

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-4527
)
FUN SPOT OF FLORIDA, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 4, 2008, in Orlando, Florida, before Jeff B. Clark, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William N. Graham, Esquire
Department of Agriculture
and Consumer Services
Mayo Building, Suite 520
407 South Calhoun Street
Tallahassee, Florida 32399-0800

For Respondent: Robert W. Anthony, Esquire
Fassett, Anthony & Taylor, P.A.
1325 West Colonial Drive
Orlando, Florida 32804

STATEMENT OF THE ISSUES

Whether Respondent committed violations of Subsection 616.242(19)(a), Florida Statutes (2006),^{1/} as alleged in the

Administrative Complaint dated August 23, 2007, and, if so, what penalties, if any, should be imposed.

PRELIMINARY STATEMENT

On August 23, 2007, Petitioner, Department of Agriculture and Consumer Services, mailed a letter to Respondent, Fun Spot of Florida, Inc., regarding "Administrative Complaint and Settlement Agreement AC Number A50008" in which it was alleged that on May 31, 2007, Respondent, violated of Subsection 616.242(19)(a)1.b., Florida Statutes, and rules promulgated as authorized by Chapter 616, Florida Statutes, related to the regulations governing amusement rides. Specifically, it was alleged that on May 31, 2007, the following violations occurred:

Violation #1

Section 616.242(19)(a)1.b., Florida Statutes:

Operating an amusement ride in a manner or circumstance that presents a risk of serious injury to patrons, in that Respondent failed to monitor every section of the go-cart track "Commander Track" (USAID #05211) during its operation, as required by Rule 5F-08.015(4)(e), Florida Administrative Code.

Violation #2

Section 616.242(19)(a)1.b., Florida Statutes:

Operating an amusement ride in a manner or circumstance that presents a risk of serious injury to patrons, in that Respondent failed to monitor every section of the go-cart

track "Quad Helix Track" (USAID #05212) during its operation, as required by Rule 5F-08.015(4)(e), Florida Administrative Code.

On September 9, 2007, Respondent requested an administrative hearing. On October 2, 2007, Petitioner forwarded the case to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

An Initial Order was sent to both parties on October 2, 2007. Based on the response of the parties to the Initial Order, on October 15, 2007, the case was scheduled for final hearing on December 5, 2007, in Orlando, Florida. On November 16, 2007, the parties jointly requested that the case be continued and rescheduled. An Order Granting Continuance was entered on December 3, 2007, and the hearing was rescheduled for January 4, 2008. The final hearing took place as scheduled on January 4, 2008.

At the hearing, Petitioner presented the testimony of Rick Soyars, and Allan Harrison. Petitioner offered Petitioner's Exhibits 1 through 13, which were received into evidence and marked accordingly. Respondent presented the testimony of John Arie, Terri Rock, Andre Corbin, Jennifer Collier, Luis Garcia, and Mike Nuñez. Respondent also presented Respondent's Exhibits 1 through 17, which were received into evidence. Official Notice was taken of Subsection

616.242(19)(a)1.b., Florida Statutes, and Florida Administrative Code Rule 5F-8.015.

A two-volume Transcript was filed with the Clerk of the Division of Administrative Hearings on January 24, 2008. Respondent requested and received an extension to February 12, 2008, to file proposed recommended orders. Both parties timely filed Proposed Recommended Orders.

All references are to 2006 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing in this matter, the following Findings of Facts are made:

1. Petitioner is the state agency responsible for inspecting and regulating amusement rides pursuant to Section 616.242, Florida Statutes.

2. Respondent, a Florida corporation, owns and operates the amusement rides which are the subject of this administrative action, specifically, two go-cart tracks known as the "Commander Track" (USAID #05211) and the "Quad Helix Track" (USAID #05212).

3. During an unannounced inspection on May 31, 2007, Petitioner's inspector observed that there was one attendant assigned to the Commander track and there were two attendants assigned to the Quad Helix track. These tracks are

interconnected in that they are laid out so that the tracks are intertwined, but one cannot drive from one track to the other. The Commander track is 590 feet long with a maximum speed of 11.61 mph. The Quad Helix track is 1575 feet long with a maximum speed of 15.13 mph.

4. At the time of the inspection, Petitioner's inspector felt that the monitoring procedures in place did not satisfy the statutory requirement that the ride not be operated "in a manner or circumstance that presents a risk of serious injury to patrons."

5. There are a total of four tracks in Respondent's park; all are to some degree intertwined or positioned close together. On May 31, 2007, there were six specified track attendants on duty that were positioned through the park and each attendant is instructed to visually monitor the interconnected tracks.

6. May 31, 2007, was a Thursday. The inspection occurred prior to noon which was not a busy time at the park.

7. At the time of the inspection, there were eight attendants operating other amusement rides in areas contiguous to the Commander and Quad Helix tracks. All attendants in the park are equipped with two-way radio communications and are in constant radio communication with each other as part of the standard monitoring procedures.

8. Respondent's has implemented a procedure called the "10-20" rule for monitoring its premises. Literally, this means that every ten seconds each attendant is to visually scan his surrounding area and each attendant must be able to respond to any area of the track within 20 seconds. Determining whether each attendant actually performs this safety ritual every ten seconds is problematic; the procedure does, however, serve to remind each employee that a safety vigil must be constantly maintained.

9. Respondent had electronic video monitoring throughout the amusement park, and although no employee is specifically designated to constantly monitor the video screens, the screens are located in an office that is regularly occupied.

10. There were a sufficient number of Respondent's employees "on duty" and in position to monitor the Commander and Quad Helix tracks at the time and date of the alleged violations to ensure that these amusement rides were operated in a manner or circumstance that did not present a risk of serious injury to patrons.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and of the parties. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

12. In the Administrative Complaint, the Department seeks to impose an administrative fine of \$1,000 for each of the two alleged violations. Accordingly, the Department must prove the allegations in the Administrative Complaint by "clear and convincing" evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d. 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

13. In determining whether Respondent violated the provisions of Section 616.242, Florida Statutes, as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute . . . This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

14. "Clear and convincing evidence" is a "level of proof" that:

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion, and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise

and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In Re: Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Respondent has been charged with two violations as stated in the Administrative Complaint:

Violation #1

Section 616.242(19)(a)1.b., Florida Statutes:

Operating an amusement ride in a manner or circumstance that presents a risk of serious injury to patrons, in that Respondent failed to monitor every section of the go-cart track "Commander Track" (USAID #05211) during its operation, as required by Rule 5F-08.015(4)(e), Florida Administrative Code.

Violation #2

Section 616.242(19)(a)1.b., Florida Statutes:

Operating an amusement ride in a manner or circumstance that presents a risk of serious injury to patrons, in that Respondent failed to monitor every section of the go-cart track "Quad Helix Track" (USAID #05212) during its operation, as required by Rule 5F-08.015(4)(e), Florida Administrative Code.

16. Subsection 616.242(19)(a)1.b., Florida Statutes, reads, as follows:

(a) The department may deny, suspend for a period not to exceed 1 year, or revoke any permit or inspection certificate. In addition to denial, suspension, or revocation, the department may impose an administrative fine of up to \$2,500 per violation, per day, against the owner of the amusement ride if it finds that:

1. An amusement ride has operated or is operating:

* * *

b. In a manner or circumstance that presents a risk of serious injury to patrons;

17. Florida Administrative Code Rule 5F-8.015(4)(e) reads as follows:

Every section of the track shall be monitored during its operation. This shall be done visually by attendants or by electronic visual and audio means.

18. In the instant case, it can be argued that the tracks in question were being electronically monitored, even though the video screens themselves were not the subject of constant attention. The evidence obviates the necessity of that discourse, because Petitioner has failed to carry the "clear and convincing" burden of proof. The evidence demonstrates that there were sufficient attendants on duty and in appropriate locations to monitor the tracks in question.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that Petitioner, Department of Agriculture and Consumer Services, enter a final Order dismissing the Administrative Complaint directed to Respondent, Fun Spot of Florida, Inc., dated August 23, 2007.

DONE AND ENTERED this 29th day of February, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of February, 2008.

ENDNOTE

1/ All references are to 2006 Florida Statutes, unless otherwise indicated.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.