

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
 :
ZOOM FLUME WATER PARK, LLC, :
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Petitioner, :
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To Review Under Section 101 of the Labor Law: :
A Notice of Violation and Order to Comply, dated : **DOCKET NO. PES 14-013**
September 15, 2014, : **RESOLUTION OF DECISION**
 :
 :
- against - :
 :
THE COMMISSIONER OF LABOR, :
 :
 :
Respondent. :
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APPEARANCES

Nixon Peabody LLP (Leah Threatte Bojnowski of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for respondent.

WITNESSES

Glenn Aragona, Edward Karrigan, and Denise Karrigan, for petitioner.

Senior Safety and Health Inspector Edward Young and Safety and Health Inspector John Noonan, for respondent.

WHEREAS:

Petitioner Zoom Flume Water Park, LLC (Zoom Flume) filed a petition in this matter on October 14, 2015, which was amended on December 10, 2014, and again on August 4, 2015, seeking review of a notice of violation and order to comply issued by respondent Commissioner of Labor against petitioner on September 15, 2014. The order finds petitioner violated Industrial Code Rules 45-2.8, 45-3.4 (a), 45-1.11 (b), and 45-1.8 (b).¹ Petitioner only seeks review of that portion of the order finding petitioner violated Code Rule 45-2.8 because its water slide was not operated by a competent operator of at least 18 years of age. The petition alleges the order is unreasonable because Code Rule 45-2.8 is not applicable to water slides. Respondent filed his answer on August 7, 2015.

¹ The Industrial Code is found at 12 NYCRR Subchapter A. The sections of the Industrial Code relevant to this proceeding are found at 12 NYCRR Subchapter A, Part 45, codified as 12 NYCRR 45-1 et seq., and are cited herein as Industrial Code or Code Rule.

Upon notice to the parties, a hearing was held in this matter December 16, 2015, Devin A. Rice, Counsel to the Board, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing legal briefs.

SUMMARY OF EVIDENCE

This matter stems from an accident that occurred on August 23, 2014, at the Zoom Flume Water Park located in East Durham, New York, where an individual was injured while riding a water slide known as the Canyon Plunge. As a result of the accident, an investigator from respondent's Bureau of Industry Inspection, investigated the incident on September 5, 2014, which resulted in issuance of the notice of violation and order to comply on review. Senior Safety and Health Inspector Edward L. Young found that the slide starter was 15 years of age on the date of the incident. Young also found that the slide attendant/lifeguard on site at the time of the incident was 15 years of age.

Young testified that he found petitioner had violated Code Rule 45-2.8 because "the age of the staff at the Canyon Plunge was under the age of 16." He further testified that there is no distinction in the regulation between mechanical and non-mechanical devices, and that he could not describe the normal and emergency operating controls of a water slide. Inspector John Noonan testified that he had conducted inspections of the water slides on numerous occasions prior to the August 23, 2014 accident, observed slide attendants at work, and never demanded proof of age, because he is not able to tell somebody is 18 just by looking at them and was not "going to stop their operation to ask for proof of age." He further testified that petitioner never attempted to conceal the age of slide attendants.

Glenn Aragona, petitioner's co-owner and operations manager, testified that the Canyon Plunge is a gravity driven water slide. It is powered by a pump located in a mechanical building that is turned on by Aragona or another operations manager. Once the pump is turned on, it stays at the same flow all day and the water at the slide cannot be made to flow faster or slower. The slide has no mechanical components, gears, levers, or buttons.

Edward Karrigan, petitioner's general manager, testified that the Canyon Plunge is staffed with a slide attendant at the starting position at the top of the slide and a lifeguard at the bottom. In addition to the slide attendant and lifeguard, a slide supervisor is responsible for three to four slides depending on the area of the park the supervisor is assigned to. The slide is staffed by a slide attendant/slide starter at the top who instructs riders how to position their bodies and checks to ensure the slide is clear before sending the rider down. The slide supervisors are always 18 years of age or older, and the attendants are under the age of 18. Karrigan testified that the slide attendant is not exposed to any machinery and cannot control the water flow to the slide. Karrigan testified that respondent had inspected the water park numerous times prior to the incident, never asked for proof of age of the slide attendants or discussed age requirements for slide staff, or informed petitioner that Code Rule 45-2.8 applied to water slides.

Denise Karrigan, petitioner's co-owner and administrator, recalled that at least 20 years ago, she and her father discussed the issue of whether Code Rule 45-2.8 applied to water slides with personnel from DOL, and were informed that:

“the section of the ages was put into place in the ‘40s or ‘50s for traveling carnivals because kids were operating mechanical things. You know, levers and cranks and things like that, and they were concerned that people under the age of 18 would be working with those kind of things Since water slides don’t have that, they don’t have mechanical cranks or buttons or anything, they did not apply to us. And that was told to both my father and I from the Department of Labor. And based on that, that’s how we’ve operated since then.”

An internal DOL memorandum of March 26, 2001, states that DOL’s position on the age of a person operating a water slide is that “as long as there was one 18 year old supervisor at the top of the slide, the other starters could be 16 or 17 year olds.” Correspondence from the Director of the Bureau of Industry Inspection to Seabreeze Amusement Park, dated April 16, 2001, advised that “the water slide supervisor must be at least 18 years of age [Code Rules 45-3.6 (e) and 2.8] Other attendants and starters may be less than 18 years of age.” The April 16 letter also explained that with respect to amusement devices in general, “[m]inors less than 18 may assist the operator in performing duties which do not expose the minor to machinery.”

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

The petitioner’s burden of proof in this matter is to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioner established by a preponderance of the evidence that the notice of violation and order to comply with Industrial Code Rule 45-2.8 is unreasonable because it does not apply to the water slide at issue in this matter.

Code Rule 45-2.8 provides in relevant part that:

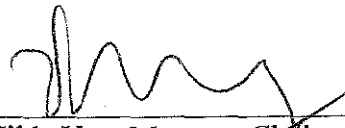
“Amusement devices shall be operated only by competent operators . . . 18 years of age or older Every operator shall have knowledge of the use and function of all normal and emergency operating controls and of the proper use of the device. An operator shall be in the immediate vicinity of the operating controls during operation and no other person shall be suffered or permitted to handle such controls during normal operation. No operator shall be responsible for the operation of more than one amusement device at a time. This provision does not apply to amusement devices designed to be operated or controlled safely by a passenger.”

After its inspection of September 5, 2014 respondent determined petitioner had violated Code Rule 45-2.8 because the Canyon Plunge, a water slide, was operated by an operator less than 18 years of age. Petitioner claims that the order is unreasonable because Code Rule 45-2.8 does not apply to water slides. We agree.

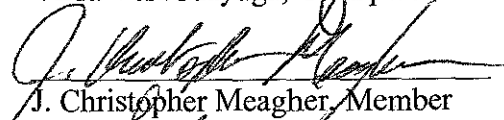
Part 45 of the Industrial Code (12 NYCRR Part 45) contains regulations related to amusement devices, viewing stands and tents at carnivals, fairs and amusement parks. Subpart 45-2 governs amusement devices, and subpart 45-3 concerns slides, including water slides (*See e.g.* Industrial Code Rules 3.3 and 3.6). Subpart 45-3 of the Industrial Code contains “special requirements” for slides, including water slides, and mandates compliance with all “applicable” provisions of subparts 45-1 and 45-2 (Industrial Code Rule 45-3.2). It was not reasonable for respondent to find petitioner in violation of Code Rule 45-2.8, which is found at subpart 45-2, because the rule is not a “special requirement” of subpart 45-3 governing slides and is not an “applicable” provision of subpart 45-2. Code Rule 45-2.8 applies to amusement devices that have “normal and emergency operating controls,” which can be “handle[d] during normal operation.” The water slide at issue, as described at hearing, did not have any controls that could be handled during normal operation, and the minor slide attendants were not exposed to machinery. Because the apparent purpose of the regulation is to protect minors from exposure to machinery, we find it inapplicable under the facts of this case. The notice of violation and order to comply with Industrial Code Rule 45-2.8 is revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The notice of violation and order to comply with Industrial Code Rule 45-2.8 is revoked; and
2. The petition for review be, and the same hereby is, granted.



Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 25, 2016.

After its inspection of September 5, 2014 respondent determined petitioner had violated Code Rule 45-2.8 because the Canyon Plunge, a water slide, was operated by an operator less than 18 years of age. Petitioner claims that the order is unreasonable because Code Rule 45-2.8 does not apply to water slides. We agree.

Part 45 of the Industrial Code (12 NYCRR Part 45) contains regulations related to amusement devices, viewing stands and tents at carnivals, fairs and amusement parks. Subpart 45-2 governs amusement devices, and subpart 45-3 concerns slides, including water slides (*See e.g.* Industrial Code Rules 3.3 and 3.6). Subpart 45-3 of the Industrial Code contains "special requirements" for slides, including water slides, and mandates compliance with all "applicable" provisions of subparts 45-1 and 45-2 (Industrial Code Rule 45-3.2). It was not reasonable for respondent to find petitioner in violation of Code Rule 45-2.8, which is found at subpart 45-2, because the rule is not a "special requirement" of subpart 45-3 governing slides and is not an "applicable" provision of subpart 45-2. Code Rule 45-2.8 applies to amusement devices that have "normal and emergency operating controls," which can be "handle[d] during normal operation." The water slide at issue, as described at hearing, did not have any controls that could be handled during normal operation, and the minor slide attendants were not exposed to machinery. Because the apparent purpose of the regulation is to protect minors from exposure to machinery, we find it inapplicable under the facts of this case. The notice of violation and order to comply with Industrial Code Rule 45-2.8 is revoked.

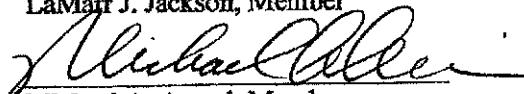
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Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMar J. Jackson, Member



Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York, on
May 25, 2016.