United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

SeaWorld of Florida, LLC, Petitioner, v. Secretary of Labor, Respondent.	OSHRC Docket No. 12-1697

Appearances:

Carla Gunnin Stone, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, Atlanta, Georgia
For Petitioner

Angela F. Donaldson, Esq., and Rolesia B. Dancy, Esq.
U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER GRANTING
PETITION FOR MODIFICATION OF ABATEMENT DATE

On July 27, 2012, SeaWorld of Florida, LLC, filed a petition for modification of abatement date (PMA) with the Secretary. SeaWorld requested an extension of six months to abate the hazard described in Item 1, Instance (b), of Citation No. 2, which this court affirmed in the underlying Decision and Order issued on June 11, 2012, and which became a final order of the Commission on July 16, 2012.

SeaWorld contends it required "additional guidance concerning the proper means to abate the hazard" and requested additional time "in an effort to obtain necessary guidance, clarification, and confirmation." Specifically, SeaWorld wanted to know what constitutes "an appropriate 'physical barrier,' 'minimum distance,' or other appropriate administrative controls within the meaning of this Item" (SeaWorld's PMA, ¶ 8).

On August 1, 2012, the Secretary denied the PMA. The court held a hearing in this matter on April 25, 2013, in Sanford, Florida. The parties have filed post-hearing briefs. For the reasons discussed below, the court grants SeaWorld's PMA and extends the abatement date until January 27, 2013[1].

Background

SeaWorld trainer Dawn Brancheau was killed while working with Tilikum, SeaWorld's largest killer whale, on February 24, 2010, in Orlando, Florida. Based on the OSHA inspection triggered by Ms. Brancheau's death, the Secretary issued three citations to SeaWorld on August 23, 2010. Relevant to this proceeding, the Secretary cited SeaWorld for a willful violation of the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§651-658, in Item 1 of Citation No. 2.

Item 1 of Citation No. 2 states:

> a) At the Shamu Stadium pools, animal trainers working with Tilikum, a killer whale with known aggressive tendencies and who was involved in the 1991 death of a whale trainer at a marine park in Vancouver, British Columbia, were exposed to struck-by and drowning hazards in that they were allowed unprotected contact with Tilikum while conducting "drywork" performances on pool ledges, slideouts and platforms, on or about 2/24/2010.
>
> Among other methods, one feasible and acceptable means of abatement would be to not allow animal trainers to have any contact with Tilikum unless they are protected by a physical barrier.
>
> b) At the Shamu Stadium pools, animal trainers working with killer whales other than Tilikum were exposed to struck-by and drowning hazards in that they were allowed to engage in "waterwork" and "drywork" performances with the killer whales without adequate protection, on or about 2/24/2010.
>
> Among other methods, feasible and acceptable means of abatement would prohibit animal trainers from working with killer whales, including "waterwork" or "dry work," unless the trainers are protected through the use of physical barriers or through the use of decking systems, oxygen supply systems or other engineering or administrative controls that provide the same or greater level of protection for the trainers.

The court affirmed this item as serious in the Decision and Order issued on June 11, 2012, which became a final order of the Commission on July 16, 2012. The court found that two forms of abatement proposed by the Secretary were technologically and economically feasible:

[1] The hearing was held three months after the requested January 27, 2013, abatement date. Neither party raised mootness as an issue. The instant PMA is the only one requested by SeaWorld. The extension of the abatement date is applied retroactively.

the installation of physical barriers and a requirement to maintain a minimum distance from the killer whales.[2] The Decision states, "Prohibiting waterwork and using physical barriers and minimum distances eliminate the trainers' exposure to the recognized hazard of working with killer whales." *SeaWorld of Florida, LLC,* 2012 WL 3019734 at *30.

SeaWorld was required to abate the described violations by July 27, 2012. On that date, SeaWorld filed the PMA at issue, asserting the violation described in Instance (a) of Item 1 (relating only to Tilikum) had been abated, but requesting an extension of six months, until January 27, 2013, to abate the violation described in Instance (b) (relating to the other killer whales in SeaWorld's facility). The Secretary denied the PMA on August 1, 2012, giving rise to the instant proceeding.

Analysis

Commission Rule 2200.37(d) addresses contested PMAs. Commission Rule 2200.37(d)(3) provides:

> An employer petitioning for a modification of the abatement period shall have the burden of proving in accordance with the requirements of section 10(c) of the Act, 29 U.S.C. § 659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's control.

Good Faith Effort to Comply with Abatement Requirements

In its PMA, SeaWorld asserted it had taken a number of steps to abate the violation cited in Instance (b) of Item 1, including:

> [U]pdating its protocols for interacting with killer whales during performances (such as by suspending "waterwork" in which trainer enter the water with killer whales, establishing variable distances between trainers and animals, establishing positioning protocols relative to the animals and enhancing spotter protocols); increasing its security measures (such as by utilizing electronic gate systems, developing new operating procedures for trainers and increasing restrictions on non-trainer access to designated areas); updating emergency response protocols (such as by installing new alarm systems, increasing and repositioning nets and increasing the amount of emergency response training); and substantial modifications within the facility (such as by reconstruction and modifying the layout of the "G-pool," adding permanent and removable bars to certain pools, installing monitors and increasing trainer and spotter visibility).

[2] Minimum distance and physical barriers were the two abatement methods proposed by the Secretary, who established at the hearing that the methods were feasible. SeaWorld is not limited to only these abatement methods—the company may implement another method or methods of abatement designed to protect trainers from struck-by and drowning hazards.

(SeaWorld's PMA, ¶ 5).

SeaWorld developed and implemented 26 protocols in an effort to abate the cited hazards. SeaWorld had implemented the protocols by the July 27, 2012, abatement date (Exhibit R-1; Tr. 81-83). Kelly Flaherty Clark, SeaWorld's curator of animal training, testified SeaWorld has experimented with the implementation of various minimum distances for trainers working with killer whales since the underlying decision became a final order on July 16, 2012. She stated that, at the time of the PMA hearing, SeaWorld was requiring its trainers to maintain a distance of 18 inches from the edge of the pool when standing and 3 feet when kneeling (Tr. 62-64).

The Secretary contends SeaWorld did not make a good faith effort to comply with the abatement requirements. He argues SeaWorld failed to establish, in accordance with 29 C.F.R. § 1903.14a(b)(4), that it took all available interim steps to safeguard its employees during the abatement period. The Secretary faults, among other methods, SeaWorld's "whale positioning theory," which permits trainers to make contact with killer whales depending on the position of the whale in relation to the trainer's location. For example, the trainer would not approach the whale's head, but would only approach the whale's body between its blow hole and its back (Tr. 82-83, 86).

The Secretary's argument addresses the efficacy of SeaWorld's efforts in abating the cited hazard. At times during the hearing and in his post-hearing brief, the Secretary focused on the merits of SeaWorld's abatement measures instead of the reasonableness of its request for an extension of time. The purpose of the PMA proceeding is to determine whether SeaWorld's request for an extension of the abatement date was justified, based on whether the employer made a good faith effort to abate the cited hazard and whether abatement was not completed for reasons outside the employer's control. As the court stated at the hearing, "I'm just here to decide whether or not the PMA should have been extended or should be extended for the six-month period that was asked for[.] . . . I'm not here to decide whether or not the abatement approaches what you are talking about are deemed appropriate abatement or not" (Tr. 15). The Secretary's counsel responded, "[W]e agree with your summary of the issues to be decided here today for the PMA" (Tr. 15). SeaWorld's counsel correctly noted, "[I]f the Secretary is not happy with the method of abating the prior citation, . . .they have methods in place to challenge the abatement that SeaWorld has decided to do. So, we would agree that the issue here is just to

decide whether or not SeaWorld took the time to develop its abatement and needed the time requested" (Tr. 16).

It is determined SeaWorld made a good faith effort to comply with the abatement requirements of the citation. It continued its suspension of waterwork and implemented minimum distance requirements. It added security and emergency response equipment. It also consulted independent experts in order to get their opinions on appropriate abatement measures. SeaWorld has met the first element of its burden.

Factors Beyond SeaWorld's Control

SeaWorld complained repeatedly in its PMA and its post-hearing brief that the underlying Decision and Order was vague and that the company required clarification on what constitutes a safe minimum distance and a physical barrier. At the underlying hearing, the Secretary's expert Dr. David Duffus speculated that if trainers stood "perhaps 5 to 8 feet away" from the edge of the pool in which a killer whale swam, they would be safe from being pulled into the water. *SeaWorld* at *24. Dr. Duffus is an expert in the behavior of killer whales in the wild, but he has no expertise in the training of captive killer whales. Neither has the court nor the Secretary. The determination of what constitutes a safe minimum distance is best left to experts in the training and behaviors of captive killer whales.

During the original hearing, the Secretary faulted SeaWorld for its reliance on operant conditioning techniques it developed in-house to prevent the killer whales from injuring its trainers, to the exclusion of all other safety precautions. The court agreed with the Secretary, stating in the underlying Decision that SeaWorld's reliance on its operant conditioning program created a "closed system," in which "any injuries sustained by a trainer will always be traceable to human error." *SeaWorld* at *26.

Charles Tompkins is the corporate curator of zoological operations for SeaWorld, Inc. (Tr. 135). At the PMA hearing, Mr. Tompkins demonstrated SeaWorld took notice of the charge its approach to safety was too insular:

> I feel like at the actual trial that there was some criticism on the fact that we didn't use outside consultants as much as we could have, and I felt the personal need to make sure that we were not working in an industry bubble and making decisions on our own.

(Tr. 139).

Ms. Flaherty Clark was also in favor of seeking outside advisors:

> We consider ourselves experts. We know that there's nobody else out there who has worked as intimately with killer whales as we have as long as we have. However, we wanted to be sure. We wanted outside eyes. We didn't want to say we know everything, and we absolutely valued the opportunity to be reviewed by not even necessarily peers but somebody who has killer whale experience or somebody who has experience working with large animals, just to put new eyes on it. Why? It was to keep our employees safe.

(Tr. 65-66).

SeaWorld included consultation with outside experts as a key factor in in its PMA:

> Since neither Judge Welsch nor the Secretary has explained the proper manner by which SeaWorld could specifically abate the hazards alleged in Citation 2 Item 1(b) through "physical barriers," "minimum distance," or other methods, and since the Secretary has threatened additional enforcement actions, even without any guidance as to the proper manner to abate such hazards, SeaWorld requests an additional six months to examine the complex issues necessary to certify abatement of Citation 2 Item 1(b). Sea World would use this time to find and consult with experts in the field of marine animals to confirm the appropriateness of its existing precautionary measures and developing principled methods to define and continue implementing "physical barriers" and/or "minimum distances" as required by Judge Welsch's Order. It would agree to provide progress reports to the Secretary during this time.

(SeaWorld's PMA, ¶11).

Mr. Tompkins led the search for outside consultants. He testified there are few experts in the training of killer whales that do not already work for SeaWorld. By early September, Mr. Tompkins had narrowed his search to three people (Tr. 136). One of the outside experts was a member of the U. S. Navy. Mr. Tompkins explained the expert from the Navy had reservations about working with SeaWorld:

> Based on his last experience with SeaWorld, apparently his organization, the Navy, felt like there was a conflict of interest. But, he said that he would go back and check with his administrator and find out if he could help in this endeavor. So, it took probably 20 or 30 days before he got back to us, but he got back to us and replied that the Navy suggested that he not help us.

(Tr. 137).

Mr. Tompkins then turned to the other two experts he had identified, one of whom works at the Georgia Aquarium and the other who works at the Atlantis Hotel in the Bahamas. Mr. Tompkins sent each of them a packet of material to review, and then set about scheduling a time when they could visit SeaWorld's Orlando Park and consult with the company.

> So, it was my role to hopefully find the time where we could bring them to the park where they could review our program. And, that turned out to be very

> difficult because, as everybody knows, November and December is an extremely popular time, especially for the Atlantis Hotel. That's when they do the majority of their work. Of course, at Sea World Park, that's when we are busy too. It's our Christmastime, Thanksgiving rush.
> So, we had to work around people's schedules. We also need to remember these are top executives of companies, so they had to work within their schedules. Both of them went to the Armada Conference in December that was two weeks in Hong Kong so that took up quite a bit of time there. So, the first available time was, I think, the first week of January is when we could orchestrate a time when they could be there with us.

(Tr. 138-139).

SeaWorld has demonstrated it required the requested additional six months for abatement due to factors beyond its control, *i.e.,* the scheduling of the two outside experts. As SeaWorld points out, there are few non-SeaWorld experts in training killer whales in the world. Because they are not SeaWorld employees, SeaWorld has no control over their schedules. As executives in their own organizations, the experts reasonably accorded a lower priority to the outside consultation desired by SeaWorld. Additionally, the requests for consultation occurred just at the beginning of the holiday season, a traditionally busy time of year for their respective organizations.

As the court noted in the underlying Decision and Order, "[T]here is essentially no distinction between SeaWorld and the industry at large. . . . SeaWorld sets the industry standard for working with killer whales." *SeaWorld* at *14. When that decision became a final order of the Commission, SeaWorld was required to significantly modify the training program it had developed over almost half a century. Previously, SeaWorld had refined its training program based on the experiences of its own trainers and input from its own management personnel and the personnel from other SeaWorld parks. This insular approach reflected a corporate culture that based its safety program largely on teaching its trainers operant conditioning techniques and relying on exacting observations of the whales' behaviors by the trainers. SeaWorld's business model was premised on the spectacle of close contact between the killer whales and the trainers during performances. The abatement methods of minimum distances and physical barriers, therefore, represented a stark change in policy. SeaWorld is recognized as the world leader in the training of killer whales. Now that it must overhaul its training program in order to reduce the proximity between the killer whales and its trainers, SeaWorld has a limited number of authoritative experts it can turn to for guidance.

SeaWorld has met the second element of its burden of proof and has thus established it is entitled to a modification of the July 27, 2012, abatement date. The requested extension to January 27, 2013, is granted retroactively.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing decision, it is ORDERED that:

SeaWorld's petition for modification date is granted. The new abatement date is January 27, 2013.

/s/

Judge Ken S. Welsch
1924 Building, Suite 2R90
100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104
Phone (404) 562-1640; Fax (404) 562-1650

Dated: August 19, 2013
Atlanta, Georgia