



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant
v.
SeaWorld of Florida, LLC,
Respondent.

OSHRC Docket No. **10-1705**

ORDER

The Secretary seeks to take the depositions of three men who work for Sea World of San Diego, LLC: Brian Rokeach, Mike Scarpuzzi, and Ken Peters. Respondent does not agree to the taking of the depositions, so the Secretary has filed a motion for an order permitting her to do so.

Commission Rule 56(a), 29 C. F. R. § 2200.56(a), provides:

Depositions of parties, intervenors, or witnesses shall be allowed only by agreement of all the parties, or on order of the Commission or Judge following the filing of a motion of a party stating good and just reasons.

Commission Rule 52(b), 29 C. F. R. § 2200.52(b), defines the scope of discovery as:

[A]ny matter that is not privileged and that is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.

The Secretary has cited Respondent for a willful violation of the General Duty Clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), for allowing its trainers to work in close contact with orca whales, thus exposing them to struck-by or drowning hazards. One of the elements the Secretary must prove in order to establish a violation of § 5(a)(1) is the employer's failure to furnish employment "free from recognized hazards." The Secretary may prove a recognized hazard exists by showing actual or constructive knowledge on the part of the employer, or by showing "the standard of knowledge in the employer's industry—an objective test." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996), citing *Continental Oil Co. v. OSHRC*, 630 F. 2d 446, 448 (6th Cir. 1980).

T-39

Respondent denies it had actual or constructive knowledge of the hazard of trainers working in close contact with orca whales. The Secretary is, therefore, seeking evidence supporting her theory that there is recognition within the aquatic animal entertainment industry of a hazard to trainers working with orca whales.

Respondent objects on three grounds:

(1) Respondent, Sea World of Florida, LLC, is a separate entity from Sea World of San Diego, LLC, with separate management;

(2) Depositions of Brian Rokeach, Mike Scarpuzzi, and Ken Peters would not likely lead to the discovery of admissible evidence; and

(3) Taking the depositions of the three Sea World of San Diego employees is an attempt by the Secretary to relitigate “an incident that occurred at the San Diego park in 2006 involving Mr. Peters, which incident was investigated by CAL/OSHA and for which no citation was issued” (Respondent’s Objection to the Secretary’s Motion to Take Depositions, p.3).

Respondent’s objections are without merit:

(1) Respondent argues it has no management personnel in common with Sea World of San Diego, and cites *Vergona Crane Co.*, 15 BNA OSHA 1782, 1783 (No. 88-1745, 1992), for the proposition that “related employers are regarded as a single entity where . . . they share a common president, management, supervision, or ownership.” *Vergona* is inapposite to this proceeding. The Secretary does not dispute that Respondent and Sea World of San Diego are two separate entities, and that Sea World of San Diego is a third party. Nothing in either the Commission Rules or the Federal Rules of Civil Procedure prohibits the Secretary from taking depositions from third party witnesses.

(2) Respondent denies it knew working in close contact with orca whales creates a recognized hazard to trainers. The Secretary is seeking to take the depositions of three employees of Sea World of San Diego in order to establish industry recognition of the hazard. Aquatic animal entertainment is a specialized industry. Rokeach, Scarpuzzi, and Peters have all worked with orca whales. Peters is the Assistant Curator of Sea World of San Diego. Although Respondent and Sea World of San Diego are separate legal entities, they exchange information with each other regarding safety protocols and incidents, as well as with Sea World of Texas and Loro Parque in the Canary Islands. Industry recognition is relevant to the Secretary’s claim. The depositions of the three men would likely lead to admissible evidence.

(3) Respondent fears the Secretary may use the depositions to relitigate a 2006 incident that occurred at Sea World of San Diego. These fears are unfounded. Sea World of San Diego is under the jurisdiction of the California Occupational Safety and Health Program (CAL/OSHA), and not Federal OSHA. *See* 29 C. F. R. § 1952.172. Furthermore, § 9(c) of the Act bars the Secretary from issuing a citation “after the expiration of six months following the occurrence of any violation.” The Secretary cannot cite Sea World of San Diego for alleged violations that occurred in the 2006 incident. She can, however, adduce evidence in support of her contention that there is industry recognition that working with orca whales is hazardous.

The court, having found the Secretary has stated good and just reasons for the taking of the requested depositions, orders that she be permitted to take the depositions of Brian Rokeach, Mike Scarpuzzi, and Ken Peters, within 30 days of this date. The Secretary’s motion for leave to take depositions is **GRANTED**.

SO ORDERED.

Date: August 11, 2011



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

This order has been sent to:

For the Secretary of Labor:

U. S. Department of Labor
Office of the Solicitor
Atlanta Federal Center, Room 7T10
61 Forsyth Street
Atlanta, GA 30303
ATTN: John A. Black, Esquire
Tremelle Howard-Fishburne, Esquire

For the Employer:

Carla J. Gunnin Stone, Esquire
Constangy, Brooks & Smith, LLC
230 Peachtree Street, NW, Suite 2400
Atlanta, GA 30303-1557