

Wiggin and Dana LLP
20 Church Street
Hartford, Connecticut
06103-3402
www.wiggin.com

Erik H. Beard
860.297.3735
860.525.9380 fax
ebeard@wiggin.com

May 23, 2018

Marlea James
Amusement Ride Coordinator
Kansas Department of Labor
417 SW Jackson Street
Topeka, KS 66603

Re: *May 15-16, 2018 Audit of KC Waterpark Management LLC dba Schlitterbahn Waterpark of Kansas City, KS*

Dear Ms. James:

We are counsel to KC Waterpark Management LLC ("KCWM") and are in receipt of the purported "Notice of Violation" dated May 21, 2018 (KDOL Case No. 2018-AR-0001) ("the Report") concerning Schlitterbahn Waterpark Kansas City. As detailed below, the Kansas Department of Labor's ("KDOL") abused its statutory authority to conduct an inspection and further failed to conduct an audit within the parameters of the Kansas Amusement Ride Act. In doing so, it has created a false impression in the community and indeed, nationwide, that Schlitterbahn Waterpark is operating its Kansas City park in an unsafe manner. This appears to be nothing more than a malicious effort on the part of the State to stir up unfounded fear and cast doubt on this company in the wake of the tragic accident in 2016. The State's conduct is unconscionable and we demand the State take immediate remedial action to end this abuse, to remediate the harm it has caused the company and to correct the misrepresentation it has created in the minds of hundreds of thousands of people who have enjoyed the park over the past several years.

KDOL Ignored The Scope of Its Statutory Authority to Conduct An Audit

The Kansas Amusement Ride Act, K.S.A. 44-1601, et seq., spells out the requirements for a waterpark to operate in Kansas as well as the authority of the Kansas Department of Labor to conduct inspections to make sure that operation is in compliance with Kansas law. More specifically, K.S.A. 44-1604 specifies that amusement rides must be "operated" in accordance with ASTM standards. K.S.A. 44-1602(d) permits the KDOL to conduct "random compliance audits" of specific amusement rides. Accordingly, a condition precedent to any valid compliance audit is that the ride be operational. Simply put, there is no way to assess whether the ride is being "operated" in accordance with ASTM standards except to audit it during operation.

Marlea James
May 23, 2018
Page 2

Contrary to your report, none of the rides at the park were operational at the time of the audit. The audit occurred while Schlitterbahn was closed to the public and being readied for its grand opening. Many of the issues noted in the report were, therefore, not yet in compliance precisely because the park was not yet open to the public. KDOL ignored the non-operational status of the park and inexplicably insisted upon full compliance during setup. This is completely improper and a plain violation of the statutory authority to conduct a random compliance audit under K.S.A 44-1602(d).

Moreover, KDOL has not even claimed that this audit was a “random compliance audit” within the scope of K.S.A. 44-1602(d). In response to questions posed by Schlitterbahn’s counsel, you admitted that this audit was not, in fact, “random” but refused to reveal how or by whom this audit was authorized.¹ This is disturbing not only because such an audit would fall well outside the scope of a permissible “*random* compliance audit” under K.S.A. 44-1602(d) (emphasis added), but also because it further suggests an ulterior motive to paint Schlitterbahn as unsafe and noncompliant in the eyes of the public on the eve of the park’s opening when, in fact, the exact opposite is true.

Finally, KDOL has acted outside the statutory bounds of the Kansas Amusement Ride Act by attempting to impose a “Notice of Violation” pursuant to K.S.A. 44-1610, and threatening further sanctions against KCWM, without first serving a “Warning Citation” pursuant to K.S.A. 44-1602(d) and allowing, pursuant to K.S.A. 44-1619, KCWM a reasonable period of time to rectify the issues identified in the Report. KDOL has not followed its own statutory and regulatory directives and its attempt to assert a “Notice of Violation” on KCWM is therefore void.

These issues are discussed in greater detail below.

¹ To the extent K.A.R. 49-55-8(b) suggests that KDOL may conduct targeted compliance audits of amusement rides, that regulation is inconsistent with the plain language of the statute which only grants authority to KDOL to conduct “random compliance audits.” Moreover, even if the regulation were not inconsistent with its enabling legislation, such an audit is only permissible under the regulation when “amusement rides . . . are determined to be in need of a compliance audit by the secretary or the secretary’s designee.” K.A.R. 49-55-8. Your refusal to disclose who authorized the audit at Schlitterbahn, and therefore confirm that it was done at the secretary’s direction per the regulatory requirement, suggests that this audit may well have been directed by an unauthorized individual.

KDOL Ignored That Schlitterbahn Was Closed To The Public During The Audit

As noted above, the audit of Schlitterbahn Waterpark Kansas City occurred before it was open to the public. While this is a serious legal violation of the Kansas Amusement Ride Act for the reasons discussed previously, as a practical matter, it all but ensured that KDOL would find noncompliance. Seasonal parks, such as Schlitterbahn, undergo extensive maintenance and upkeep during the off-season that includes, among other things, maintenance on rides, ride units, signage, and park infrastructure. Equipment such as height measuring devices, park benches, and trash cans are stowed for the winter to avoid undue wear and tear during colder months. In the days and weeks leading to park opening, park team members work hard to finish these projects, clean the park thoroughly, test run each ride and attraction, and ready the park to welcome guests. Among the final tasks to be completed are items such as re-setting height measurement devices and erecting new signage, both of which KDOL cited as supposed “violations” in the Report. *See, e.g.*, Report at 6, ¶ 5; 7, ¶ 13, 14, Neither are. During this pre-opening phase, the park is not open to the public and does not hold itself out as being operationally-ready. While the Report specifically notes that “the facility had ceased operation of the amusement rides over the winter months, and is planning to open operations to the general public May 25, 2018,” Report at 1, the Report repeatedly ignores this fact and continually claims that Schlitterbahn’s rides and attractions “were in an operational status at [the] time of inspection.” These claims are false and should be publicly retracted.²

Safety is Schlitterbahn’s highest priority and its rides are safe to the public. Schlitterbahn personnel cooperated fully with KDOL and test-ran each of the park’s attractions, without riders, so that KDOL auditors could observe the proper mechanical and electrical function of these rides. All rides and attractions functioned properly and safely. Indeed, with only a single exception, neither KDOL’s auditors nor the Report noted any issues with the physical condition or mechanical function of Schlitterbahn’s rides and attractions. The sole exception to the Park’s otherwise excellent condition noted in the Report related to Soaring Eagle Zip Line. At this attraction, auditors noted that the certain parts were not replaced according to the manufacturer’s maintenance schedule. However, as also noted in the Report, the manufacturer had “completed the annual inspection on behalf of the owner / operator in 2017 and 2018” and had notified the KDOL, before issuance of the Report, that

² The Report also falsely asserts that “Schlitterbahn representatives did not dispute the audit findings” when orally presented at the conclusion of the audit. In fact, KDOL did not represent anything as “findings,” rather they were couched as auditor field notes. Schlitterbahn representatives did dispute some of the field notes which KDOL auditors refused to discuss.

Marlea James
May 23, 2018
Page 4

it would be issuing a manufacturer's service bulletin extending the life of this part for another year due to its safe condition. In short, while the Report claims that Soaring Eagle Zip Line is not in compliance with its manufacturer's recommendations that claim is also false and should also be publicly retracted.

Given the safe mechanical condition and function of Schlitterbahn's rides and attractions, KDOL's auditor and its Report necessarily focused the majority of their attention on record keeping and training issues. Here again though, KDOL's auditors ignored critical facts. For example, KDOL found that some of the original manufacturer manuals could not be immediately located. However, after raising this issue with KCWM personnel on site, at least some of these manuals were located and produced to KDOL auditors who inexplicably refused to review them before leaving the property. Further, KDOL noted that certain training and inspection records could not be produced notwithstanding that KCWM officials handed these records directly to KDOL auditors. Again, these records were not reviewed. If the true purpose of KDOL's audit was to assess Schlitterbahn's compliance with governing standards, there would be no reason for the auditors to have refused to review these materials during the audit.

KCWM takes its obligations under the Kansas Amusement Ride Act seriously. To that end, and despite KCWM's strong disagreement with some of the issues in the Report and KDOL's audit process, KCWM is addressing carefully each of the issues raised and expects that such issues will be rectified before the individual rides are opened to the public. While these clerical and administrative issues do not generally impact guest safety, in the interest of ensuring all Schlitterbahn guests that their safety is Schlitterbahn's highest priority, the park will not open any ride or attraction unless and until the issues raised in the Report have been fully addressed.

KDOL Could Not Lawfully Issue A "Notice Of Violation" Under KSA § 44-1610

In addition to the serious substantive problems with the conduct of KDOL's audit, KDOL has greatly overstepped its legal bounds in purporting to issue a "Notice of Violation" when no such notice is authorized by law. This Report is not and, under the Kansas Amusement Ride Act, cannot be a "Notice of Violation" under KSA 44-1610. The Report is, at most, a "warning citation" under KSA 44-1602(d) that carries with it no monetary or criminal penalties and entitles KCWM to a reasonable time in which to comply before the KDOL may take any further action.

The Kansas Amusement Ride Act recognizes, prudently, that an amusement ride owner's or operator's first alleged deviation from the Act's requirements warrants a warning and an opportunity to cure

before more serious consequences are imposed. While, as noted, K.S.A. 44-1602(d) permits the KDOL to “conduct random compliance audits of amusement rides,” the law goes on to state that only a “*warning citation for violation of this act shall be issued against any owner or operator for a first violation.*” The Act also recognizes that imposing serious penalties for noncompliance without first affording an owner or operator of an amusement ride the opportunity to comply is fundamentally unfair. The underlying purpose of the Kansas Amusement Ride Act is to improve ride safety. With that in mind, the Act requires KDOL to “provide the owner or operator of an amusement ride a reasonable period of time to comply with the provisions of K.S.A. 44-1601 et seq.” before it may take “any action pursuant to K.S.A. 44-1610.” Such prohibited actions include charging any person with a Class B misdemeanor for operating without a permit under K.S.A. 44-1610(a),³ issuing a “notice of violation” under K.S.A. 44-1610(b), and / or imposing fines for failure to comply with the notice of violation under K.S.A. 44-1610(d). Further, the administrative remedies in K.S.A. 44-1610(c), are not authorized unless and until a valid “notice of violation has been issued.” Id.

As recognized in the Report, the alleged noncompliance with the Kansas Amusement Ride Act is the first raised against KCWM. As such, KDOL’s sole recourse under the Act is to issue a “warning citation” under K.S.A. 44-1602(d). The KDOL’s contention, therefore, that the report is a “Notice of Violation” under 44-1610, and that further sanctions are authorized, is wrong as a matter of law and undermines the legislative intent of the Kansas Amusement Ride Act. KDOL’s position does nothing to improve ride safety, but seems only directed to collecting statutory fines and penalties in derogation of the law while simultaneously undermining public confidence in the park.

KDOL Must Provide A Reasonable Amount Of Time To Comply

The Report makes no effort to afford KCWM any time, reasonable or otherwise, within which to comply. Pursuant to K.S.A. 44-1619, however, KDOL must provide KCWM “a reasonable period of time to comply” before it may take any further action” pursuant to K.S.A. 44-1610.” In a similar context, KDOL has already recognized, and indeed codified in KAR 49-55-2, that thirty days is a “reasonable amount of time.” While KCWM recognizes that this regulation is narrower than the statute, as it applies only to the time following the adoption of KDOL regulations and not, as set forth in K.S.A. 44-1619, to the time before “any action pursuant to K.S.A. 44-1610” may be taken, there

³ To be clear, Schlitterbahn’s rides all currently have a valid permit from the State of Kansas as required by law.

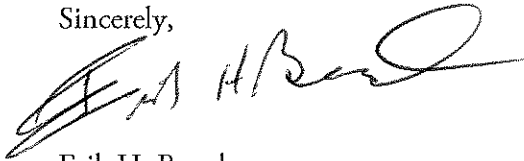
Marlea James
May 23, 2018
Page 6

is no principled reason to adopt a different time period in this instance.⁴ KCWM should be granted until June 20, 2018 to comply with the alleged noncompliance noted in the Report and no sanctions, criminal or otherwise, may be imposed during this time period.

We request that you respond, in writing, to this correspondence no later than noon on May 24, 2018 confirming that, in light of the points raised above, KDOL is withdrawing the Report entirely and will no longer distribute it publicly in any form. In the event, KDOL wishes to conduct a compliance audit, in accordance with the statutory procedure discussed above, KCWM will cooperate with KDOL as required under the Kansas Amusement Ride Act.

Finally, KCWM reserves all rights to object, challenge, and appeal this Report through all available legal means including, but not limited to, seeking relief from a court of competent jurisdiction to prevent KDOL from taking further unlawful action in this matter. We are, of course, willing to forego such action should you timely give the written assurances requested above. While we hope and expect that judicial intervention will be unnecessary, we will take all steps necessary to protect KCWM's interests and rights.

Sincerely,



Erik H. Beard



Melanie Morgan
Erin Thompson
Morgan Pilate LLC

Attorneys for KC Waterpark Management LLC

⁴ Under no reasonable interpretation of the statutory language could the four days provided between the service of the Report and the Park's planned opening day be considered a "reasonable period of time."

Marlea James
May 23, 2018
Page 7

EHB:flm

27313\1\4822-3268-5926.v1