

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CUSE BOUNCE HOUSES LLC,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Notice of Violation and Order to Comply dated
April 2, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent,
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DOCKET NO. PES 19-006

RESOLUTION OF DECISION

APPEARANCES

Eric Taetsch, for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Justine Clark Caplan* of counsel) for respondent.¹

WITNESSES

Eric Taetsch, for petitioner.

Safety and Health Inspector Rudy Goetz and Program Manager II Vincent Rapacciuolo, for respondent.

WHEREAS:

On May 30, 2019, petitioner Cuse Bounce House LLC (hereinafter “Cuse Bounce House”) filed a petition contesting a Notice of Violation and Order to Comply (hereinafter “NOV”) dated April 2, 2019 issued by the Public Employee Safety and Health Bureau (hereinafter “PESH”) of the New York State Department of Labor (hereinafter “DOL”). Respondent answered the petition on July 11, 2019. Upon notice to the parties, a hearing was held on October 30, 2019 in Syracuse, New York, before Associate Counsel Matthew Robinson-Loffler, the designated Hearing Officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence,

¹ Pico P. Ben-Amotz was respondent’s General Counsel at the time of the hearing. Jill Archambault is respondent’s Acting General Counsel at the time of decision.

to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

Petitioner asserts that the NOV was incorrectly issued because the two devices for which respondent issued violations are not amusement devices, as respondent determined, but are virtual reality simulators and, thus, are not subject to the permit requirements for amusement devices.

SUMMARY OF EVIDENCE

Testimony of Eric Taetsch

Eric Taetsch (hereinafter “Taetsch”) testified that the two machines that are the subject of this matter, the Stereolife Rifter machine and the Stereolife eMotion machine, are virtual reality simulators and the machines do not convey or move from one place to another. Taetsch testified that the goggles that are used with the machines create the excitement, not the movement of the machines. Taetsch testified that a PESH investigator gave him an application for amusement devices that sets forth specific items that must be inspected and most of those items are not applicable to virtual reality simulators. For example, Taetsch testified, the subject machines do not have speed limit devices because there is no speed limit, nor are there brakes or an anti-rollback device. Taetsch further testified that the machines have no signal system. Taetsch testified that he did not complete the application that the PESH investigator provided to him. Taetsch testified that his machines tilt the user but do not convey the user and, thus, are not amusement devices as defined in the law that petitioner was cited for violating.

Taetsch testified that there is a sign posted near the Stereolife Rifter machine, which he made, and which is shown in a photograph that was entered into evidence. He testified that he posted the sign because for safety reasons he wanted to give people with high blood pressure, vertigo and “stuff like that” an idea of the ride. Taetsch testified that the Stereolife Rifter machine is “a moving virtual reality experience.” The sign specifically states:

“Warning: The Rifter is a moving virtual reality experience. The seats have hard and fast movements at times during the ride. For your safety, all riders should be in good health and free from high blood pressure, heart, back or neck problems, motion sickness, vertigo, epilepsy or other conditions that could be aggravated by the adventure. Expectant mothers should not ride.

Rules: Keep hold of handles at all times. Stay back in your seat, do not lean over bars. Remove your headset to end your experience. No swearing.”

The word “moving” in the sign is written in red, as are the rules. Otherwise, the warning part of the sign is in black. Taetsch testified that he created the sign on the advice of his insurance company and it was not a sign from the manufacturer of the machine. He testified that there are no restrictions as to who can use the Stereolife Rifter machine.

Testimony of Associate Safety and Health Inspector Rudy Goetz

Rudy Goetz (hereinafter “Goetz”) testified that he has worked for the Department of Labor for more than 8 years and he has been performing safety inspections for 8 years at the mall where the subject machines are located. Goetz testified that Rob Schoeneck, the manager of the mall, made a complaint about permits for the subject machines and because of that complaint, Goetz went to the mall to investigate on February 14, 2019. Ethan Miller (hereinafter “Miller”), a senior safety and health inspector, was with Goetz during the investigation and Goetz was Miller’s supervisor at the time. Goetz testified that Miller assisted with the inspection and, under Goetz’s direction, wrote the NOV.

Goetz testified that there were two machines that they investigated, the Stereolife Rifter machine and the Stereolife eMotion. Videos were entered into evidence that depict Goetz using each of the machines. Photographs of the machines were also entered into evidence. Goetz testified that the Stereolife eMotion includes a standing platform that has a single fixed point in the center and it “rocks back and forth.” Goetz further testified that the platform moves the person by tilting side to side and forward and backward. Goetz testified that in his opinion, the tilting constitutes movement in that the machine “moves your entire body up and down and forward and backwards and side to side based on the single fixed point underneath the platform.” Goetz further testified that this movement is how the device carries and conveys. The Stereolife eMotion has a railing on the platform.

Goetz testified that he requested to inspect the inside of the machines, but his request was denied. Goetz testified that typically an operator of a machine would request a permit and before approving that permit, an inspection would occur. The inspection relies on both the Department of Labor’s rules governing amusement devices and the manufacturer’s manual for the machine. Without doing that inspection, Goetz was assuming that there was a single fixed point in the center of the platform of the Stereolife eMotion machine. Goetz testified that he never saw any documents from the manufacturer for the machines.

Goetz testified that the Stereolife Rifter also has a single fixed point in the center and a seat that tilts the person side to side and forward and backward. Goetz testified that the device also moves and carries and conveys. He testified that it has fencing and gates and waist restraints.

Goetz testified that the Stereolife Rifter is in a fixed area in that it is surrounded by fencing that is permanently bolted to the machine and the machine cannot move outside of the fixed area. Goetz later testified that he could not tell whether the fencing was bolted or welded to the machine. Goetz testified that the purpose of the fencing is to keep people from entering an area where they could be hit by the machine but that the fencing is not a determining factor in whether machine is an amusement device. Goetz further stated that he believed both machines were for amusement and entertainment and that people could be injured on the machines due to the movements of the machines and there are electrical hazards. Goetz also testified that he believes that people could fall off the machines and that the virtual reality goggles that people use on the machines do not matter with respect to the respondent’s determination that the machines are amusement devices. Goetz testified that his inspection was about the actual machinery and its movements. On cross-examination, Goetz testified that the bases of the machines do not move.

Goetz testified that Miller delivered the NOV to Taetsch and that the NOV is regarding both the Stereolife Rifter and the Stereolife eMotion machines.

Testimony of Vincent Rapacciuolo

Vincent Rapacciuolo (hereinafter “Rapacciuolo”) testified that he works at the Department of Labor as a Program Manager II in charge of the Industry Inspection Program, Safety Program, which regulates amusement devices. Rapacciuolo testified that he has worked at the Department of Labor for 13 years. Rapacciuolo testified that his program issues permits for amusement devices, which “ensure that the proper inspections, insurance and maintenance is done on the equipment so to protect the riders of the equipment, the employees operating or assembling the equipment or the general public.” As part of the process for issuing permits, Rapacciuolo’s program looks at manufacturer’s manuals to be sure the machine is assembled correctly and being maintained and operated correctly. The machines or devices are not supposed to operate until they are permitted.

Rapacciuolo testified that he looked at the information about the machines on the manufacturer’s website and he also viewed videos of the machines on that website. Rapacciuolo testified that as part of the investigation review, he decided the machines were amusement devices. Rapacciuolo testified that he never went to see the machines himself nor had he ever ridden on the machines.

Rapacciuolo testified that each amusement device has different safety requirements and that those requirements are supplemented by any manufacturer requirements for maintenance. Rapacciuolo testified that according to the manufacturer’s information that he reviewed, the Stereolife eMotion tilts in four directions and while on the machine, riders are made to feel as though they are moving through an adventure. Rapacciuolo testified that tilting is movement. He stated that the tilting movement is carrying the passengers and that the ride moves in four directions and the passenger needs safety equipment to stay contained. Rapacciuolo further testified that the purpose of the Stereolife eMotion is to amuse and that it is located in an amusement park. He testified that he believes people can be hurt by the ride, as evidenced by the safety devices, such as the rail. Rapacciuolo also testified that people can be pinched by the moving parts on the device or get hit by it if they get too close.

Rapacciuolo testified that the Stereolife Rifter is a larger ride with a seat and it is contained in a fenced in area. It also has a safety warning and an operator. Rapacciuolo testified that the perimeter fence around the Stereolife Rifter keeps people from getting too close to the machine so they do not get hit by it. He testified that a perimeter fence indicates that a machine has maintenance and operation requirements that must be followed and that there is a potential for injury from the machine. Rapacciuolo testified that he determined that the Stereolife Rifter was an amusement device.

Rapacciuolo testified that the NOV in this matter was issued several months after the inspection because he needed to research these machines to determine whether or not they were amusement devices. He further testified that the Department of Labor tries to give operators a chance to come into compliance before issuing violations.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to Industrial Board of Appeals Rules of Procedure and Practice (hereinafter “Board Rules”) (12 NYCRR) § 65.39.

Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner is “valid and reasonable” (Labor Law § 101 [1]). A petition must state “in what respects [the order on review] is claimed to be invalid or unreasonable,” and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v National Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

Amusement Device

Article 27 of the Labor Law regulates amusement devices, viewing stands and tents carnivals, fairs and amusement parks (Labor Law §§ 870-a – 870-o; Department of Labor Regulations [12 NYCRR] § 45-1.1). The purpose of Article 27 and its attendant regulations is to “guard against personal injuries in the assembly, disassembly and use of amusement devices, viewing stands and tents at carnivals, fairs and amusement parks” (Labor Law §§ 870-a). Pursuant to Labor Law § 870-d, an amusement device may not be operated without a permit and an amusement device is defined as “any contrivance that carries and conveys passengers along, around or over a fixed or restricted course or within a defined area for the purpose of amusing or entertaining its passengers, and which is of such nature that accidental personal injuries may be incurred in its assembly, disassembly or use” (Labor Law § 870-c; Department of Labor Regulations [12 NYCRR] § 45-2.3).

Petitioner asserts that the subject machines are not amusement devices because they do not carry and convey passengers along, around or over a fixed or restricted course, but, the definition of amusement device further states “within a defined area,” which petitioner neglects to include in its assertion. The evidence clearly supports a determination that the subject machines carry, which is defined as to move while supporting (Merriam-Webster Online Dictionary, carry [<http://www.merriam-webster.com/dictionary/carry>] [Note: online free version]). It is clear the machines carry passengers within a defined area, as the machines move passengers by tilting them on the platform or seat, which is a defined area.

The only issue is whether the subject machines also convey passengers, which is a necessary part of the definition of amusement devices. Petitioner asserts that the machines do not convey passengers because the machines do not move from their floor position. Respondent contends that the machines do convey because the tilting movement of the passenger constitutes conveyance. Merriam-Webster’s dictionary defines convey, in relevant part, as “to bear from one place to another” or “to cause to pass from once place . . . to another” (Merriam-Webster Online Dictionary, convey [<http://www.merriam-webster.com/dictionary/convey>] [Note: online free version]). The machines tilt the passengers in multiple directions, and it is reasonable to find that

this movement is bearing the passenger from one place to another or "causing the passenger to pass from once place to another." It is petitioner's burden to prove that the respondent's determination was invalid or unreasonable and we find petitioner did not meet that burden. Taetsch's only evidence that the machines do not convey passengers is that the base of the machines do not move. We find this is insufficient to establish that respondent's determination that the tilting mechanism of the machines constitutes carrying and conveyance is unreasonable.

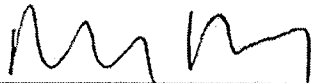
Similarly, Taetsch's testimony that respondent's application for amusement devices sets forth specific items that are not applicable to virtual reality simulators does not support a finding that it was unreasonable for respondent to determine that the subject machines are amusement devices under the Labor Law. Rapacciuolo testified that all amusement devices are different. For example, Rapacciuolo testified that the daily inspection form would need to be tailored to the specific device and potentially supplemented by any requirements of the manufacturer. We also find that the inapplicability of some sections of respondent's general forms used in the licensing and inspection for all amusement devices is an insufficient basis to find respondent's determination that petitioner's machines are amusement devices invalid or unreasonable.

Petitioner did not meet its burden to prove that the notice of violation and order to comply issued by respondent was invalid or unreasonable. We affirm the notice of violation and order to comply.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition is hereby denied; and
2. The Notice of Violation and Order to Comply is affirmed.

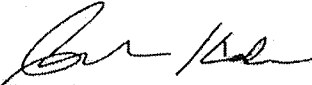
Dated and signed by the Members of the Industrial Board of Appeals on April 7, 2021.



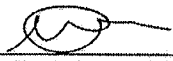
Molly Doherty, Chairperson
New York, New York

ABSENT

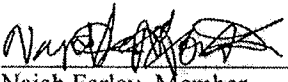
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