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LITIGATION

Zip line operators object to new rules

By Chase Scheinbaum

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Last July, regulators told brothers Pete and Mike Liston they had to shut down their 11 zip lines at Skull Canyon Eco Experiences and Zipline in Corona because they were out of compliance with state law. “They told us we had to shut down that day,” Pete said. The brothers laid off 16 workers and refunded \$8,000 in advance payments they had received for tours.

While they remained shuttered over the next three months, they lost out on “at least \$100,000 in revenue,” he said.

Inspectors looked over the course and requested additional record-keeping. They ultimately allowed the zip lines to reopen without asking the brothers to make a single substantive change to the course, Pete said.

“I’m still confused about it all myself, honestly,” he said.

The brothers weren’t alone.

Beginning in October, state regulators asserted jurisdiction over California’s dozens of zip lines, demanding that operators adhere to state safety rules. The oversight was enough to put more than a dozen zip lines out of business, at least temporarily, while operators strove to meet the rules.

Trouble is, said Douglas J. Dennington, an attorney who represents Skull Canyon, the regulators pulled the rules from the clear blue sky. The California Department of Industrial Relations, Division of Occupational Safety and Health, Cal/OSHA, imposed the rules at its whim, he said.

Specifically, the agency deemed zip lines to be amusement rides and asserted safety standards for harnesses and anchor points. But zip lines — metal cables along which suspended riders glide, pulled only by gravity — are in a league of their own, say operators and attorneys.

“They’re trying to force zip lines to comply with standards that are really adopted for rollercoasters at Magic Mountain,” Dennington said.

California’s oversight makes it the 12th state to regulate the activity, and roughly a dozen other states are considering zip line regulations, according to a 2012 study done by the state of Hawaii.

Improperly imposing rules could be a violation of the state Administrative Procedure Act, so Dennington, an attorney with Rutan & Tucker LLP, took action. On March 13, he challenged the rules as “underground regulations” in a petition filed with the Office of Administrative Law.

By May 12, the office will decide if it wishes to take up the petition. If it does, it will accept public comments, briefing from the agency and rebuttal from the petitioner. It will then issue a decision that could be challenged in superior court.

Not all administrative rules are subject to the Administrative Procedures Act, said Elizabeth A. Heidig, an attorney with the Office of Administrative Law assigned to the matter. “There are exemptions from the APA, so that’s usually where the focus lands.”

California regulators say zip lines clearly fit the amusement ride definition of a “mechanical device that carries or conveys passengers over a fixed route.”

Until now, zip lines merely operated “under the radar,” said John Cumming, special counsel at the Department of Industrial Relations, Cal/OSHA’s parent agency.

“There should be no debate that there should be regulatory authority over the people who are operating the ride,” Cumming said.

Zip line operators are all the more befuddled by the rules because of what they say is a good record of safety, Dennington said. Many people have asked agency officials why it suddenly seems concerned. “What we’ve heard from them is that ‘We don’t want to wait until there is an accident,’” he said.

“It was a matter of the division feeling like they were remiss in not regulating these folks,” said Fred Walter, an attorney with Walter & Prince LLP who represents two zip line operators before Cal/OSHA.

While there have been no deaths from riding or working on zip lines in California, there have been injuries in other states and one death from a 2011 accident in Hawaii. Following that incident, in which a zip line worker fell to his death when part of the system failed, pending legislation was introduced that would give oversight to Hawaii’s currently unregulated industry.

In 2009, a man died in Lake Tahoe when he was thrown from a chairlift due to a rope from an adjacent zip line becoming entangled in the chair, causing it to swing violently. Though the man was not riding on the zip line, Dennington believes this incident may have attracted the state’s attention and cast zip lines in a negative light.

Complicating matters is the fact that most zip lines are unique, built in position to span a natural chasm,

gap between trees, man-made platforms or any combination of anchor points. Proprietors cannot readily meet the agency’s standards because of the custom nature of the lines, critics of oversight say.

“It’s really not one size fits all,” Walter said.

He said many zip line operators, including the Listons, are not averse to regulation. But he objects to the standards imposed and the way the state imposed them. Zip line operators generally submit to the Association for Challenge Course Technology or the Professional Ropes Course Association, industry groups that set national standards.

“Oversight would never hurt our industry, but it needs to be done responsibly, not by just shutting everyone down,” Pete Liston said.

If the state wants oversight, Dennington said, it should craft rules tailored to zip lines. He wants to see the agency “get public participation and adopt standards that are specific to zip lines and not impose standards that are really designed for roller coasters,” he said.

Unless Dennington’s petition is taken up and affirmed, zip lines have no choice but to take direction from the state.

Since reopening a few months ago, the Liston brothers have hired back all 16 employees and their customers have returned in the same numbers as before the shutdown. Pete Liston is happy to be back up and running, though he’s not sure why the episode was necessary, or why it transpired the way it did.

“I wish they’d went about it the right way,” he said, “though I’m not sure what that is.”

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