informed decisions about potential places of employment.”⁶⁵

Disclosure of medications to riders is feasible even if it requires the horse-racing industry to change how it does business. This is insufficient reason to turn a blind eye to the serious risks inherent in using medications to mask horses’ injuries. The U.S. Court of Appeals for the D.C. Circuit recently affirmed OSHA’s order requiring SeaWorld to use barriers or minimum distance between orcas and trainers on deck,⁶⁶ and SeaWorld has decided not to appeal this ruling.⁶⁷ The Court explained that “[t]he remedy imposed for SeaWorld’s violations does not change the essential nature of its business. There will still be human interactions and performances with killer whales; the remedy will simply require that they continue with increased safety measures.”⁶⁸ The Court further observed that

[m]any traditional industries can be extremely dangerous to their employees: construction, metal pouring, logging, welding, firefighting, roofing, electric power installation, handling explosives. Yet these industries have been regulated pursuant to the Occupational Safety and Health Act, notwithstanding that employers could claim . . . that the employees were taking part in “the ‘normal activities’ intrinsic to the industry.”⁶⁹

The Need for Regulation

It is imperative that OSHA act to protect riders employed in the horse-racing industry because worker safety is falling through the cracks of a patchwork of inconsistent state regulations. As a 2012 internal memorandum from the majority staff to the members of the Health Subcommittee of the House Committee on Energy and Commerce summarized:

[T]here are 38 separate State racing commissions, with 38 different sets of rules and practices in place. As a result, no uniform rules exist to prohibit the use of performance enhancing drugs and to penalize doping violations. This has led to enforcement problems. For example, if there is one State horseracing commissioner who wants to enforce a zero tolerance drug use policy, then trainers can avoid the rule by simply racing their horses elsewhere. States face stiff competition for the horse business and may be willing to sacrifice oversight in order to get revenue from horseracing. That impunity leads trainers to continually violate medication rules. And,

⁶⁵ Improve Tracking of Workplace Injuries and Illnesses, 78 Fed. Reg. 67254, 67256 (Nov. 8, 2013).

⁶⁶ *SeaWorld of Fla., LLC*, 748 F.3d at 1215.

⁶⁷ *Accord* OSHA Citation, Inspection No. 954477, Miami Seaquarium (July 10, 2014) (Ex. 24) (prohibiting Miami Seaquarium trainers from working or performing with orcas “unless the trainers are protected through the use of physical barriers or the trainers are required to maintain a minimum safe distance from the killer whale”).

⁶⁸ *SeaWorld of Fla., LLC*, 748 F.3d at 1210.

⁶⁹ *Id.* at 1212-13.

horseracing then becomes a “race to the bottom” as drug use trumps the enforcement of protective rules and regulations.⁷⁰

Indeed, when the Breeders’ Cup world championships prohibited owners and trainers from injecting two-year-old horses with Lasix, a drug intended to restrict pulmonary bleeding, in November 2012, several owners chose to boycott the Cup races.⁷¹

Moreover, given the life-threatening risks to workers posed by using drugs to mask horses’ injuries, the concurrent jurisdiction of state racing commissions over this problem should be no bar to action by OSHA—which is charged with “assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁷² “The Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency.”⁷³

Requested Action

Because failing to disclose to jockeys and exercise riders the drugs administered to horses for the purpose of or with the effect of masking injury places workers at significant risk of death or serious physical harm, OSHA should promulgate a safety and health standard, pursuant to 29 U.S.C. § 655(b), requiring employers in the horse-racing industry to report to riders in their employ all medications recently administered to horses prior to racing, training, or exercising.

In the alternative, OSHA should issue enforcement guidance explaining that failing to disclose to riders medications administered to horses either for the purpose of or with the effect of masking injury violates the OSH Act’s General Duty Clause.

The stated purpose of the OSH Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁷⁴ This is accomplished by requiring each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” and to “comply with occupational safety and health standards promulgated under this Act.”⁷⁵ Given the extensive evidence of deaths and injuries, and the certainty that many other injuries go unreported, it is clear that continuing to allow employers to administer drugs that act to mask horses’ injuries, without providing this critical information to jockeys and exercise riders, is likely to cause further death and serious physical harm to workers.

⁷⁰ Memorandum from Majority Staff to Health Subcommittee, House Committee on Energy and Commerce 2 (Apr. 26, 2012) (Ex. 25).

⁷¹ Joe Drape, *Critics Boycott Breeders’ Cup After Drug Ban*, N.Y. Times, October 30, 2012 (Ex. 26).

⁷² 29 U.S.C. § 651(b).

⁷³ *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948, 952 (D.D.C. 1973); see, e.g., *U.S. Alkali Export Ass’n v. United States*, 325 U.S. 196, 208-09 (1945) (discussing the Federal Trade Commission and the Department of Justice’s concurrent jurisdiction to prosecute violations of the Clayton Act).

⁷⁴ 29 U.S.C. § 651(b).

⁷⁵ *Id.* § 654(a).

Promulgating the requested safety and health standard—or, alternatively, issuing the requested enforcement guidance—is the least OSHA can do to fulfill its statutory duty and protect workers from entirely preventable injury and death.

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