

CAUSE NOS.: 07-13 and 07-15

**NAME: POOR JACK AMUSEMENTS AND
FANTASY AMUSEMENT COMPANY**

ADMINISTRATIVE LAW JUDGE: WILLIAM K. TEEGUARDEN

DATE: JULY 24, 2008

COMMISSION ACTION: AFFIRMED

FINDINGS OF FACT

1. The Indiana Department of Homeland Security is an Agency within the meaning of IC 4-21.5.
2. IC 4-21.5, IC 22-5, and IAC 685 IAC apply to these proceedings.
3. The Fire Prevention and Building Safety Commission (“Commission”) is the ultimate authority within the meaning of IC 4-21.5 with respect to reviews of Agency orders.
4. The Agency is the state entity responsible for inspecting and certifying amusement rides in the State of Indiana.
5. At all times relevant to these proceedings, Poor Jack and Fantasy (“Petitioners”) operated amusement rides in the State of Indiana.
6. On May 1, 2007, during a routine inspection of amusement rides in New Castle, Indiana, operated by Poor Jack, a duly authorized inspector of the Agency issued a correction order which covered two rides.
7. The “Scooter” was cited for not having the rubber protection completely around what are also known as “bumper cars”.
8. Two cars on the ride had places where the rubber outsides of a tire-like inflated device used for protection of the drivers had peeled off and the webbing was exposed.
9. The second portion of the administrative review for Poor Jack involves the assessment of a subsequent inspection fee.
10. The ride known as “1001 Nachts” was supposed to be inspected but was not ready for the prearranged inspection in Shelbyville.
11. The ride passed inspection in Greenwood in June.
12. The ride in question was still being refurbished in May and was not on site.
13. Poor Jack did not notify the Agency in advance that the ride would not be there and the inspection should be cancelled and rescheduled.
14. Six other rides were inspected as scheduled that day.
15. The lead inspector testified that in his experience as a team leader, the field policy has been to charge a re-inspection fee unless the Agency is notified a ride is not ready prior to inspectors arriving.
16. The operator denied ever requesting an inspection of 1001 Nachts in May because he knew it was still in pieces.
17. Exhibit 7 shows an application for inspections for seven rides. It does not designate which seven.
18. Poor Jack also contends that over the years, not all team leaders assess re-

inspection fees for a ride that is not present and have, on occasion, inspected more rides than they were sent to inspect if the rides were there and ready to go.

19. Poor Jack also contends the inspectors are (or were) not properly certified as required by law.

20. Finally, Poor Jack contends that an inspector cannot issue a seal out of service order since it is an “Emergency Order” and must be signed by the Fire Marshal or Agency Director.

21. Fantasy’s fact situation is somewhat simpler but no less important.

22. Fantasy had requested annual certification inspections for several rides when the rides were set up in Hammond, Indiana.

23. Seven rides were deemed not ready for inspection that morning by the inspectors on site because some records mostly dealing with repairs were not available on site.

24. The inspectors would not start the physical inspection of the rides until the information was provided which it was later that day before the team left the site.

25. This led to the imposition of an additional \$172 per ride assessed in subsequent and re-inspection fees.

26. The \$172 per ride fee was assessed because of a miscommunication between the office staff and the field staff.

27. The total fee was \$100 for a subsequent inspection and \$72 for a re-inspection.

28. Since the problems were corrected prior to the inspection team leaving the site and no inspection as such had been performed in the morning, the Agency agrees the \$72 re-inspection fee should not have been charged.

29. Fantasy is entitled to a \$504 refund.

30. Fantasy contends that since all the information on the rides in question should have been readily accessible to the Agency in its records, the assessment of any fee was inappropriate because the rides were set up and ready for inspection.

31. Both Petitioners contend that the Agency’s “paperwork” requirements should take a back seat to the actual physical inspection as the working machinery is more important for ride safety.

32. Both also contend that the Agency inspectors were not (and are not) properly certified to do the job.¹

33. As to the issue of certification of inspectors, IC 22-15-7-4 sets forth minimum requirements for inspectors as being certified at Level 1 by the National Association of Amusement Ride Safety Officials (“NAARSO”).

34. The Agency introduced evidence from NAARSO as to the date of certification and current certification of each witness.

1 There was a trainee who accompanied the inspection team to the Fantasy site. He had no certifications but only acted under the direction and supervision of the team leader and did examine some of the paperwork. As long as all orders are inspected and signed by a regular inspector, the trier of fact sees no problem; indeed this is a desirable way to provide training for new hires.

35. These documents set forth a presumption that the witnesses met the minimum qualifications to be an amusement ride inspector for the State and that presumption cannot be overcome merely by the belief or opinion of some members of the regulated community that inspectors are not legally certified.
36. The Petitioners could not produce any factual evidence contradicting the NAARSO exhibits.
37. The “paperwork” argument is an interesting argument which prior to 1997 may have had some merit.
38. IC 22-15-7 was passed in its current form in 1997. It is sometimes known as “Emily’s Law” in honor of a young girl who was seriously injured on an Amusement Ride.
39. IC 22-15-7-5(a) requires all owners manuals, operation manuals, complete maintenance records, and other such information for each operating ride to be available at any site where the ride is being operated. Section 5(b) allows the Agency to shut down a ride for which the information in 5(a) is not available on site.
40. Thus regardless of whether the Agency had received information about repairs and corrections from the prior season, the operator is under a statutory duty to maintain this information with the ride whenever it seeks to operate in Indiana.
41. Emily’s Law made “paperwork” an important part of the permitting and operating process. If Petitioners have a problem with “paperwork” being given such importance, they need to focus on the Legislature, not the Commission, as the Commission cannot change or give Variances to a statute.
42. As to Poor Jack’s contention and evidence that in the past, inspectors have inspected more (or fewer) rides than they were sent to inspect, the trier of fact has no doubt this is true.
43. While perfect consistency looks nice in text books and on organizational charts, it will never happen in the field where a number of different personalities empowered with inspection duties operate over 100 miles from a central office.
44. Poor Jack’s argument is similar to the defense to a traffic ticket that “some troopers do not ticket anyone unless they exceed the limit by 15 mph, so my ticket for going 8 mph over the limit should not be considered a violation.”
45. In other words, the operators in the incidents Poor Jacks put into evidence were fortunate on that day; Poor Jacks was not so fortunate in May of 2008.
46. The documentary evidence shows the inspection team was sent to perform seven annual inspections; only six were performed.
47. The assessment of the additional fee was proper.
48. The one remaining issue of general interest is the one involving the power of an inspector to shut down a ride, known as “seal out of service”.
49. The Petitioners correctly contend that to be effective, an Emergency Order issued pursuant to IC 4-21.5-4 must be signed by the Fire Marshal or the Agency Director. See IC 22-12-7-6(b), attached to this decision.
50. However, a “seal out of service” order is not always an Emergency Order within

the meaning of IC 4-21.5-4.

- 51. IC 22-15-7-22(e) requires an operator to satisfy an inspector that an amusement device meets all safety requirements.
- 52. 685 IAC sets forth the Commission Rules for Amusement Rides.
- 53. In the case of Poor Jack's "Scooter" ride, the "seal out of service" order was not entered as an emergency order.
- 54. A duly authorized representative of the Agency issued a correction order in early May.
- 55. No action had been taken by early June, a time exceeding the date specified in the correction order.
- 56. 685 IAC 1-4-9 allows an inspector to seal a ride out of service if corrections have not been made.
- 57. This provision has nothing to do with Emergency Orders; it is an enforcement tool used to make an operator take correction orders seriously.
- 58. Had the operator provided the same information from the manufacturer at the stay hearing that he presented as Exhibit C-1 and C-2, the trier of fact could have granted a stay to allow more time to replace the rubber as the manufacturer clearly indicates the primary key to the safety is maintaining a psi of 10 lb.
- 59. If the operator had produced these documents and requested additional time to comply as long as proper pressure could be maintained, that request would have likely been granted.
- 60. The loss of rubber to the extent that webbing shows through is a violation, however, as the device as designed and manufactured includes the rubber covering and 685 IAC 1-4-6 requires an amusement device to conform to the manufacturer's specifications.
- 61. The correction order and fee assessed against Poor Jack's should be affirmed.

NONFINAL ORDER

The Correction Order issued May 1, 2007, by the Indiana Department of Homeland Security to Poor Jack Amusements is hereby affirmed as written.

The \$1204 fee charged to Fantasy Amusements on April 25, 2007, was in excess of the amount allowed by law and Fantasy Amusements is entitled to a refund of \$504.00.