

## OSHA Hails Judge's Decision Upholding General Duty Use In Whale Mauling Case

OSHA hailed a recent decision by a federal judge upholding the agency's use of the OSH Act general duty clause in the highly publicized case of a whale trainer who was fatally mauled by an orca at SeaWorld, saying the decision shows that the broad requirement in the OSH Act can be effectively used in cases where there is a recognized hazard but no specific regulation. The decision prompted concern from industry, with one attorney who has criticized the administration's expanded use of the general duty clause questioning why OSHA has not instead proposed a rule.

An administrative law judge (ALJ) for the Occupational Safety and Health Review Commission (OSHRC) affirmed one citation alleging a serious violation, and another citation alleging a willful violation as serious, with penalties totaling \$12,000. OSHA proposed the penalties after investigating the whale attack on a trainer in front of a crowd at Shamu Stadium in February 2010, a case that drew national headlines.

"OSHA's only intent has been to ensure the safety and health of employees who work with SeaWorld's killer whales in performances," OSHA chief David Michaels says in a statement. "That is a win for the employees of SeaWorld, because within 10 days after the Judge's order becomes final, SeaWorld must abate the hazards and provide documentation to OSHA's Tampa Area Office that the hazards have been corrected."

**The company, in arguments before the commission, pointed to *Megawest Financial Inc.*, an OSHRC judge's decision that is often cited by industry on the issue of workplace violence.** SeaWorld contended that working in close contact with killer whales does not present a recognized hazard to its trainers, citing *Megawest*, in support of its position. In that case, the judge vacated a general-duty citation where the alleged recognized hazard was workplace violence inflicted on apartment complex management personnel by tenants of the apartment complex.

"SeaWorld claims the actions of its killer whales are analogous to the criminal behavior of the non-employee tenants. The company argues animal behavior, like human behavior, cannot always be controlled, and contends the Secretary should be held to a higher standard of proof for a recognized hazard under these circumstances," ALJ Ken Welsch says in the decision. "The court disagrees. Unlike the apartment tenants in *Megawest*, the killer whales are in the continual custody of the employer. By their nature as aquatic animals the killer whales are confined to the pools, an environment over which SeaWorld can control access."

The ruling adds that "[u]nlike the employees in *Megawest* who were subject to irate tenants showing up unannounced and with undetermined intentions, Sea World knew in advance when its employees were scheduled to interact with the killer whales. The trainers always initiated contact with the killer whales, and could anticipate that each time there would be a risk of injury or death."

Also the decision says *Megawest* is an unreviewed ALJ decision with no precedential value for the commission.

***Megawest* was closely watched because of its implications for OSHA enforcement against workplace violence.** Last year business interests voiced concerns about the broad scope of a new OSHA directive calling for reliance on the general duty clause to enforce workplace violence protections, arguing that it is still unclear what measures employers must take to fully comply. They also cite unresolved legal issues surrounding the actions of third parties outside an employer's control, but OSHA and organized labor say a broad policy is needed.

An industry attorney questions the current OSHA administration's continued push to use the OSH Act section 5(a)(1) for cases such as whale mauling where there is no standard. "My concern is the continuing expansion of the general duty clause," Michael Billok, an attorney with Bond, Schoeneck and King, tells *Inside OSHA Online* in an email. "It was only meant to be used where rulemaking is inappropriate or has not yet taken place, but there have been accidents involving orcas for years."

Billok asks why OSHA didn't propose a rule about exposure to orcas 10 or 20 years ago, or even today. "Judging what are 'feasible' means of abatement on a case-by-case basis leaves companies in the dark regarding their legal obligations." Further he quotes a blog by Michaels after the ALJ decision that "workers who interact with large and unpredictable animals deserve no less protection than anyone else." Billok says that "invites the question of if — or rather, when — the general duty clause might be applied to more categories of employees, such as circus performers, zoo keepers, and park rangers." — *Christopher Cole*