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).

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 acknowledged the criticism that SeaWorld's 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: